



Law Society  
of Scotland

# Consultation Response

## Draft Contract (Third Party Rights) (Scotland) Bill

March 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Obligations Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Government's call for evidence on the Contract (Third Party Rights) (Scotland) Bill.<sup>1</sup> The Sub-committee has the following comments to put forward for consideration.

## Response to questions

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### **Question 1: What are the benefits of moving from a common law approach to a statutory footing?**

We support the principles of the Bill. The law on this issue is outdated compared to the approach other modern legal systems<sup>2</sup> and international instruments which allow for greater flexibility as there is no blanket irrevocability requirement. Furthermore, the law around irrevocability at present is confused in itself.

Moving to statutory footing will allow this requirement to be removed and for the law to be modernised and clarified. We are aware that work-arounds are used in some areas because of the lack of clarity in this area and lawyers do not like to give advice in areas where the law is unclear: both of these factors make it less likely that there would be a sufficient flow-through of cases in this area to effect the necessary changes within the common law.

Furthermore, the Bill will bring the law in this area into line with other law on unilaterally created rights and therefore improve the coherence of the law at a general level.

<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103671.aspx>

<sup>2</sup> Including the system in England and Wales which is governed by the Contracts (Rights of Third Parties) Act 1999 (<http://www.legislation.gov.uk/ukpga/1999/31/contents>)

Codification will also mean all law relating to third party rights in contract is in one place which will improve its accessibility for contracting parties, third parties and their legal advisers.

## Question 2: What impact will this Bill have on third party rights?

The Bill will create a more modern system of third party rights.

### *Requirement of irrevocability*

The common law on *jus quaesitum tertio* (often referred to as JQT) requires third party rights to be irrevocable. This does not allow the contracting parties to account for developing circumstances. It also means that some parties are less inclined to grant third party rights because of this lack of flexibility. Removing the requirement of irrevocability therefore seems sensible and will give contracting parties greater freedom and flexibility.

The mechanism can only be used to create rights and not to impose obligations: it therefore seems fair to allow modification as the third party will be in no worse situation than if the original right had never been created. That said, it is important that third party rights are given proper effect and receive some form of protection. For these reasons, we see merit in rules which “fix” the right in clearly defined circumstances.

The approach taken in this Bill seems sensible and fairly balanced between granting freedom to contracting parties while ensuring that third parties to whom rights have been granted are not treated unfairly.

## Question 3: Do you think the Bill will increase the use of Scots Law?

As discussed in the evidence session on 21 March,<sup>3</sup> anecdotal evidence suggests that at present where parties are looking to create a more flexible/ revocable right they are likely to designate the law of another jurisdiction (most commonly English law) as the governing law of the contract or create a specific carve-out for that portion of the contract to allow the third party right to fall under the English rules. This practice will no longer be necessary under the new rule and could increase the use of Scots law in such cases.

Recent experience with the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 suggests that clarifying legislation in contract law can have a significant positive impact on the perceived utility of Scots law.

The Law Society of Scotland recently responded to the Scottish Government’s call for feedback on use of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 which came into force on 1 July 2015. Members reported that the Act had delivered efficiencies and aided the conduct of business.

<sup>3</sup> Meeting of the Delegated Powers and Law Reform Committee on 21 March 2017 at 10am.

The change proposed in this bill is more far reaching and the available workarounds are less attractive than was the case with that bill and therefore there is every reason to believe this legislation will have similar effect.

It must be acknowledged, however, that uptake of new solutions is often slow because solicitors and clients may be reluctant to depart from a model which is considered to work, albeit in a less than optimal fashion.

It is important to bear in mind, that the legislation will significantly improve the position of parties who were always going to use Scots law, particularly those who cannot afford the legal advice necessary to set up an arrangement which uses foreign law or a complex alternative. Their interests should not be forgotten.

#### **Question 4: Do you have any concerns about the approach taken in the Bill?**

The Law Society supports the objectives and as a general rule we are happy with the approach taken in the Bill.

However, there are certain minor adjustments to the drafting which we believe could be beneficial.

In particular, we consider that signposting regarding the content and effect of sections 4, 5 and 6 would significantly improve their accessibility. These rules are new, core to the operation of the act and, as Professor Beale indicated in his evidence, somewhat complex. We suggest therefore, that headings which indicate that all three sections have the same effect, albeit triggered in different circumstances. This point might be made even clearer by stating the effect in one section and the various conditions for applicability in subsequent section.

We believe such minor amendments would offer greater clarity ensuring that the legislation is well understood and handled with confidence, increasing the chances of uptake by solicitors and clients.

We support the inclusion of clarification around the application of arbitration which we consider may be helpful where the contracting parties have specified a preference for arbitration but urge careful consideration of the evidence submitted on behalf of the Faculty of Advocates on this matter.

#### **Question 5: What are the financial implications of the Bill?**

We have no evidence on this point.

**For further information, please contact:**

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