



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

65th Report, 2014 (Session 4)

**Report on the Legal Writings
(Counterparts and Delivery)
(Scotland) Bill at stage 1**

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CONTENTS

Remit and membership

Report	1
Summary of Conclusions and Recommendations	1
Introduction	5
Background to the Bill	5
Scottish Law Commission bills	5
Legal Writings (Counterparts and Delivery) (Scotland) Bill	6
Consultation	7
General Principles of the Bill	8
Bill provisions	8
Current system for signing contracts in Scotland	10
Potential benefits of the Bill	15
Practical challenges of the Bill	22
Delegated powers provisions	33
Financial Memorandum	34
Policy Memorandum	34
Conclusions on the General Principles of the Bill	34
Annexe A – Extracts from the Minutes of the Delegated Powers and Law Reform Committee	35
Annexe B – Index of Oral Evidence	38
Annexe C – Index of Written Evidence	40



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee

Euan Donald

Assistant Clerk

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Support Manager

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The Scottish Parliament
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Delegated Powers and Law Reform Committee

65th Report, 2014 (Session 4)

Report on the Legal Writings (Counterparts and Delivery) (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Background to the Bill

Consultation [paragraphs 17-24]

1. The Committee notes the extensive consultation carried out by the Scottish Law Commission and considers that the responses received highlight widespread support amongst the legal, business and academic sectors in Scotland for the Bill's key provisions.

2. Given the extent of the Scottish Law Commission's consultation, the Committee considers it reasonable that the Scottish Government did not carry out further consultation of its own.

Current system for signing contracts in Scotland

Existing practice under Scots law [paragraphs 39-51]

3. It is apparent to the Committee that the current system for signing contracts under Scots law is unsatisfactory and that legislation clarifying the rules for agreeing written contracts is necessary to enable Scots law to work more efficiently and to effect an improvement in its reputation.

Change of governing law [paragraphs 52-65]

4. The Committee recognises that it could be argued that documents can already be executed in counterpart under Scots law. However, the Committee acknowledges that there appears to be a considerable level of doubt in relation to this matter and that, as a result, the process is not commonly practiced under Scots law.

5. It is apparent to the Committee that the problems associated with the current system in Scotland have, to an extent, led to a drift away from contracts being made under Scots law as parties determine that it would be easier to switch a contract to English law rather than to deal with the problems associated with signing ceremonies and round robins.

6. The Committee considers therefore that the process for concluding signed contracts in Scotland could be improved and that changes are necessary to encourage greater use of Scots law.

Potential benefits of the Bill

Savings in time and money [paragraphs 66-75]

7. The Committee considers that the Bill would appear to offer scope for savings and efficiencies. The Committee particularly notes the potential of the Bill to make the agreement of contracts under Scots law a more efficient and convenient process.

Increase in Scots law contracts [paragraphs 76-93]

8. The Committee acknowledges that the ability to use execution in counterpart or not is normally not the only factor for parties deciding which law to conduct their business under. Instead, factors such as familiarity and global reputation come into play with evidence to the Committee suggesting that in that regard the use of English and New York law is common.

9. Mindful of these factors the Committee appreciates that English and New York law will continue to be used in certain circumstances.

10. However, the Committee also heard evidence to suggest that, for some, the ability to execute in counterpart, or lack thereof, was a deciding factor in choosing the law of a contract with examples given of instances in which a contract was switched to English law at the eleventh hour when it became apparent that all parties would be unable to meet in order to sign a single hard copy document.

11. The Committee therefore considers the certainty of knowing from the outset that the contract can be conducted under Scots law and executed via the electronic delivery of a traditional document to be one of the Bill's greatest benefits.

12. It is apparent to the Committee that the Bill will put Scotland in a more equitable position with other jurisdictions by removing some of the factors which were viewed as off-putting by parties to contracts. It appears to the Committee therefore that a substantial benefit of the Bill will be its ability to stop the drift of contracts away from Scots law which would otherwise be made under Scots law.

Precision of Delivery [paragraphs 94-98]

13. The Committee considers the provision allowing parties to determine the precise time a document takes legal effect to be useful, particularly as it will allow parties a degree of flexibility which will enable them to adapt to changing circumstances and ensure that all parties are satisfied that a document is in force at the appropriate time.

Statistical evidence [paragraphs 99-105]

14. The Committee suggests that, wherever possible, statistical evidence should be provided with Scottish Law Commission Bills in order to aid the

Committee's assessment of the likely impact of the Bill. The Committee therefore recommends that the Scottish Government takes steps in order to ensure appropriate research has been undertaken to provide such data to the Committee when future Scottish Law Commission Bills are introduced.

Practical challenges of the Bill

Potential for fraud and error [paragraphs 106-129]

15. The Committee is not persuaded that the Bill will lead to an increase in instances of fraud and error where legal documents are signed under Scots law.

16. Whilst acknowledging that instances of fraud and error may still occur when parties use execution in counterpart, the Committee notes that the existing safeguards in the general law will remain.

17. In reaching this view, the Committee notes the apparent lack of evidence pointing to problems of fraud and error in other countries in which execution in counterpart and the electronic delivery of documents is already commonly practised.

18. The Committee does not agree with the Faculty of Advocates suggestion that the Bill should be amended to provide that entire documents should be delivered in counterpart not just signature pages. The Committee considers that such an arrangement could be impractical, and is not persuaded that it would lead to a decrease in instances of fraud and error.

19. However, the Committee welcomes the Scottish Government's commitment to take account of any further suggestions made by the Faculty of Advocates on how it considers the risk of fraud and error can be reduced.

20. The Committee encourages the Scottish Government to ensure the potential for fraud and error is accounted for and to consider how such risks could be reduced further.

Pre-signed signature pages [paragraphs 130-140]

21. The Committee notes that whilst the Bill does not specifically provide for the use of pre-signed signature pages, it does not prevent their use.

22. The Committee therefore notes the evidence it received on this matter and considers that while there may be misgivings about the use of pre-signed signature pages, there might be circumstances in which their use may be justified.

Related issues not provided for in the Bill

Electronic signatures [paragraphs 142-157]

23. The Committee supports the use of electronic signatures and considers that they can provide a secure means of agreeing contracts and help mitigate against fraud.

24. The Committee encourages efforts to increase their use and welcomes the Law Society of Scotland's electronic Smartcard scheme which will provide all of its members with an electronic signature.

25. It is apparent from evidence to the Committee, however, that there is still a strong demand for the use of traditional signatures. The Committee considers that the Bill responds to this demand by allowing the continuation of wet ink signatures whilst bringing the additional benefits of the use of counterparts and the ability to exchange traditional documents electronically.

Electronic Repository [paragraphs 158-174]

26. The Committee supports the establishment of an electronic document repository maintained by the Registers of Scotland. The Committee considers that such a system would be a useful tool for conserving records of contracts.

27. The Committee is supportive of the idea of the repository being used not only for the storage of documents but also as a means of executing documents by way of electronic signature.

28. The Committee considers, however, that if a repository is to be established, sufficient safeguards should be put in place to ensure that it is secure and inspires confidence in those using it. The system should also be able to adapt to developments in technology.

29. Taking into account the reservations expressed by some of the witnesses, the Committee is of the view that, if a central repository is established, parties should not be obliged to use it.

Conclusions on the General Principles of the Bill [paragraphs 183-187]

30. The Committee supports the general principles of the Bill and in particular the Bill's two key provisions; that execution in counterpart should be clarified as a valid process in Scots law, and that paper legal documents should be deliverable by electronic means.

31. The Committee considers that the current system for agreeing written signed contracts under Scots law is unsatisfactory and needs to be changed. By removing some of the barriers to the efficient, straightforward agreement of contracts under Scots law, the Committee considers that the Bill will improve Scots law.

32. Whilst acknowledging that the Bill's provisions are unlikely to bring an influx of new contracts to Scotland, the Committee considers that the Bill has the potential to increase the number of contracts made under Scots law by encouraging those who would otherwise have completed a contract under Scots law to choose to do so.

33. **Whilst the Committee considers the potential for fraud and error to be a serious matter, it is not of the view that the passing of the Bill will lead to an increase of such instances.**

34. **The Committee recommends that the general principles of the Bill be agreed to.**

INTRODUCTION

1. The Legal Writings (Counterparts and Delivery) (Scotland) Bill¹ was introduced in the Scottish Parliament on 14 May 2014 by the Cabinet Secretary for Finance and Sustainable Growth, John Swinney. It is the first bill to be known as a Scottish Law Commission Bill.

2. The Delegated Powers and Law Reform Committee was designated on 21 May as lead committee for Stage 1 consideration of the Bill. The Committee issued a call for written evidence on 28 May seeking views on the proposals contained in the Bill. Ten written submissions were received (listed at Annexe C).

3. The Committee took oral evidence on the Bill over five sessions between June and October. Evidence was taken from a range of law bodies, commercial law firms, business and academic representatives, as well as from Registers of Scotland, the Scottish Law Commission (SLC) and the Minister for Energy, Enterprise and Tourism.

