



Law Society  
of Scotland

# Contract (Third Party Rights) (Scotland) Bill

## Stage 1 Briefing

May 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 has considered the Contract (Third Party Rights) (Scotland) Bill. The Society supports the modernization of law in this area and welcomes both the introduction of the Bill itself and the Conclusions of the Delegated Powers and Law Reform Committee in its Stage 1 Report on the Contract (Third Party Rights) (Scotland) Bill<sup>1</sup> (the Stage 1 Report). The Society offers the following observations at Stage 1 of the Bill process.

## Benefits of modernization and moving to a statutory footing

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We support the principles and overarching objective of the Bill.

The current law on *jus quaesitum tertio* (JQT) or third party rights contains a requirement that the rights must be irrevocable: this is outdated compared to the approach of other legal systems<sup>2</sup> and international instruments<sup>3</sup> which allow for greater flexibility. It is also worth noting that the law around irrevocability is, in itself, confused. Moving to a statutory footing will allow this requirement to be removed and for the law to be modernised and clarified.

We are also aware, and this point was picked up in the Stage 1 Report, that work-arounds are sometimes used because of the lack of clarity in this area: the Bill will provide this much-needed clarity.

<sup>1</sup> Stage 1 Report on the Contract (Third Party Right) (Scotland) Bill, 25<sup>th</sup> Report (Session 5) available here: <https://sp-bpr-en-prod-dnep.azureedge.net/published/DPLR/2017/5/12/Stage-1-Report-on-the-Contract--Third-Party-Rights---Scotland--Bill/25th%20Report.pdf>

<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>)

<sup>3</sup> Such as the Draft Common Frame of Reference, Principles of European Contract Law and Unidroit Principles of International Commercial Contracts

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.

The codification which is achieved by the Bill will also mean all law relating to third party rights in contract is in one place which should help to improve its accessibility for contracting parties, third parties and their legal advisers.

## **Impact on third party rights and changes to the requirement of irrevocability**

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### *Requirement of irrevocability*

JQT currently 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.

### *Impact on third parties*

JQT can only be used to create rights and not to impose obligations: it therefore seems fair, in principle, to allow modification of those rights by the contracting parties, not least as the third party will be in no worse situation than if the original right(s) 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.

## **Specific comments on the drafting of the Bill**

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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. We are pleased to see that this point has been recognised in the Stage 1 Report and that the Scottish Government has committed to reviewing these suggestions.<sup>4</sup>

<sup>4</sup> See Executive Summary of the Stage 1 Report at p1

### *Additional signposting for sections 4, 5 and 6*

In particular, we consider that signposting regarding the content and effect of sections 4, 5 and 6 would significantly improve their accessibility. The Faculty of Advocates shared our concern that these sections are difficult to follow. 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.

The Stage 1 Report notes that the Delegated Powers and Law Reform Committee drew this matter to the attention of the Minister. We welcome the Committee's decision to reiterate its invitation to the Scottish Government to continue to reflect on this point.<sup>5</sup>

### *Arbitration*

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.

## **Increasing the use of Scots Law**

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As discussed in the evidence session on 21 March,<sup>6</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.

Finally, 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.

<sup>5</sup> See paragraph 91 of the Stage 1 Report at page 12

<sup>6</sup> Meeting of the Delegated Powers and Law Reform Committee on 21 March 2017 at 10am



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