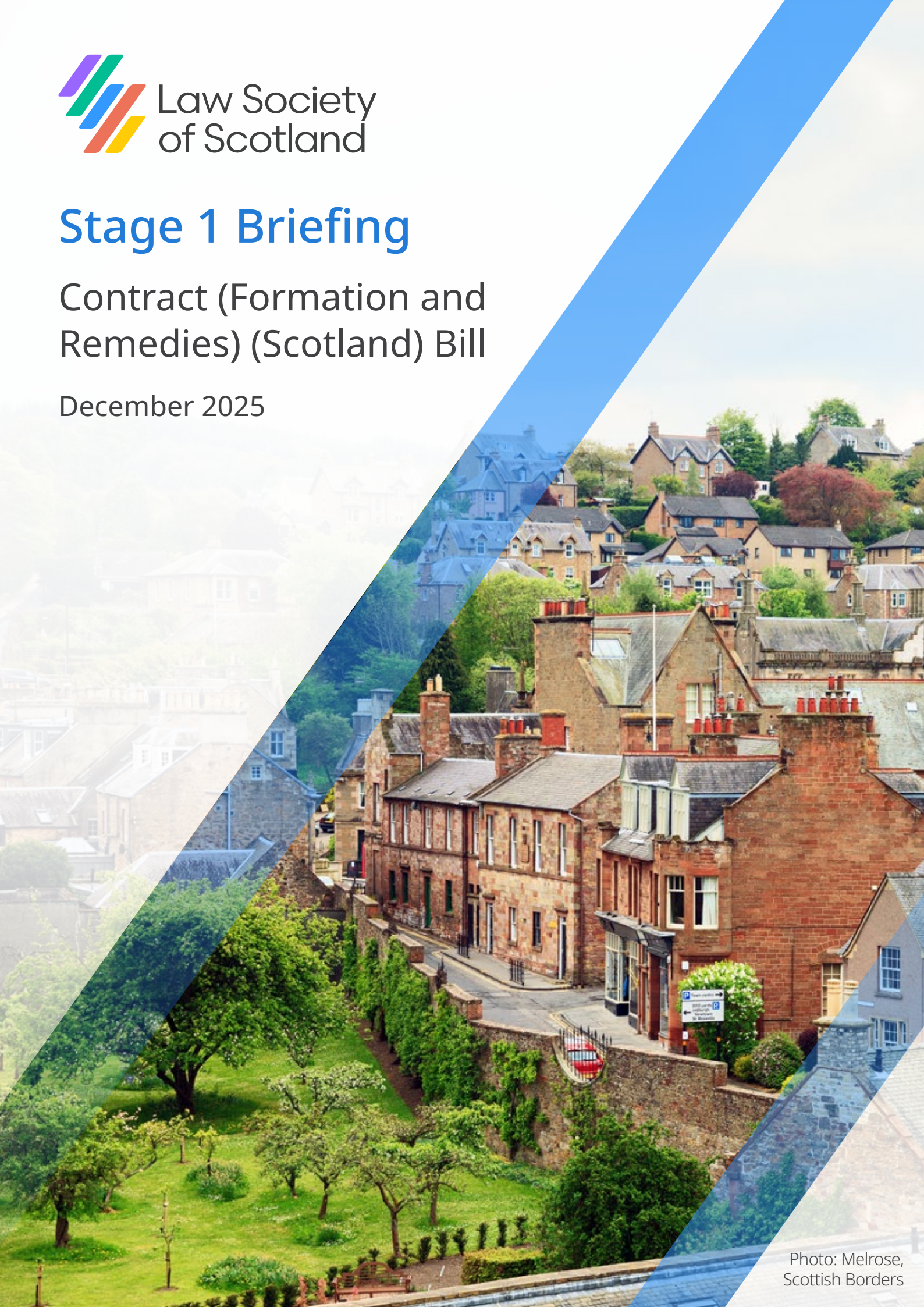


Stage 1 Briefing

Contract (Formation and Remedies) (Scotland) Bill

December 2025



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Introduction

The Law Society of Scotland is the professional body for over 14,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Contract (Formation and Remedies) (Scotland) Bill¹ (**Bill**) was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 2 October 2025. This Bill finds its origins in the work undertaken by the Scottish Law Commission (**SLC**) and their 2018 Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses² (**2018 Report**).

We submitted written evidence to the Delegated Powers and Law Reform Committee (**Lead Committee**) in November 2025³ and provided oral evidence as part of the Lead Committee's stage 1 consideration of the Bill on 18 November 2025. The Delegated Powers and Law Reform Committee Report on the Contract (Formation and Remedies) (Scotland) Bill at Stage 1⁴ (**Stage 1 Report**) was published on 10 December 2025. We note that the Lead Committee recommends to the parliament that the general principles of the Bill be agreed to.⁵

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 18 December 2025.