BACKGROUND TO THE BILL

Scottish Law Commission bills

4. The Bill is the first Scottish Law Commission Bill (SLC Bill) to be considered by the Committee following changes to Standing Orders in June 2013 which altered the Committee's remit, allowing it to take the lead role in scrutinising certain SLC Bills.

5. The changes were put in place in order to increase the implementation rate of SLC reports. This followed recommendations made by the Standards, Procedures and Public Appointments Committee (SPPA Committee) in its report on the matter² which was published on 18 April 2013.

6. The SPPA report proposed a process for the referral of SLC Bills to the Subordinate Legislation Committee (as the Delegated Powers and Law Reform Committee was then known) and recommended certain changes to Standing Orders which would allow the procedure to be put in place.

¹ Legal Writings (Counterparts and Delivery) (Scotland) Bill, as introduced (SP Bill 50, Session 4 (2014)). Available at: [http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd.pdf)

² Standards, Procedures and Public Appointments Committee, 2nd report 2013, *Implementing Scottish Law Commission reports* available here: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62339.aspx>

7. The report further recommended that the Subordinate Legislation Committee's name should be changed to the Delegated Powers and Law Reform Committee in order to reflect the changes to its remit.

8. On 28 May 2013, the Parliament agreed to implement the recommendations made in the SPPA Committee report. The relevant Standing Orders changes were then applied from 5 June 2013.

9. As a result of the changes, SLC Bills may be referred to the Committee where they meet the conditions of Standing Orders Rule 9.17A and the associated criteria as determined by the Presiding Officer. The Presiding Officer determined under Rule 9.17A.1(b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament—

- (a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;
- (b) which does not relate directly to criminal law reform;
- (c) which does not have significant financial implications;
- (d) which does not have significant European Convention on Human Rights (ECHR) implications; and
- (e) where the Scottish Government is not planning wider work in that particular subject area.³

10. To ensure that those conditions are adhered to, the Scottish Government is required to write to the Parliament prior to the introduction of a SLC Bill, explaining why it considers the bill to comply with the criteria as set out by the Presiding Officer.

Legal Writings (Counterparts and Delivery) (Scotland) Bill

11. In April 2013, the SLC published a *Report on Formation of Contract: Execution in Counterpart*. ("the SLC report")⁴ The report was submitted to Scottish Ministers along with a draft bill which sought to give effect to the report's recommendations.

12. The report and draft bill proposed two main changes to Scots law and practice:

- First, it proposed clarifying the law to make it clear that legal documents governed by Scots law can be "executed in counterpart", i.e. that they can be brought into legal effect by each party signing separate identical copies of the document, (the counterparts) rather than the same physical document. The aim was to resolve the current uncertainty as to whether counterparts were a valid way of creating legally effective documents in Scots law

³ Scottish Parliament *Business Bulletin*, 6 June 2013 available here;

<http://www.scottish.parliament.uk/parliamentarybusiness/BusinessBulletin/64350.aspx>

⁴ Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), available at: http://www.scotlawcom.gov.uk/index.php/download_file/view/1151/329/

- Second, it proposed that it should be possible to deliver paper legal documents by electronic means. The aim was to resolve the current doubt as to whether faxing or emailing a copy of a signed paper document can make it legally effective.

13. The Scottish Government set out its legislative programme for 2013/14 in September 2013. The programme included a bill which would implement the majority of the recommendations made in the SLC report.

14. The Minister for Energy, Enterprise and Tourism (“the Minister”) subsequently wrote to the SLC on 28 February 2014 setting out why the Scottish Government considered the draft bill to comply with the criteria as set out in the Standing Orders and by the Presiding Officer. The letter (a link to which is listed at Annexe C of this report) was laid simultaneously in the Parliament.

15. The Legal Writings (Counterparts and Delivery) (Scotland) Bill (“the Bill”) was then introduced in Parliament on 14 May. Although some small changes to the final draft were agreed by the Scottish Government and the SLC, the Bill implements the vast majority of the legislative recommendations contained in the SLC report.

16. The Parliamentary Bureau then referred the Bill to the Delegated Powers and Law Reform Committee on 21 May 2014.

Consultation

17. The SLC’s eighth programme of law reform, which was published in 2010, included a project on ‘Contract law in light of the Draft Common Frame of Reference’.

18. As part of that project, in March 2012 the SLC produced a discussion paper on the formation of contracts.⁵ A large part of the paper focused on execution in counterpart and the electronic delivery of documents.

19. The discussion paper was circulated to a wide range of interested parties for consultation. In addition, the paper and accompanying response form were available on the SLC’s website. Responses were received from a variety of Scottish law firms, academics and law organisations.

20. The SLC subsequently produced two draft bills on execution in counterpart which were available for comment on its website. Additionally, the SLC held a seminar on execution in counterpart in November 2012 at which a draft bill was discussed. Following the seminar, further written views on the draft bill were received from representatives of the legal, academic and business sectors.

21. The Committee understands that throughout the SLC’s consultation period the majority of responses expressed strong support for the two key provisions which would go on to form the basis of the Bill - that execution in counterpart

⁵ Scottish Law Commission Discussion Paper on formation of contract (DP 154), available here: http://www.scotlawcom.gov.uk/index.php/download_file/view/984/329/

should be clarified as a valid process in Scots law and that paper legal documents should be deliverable by electronic means.

22. Whilst the Scottish Government did not carry out a separate consultation on the Bill, it did meet with the SLC to discuss the draft bill. The SLC also consulted with Registers of Scotland (an executive agency of the Scottish Government) at various stages prior to the introduction of the Bill.

23. The Committee notes the extensive consultation carried out by the SLC and considers that the responses received highlight widespread support amongst the legal, business and academic sectors in Scotland for the Bill's key provisions.

24. Given the extent of the SLC's consultation, the Committee considers it reasonable that the Scottish Government did not carry out further consultation of its own.

GENERAL PRINCIPLES OF THE BILL

Bill provisions

Execution of documents in counterpart

25. The SLC report defines execution in counterpart as 'the process by which a contract may be signed ("executed") by each party signing its own copy (counterpart) and then exchanging it with the other party for that party's signed counterpart.'⁶

26. The procedure is widely practised in England and Wales, in addition to many other countries such as the United States and Australia. This contrasts with the current situation in Scotland, where doubt has been expressed as to whether a document may be executed in counterpart under Scots law.⁷

27. The Bill seeks to remove any such doubts by clearly setting out that a document may be executed in counterpart under Scots law. However, the Bill does not *require* legal documents to be executed in counterpart. Instead it clarifies that the process may be used if the parties involved wish to do so.

28. The Bill provides that, once collated, all the counterparts are to be treated as a single document. The single document may be comprised either of each counterpart in its entirety or one counterpart in its entirety to which a signature page for each party has been attached. Therefore, if, for example, a contract is agreed between three parties, the final legally binding contract will either comprise three signed contracts in their entirety, each signed by a different party, or one contract in its entirety with signature pages for all three parties attached.

⁶ Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), glossary x -xi

⁷ Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), glossary x -xi, page 1-2, paragraph 1.3

29. The Bill further provides that a document which is executed in counterpart becomes effective when both or all of the counterparts have been delivered. Delivery is only complete when each counterpart has been delivered to every party whose signature is not on the counterpart, or to a person nominated by the parties to take delivery of the counterparts.

30. The Bill does not specify which type of delivery should be used, allowing parties the freedom to choose whichever method they wish as long as it complies with the provisions set out in the Bill and any other relevant legislation relating to the delivery of documents. The parties also have control over when a document is delivered, and therefore when it takes legal effect. For example, the parties may come to an agreement that a document is to take effect on a specific day or as a result of a certain circumstance having been met.

Nomination of person to take delivery of counterparts

31. The Bill provides that the parties to a contract may choose to nominate a person who will have responsibility for taking delivery of the counterparts. The nominee could be one of the parties, or an agent representing one or more of the parties. In practice, the role is most likely to be carried out by a solicitor. On taking receipt of a counterpart, the nominee is required to hold it 'and preserve it for the benefit of the parties'.⁸

Use of counterparts: electronic documents

32. The provisions in the Bill which relate to execution in counterpart apply to both traditional documents and electronic documents as set out in the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act").⁹

33. According to the Bill's Explanatory Notes¹⁰, however, it is unlikely that parties will choose to execute electronic documents in counterpart. This is due to modifications to the 1995 Act (as inserted by the Land Registration (Scotland) Act 2012) which provide that electronic documents may be executed by means of electronic signature. As a result, parties can simply attach their electronic signature to a document in order to execute it and therefore the process of execution in counterpart is unnecessary.

34. However, the provision could be useful when some parties to a contract are using traditional documents whilst others are using electronic delivery.

Electronic delivery of documents

35. The Bill establishes that a traditional legal document (one created on paper) may be delivered by electronic means (such as by email or fax). It should be noted that this provision of the Bill applies to *all* legal documents which are required to be delivered in order to take effect, and not only to those which have been executed in counterpart.

