

SUMMARY AND ANALYSIS OF CONSULTATION RESPONSES

Consultation on the Scottish Law Commission Report on Review of Contract Law

Background

1. Contract law impacts on day to day economic life in relation to all types of transactions, for businesses and individuals alike. In March 2018, the Scottish Law Commission (SLC) published a report and a draft Bill on a review of contract law which was the final output of a reform project that began in 2010. The recommendations include a statutory statement of the law in relation to formation of contracts, the abolition of the postal acceptance rule and some reshaping of aspects of the law in relation to remedies for breach of contract.
2. It has, though, been 6 years since the recommendations on contract law were published and the Scottish Government sought views on whether the landscape around this area of the law has changed since then and, if so, whether the changes are material to the recommendations contained in the Report. The Scottish Government also sought to test whether the views received by the SLC are still broadly held.

Summary

3. The Scottish Government's consultation opened on 8 July 2024 and ran for 12 weeks. A total of 9 responses were received and a list of respondents can be found at the Annex of this document.
4. This paper summarises the key points raised by respondents.¹
5. To protect the reputation of Scottish Ministers, named individuals, organisations and companies, all responses were screened for potentially defamatory statements before they were made available to the public. The Scottish Government have published the responses of those who gave consent.²
6. The questions were framed to elicit a broad range of responses and because of the wide range of open comments submitted we have opted to provide an analysis of each question, as set out below.

Conclusion

7. Overall, the majority of respondents expressed continued support for the recommendations of the SLC and were not aware of material developments in the law or practice that require those recommendations to be revisited. The sole exception is the law of retention which the Scottish Government will consider further.

¹ The consultation paper, as well as responses to the consultation, can be accessed at <https://consult.gov.scot/justice/scottish-law-commission-report-contract-law-review/>.

² The published responses can be accessed at https://consult.gov.scot/justice/scottish-law-commission-report-contract-law-review/consultation/published_select_respondent.

Scottish Government response

8. Of the 9 responses received, 6 respondents answered the majority of the questions while the other 3 respondents provided their view at a relevant section. Two respondents withheld their personal information and of the other 7, two were individuals and the remaining 5 were a mix of legal firms, a local authority, a group of academics, or other organisation.
9. The consultation has provided some clarity on which issues need to be considered further when taking forward work on implementing the SLC's recommendations.

Next steps

10. The comments raised in the consultation will need to be considered carefully. On the law of retention, the Scottish Government intends to undertake a targeted consultation in order to test the views of relevant stakeholders.
11. Overall though respondents were positive in their response to the SLC recommendations. The Scottish Government's intention is to continue work to implement these proposals, although this will be dependent on future work priorities and legislative activity.

Table of all responses to the consultation

12. Below is a straightforward tally of “yes” and “no” responses received for each question in the consultation. We have opted to count some answers as either “yes” or “no” when it was clear from the open comments that they either agreed or disagreed with a question.

Question	Yes	No
<u>1</u> Are you content with this approach [of default rules]?	6	0
<u>2</u> Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Report?	0	6
<u>3</u> Are you aware of change in contract law practice which impacts on any of the recommendations contained in the Report?	1	5
<u>4</u> Do you agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the recommendations of the SLC?	5	0
<u>5</u> Is there anything in the BRIA that requires to be updated?	2	3
<u>6</u> Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the SLC’s draft Bill?	1	3
<u>7</u> Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the SLC’s draft Bill?	0	4
<u>8</u> Are you satisfied that the approach of a statutory statement on contract formation does not differentiate Scots and English law in a way that might deter cross-jurisdictional business?	4	2
<u>9</u> Are you aware of any technical advances/ practical changes which postdate the Report which may impact on this approach?	1	4
<u>10</u> Are you content with the approach taken in respect of the battle of the forms?	4	1
<u>11</u> Are you content with the approach taken in respect of the acceptance of general offers?	5	1
<u>12</u> Are you content with the approach of rejecting a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price?	6	0
<u>13</u> Do you agree that the law on interpretation is settled and that legislative reform is not needed or wanted? If not, please give your reasons.	2	4
<u>14</u> In the light of the subsequent case law do you consider that the law of retention would benefit from clarification?	5	0

15 Are you content with the proposed approach taken to restitution following rescission?	5	1
16 In light of the decision in <i>Primeo</i> are you content with the proposed approach taken to apply the defence of contributory negligence to claims of damages for breach of contract?	4	0
17 Are you aware of any developments in case law which suggest that the law of anticipated breach needs reform?	0	5
18 Are you aware of any developments in the courts which are either helping or hindering this area of the law?	1	5
19 Do you have any views on the current state of the law in respect of transferred loss claims?	4	2
20 Has the UK Supreme Court decision produced certainty or has it caused any difficulties or created unfairness?	1	2

Summary of responses to each question in the consultation paper

13. What follows is an analysis of the open comments provided for each question in the consultation.

Question 1: Are you content with this approach [of default rules]?