Our briefing includes the following key points:

- We are supportive of the Bill and believe the reforms represent a new and modern approach which enables less sophisticated users of contracts to effectively govern their contractual arrangements without the need for a detailed understanding of the common law.
- We anticipate that practitioners will be able to apply the legislation with relative ease given the terminology is generally clear, accessible, and readily understandable.
- We support the repeal of the postal acceptance rule.

¹ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/contract-formation-and-remedies-scotland-bill/introduction/spbill76s062025.pdf>

² [Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses \(Report No 252\)](#)

³ <https://www.lawscot.org.uk/media/exjdkwot/02-11-25-cd-call-for-views-on-cfrb-written-evidence.pdf>

⁴ [Contract \(Formation and Remedies\) \(Scotland\) Bill at Stage 1](#)

⁵ [Stage 1 Report, at para 156](#)

- We believe it is of crucial importance that party autonomy is retained in the Bill so that more sophisticated parties have the freedom to contract on terms that are best suited to their needs.

General Comments

We welcome the introduction of the Bill and its overarching policy aim of restating and reforming certain areas in the law of formation of contract alongside specific remedies for breach⁶.

In doing so, we welcome the attempts being made to produce a statutory set of default rules that parties can adopt. We agree with the Lead Committee's conclusion that a law setting out default rules relating to the formation of contracts and certain aspects of the law on remedies for breach of contract is an appropriate way to produce rules that are as clear, certain and accessible as possible⁷. We believe that this will improve the law's accessibility for various types of users, both from within and outside of the legal profession. We also believe that the reforms will improve access to justice by enabling less sophisticated users of contractual agreements to agree terms that are best suited and tailored to their needs. We therefore also welcome the Lead Committee's emphasis on the importance of making legislation accessible and easy to understand for lay-people⁸.

Furthermore, we believe that the current draft of the Bill does not represent a radical departure from the existing common law regime. As a result, we anticipate that practitioners will be able to apply the legislation with relative ease as the terminology is generally clear, accessible, and readily understandable without reference to case law or commentary. We believe this contrasts with the current regime which can require consultation of a variety of case law and institutional writings in order to understand the core legal principles in question.

We are aware that this Bill does not fully codify Scots contract law in the areas of interpretation, penalty clauses, the "battle of the forms" alongside certain areas of remedies upon breach. These areas are to remain governed by the common law, which we are broadly supportive of. However, we would advocate that a cautious approach is taken as to how the new statutory provisions introduced by the Bill will interact with existing precedent, particularly in the early stages of implementation. We consider this to be a complex process, however, we do support the judiciary retaining an ability to balance the various principles of the Bill on a case-by-case basis. This is so the law can adequately deal with more complex factual scenarios that reflect the nuanced realities of larger commercial transactions.

⁶ [Paragraph 6 - Policy Memorandum](#)

⁷ [Stage 1 Report, at Para 28](#)

⁸ [Stage 1 Report, at Para 58](#)

Specific Comments on Sections of the Bill

Part 1 of the Bill – Formation of Contracts (sections 1 to 15)

Part 1 deals with formation of the contract and attempts to codify existing common law principles in one place through its use of default rules. These default rules are to act as a starting point in negotiations insofar as they can be relied upon to provide for common contractual situations.

We welcome section 1 of the Bill and its recognition of party autonomy. We consider that this provides users the freedom to contract out of certain provisions of the Bill and thus allows parties the ability to determine the precise terms that will govern their legal relations. However, whilst we consider that these default rules are useful as a guide for certain individuals and smaller business transactions, we believe that there is a risk that these provisions may be too inflexible and restrictive for more complex contracts that govern larger corporate and commercial transactions. We therefore believe it crucial that section 1 (and section 16) of the Bill (which protect party autonomy) are retained in their current form. In view of the foregoing points, we agree with the Lead Committee's support of the flexible approach adopted in the Bill allowing for parties to contract out of most default rules by mutual agreement⁹.

We also welcome the express terminology at section 2(1)(a) that focuses on the parties' intent that their communications are to have legal effect. We believe that this is clearer and more readily understandable than the common law concepts of will, desire, and engagement. We believe this provision makes the law clearer, more certain and more accessible to users.

However in order to improve certainty for the parties, we believe that the provision could be strengthened by amending the wording at section 2(3) to include either i) *express communication* confirming the parties' agreement on a specific matter prior to the contract being formed, or ii) that both parties *signal* their agreement that a particular matter is to be settled prior to formation. Without this, we believe that there is a risk that the Bill could be interpreted as preventing formation where one of the contracting parties subjectively intends not to contract prior to agreement on a certain point (and thus could lead to legal uncertainty). We therefore believe that it is crucial that the Bill places a parties signalled intent as being central to the formation of their contractual arrangement.