⁸ Legal Writings (Counterparts and Delivery) (Scotland) Bill, section 2

⁹ Requirements of Writing (Scotland) Act 1995, available here:

<http://www.legislation.gov.uk/ukpga/1995/7/contents>

¹⁰ Legal Writings (Counterparts and Delivery) (Scotland) Bill. Explanatory Notes(SP Bill 50-EN, Session 4 (2014), paragraph 15, Available at:

[http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-en.pdf)

36. The Bill provides that the requirement for delivery by electronic means is satisfied when a copy of all, or part, of the document has been delivered. However, when only part of a document is delivered it must contain the signature of the sender and it must be sufficiently clear which document the copy relates to.

37. When a contract is to be delivered electronically, the parties may agree that rather than send a signed copy of the whole contract, each party will send a signature page which is clearly distinguished as relating to the contract in hand, perhaps through the use of a unique header or footer.

38. The Bill allows parties discretion in determining how delivery is managed in practice. For example, the parties can agree what form of electronic delivery to use, or indeed whether to use it at all. When no such method has been agreed, that which is deemed reasonable for all parties constitutes delivery¹¹.

Current system for signing contracts in Scotland

Existing practice under Scots law

39. Although some witnesses were of the view that documents can already be executed in counterpart under Scots law (e.g. Dr Gillian Black of the University of Edinburgh)¹², in practice it is not widely accepted as a valid process and, as a result, parties are generally reluctant to complete contracts in this way since they fear that they may not be enforceable. There would therefore seem to be uncertainty in the law.

40. Similarly, although recent legislation has provided for the electronic delivery of electronic documents, it remains unclear whether traditional documents can be delivered by electronic means. The Bill confirms that this is a valid process under Scots law.

41. Under existing practice, all parties to contracts made in Scots law must sign the same document rather than each party signing separate identical counterparts. This is usually achieved by all parties meeting at the same place at the same time in order to sign the document (a “signing ceremony”) or by the document being sent round each party sequentially until it has all of the parties’ signatures (the “round robin” process). Evidence taken by the Committee suggests that the norm now is for the round robin process to be used with documents being sent to the parties by e-mail.

42. Evidence to the Committee suggests that such methods of signing can be time-consuming and cumbersome, and can lead to delay as highlighted in Glasgow City Council’s written evidence—

“At times it can be problematic to get all parties to a transaction to sign the same principal copy of a legal document on time, especially in transactions involving multiple parties based in different geographical locations. This

¹¹ Legal Writings (Counterparts and Delivery) (Scotland) Bill, section 4(5)

¹² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 12

causes delay, practical difficulties and, in some cases, financial loss to one or more parties.”¹³

43. Travelling to attend a signing ceremony can take up a large amount of time as the parties must travel to the agreed destination, in addition to the time spent at the ceremony itself. There are also financial costs associated with travel and accommodation. The SLC report expands on this—

“The traditional practice in commercial as distinct from conveyancing transactions was for the parties and/or their lawyers, acting as agents, to meet together in one place and apply their "wet ink" signatures to the transaction's documentation. For many commercial transactions involving multiple parties this could mean a gathering of a significant number of people to sign a large number of frequently bulky documents, preceded by a process of checking that the documents are in good order for the purpose. This checking process is often necessary in complex development and similar transactions because it is only upon the organising solicitor certifying that all the other contracts involved are fit for their purpose and validly executed that the project's funders will execute the funding agreements and release the necessary finance. These checks frequently reveal drafting and typographical errors needing last-minute correction. Arranging such a "signing ceremony" and carrying it through can thus be a time-consuming, expensive and complex process.”¹⁴

44. There are particular problems for multinational, multilateral contracts where those signing are in different countries or time zones. In many cases, international parties will be used to a system in which documents are agreed and executed by the electronic exchange of traditional documents. In agreeing a contract, or part of a contract, under Scots law, representatives of different organisations, and often different countries, are required to gather at a specific place and time in order to sign one single document.

45. Whilst the financial costs of the round robin process are likely to be less than those associated with a signing ceremony, parties may still have to pay for a courier or postage. In addition, the process of waiting for the single contract to be sequentially delivered to each party for signing may be extremely time-consuming, particularly when a large number of parties are involved. Such issues are of particular relevance when a contract must be agreed as a matter of urgency which can often be the case in commercial contracts. Shepherd and Wedderburn's written submission highlights some of the problems with the current system—

“The nature of modern commercial transacting means that completion “in person” is simply not a practical alternative in the majority of cases. This has resulted in the requirement either to construct elaborate, but inefficient and often time-consuming completion mechanism...”¹⁵

¹³ Glasgow City Council Written Submission

¹⁴ Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 231), paragraph 1.15

¹⁵ Shepherd and Wedderburn written submission

46. It has been suggested that the lack of a law on counterparts can cause damage to the reputation of Scots law internationally. Tods Murray's written submission suggested that—

“The existing Scots law, particularly the lack of counterpart execution as a valid form of execution, can cause problems in terms of transaction logistics and requirements as well as giving a poor impression of Scots law and Scotland generally as a place in which to do business.”¹⁶

47. Dr Hamish Patrick of Tods Murray expanded on this in oral evidence, explaining that having to explain the different system in Scotland can at times be frustrating—

“I spend quite a lot of my time apologising for the inadequacies of Scots law. For example, if you have a multijurisdictional financing transaction with assets in England and various European countries or the United States, all the parties involved will sign their documents electronically in counterpart, and they will do them in advance, with a signing date several days before the closing date. I have to tell them, “Sorry, we can't do that.” I have to explain that we need separate Scottish documents that operate differently, and that we must then work out how to get our footwork right so that they work, and it is not uncommon for us to have to get signatories out again on the day of completion to sign a series of documents, in a specific order, to comply with the requirements of Scots law as to counterpart or delivery.”¹⁷

48. The Committee notes that the current system of signing a single, hard copy document can be costly, both financially and in terms of time.

49. The Committee also recognises that these processes can lead to logistical problems, particularly for multiparty, multinational contracts. It also recognises that some witnesses considered that the current rules reflect negatively on the reputation of Scots law.

50. The Committee further considers that the current system lacks the flexibility and efficiency required in order for Scots law to adapt to modern advances and compete on a level playing field internationally.

51. It is apparent therefore to the Committee that the current system for signing contracts under Scots law is unsatisfactory and that legislation clarifying the rules for agreeing written contracts is necessary to enable Scots law to work more efficiently and to effect an improvement in its reputation.

¹⁶ Tods Murray's written submission, paragraph 2.1

¹⁷ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 43

Change of governing law

52. Under EU legislation,¹⁸ the parties to a contract can normally exercise a choice as to which law will govern their transaction. Evidence to the Committee suggests that commercial parties often take up this option, switching contracts to another form of law in which execution in counterpart is provided for. Normally English law will be chosen as the alternative.

53. The system for signing documents in counterpart in England was explained to the Committee by Warren Gordon, Head of Real Estate Know How at Olswang LLP, who gave evidence on behalf of the Law Society of England and Wales.

54. Under English law, parties may conclude a contract by signing copies of the final versions of written agreements and then sending the copies to each other. The documents are normally exchanged by electronic means. Mr Gordon explained that—

“Signed, separate counterparts have the same effect as if all the signatures on the counterparts had been on one document, so although the parties are physically signing separate documents, legally, you treat them together as one document. Each counterpart is an original, which can be taken to court and sued upon. All the counterparts together, similar to an original and a counterpart, constitute one document.”¹⁹

55. The practice of signing documents in counterpart is longstanding and widely-used in England, although it is not explicitly provided for in English legislation. Instead, modern usage is based on a mixture of best practice and case law. Guidance on the use of execution in counterpart, with particular reference to executing documents electronically, was drawn up by the Law Society of England and Wales in 2010 following a court case²⁰ relating to the use of execution in counterpart (“the practice note”)²¹.

56. The practice note outlines the three available options for completing this process. Firstly, each party may return electronically their copy of the entire document to the coordinator along with their signature page. Secondly the parties may return electronically to the coordinator their signed signature page. The third available option is to create a pre-signed signature page which can be attached by the finalised document.