14. There were a total of 6 responses to this question, with all 6 respondents agreeing that they were content.
15. The Centre for Scots Law suggested a point of terminology: it would be preferable to refer to “defeasible rules” rather than “default rules”. It also suggested that section 1(1)(b) of the SLC draft Bill could be clearer as to whether the agreement referred to in that subsection is a itself a contract, subject to the defeasible rules.
16. Hector MacQueen said “codifying a set of default rules will serve to facilitate a better understanding of the law in this area, for members of the public, those operating in business as well as members of the legal profession.” This view was echoed by Respondent B.
17. Dumfries and Galloway Council, while content with the approach said that, “codifying contract law may not of itself make the law significantly more clear and accessible to laypersons.”

Question 2: Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Report?

18. Respondents to this questions were not aware of any subsequent case law which impacts on the SLC’s recommendations. Respondent B commented that the Contract (Third Party Rights) Scotland Act 2017 came into force after shortly before publication of the SLC’s Report. The Scottish Government would point out that this legislation implemented other SLC recommendations that were made as part of its reform of contract law project.

Question 3: Are you aware of change in contract law practice which impacts on any of the recommendations contained in the Report?

19. Respondent A commented that a number of commercial property missives are now concluded electronically, with signatories using qualified electronic signatures (QES). Without legislative change, the Land Register of Scotland and the General Register of Sasines cannot accept QES-signed documents.
20. Respondent B highlighted that commercial contract drafters often refer to 'playbooks' in the initial stages of drafting and negotiation to ensure that clients' preferred default positions are reflected as far as possible in the drafts under discussion. However, they went on to say that the draft Bill may assist in providing clearer legal reference points for some aspects of drafting, as well as the process of concluding commercial contracts.
21. No other respondent referred to a change in practice.

Question 4: Do you agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the recommendations of the SLC?

22. All respondents who answered this question agreed.
23. Hector MacQueen questioned whether there should be an express statement in any potential Bill to the effect that a contract is formed by an offer from one party met by acceptance from the offeree, which is otherwise implicit in the SLC draft Bill.
24. The Centre for Scots Law suggested that the drafting of the Bill published with the SLC's Report could be clearer and that its approach to such issues as formation of contract is very piecemeal.

Question 5: Is there anything in the BRIA that requires to be updated?

25. Updating the training costs of legal professionals was the only matter referred to by respondents who answered yes to this question.

Question 6: Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the SLC's draft Bill?

26. Most respondents were of the view that the recommendations for reform would not have a negative an impact (direct or indirect) on children. Hector MacQueen pointed out that it would be easier for children to acquire third party rights, albeit those rights for children under the age of 16 would have to be enforced by their guardians.
27. Respondent B noted that the proposals do not appear to impact (adversely or otherwise) the current rules on the capacity of children and young people to enter contractual agreements set out in the Age of Legal Capacity (Scotland) Act 1991.
28. The Centre for Scots Law said that it is not clear that the proposals will have an impact on children and young people in particular but any such impact would most likely be minimal.

Question 7: Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the SLC's draft Bill?

29. Respondents either answered "no" or "don't know" to this question. There were no open comments.

Question 8: Are you satisfied that the approach of a statutory statement on contract formation does not differentiate Scots and English law in a way that might deter cross-jurisdictional business?

30. Of the 6 respondents who answered this question, 4 were satisfied that the approach taken does not differentiate Scots and English law in a way that might deter cross-border jurisdictional business.
31. Hector MacQueen pointed out that the only significant change proposed is the abolition of the postal acceptance rule, which parties can agree to contract into if

they so wish, and which does not differentiate Scots from English law in a very radical way. Lorna Richardson agreed that while abolishing the postal acceptance rule will differentiate Scots from English law the change aligns with practice and the reasonable expectations of people, which should not be a reason not to make changes to Scots law on the issue.

32. Of the 2 respondents who disagreed, The Centre for Scots Law highlighted that legislation could lead to unexpected divergences or interpretative dilemmas in areas of law which had hitherto been relatively clear and on which Scots and English law had been substantially the same.

33. Respondent B meanwhile commented that the approach taken by the SLC will not deter any form of cross-jurisdictional business given that party autonomy means that a convergence or divergence between the two jurisdictions can be achieved should the parties want.

Question 9: Are you aware of any technical advances/ practical changes which postdate the Report which may impact on this approach?

34. Of the 6 respondents who replied to this question, only the Centre for Scots Law was aware of any technical advances/ practical changes that postdate the Report and which might impact on the approach taken in the Bill: the advent of Chat GPT and the increasing prominence of dynamic pricing.

35. Respondent B suggested that the drafting of section 13 of the SLC draft Bill should be considered again.

Question 10: Are you content with the approach taken in respect of the battle of the forms?

36. There were 6 responses to this question and only one respondent – Lorna Richardson - stated outright that they were not content given the importance of standard terms and conditions. While Dumfries and Galloway Council indicated they were content they did go on to point out that if the aim is codification of contract law then not including something on the battle of forms would undermine this policy.

37. Of those who were content Hector MacQueen pointed out that previous attempts to deal with the issue have raised more problems than solutions, while Respondent B suggested that an overriding legislative statement on the issue would be difficult to achieve.

38. The Centre for Scots Law said that the drafting of section 2(2) in the SLC's draft Bill could have unintended consequences.