We note from the Stage 1 Report that the Lead Committee is inviting the Scottish Government to consider the above noted drafting suggestions and to engage with relevant stakeholders in advance of Stage 2.¹⁰ We would welcome an opportunity

⁹ [Stage 1 Report, at Para 57](#)

¹⁰ [Stage 1 Report, at Para 147 and 148](#)

to engage with this process and welcome the Scottish Government's commitment to consider other drafting suggestions mentioned in evidence.¹¹

Sections 4 – 12 outline the rules governing offer, acceptance and time limits. We have no comments to make on these provisions.

In terms of notification and the provisions found at section 13, we believe that sub-section (4)(d) does raise certain complexities that require further consideration. This provision asserts that it is reasonable to expect that a person accesses a notification *"transmitted by electronic means, when it becomes available to be accessed by the person"*. We are aware of issues that can arise in practice in relation to *"out of office"* messages and believe it is unclear whether the Bill should be interpreted so as to provide that an email is available (i) upon delivery to the recipient's inbox i.e. instantaneously upon the sender sending the email; or (ii) upon delivery to the recipient's inbox and assuming that no *"out of office"* is received (with an anticipated return date).

Whilst we acknowledge that this issue was considered in the 2018 Report (alongside various other academic commentary on the point¹²), and that the Lead Committee agrees that the Bill provides a reasonable general rule for when notification takes effect¹³, we believe that caution must be exercised and that parties need to be made aware of the implications that flow from this provision. This issue is further complicated by the underlying technology and infrastructure that supports email or instant messaging in that servers are subject to outages from time-to-time and thus communications may be subject to delay or instances when they are not actually received.

Linked to this is the abolition of the postal acceptance rule at section 14 of the Bill. We note that the Minister has confirmed that the Scottish Government supports abolishing this rule given it *"means contracts can be formed without one party ever knowing that their offer has been accepted"*¹⁴ and that this *"is at odds with common-sense expectations"*¹⁵. We agree with these points and welcome the provision to abolish the rule.

In support of our view, we point to feedback we have received that suggests the majority of contracts (including commercial agreements) are now concluded electronically. In view of this (and the increasing use of digital technologies), we believe there remains little justification for retaining complex protections for acceptance sent by post. This represents a deviation from parties' general expectations of legal communications (for example, the majority of notice provisions in contracts indicate that where a notice is sent by post, it does not

¹¹ [Scottish Government's response to Stage 1 Report: Letter from Minister for Victims and Community Safety dated 12 December 2025](#)

¹² See further H G Beale (ed), Chitty on Contracts (32nd edn, 2015) – paras 2.080 & 2.084 and Mik, *"Problems of Intention and Consideration in Online Transactions"*, paras 6.37 & 6.38

¹³ [Stage 1 Report, at Para 75](#)

¹⁴ [Stage 1 Report, at Para 86](#)

¹⁵ Ibid

take effect until at least a day after posting to allow for delivery to the recipient, and that it must generally be sent by recorded delivery to ensure receipt). Further support for the abolition of the postal acceptance rule can be found in corporate transactions where the widespread use and ability for parties to hold contracts as “undelivered” allows users the flexibility to conclude agreements without being subject to the risks of outdated (or unreliable) forms of document transfer.

Finally, we welcome section 15 of the Bill which sets out definitions applicable to Part 1. We believe that this facilitates a better understanding of the Bill, particularly for lay persons.

Part 2 of the Bill – Remedies for Breach of Contract (sections 16 to 22)

Part 2 of the Bill contains provisions to reform certain aspects of the law of remedies in relation to mutuality, restitution after rescission and contributory negligence. Whilst we are supportive of reform to these specific remedies, we do also acknowledge wider concerns that this could lead to fragmentation in the law of remedies when navigating both statute and the common law. This could lead to legal uncertainty for practitioners, wider business and individuals alike.

We would therefore welcome further reform to address the full range of remedies that are available such as damages, specific implement and interdict so as to ensure that the statutory provisions are both comprehensive and consistent in application. We note from the Stage 1 Report that the SLC will undertake more work in other areas of contract law not covered by the Bill, and that it will consult on its next programme of work in 2026¹⁶. We support this approach and will be happy to engage with further consultation on these areas.

Other than the above noted points, we have no comments to make on sections 17 to 21.

In terms of the proposed reforms to the law of retention, we are uncertain that the current proposals that are to be introduced by way of an amendment at Stage 2 (which inserts new sections 21A – D to the Bill) will adequately address more complex transactions and contractual arrangements. We therefore believe it is crucial that the parties retain the ability to contract out of the proposed provisions relevant to the law of retention. We note from the Stage 1 Report that this view is also shared by a number of key stakeholders who responded to the associated Call for Views¹⁷. The Scottish Government, in their response to the Lead Committee’s Stage 1 Report¹⁸, have also confirmed that their intention is that the provisions on retention will be default and so can be contracted out of by parties should they agree¹⁹.