57. Mr Gordon considered that the system of executing documents in counterpart and exchanging documents electronically works well in England. He explained that the overriding benefit of such a system was the level of efficiency and speed it could bring to a transaction—

¹⁸ Rome I Regulation (EC) No 593/2008, available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>

¹⁹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1602

²⁰ Mercury Tax Group and another v HMRC [2008] EWHC 2721

²¹ Law Society of England and Wales (2010). *Execution of documents by virtual means*. Available at: <http://www.lawsociety.org.uk/advice/practice-notes/virtual-execution-of-documents/>

“The key benefit of having the original and the counterpart separately executed by the parties is fairly obvious: if the parties execute separate identical parts, the speed of execution is much quicker, which must improve the efficiency of the transaction. If you have to get all the parties—the landlord, the tenant and a guarantor—to execute both parts of the document, that would slow up the transaction, particularly if the parties were based overseas. In that case, it might be much more difficult and time consuming to get the documents executed, especially if you were executing with a wet ink signature, as we call it.”²²

58. Evidence from witnesses with experience of dealing with contracts in Scotland suggested that a switch to English law is often viewed a preferential to setting up a signing ceremony or signing on a round robin basis. Dr Ross Anderson, an advocate and honorary research fellow at the University of Glasgow, explained that—

“..when the 11th hour approaches it can become clear that some of the parties will not be available so that they can all come to one room to sign on the dotted line, so the view is taken that the easiest thing to do is simply to change the governing law clause and execute under English law.”²³

59. This view was shared by Alasdair Wood of the Law Society of Scotland who explained that contracts are often switched to English law, even in cases where Scots law would otherwise be the preferable choice—

“In a number of transactions that we work on, the sole reason to change the law to English law or to that of another jurisdiction is the inconvenience of creating a valid document when people are based in different countries, different towns or even different offices in the same city or town, late at night, for instance.”²⁴

60. Although the practice of switching contracts from Scots to English law appears to be a relatively common occurrence, the Committee notes that this option is not universally available to parties agreeing contracts in Scotland. The Policy Memorandum explains that this is the case for most public procurement contracts in Scotland and contracts relating to heritable property²⁵. Glasgow City Council set out its position in a written submission to the Committee—

“Changing the governing law of the legal document to English law, which allows execution in counterpart, would not be a suitable option for a Scottish local authority. In addition, this option would not be applicable to Scottish property transactions, as the governing law for such transactions is

²² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 19 August 2014*, column 1601-2

²³ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 7 October 2014*, column 2

²⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 30 September 2014*, column 34

²⁵ Legal Writings (Counterparts and Delivery) (Scotland) Bill. Policy Memorandum (SP Bill 50-PM, Session 4 (2014), paragraph 23, available here: [http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-pm.pdf)

lex situs (the law of the place where the property is situated), namely Scots law.”²⁶

61. Parties to such contracts, therefore, have little choice but to sign in person at a signing ceremony or to sign on a round robin basis.

62. Whilst the Committee’s report goes on to note that the issue of contracts being switched to another law is a common problem and by no means exclusive to Scotland, the Committee still considers that steps must be taken to ensure that contracts which would otherwise be made under Scots law remain under Scots law.

63. The Committee recognises that it could be argued that documents can already be executed in counterpart under Scots law. However, the Committee acknowledges that there appears to be a considerable level of doubt in relation to this matter and that, as a result, the process is not commonly practiced under Scots law.

64. It is apparent to the Committee that the problems associated with the current system in Scotland have, to an extent, led to a drift away from contracts being made under Scots law as parties determine that it would be easier to switch a contract to English law rather than to deal with the problems associated with signing ceremonies and round robins.

65. The Committee considers therefore that the process for concluding signed contracts in Scotland could be improved and that changes are necessary to encourage greater use of Scots law.

Potential benefits of the Bill

Savings in time and money

66. By allowing for contracts to be executed in counterpart and traditional documents to be delivered electronically, the Bill removes the need for signing ceremonies and round robins.

67. The Bill, therefore, has the potential to reduce the amount of time spent by parties in order to complete a contract. For example, parties will no longer have to travel to signing ceremonies or wait for a round robin process to reach completion.

68. This was welcomed in the Weir Group’s written evidence—

“In our business environment, and given the countries in which we operate, transactions are increasingly time critical with often multiple parties involved in different locations. Therefore, both the virtual signing facilitation and clarity and certainty around the law on execution in counterpart, will allow our business to utilise Scots law more as a preferred law of choice.”²⁷

²⁶ Glasgow City Council, written submission

²⁷ Weir Group, written submission

69. Colin MacNeill from Dickson Minto WS explained that the time taken up by travelling to and attending signing ceremonies was one of the main reasons for transactions being switched to English law—

“... the choice of law was changed from Scots to English, not because of a minor inconvenience or minor travelling cost for the parties to get to one place...but because we could not contemplate asking many busy people to take a day or half a day out of their lives to get to one solicitor’s office. The effect is multiplied when you deal with parties in places outside Scotland.”²⁸

70. Overall, the weight of evidence suggests that the Bill could lead to an increase in efficiency when contracts are agreed in Scots law. This is summarised in Glasgow’s City Council’s written submission to the Committee—

“The process of the execution of legal documents in Scotland will become more efficient and less time-consuming. It will provide greater flexibility to all parties to a transaction.”²⁹

71. The Financial Memorandum illustrates the potential financial savings created by the Bill, giving the example of a transaction between eight parties located in different offices in different cities.³⁰

72. The Memorandum suggests that £150 per transaction could be saved if parties no longer choose the round robin process. It also outlines the potential savings of up to £1096 which could be made when travel to a signing ceremony is no longer necessary. In contrast, the Memorandum states that there are no financial costs associated with the use of execution in counterpart, although postage to a nominee may have a cost of up to £41.30.

73. The Faculty of Advocates (“the Faculty”) is sceptical, however, as to the extent to which savings will be made in reality, particularly for smaller contracts made by smaller firms. Robert Howie QC explained—

“Most of the contracts that are made under Scots law are smaller-scale contracts, which are made not in Glasgow, Edinburgh or Aberdeen but in small towns around Scotland. In such cases, we suspect that the saving of cost and the convenience that are envisaged as a result of the electronic execution and exchange of counterparts, instead of simply having people come into the office to do all that, will be limited.”³¹

²⁸ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 42

²⁹ Glasgow City Council, written submission

³⁰ Legal Writings (Counterparts and Delivery) (Scotland) Bill. Financial Memorandum (SP Bill 50-EN, Session 4 (2014) table 1, page 9. Available at: [http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-en.pdf)

³¹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 22

74. In contrast, Dr Anderson of the University of Glasgow suggests that execution in counterpart could be beneficial to those in rural areas or smaller towns—

“The geography of Scotland suggests that counterpart execution may be of particular relevance to so-called small-town cases for businesses in the Highlands and Islands, the Hebrides and so on. Trying to get people on a cold November evening to take trains and ferries—even to Inverness—is not easy. One could see, in Scotland in particular, considerable benefit for small-town practices that want to avail themselves of the option. It is not an obligatory provision—it is merely facilitative”³²

75. The Committee considers that the Bill would appear to offer scope for savings and efficiencies. The Committee particularly notes the potential of the Bill to make the agreement of contracts under Scots law a more efficient and convenient process.

Increase in Scots law contracts

76. The majority of the evidence received suggests that by allowing for execution in counterpart and the electronic delivery of traditional documents, some of the perceived barriers to the use of Scots law will be removed and that, as a result, more contracts will be conducted under Scots law.

77. However, whilst the Faculty accepts this premise to an extent, it is unconvinced as to the level of impact the Bill will have in this regard. Robert Howie QC suggested that the reasons parties choose to have their contracts governed by a certain law—

“...are generally substantive and relate to the transaction that they are trying to carry out and where those involved in funding and underwriting it are based.”³³

78. He was therefore of the view that the ability to use execution in counterpart would not necessarily lead to an increase in contracts made under Scots law as opposed to English law, stating that—

“...people tend to have a familiarity with and a concentration on English law and use English firms, and they have merchant banks that are much more comfortable using people whom they know, recognise and have dealt with for the last 30 years.”³⁴

79. Further evidence to the Committee suggests that, in many cases, English law is viewed as the preferable choice regardless of the circumstances. Parties may, for example, choose English law due to its good reputation throughout the world or because they are familiar with the law, having used it many times before. Professor George Gretton explained that—

³² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 6

³³ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 24

³⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 24

“In commerce, people have a tendency to choose English law...It is so standard. Internationally, English and New York law are consistently chosen.”³⁵

80. Professor Gretton also made clear that the popularity of English and New York law is so prevalent that every legal system in Europe is being “squeezed” in favour of them.³⁶ It would seem, therefore, that parties in Scotland choose English law for a variety of reasons and it is unlikely that all of those doing so will switch to Scots law as a result of the Bill’s provisions.

81. However, much of the evidence to the Committee suggests that, as a result of the Bill, parties who normally choose Scots law as the law of the contract, will no longer feel forced to switch to English law. This viewpoint is backed up by the evidence provided to the Committee suggesting that many contracts are switched to English law at the eleventh hour when it becomes apparent that the planned workaround is no longer appropriate.

82. This view was expressed by Dr Ross Anderson of the University of Glasgow—

“We are a small system; business from around the world will not flock to Scotland just because of how one can sign a document. What is crucial is that Scotland stops exporting transactions that are carried out by the ordinary people of Scotland and by Scottish businesses and companies, and which relates to assets in Scotland. If we cannot persuade our own citizenry to use our law, that reflects poorly on the content of our law.”³⁷

83. Catherine Corr, of Scottish Enterprise, echoed this view—

“I do not think that the change being made in the bill will necessarily make people who are not otherwise connected to Scotland suddenly flock to Scotland to use Scots law, but it will certainly make the messaging around Scots law and the utilisation of Scots law for commerce easier.”³⁸

84. In exploring the current system for signing contracts in Scotland (discussed in paragraphs 39-65 of the Committee’s report) the Committee heard real life examples of situations where the current system for signing contracts under Scots law has caused parties to view Scots law with a degree of negativity.

85. The Policy Memorandum explains that the Scottish Government’s intention is to set out the provisions clearly in statutory legislation with the aim of counteracting any such potential damage to the reputation of Scots law.