¹⁶ [Stage 1 Report, at Para 35 and 59](#)

¹⁷ [See Published responses for Contract \(Formation and Remedies\) \(Scotland\) Bill - Scottish Parliament - Citizen Space](#) and [Stage 1 Report, at Para 116 and 117](#)

¹⁸ [Scottish Government’s response to Stage 1 Report: Letter from Minister for Victims and Community Safety dated 12 December 2025](#)

¹⁹ Ibid

In support of the need for parties to be able to contract out of the provisions on retention, we point to the example of derivatives and similar sophisticated financial instruments which depend on the precise operation, in an international context, of complex contractual mechanisms in the event of breach (and on the occurrence of various events that may or may not constitute breach or a termination event). The powers available to the parties upon the occurrence of a given breach or non-breach event (and combinations of) can be highly structured including; options to delay performance; non-performance; termination; closing out and netting of different transactions (or combinations of transactions). This is alongside retaining a choice in how to apply the collateral provided in the contractual arrangement, often using different valuation methodologies in different situations under different options. Scottish financial institutions (and other large Scottish business entities) are routinely party to these type of contracts and so we consider it is crucial that these important issues are incorporated into any reforms to the law of retention.

With this in mind, we would flag the following provisions which we believe risk creating uncertainty in their interpretation or appropriateness in sophisticated financial contracts:

- **Section 21A(2)(b)**- Counterpart obligations may be contained in separate contracts as long as the contracts form part of the same transaction.
- **Section 21A(3)(a)**- There must be a material breach in the case of an anticipatory breach.
- **Section 21(4)**- The effect of the contractual retention must not be clearly disproportionate to the effects of the breach or anticipatory breach.
- **Section 21B**- Where PA exercises contractual retention for an anticipatory breach by PB in accordance with section 21A(1)(b), PA must notify PB of the contractual retention.

In addition to these, we also believe that enabling a damages payment as a mandatory retention “cure” in section 21A(6) undermines the flexibility required in more sophisticated financial agreements.

For the above noted reasons (and the possible associated uncertainty that is caused), we consider that section 21D should expressly preserve contractual set-off, closing out rights and the netting of obligations in any attempt to codify the law of retention. This is in consideration of our belief that reference in section 21D(a)(v) to *“any other circumstances in which the right to retain or abate obligations is conferred”* may not sufficiently capture these important rights that are available to parties in more complex contractual arrangements.

We believe it is important to note that section 21D(b) does not introduce a new *“power of a court to refuse the exercise of contractual retention where that retention is or would be inequitable”*. We therefore believe that this should be amended to expressly preserve the current law of retention to that effect.

Again, we note from the Stage 1 Report that the Lead Committee recommends that the Scottish Government consider these drafting points²⁰ and that the Minister has confirmed she would be happy to consider any suggestions which the Lead Committee considers may make the Bill stronger.²¹ We welcome this commitment.

We have no comments to make on section 22 and its amendment to the Law Reform (Contributory Negligence) Act 1945.

Part 3 of the Bill

On section 23, we particularly support subsections (e) and (f) which preserve relevant protections against unfair contract terms and for vulnerable persons.

However, we have concerns that the ancillary provision at section 24(2) of the Bill is too wide in giving Scottish Ministers the powers to amend the legislation *ex post facto*. We consider this extension as being unwarranted, particularly given the importance that is placed on party autonomy contained within this Bill.

We have no further comments to make on this Part.

Concluding Comments

We are supportive of the Bill and believe the reforms represent a new and modern approach to this area of Scots private law. We agree with the Minister's view that the proposals will make the law clearer, more accessible and address uncertainties on a number of specific points around contract law²². We also believe these reforms will better enable less sophisticated users to effectively govern their contractual arrangements without the need for a detailed understanding of the common law or wider institutional writings. Further guidance on the Bill may assist those who are unable to afford legal representation a means to understand how these provisions will impact already established principles in contract law.

However, whilst we acknowledge that it will be difficult to predict how parties to more complex contractual arrangements might perceive the value of a statutory regime in Scots law, it is hoped that a modernised and clarified law will ultimately encourage parties to conclude their contractual agreements using Scots law (and in turn submitting to the jurisdiction of the Scottish Courts).

²⁰ Stage 1 Report, at Para 147

²¹ [Delegated Powers and Law Reform Committee: Official Report, 2 December 2024. Column 14](#)

²² [Stage 1 Report, at Para 27](#)



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