³⁵ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 7 October 2014*, column 4

³⁶ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 7 October 2014*, column 4

³⁷ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 7 October 2014*, column 5

³⁸ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report, 7 October 2014*, column 17-18

86. Catherine Corr considered that the Bill could be used to change the perception of Scots law internationally—

“We can do that now, and the bill will help in the process. There is a misconceived idea about Scots law being somehow very different because it is a separate system; we have to explain that, in commercial terms, the law is not very different throughout the UK. That is a dialogue that Scots lawyers in Scotland probably have with international clients every day at some point. The bill is a practical step that can help in that discussion.”³⁹

87. It was also suggested that the fact the provisions are to be specifically set out in statute will lead to the promotion of Scots law.⁴⁰ The SLC, in particular, consider that, as a result of the Bill, parties will be attracted to Scots law as it will be “clean and clear cut”⁴¹ whilst based on “clear legal principles.”⁴²

88. Stephen Hart from the Braveheart Investment Group also suggested that the primary benefit of the Bill is the certainty it will bring to this matter by clearly stating that a document may be executed in counterpart under Scots law—

“For me, the benefit of the bill will be certainty. People are doing this anyway; they have been working out ways of getting around the strict requirements of Scots law, and notwithstanding the current law, we are currently undertaking transactions in counterpart with electronic delivery. I think that commercial practice is already there, and the bill is all about catching up.”⁴³

89. The Committee acknowledges that the ability to use execution in counterpart or not is normally not the only factor for parties deciding which law to conduct their business under. Instead, factors such as familiarity and global reputation come into play with evidence to the Committee suggesting that in that regard the use of English and New York law is common.

90. Mindful of these factors the Committee appreciates that English and New York law will continue to be used in certain circumstances.

91. However, the Committee also heard evidence to suggest that, for some, the ability to execute in counterpart, or lack thereof, was a deciding factor in choosing the law of a contract with examples given of instances in which a contract was switched to English law at the eleventh hour when it became apparent that all parties would be unable to meet in order to sign a single hard copy document.

³⁹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 21

⁴⁰ This differs from the English system in which execute in counterpart is not provided for in legislation and instead has developed through practice

⁴¹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1532

⁴² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1532

⁴³ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 19

92. **The Committee therefore considers the certainty of knowing from the outset that the contract can be conducted under Scots law and executed via the electronic delivery of a traditional document to be one of the Bill's greatest benefits.**

93. **It is apparent to the Committee that the Bill will put Scotland in a more equitable position with other jurisdictions by removing some of the factors which were viewed as off-putting by parties to contracts. It appears to the Committee therefore that a substantial benefit of the Bill will be its ability to stop the drift of contracts away from Scots law which would otherwise be made under Scots law.**

Precision of delivery

94. Although there are exceptions, in Scots law the general rule is that a document must be delivered in order to take legal effect. In order to be delivered a document must both be physically handed over ("physical delivery") and it must be the intention of the parties that the document will be legally binding ("legal delivery").

95. The Bill will allow for parties agreeing a contract under Scots law to determine the time a document will be "delivered" and therefore at what precise time the document takes legal effect. Therefore, the parties may determine that a document will come into effect after a certain date or event has come to pass.

96. The Policy Memorandum explains that this will give parties complete control of when a document will come into force, providing a higher degree of certainty than is currently provided for.

97. Those giving evidence to the Committee supported the Bill's facilitative approach – the Bill allows parties a great deal of freedom to determine how execution in counterpart will work for them in reality. By allowing parties the ability to determine when exactly a document will come into legal force, this flexibility is further maintained.

98. **The Committee considers the provision allowing parties to determine the precise time a document takes legal effect to be useful, particularly as it will allow parties a degree of flexibility which will enable them to adapt to changing circumstances and ensure that all parties are satisfied that a document is in force at the appropriate time.**

Statistical evidence

99. The Policy Memorandum suggests that the Bill will lead to an increase in contracts being made under Scots law, in addition to savings in time and money. The Committee notes, however, that the Scottish Government has not provided statistical evidence to support this view.

100. During its oral evidence sessions, the Committee asked witnesses whether they were able to quantify the potential financial benefits of the Bill. However, those giving evidence generally felt unable to provide such information. For example, the Committee was unable to gain an understanding of the number of contracts which are currently being switched from Scots to English law.

101. Dr Ross Anderson of the University of Glasgow explained—

“In particular in the corporate world, if there was a real possibility that a signatory could not be present from the beginning of a transaction, that would support the choice to use English law on a matter on which English law is roughly identical anyway. One can put it no more strongly than that; it always depends on the circumstances. However, everyone who has been involved in such transactions will have had occasions when that was done, and it is not infrequent. Beyond that, I am afraid, “commonly” is a deliberately vague and general term. I do not have statistics.”⁴⁴

102. Paul Hally of Shepherd and Wedderburn echoed this view—

“I am not sure that I have figures for that. In writing a contract[s] for which we know that it is highly unlikely that the parties will come together to sign, we would predominantly choose English law rather than Scots law. It is not a question of how many documents there are or whatever; it is about the fitness for purpose of Scots law against the expectation of the global community.”⁴⁵

103. Whilst the Committee recognises the views expressed, it considers that statistical evidence would have proved useful in helping it reach its conclusions on the potential benefits of the Bill. It therefore raised this matter with the Minister who explained that, as the Bill is permissive and does not require parties to execute documents on counterpart, it is difficult to quantify what the potential increase in business, or savings made, will be.⁴⁶ He explained that—

“We are providing a useful tool. It is not really possible to state what its benefit will be; it depends on how the business world in Scotland uses it.”⁴⁷

104. It is apparent from written and oral evidence that the Committee received that the Bill does have the potential to save businesses money and to increase the number of contracts conducted under Scots law. Nevertheless, the Committee considers that it would have been useful if the Government could have provided some data illustrating the number and the value of contracts that will be written under Scots law as a result of the Bill.

105. The Committee therefore suggests that, wherever possible, statistical evidence should be provided with SLC Bills in order to aid the Committee’s assessment of the likely impact of the Bill. The Committee therefore recommends that the Scottish Government takes steps in order to ensure appropriate research has been undertaken in order to provide such data to the Committee when future SLC Bills are introduced.

⁴⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 3

⁴⁵ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 44

⁴⁶ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 11

⁴⁷ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 12

Practical challenges of the Bill

Potential for fraud and error

106. The main concern raised with the Committee in relation to the Bill was that it would lead to more instances of fraud and error. This concern stems primarily from the fact that the Bill allows parties each to sign a counterpart as opposed to all parties signing one single document. The Faculty suggested that this approach could lead to different parties unknowingly signing different versions of a document either as a result of error (caused by, for example, a computer error) or fraud (such as the deliberate removal of a page from a document).

107. In particular, the Faculty expressed concern in relation to the provision in the Bill which allows parties to exchange signature pages as opposed to counterparts in their entirety. It was suggested that if parties were only exchanging signature pages it would be easier for the content of the document to be altered. Robert Howie QC explained this view—

“If one permits execution by the exchange of the back pages of a contract, each signed by a particular party, plus the front page, it is all too easy for the rogue or fraudster to amend the critical stuff in the middle of the sandwich.”⁴⁸

108. It was further suggested by the Faculty that such undetected issues would lead to an increase in parties coming to court in order to resolve disagreements over the content of documents.

109. The Faculty considered that such risks could be lessened if the Bill was amended to specify that entire documents must be exchanged rather than signature pages only. Further to this, it proposed that the Bill should specify that, when only signature pages have been exchanged, the parties should subsequently exchange full versions of the document via post, allowing checks to be made for differences between the counterparts.

110. The majority of those giving evidence did not consider the Faculty’s concerns to be valid. The general view evinced was that instances of fraud and error would always occur to an extent and that the Bill was unlikely to lead to an increase in fraud or error.

111. In expressing that view, the Minister explained that fraud and error is not a problem unique to execution in counterpart—

“..the issue of fraud and error is not new. The risk of a document used at a signing ceremony being incorrect because of error or fraud exists currently. There are means to deal with that already in the civil and criminal law, and the bill does not need to add to those. There is an existing risk and, in our opinion, the bill does not alter that.”⁴⁹

⁴⁸ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 22

⁴⁹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 13

112. Professor George Gretton from the University of Edinburgh suggested that it would be just as easy for a page to be swapped into a single hard copy document signed by all parties as it would be to add a page to a counterpart, whether in hard copy or in electronic form—

“Fraud can happen in our system now. For example, a few years ago a solicitor in Aberdeen substituted earlier unsigned pages in deeds transferring property so as to insert his own name rather than that of his client, and then registered that version. He did that more than once. There is risk in such things; I do not think that the bill will decrease risk, but I do not think that it will significantly increase risk, either.”⁵⁰

113. Many of those giving evidence to the Committee referred to the fact that other countries execute documents in counterpart successfully with little to suggest that there was an increase in instances of fraud and error as a result. Professor Rennie of the Law Society of Scotland illustrated this point in his evidence to the Committee—

“I also point out that execution in counterpart is a feature of the English jurisdiction and of European and American jurisdictions. They seem to have managed to operate it without any substantial increase in fraud. I make a third point—and it is the obvious one—that people will commit fraud no matter what you do or what the process is. No bill, and no safeguard in a bill, is ever going to prevent fraud absolutely. I do not consider that the measure substantially increases the risk of fraud in commercial transactions.”⁵¹

114. Warren Gordon, who gave evidence on behalf of the Law Society of England and Wales, supported this view as he considered there was little to suggest an increase in fraud and error where documents were executed in counterpart, whether by electronic or paper means.⁵²

115. Further to this, the majority of those giving evidence to the Committee were content that sufficient safeguards against fraud and error are already in place. Colin MacNeill of Dickson Minton WS set out the steps taken by legal practitioners when executing a document in counterpart by electronic means—

“All documents are transferred in Word format by email until they are agreed, and the final version is agreed and signed off as the final version, by both sides. That follows best practice in England: one firm will then convert the document to a PDF. At that point, if there is to be a physical completion meeting, the solicitor prints off however many copies are needed and takes them to the meeting to be signed. If completion is to be done electronically, the solicitor sends the PDF, which of course cannot be

⁵⁰ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 6

⁵¹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 35

⁵² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1615

changed, round all the parties, who agree that that is the document to be signed.”⁵³

116. Those giving evidence saw no reason why this process would change as a result of the Bill and expressed satisfaction that the current safeguards would continue to protect against fraud and error should the Bill pass into law.

117. It is apparent from evidence to the Committee that in the majority of cases where documents are executed in counterpart, legal practitioners will carry out the process on the parties’ behalf. The Minister argued that clients held a high degree of confidence in the integrity of their lawyers and their ability to ensure a document was executed safely and securely.

118. This view was shared by Catherine Corr of Scottish Enterprise—

“Trust between clients and their lawyers is an issue. Solicitors are regulated by a host of professional duties, and there are engagement letters and so on. When a client is asked to sign a signature page, they therefore think just of the convenience and are usually happy, because they trust that the proper document will be executed.”⁵⁴

119. In addition to the safeguards put in place by legal practitioners and the trust between practitioners and clients it should be noted that legal sanctions are currently in place to protect against fraud.

120. The majority of witnesses were of the view that the Faculty’s suggestion that the Bill should be amended to require that parties deliver documents in their entirety instead of just signature pages was unnecessary and impractical.

121. Dr Black of the University of Edinburgh suggested that, particularly where large documents are being executed, the exchange of entire documents could lead to practical problems—

“I also have concerns about the number of documents that would be floating about. If you have four parties to a transaction, that would involve the exchange of 12 counterparts. It is manageable and feasible to exchange 12 signature pages, but I would have thought that it would become incredibly uncommercial to exchange 12 counterparts of a 200-page contract.”⁵⁵

122. Colin MacNeill of Dickson Minton WS also had doubts about the Faculty’s proposal, suggesting that the obligation to sign and deliver documents in their entirety would negatively impact on the Bill’s aims of providing a straightforward and flexible method of executing documents—

⁵³ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 46

⁵⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 22

⁵⁵ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 8

“It is a gross inconvenience to ask a company director to print off 100 pages at 2 o’clock in the morning and then rescan them all to send back, whereas printing off a single signature page to get the deal done is not an inconvenience.”⁵⁶

123. Whilst the Government does not consider that the Bill should be amended to take account of the Faculty’s suggestion, the Minister assured the Committee that the Scottish Government would give full consideration to any suggestions made by the Faculty.

124. The Committee is not persuaded that the Bill will lead to an increase in instances of fraud and error where legal documents are signed under Scots law.

125. Whilst acknowledging that instances of fraud and error may still occur when parties use execution in counterpart, the Committee notes that the existing safeguards in the general law will remain.

126. In reaching this view, the Committee notes the apparent lack of evidence pointing to problems of fraud and error in other countries in which execution in counterpart and the electronic delivery of documents is already commonly practised.

127. The Committee does not agree with the Faculty of Advocates suggestion that the Bill should be amended to provide that entire documents should be delivered in counterpart not just signature pages. The Committee considers that such an arrangement could be impractical, and is not persuaded that it would lead to a decrease in instances of fraud and error.

128. However, the Committee welcomes the Scottish Government’s commitment to take account of any further suggestions made by the Faculty of Advocates on how it considers the risk of fraud and error can be reduced.

129. The Committee encourages the Scottish Government to ensure the potential for fraud and error is accounted for and to consider how such risks could be reduced further.

Pre-signed signature pages

130. Some of the discussion on the potential for fraud focused on pre-signed signature pages. These are signature pages which have been signed by a party to a contract in advance of a document being finalised. The signature page is subsequently attached to the counterpart once the final version of the document has been agreed.

131. The SLC suggested that pre-signed signature pages could be used when a party to a contract was, for example, on holiday and unable to sign a counterpart. More typically, a pre-signed signature page could be used to ratify a change made

⁵⁶ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 50-51

after the document had already been signed, for example, if an error had come to light.⁵⁷

132. Whilst the Bill does not directly provide for the use of pre-signed signature pages, the Policy Memorandum states that a pre-signed signature page may be used if it can be—

“shown that the party concerned clearly authorised or mandated this in advance, or subsequently ratified what had been done with the full knowledge of the content of the new document.”⁵⁸

133. Given the concerns raised in England as regards pre-signed signature pages, the Committee wished to determine whether, by not specifically preventing the use of pre-signed pages, the Bill could precipitate an increase in instances of fraud and error.

134. The strong view put forward by witnesses was that they did not use pre-signed signature pages, nor did they recommend their use. The disinclination to use such a method was explained by Dr Patrick of Tods Murray—

“It is very unusual to use pre-signed signature pages. In practice I would be reluctant to do so, other than very exceptionally. In an advised transaction, where lawyers were involved, I would ensure that I had a clear trail of authorisations indicating approval of the document to which the page was attached. I would want the PDF to be accompanied by an email that said, “You can attach this page to this document” if I was the person who was doing the attaching. I would also want to know why we had to do it that way.”⁵⁹

135. Dr Anderson of the University of Glasgow shared this view—

“As a solicitor, I would never use them. Actually, one questions what is being done here. It seems to me that the authorisation that has been given by client in that situation is essentially a power of attorney to the solicitor to sign the document, once the solicitor has seen the full document on behalf of the client. I confess that I find the use of pre-signed signature pages odd.”⁶⁰

136. Further to this, although the English practice note outlines a procedure for pre-signed signature pages, Warren Gordon of the Law Society of England and Wales was of the view that their use should be avoided where possible—

⁵⁷ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1529

⁵⁸ Legal Writings (Counterparts and Delivery) (Scotland) Bill. Policy Memorandum (SP Bill 50-PM, Session 4 (2014), paragraph 19

⁵⁹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 46

⁶⁰ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 9

“Although option 3 caters for that scenario, I would not recommend it to people, because I think that signing a page up-front before you actually see the document itself is a very dicey form of execution.”⁶¹

137. However, whilst Stephen Hart agreed that pre-signed signature pages should be avoided if possible, he considered that they can at times be a helpful device. In such cases, a high degree of trust between a practitioner and a client is required—

“...commercial organisations can be affected by the availability of signatories or the timing of the transaction. It may be that, once the terms of a document have been negotiated and broadly agreed, the engrossment version is not quite ready yet because, for example, we are still arguing about a point or waiting to hear back from a third party or, with time progressing, my board is unavailable or will shortly become unavailable. There is an implicit trust that the document that I approve for signature will be the document that we as an organisation may wish to enter into. There are times when I may take the opportunity to benefit from that provision to obtain a pre-signed signature page.”⁶²

138. Therefore, although the Bill tacitly allows for the use of pre-signed signature pages, it would appear from those giving evidence to the Committee that they are rarely used.

139. The Committee notes that whilst the Bill does not specifically provide for the use of pre-signed signature pages, it does not prevent their use.

140. The Committee therefore notes the evidence it received on this matter and considers that while there may be misgivings about the use of pre-signed signature pages, there might be circumstances in which their use may be justified.

Additional concerns raised by witnesses

141. A number of additional issues were raised with the Committee in the course of its consideration of the Bill. The Committee notes the responses received from the Scottish Government which can be found at Annex C.

Related issues not provided for in the Bill

Electronic signatures

142. The Bill seeks to make clear that traditional, paper documents may be delivered by electronic means and does not set up a system of electronic signatures.

143. However, it should be noted that legislation is currently in place which allows for contracts to be drawn up and agreed without the need for paper

⁶¹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1619

⁶² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 24

documents, through the use of both simple electronic signatures such as tickbox declarations/scanned written signatures and so-called advanced electronic signatures. The SLC report analyses this legislation in more detail and defines advanced electronic signatures as—

“...a secure method of applying a signature electronically. It guarantees both the identity of the signatory and also the integrity of the data to which it is attached. In other words, it is a guarantee that a certain person applied the signature and that the document to which the signature relates has not been subsequently altered. Electronic signatures can confer probativity under the Requirements of Writing (Scotland) Act 1995 as amended by the Land Registration etc. (Scotland) Act 2012.”⁶³

144. In addition, since the writing of the SLC report, as a result of the coming into force of parts of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”) and the Electronic Documents (Scotland) Regulations 2014 on 11 May 2014, most of the documents which require to be formally valid under the 1995 Act (i.e. in writing) can now be drawn up in electronic form.

145. Consequently, there would seem to be options available by which contracts could be signed using electronic signatures (including advanced electronic signatures).

146. As highlighted, the Bill does not mandate the use of advanced electronic signatures, and instead focuses on the electronic delivery of traditional paper documents (in practice by using scans of traditional wet ink signatures). The SLC explained to the Committee that this was in part based on the results of their consultation exercise, which highlighted that there was very little client demand for the use of electronic signatures.

147. This view was shared by Colin MacNeill of Dickson Minto WS—

“They are not used at all. Pen and paper are used the world over, whatever jurisdiction people are in. That is true for the contracts that I get involved in”⁶⁴

148. The Committee understands that advanced electronic signatures are generally purported to be a very secure way of executing a document. Advanced electronic signatures validate the identity of both the signatory and the document to which the signature is attached. The Committee was therefore keen to determine the reason behind the apparent reluctance to use them.

149. The Committee heard that there is a degree of uncertainty with regard to the use of advanced electronic signatures. This is in part the result of an apparent

⁶³ Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 231), glossary, x

⁶⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 48

lack of trust in certification service providers. The SLC cited examples of European certification providers which had recently gone out of business.⁶⁵

150. Many considered the use of advanced electronic signatures to be a relatively new phenomenon using technology which was continuing to develop over time. As a result, there is a lack of familiarity, and therefore a degree of reluctance to adopt the use of electronic signatures, as Professor Gretton explained—

“the technology is still a bit science-fiction for many people, including sophisticated commercial practitioners. They are familiar with paper and wet ink, and with scanning and PDFs, but they are not very familiar with the idea of pure electronic documents.”⁶⁶

151. One suggestion put to the Committee was that electronic signatures were not commonly used to conclude transactions in Scotland as they are not widely available. The Committee heard that some developments have been made in that regard as the Law Society of Scotland is in the process of issuing electronic Smartcards to all of its members. The cards will provide an electronic signature for every solicitor who is registered with the Law Society.

152. In a letter to the Committee (a link to which is listed at Annexe C to this report), the Law Society of Scotland explained that the smartcards will provide solicitors with a digital signature which will allow them to securely sign documents. In addition, they will be able to take receipt of digital signatures safe in the knowledge that they are coming from ‘a trusted professional system’.⁶⁷

153. The Law Society further explained—

“The Smartcard will provide Scottish solicitors with a qualified secure digital signature, the EU digital signature with the highest form of security and ‘self-proving’ in Scotland. This form of digital signature guarantees the integrity of the text, as well as the authentication.”⁶⁸

154. The Committee was interested to hear of the progress being made in this area and considers that the smartcards could act as a useful tool in the undertaking secure transactions.

155. The Committee supports the use of electronic signatures and considers that they can provide a secure means of agreeing contracts and help mitigate against fraud.

156. The Committee encourages efforts to increase their use and welcomes the Law Society of Scotland’s electronic Smartcard scheme which will provide all of its members with an electronic signature.

⁶⁵ Scottish Law Commission Discussion Paper on formation of contract (DP 154),page 109, paragraph 7.37

⁶⁶ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*,7 October 2014, column 7

⁶⁷ Law Society of Scotland, written submission, 31 October 2014

⁶⁸ Law Society of Scotland, written submission, 31 October 2014

157. **It is apparent from evidence to the Committee, however, that there is still a strong demand for the use of traditional signatures. The Committee considers that the Bill responds to this demand by allowing the continuation of wet ink signatures whilst bringing the additional benefits of the use of counterparts and the ability to exchange traditional documents electronically.**

Electronic repository

158. The SLC report recommends that the Scottish Government should consider setting up an electronic document repository which would be run by the Registers of Scotland (ROS). The repository would allow for the execution of documents by electronic signature and the secure storage of electronic documents.

159. Evidence to the SLC's consultation suggested that ROS is the obvious choice to run such a repository – already having experience in the area and technological capacity. Further to this, the organisation is known and trusted throughout the Scottish legal profession. Professor Gretton of the University of Edinburgh expressed this view—

“The fact that the repository would be run by Registers of Scotland gives it a credibility that might not exist if it was offered to the private sector.”⁶⁹

160. The Bill does not take up the SLC's recommendation that a central repository should be established. However, Jill Clark from the Scottish Government explained that, although legislation is not required in order to set up an electronic repository, the Government is keen to pursue the idea—

“In line with the SLC's recommendation, we are keen to get involved, and we are certainly happy to look at the matter further. I expect that that will happen after the bill has gone through, but I cannot give you a firm timescale.”⁷⁰

161. In addition, ROS expressed its willingness to being involved in the operation of an electronic repository whilst adding that no detailed discussions had taken place on the matter to date. Kenny Crawford of ROS explained that one of the main benefits of having such a repository would be the degree of trust it would be held in by its users—

“We can see the benefits of having a repository that people can use. If it were to be run by Registers of Scotland, it would be independent and held by the keeper, so it would be trusted. The resilience of Registers of Scotland is a factor, as we are not likely to go out of business. We have been doing our job for almost 400 years, so we have a track record.”⁷¹

⁶⁹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 10

⁷⁰ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1514

⁷¹ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 32

162. The SLC report suggests that, should an electronic repository be set up, it could be used for both the preservation and the execution of documents. Therefore, in addition to the storing of documents, the repository could be used to agree documents and virtually sign them by means of electronic signature.

163. Whilst not dismissing the proposal, Christopher Kerr of ROS explained that in order to achieve this a change to legislation would be required—

“For an electronic repository to be used for execution as well as preservation would require an amendment to the underpinning legislation for the books of council and session. That would involve creating an electronic aspect for the books rather than simply a stand-alone electronic repository. If a repository was to be used purely for preservation, we could potentially create one without the need for underpinning legislation. We do not have a view on whether a repository would be just for Scottish parties or whether it could be more international. We would hold an entry and register it if the market, and our customers, wanted it.”⁷²

164. Those giving evidence to the Committee were, on the whole, supportive of the idea of a central electronic repository and particularly of the idea that, should a repository be created, it would be operated by ROS.

165. The idea of maintaining a digital archive of documents was considered appealing and it was considered that if ROS ran the repository, parties would have trust that the system would be neutral and secure. Robert Howie QC explained—

“...if one were to create a repository, it would be of help if that repository were of some official variety, such as the Registers of Scotland. Some of the responses that the committee has received have clearly grasped that. One would want to be able to ensure its security and confidentiality so that it could not be a place where those of ill intent could get in and make use of things or alter things electronically.”⁷³

166. Warren Gordon of the Law Society of England and Wales, explained that similar systems were in place for dealing with property transactions in England, considered that an electronic document repository could prove to be useful—

“Ultimately, people are seeking to improve the efficiency of property transactions in our jurisdiction—and, I am sure, in other jurisdictions—and having ease of access to all relevant electronic documents in one electronic document repository would be very helpful to all parties.”⁷⁴

167. Witnesses told the Committee that, if a repository was to be used for cross-border transactions, work would need to be undertaken to determine how such a

⁷² Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 32

⁷³ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 30

⁷⁴ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1619

repository would work and what the role of ROS would be. Catherine Corr considered that—

“Registers of Scotland is primarily a land register that is linked to Scotland. If we were looking to create a repository for international contracts, for example, we would need to work out how that fits with Registers of Scotland’s role and remit as a Scottish registry for property transactions and how that would morph into a wider role if it were to take on that responsibility. Such questions would need to be answered, but I can see the merit in the concept.”⁷⁵

168. Others echoed the view that in order to work on an international basis, there would have to be an agreement between all parties that the repository would be used. This could prove difficult if each country or each organisation had its own repository. It would have to be agreed that a central repository was to be used and all parties would have to have trust in ROS to operate the repository. Paul Hally of Shepherd and Wedderburn LLP told the Committee—

“Because we often transact cross border, any form of depository would need to gain a degree of universal acceptance. Registers of Scotland, or someone else, may be able to provide that—I do not know. It might be possible for such a register to become universally accepted, which would be very helpful—the situation is similar to that of CHAPS [*Clearing House Automated Payment System*], which has been discussed.”⁷⁶

169. Whilst acknowledging the potential benefits of an electronic repository as opposed to a paper repository, witnesses considered that an electronic repository must be secure and able to adapt to changes in technology.

170. As discussed, the Books of Council and Session have been maintained for hundreds of years. Witnesses were of the view that any electronic repository must have built-in safeguards which ensure that the documents it holds will continue to be accessible and readable despite any changes to technology. Professor Rennie of the Law Society of Scotland explained—

“The problem with repositories is that IT systems change and are updated from time to time. we would want to be sure that whatever system was used was never going to be completely outdated, meaning that we could not access what was there.”⁷⁷

171. The Committee supports the establishment of an electronic document repository maintained by ROS. The Committee considers that such a system would be a useful tool for conserving records of contracts.

⁷⁵ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 25

⁷⁶ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 49

⁷⁷ Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 37

172. **The Committee is supportive of the idea of the repository being used not only for the storage of documents but also as a means of executing documents by way of electronic signature.**

173. **The Committee considers, however, that if a repository is to be established, sufficient safeguards should be put in place to ensure that it is secure and inspires confidence in those using it. The system should also be able to adapt to developments in technology.**

174. **Taking into account the reservations expressed by some of the witnesses, the Committee is of the view that, if a central repository is established, parties should not be obliged to use it.**

Delegated powers provisions

175. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. The Committee may also consider and report on any provision in such a Bill conferring other delegated powers.

176. The Committee published its report on the Delegated Powers provisions in the Bill at stage 1 on 6 August 2014.⁷⁸

177. There are two provisions in the Bill which will confer delegated powers to make orders. Section 5 makes the usual ancillary provision generally found in Government bills. It provides the Scottish Ministers with the power to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Such an order may modify any enactment, including any provision made by the Bill.

178. Sections 5, 6 and 7 of the Bill will come into force on the day after Royal Assent. Section 6(2) provides that the Scottish Ministers may, by order, appoint days on which the other provisions of the Bill come into force. Subsection (3) provides that a commencement order may include transitional, transitory or saving provision.

179. The Committee reported that it does not need to draw the attention of the Parliament to the delegated powers provisions in the Bill at Stage 1 and that it is content with the Parliamentary procedure to which they are subject.

⁷⁸ Scottish Parliament Delegated Powers and Law Reform Committee, 46th Report, 2014 (Session 4), *Delegated Powers in the Legal Writings (Counterparts and Delivery) (Scotland) Bill*, (SP paper 575) available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/79946.aspx>

Financial Memorandum

180. The Finance Committee received four responses to its call for evidence and shared the written responses with the Committee.

181. The Committee has discussed the estimated costs and savings arising from the Bill elsewhere throughout the report.

Policy Memorandum

182. The Committee is content with the Policy Memorandum provided in support of the Bill.

CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

183. The Committee supports the general principles of the Bill and in particular the Bill's two key provisions; that execution in counterpart should be clarified as a valid process in Scots law, and that paper legal documents should be deliverable by electronic means.

184. The Committee considers that the current system for agreeing written signed contracts under Scots law is unsatisfactory and needs to be changed. By removing some of the barriers to the efficient, straightforward agreement of contracts under Scots law, the Committee considers that the Bill will improve Scots law.

185. Whilst acknowledging that the Bill's provisions are unlikely to bring an influx of new contracts to Scotland, the Committee considers that the Bill has the potential to increase the number of contracts made under Scots law by encouraging those who would otherwise have completed a contract under Scots law to choose to do so.

186. Whilst the Committee considers the potential for fraud and error to be a serious matter, it is not of the view that the passing of the Bill will lead to an increase of such instances.

187. The Committee recommends that the general principles of the Bill be agreed to.

**ANNEXE A – EXTRACTS FROM MINUTES OF THE DELEGATED POWERS
AND LAW REFORM COMMITTEE**

18th Meeting, 2014 (Session 4) Tuesday 27 May 2014

Decision on taking business in private: The Committee agreed to take items 5 and 6 in private.

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

21st Meeting, 2014 (Session 4) Tuesday 17 June 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Jill Clark, Team Leader, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government;

and then from—

Lord Pentland, Chairman; Hector MacQueen, Commissioner; Malcolm McMillan, Chief Executive; Stephen Bailey, Legal Assistant; Charles Garland, Government Legal Service for Scotland, Scottish Law Commission.

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

23rd Meeting, 2014 (Session 4) Tuesday 05 August 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee considered the delegated powers provisions in this Bill at Stage 1.

25th Meeting, 2014 (Session 4) Tuesday 19 August 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 via video conference from—

Warren Gordon, Member of the Law Society of England and Wales Conveyancing and Law Committee, Head of Real Estate Know How, Olswang LLP

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee considered the written evidence received in relation to the Bill and agreed a future programme of oral evidence.

27th Meeting, 2014 (Session 4) Tuesday 30 September 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Robert Howie, QC, Faculty of Advocates;

and then from—

Professor Robert Rennie, Chair of Conveyancing, University of Glasgow, and Alasdair Wood, Member of Law Society of Scotland Obligations Law Committee, Law Society of Scotland;

and then from—

Paul Hally, Partner, Finance and Restructuring, Shepherd and Wedderburn LLP; Colin MacNeill, Corporate Partner, Dickson Minto W.S; Dr Hamish Patrick, Partner, Banking and Finance Team, Tods Murray LLP.

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee agreed to defer consideration of the evidence it heard to a later meeting.

28th Meeting, 2014 (Session 4) Tuesday 07 October 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Professor George Gretton, Lord President Reid Professor of Law, and Dr Gillian Black, Senior Lecturer in Law, University of Edinburgh; Dr Ross Anderson, Junior Counsel, Ampersand Advocates and Honorary Research Fellow, University of Glasgow;

and then from—

Stephen Hart, Legal Counsel, Braveheart Investment Group plc; Catherine Corr, Principal Solicitor, Scottish Enterprise;

and then from—

Christopher Kerr, Head of Legislation and Legal Policy, and Kenny Crawford, Commercial Services Director, Registers of Scotland.

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee considered the evidence it heard over the course of the last two meetings.

29th Meeting, 2014 (Session 4) Tuesday 28 October 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism; Jill Clark, Team Leader, Civil Law Reform Unit; Ria Phillips, Civil Law Policy Manager, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government.

30th Meeting, 2014 (Session 4) Tuesday 04 November 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee considered the evidence it has received on the Bill.

31st Meeting, 2014 (Session 4) Tuesday 11 November 2014

Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private): The Committee agreed its Stage 1 report.

ANNEXE B: INDEX OF ORAL EVIDENCE

21st Meeting, 2014 (Session 4) Tuesday 17 June 2014

Jill Clark, Team Leader, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government;

Lord Pentland, Chairman; Hector MacQueen, Commissioner; Malcolm McMillan, Chief Executive; Stephen Bailey, Legal Assistant; Charles Garland, Government Legal Service for Scotland, Scottish Law Commission.

25th Meeting, 2014 (Session 4) Tuesday 19 August 2014

Warren Gordon, Member of the Law Society of England and Wales Conveyancing and Law Committee, Head of Real Estate Know How, Olswang LLP

27th Meeting, 2014 (Session 4) Tuesday 30 September 2014

Robert Howie, QC, Faculty of Advocates;

Professor Robert Rennie, Chair of Conveyancing, University of Glasgow, and Alasdair Wood, Member of Law Society of Scotland Obligations Law Committee, Law Society of Scotland;

Paul Hally, Partner, Finance and Restructuring, Shepherd and Wedderburn LLP; Colin MacNeill, Corporate Partner, Dickson Minto W.S; Dr Hamish Patrick, Partner, Banking and Finance Team, Tods Murray LLP.

28th Meeting, 2014 (Session 4) Tuesday 07 October 2014

Professor George Gretton, Lord President Reid Professor of Law, and Dr Gillian Black, Senior Lecturer in Law, University of Edinburgh; Dr Ross Anderson, Junior Counsel, Ampersand Advocates and Honorary Research Fellow, University of Glasgow;

Stephen Hart, Legal Counsel, Braveheart Investment Group plc; Catherine Corr, Principal Solicitor, Scottish Enterprise;

Christopher Kerr, Head of Legislation and Legal Policy, and Kenny Crawford, Commercial Services Director, Registers of Scotland.

29th Meeting, 2014 (Session 4) Tuesday 28 October 2014

Fergus Ewing, Minister for Energy, Enterprise and Tourism; Jill Clark, Team Leader, Civil Law Reform Unit; Ria Phillips, Civil Law Policy Manager, Civil Law

*Delegated Powers and Law Reform Committee, 65th Report, 2014 (Session 4) –
Annexe B*

Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government.

ANNEXE C: INDEX OF WRITTEN EVIDENCE

Correspondence from Minister for Energy, Enterprise and Tourism

[Letter from Minister for Energy, Enterprise and Tourism to Scottish Law Commission \(laid before Parliament on 28 February 2014\)\(1.21MB pdf\)](#)

Submissions received on the Legal Writings (Counterparts and Delivery) (Scotland) Bill

Responses to the Committee's call for evidence—

[Dickson Minto W.S \(25KB pdf\)](#)

[Faculty of Advocates \(71KB pdf\)](#)

[Freshfields Bruckhaus Deringer \(90KB pdf\)](#)

[Glasgow City Council \(11KB pdf\)](#)

[Law Society of Scotland \(69KB pdf\)](#)

[Maclay Murray and Spens LLP \(36KB pdf\)](#)

[Registers of Scotland \(76KB pdf\)](#)

[Shepherd and Wedderburn LLP \(68KB pdf\)](#)

[Tods Murray LLP \(70KB pdf\)](#)

[Weir Group plc \(68KB pdf\)](#)

Additional correspondence and submissions—

[Paper provided by the Scottish Law Commission on Signatures in Scots Law dated 19 August 2014\(256KB pdf\)](#)

[Correspondence from Professor George Gretton, University of Edinburgh dated 8 October 2014\(69KBpdf\)](#)

[Scottish Government and Scottish Law Commission response to issues raised in written and oral evidence dated 23 October 2014\(144KB pdf\)](#)

[Correspondence from the Law Society of Scotland on Smartcard scheme dated 31 October 2014 \(81KB\)](#)

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