Question 11: Are you content with the approach taken in respect of the acceptance of general offers?

39. Almost all respondents were agreed that they were content with the approach taken in by the SLC to the acceptance of general offers. Respondent B said that

while section 2(4) of the SLC draft Bill provides for the acceptance of a general offer through the conduct of the parties, section 3(1) offers further clarification which provides an alternative provision on which a party can rely to ensure that a valid contract has been formed.

40. The Centre for Scots Law, though, expressed the view that the common law already addresses this problem.

Question 12: Are you content with the approach of rejecting a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price?

41. All respondents who answered this question were unanimous in their agreement that such a special rule should be rejected. Respondent B said that the current Scots position strikes a better balance between protection of traders and the protection of consumers than other international instruments.

Question 13: Do you agree that the law on interpretation is settled and that legislative reform is not needed or wanted? If not, please give your reasons.

42. Considering the free comments of all respondents who answered this question, only Morton Fraser McRoberts thought the law on this matter settled.

43. Of those who disagreed, the prevailing view was that legislative reform was not appropriate. Lorna Richardson pointed out that legislative reform would make the law different (or with the potential to be different) to English law (should matters develop there in the case law in the future) which would be unhelpful and create confusion for those operating across the UK. Dumfries and Galloway Council thought that the SLC should look again at this issue. Respondent B pointed out that interpretation is by its nature highly fact-specific and legislative reform may risk unnecessarily constraining the judiciary's ability to balance various principles.

44. Judicial practice and guidance were suggested to be more appropriate as alternatives to legislative reform. As the Centre for Scots Law put it, there is value in guidance for the courts but this need not take the form of legislative provisions.

Question 14: In the light of the subsequent case law do you consider that the law of retention would benefit from clarification?

45. There were 5 responses to this question and all agreed that the law of retention should be clarified. As Hector MacQueen pointed out, the SLC thought the uncertain state of the law could be resolved through the courts but the problems may have actually increased over the intervening period, which was a view echoed by Respondent B.

Question 15: Are you content with the proposed approach taken to restitution following rescission?

46. Of those who answered this question 4 were content with the proposed approach, with Respondent B agreeing that the clarity which would be provided by the SLC's approach is to be welcomed for the reasons as set out in the Report.
47. Two respondents were not content, though, with Lorna Richardson pointing out that what is the SLC propose unwinds aspects of a contract when rescission for breach is essentially a forward looking remedy. The Centre for Scots Law said that there would be value in including a statutory definition of rescission given the confusion in case and because sometimes courts confuse resiling, rescission and repudiation.

Question 16: In light of the decision in Primeo are you content with the proposed approach taken to apply the defence of contributory negligence to claims of damages for breach of contract?

48. All respondents who answered this question were content with the proposed approach taken by the SLC with regards to the defence of contributory negligence to claims of damages for breach of contract.
49. The Centre for Scots Law did though suggest that there could be a freestanding provision on contributory negligence in the context of breach of contract, with appropriate protections for consumers. It also suggested that there should be consolidation of extant statutory provisions regarding the general law of contract.

Question 17: Are you aware of any developments in case law which suggest that the law of anticipated breach needs reform?

50. Respondents to this question were not aware of any developments but the Centre for Scots Law suggested that consideration should be given to circumstances where one party to a contract performs their obligations and, rather than demanding damages, demands payment instead.

Question 18: Are you aware of any developments in the courts which are either helping or hindering this area of the law?

51. Only one respondent answered yes to this question but no further information was provided in the comments section.
52. The other 5 respondents who answered were not aware of any developments. Hector MacQueen set out that a new general rule on the matter might cause more problems than solutions.
53. The Centre for Scots Law suggested that the SLC could consider this matter further as a limited exception to the compensation principle.

Question 19: Do you have any views on the current state of the law in respect of transferred loss claims?

54. Of those who answered this question, Hector MacQueen suggested that there is still a problem with the law in this area and that the tentative approach of the SLC should be pursued, while Respondent B pointed out that significant work would be needed to ensure that any reforms are satisfactory. The Centre for Scots Law urged the SLC to consider this matter further.

Question 20: Has the UK Supreme Court decision produced certainty or has it caused any difficulties or created unfairness?

55. There were 5 responses to this question. Hector MacQueen mentioned that while there are uncertainties in the UK Supreme Court decision there would be no benefit in establishing a specifically Scottish regime and that it is important to ascertain if there are any practical difficulties following from these uncertainties. The Centre for Scots Law said that the decision is an unsatisfactory development, particularly for consumers who should be protected.

56. Of those who argued differently, Respondent B welcomed the helpful framework provided by the decision and that it had provided welcome clarification. Morton Fraser MacRoberts, a solicitor firm, responded that it is not aware of the decision causing any difficulty and that it should be allowed to bed in.

Additional comments

57. The Centre for Scots law suggested that the law could clarify whether a non-patrimonial claim for loss is available in general breach of contract; that consideration should be given to frustration of contract, particularly with a view to widening the range of available remedies; and thought should be given to a consolidation of existing statutes concerning contract law.

58. CMS said that that a number of commercial property missives are now concluded electronically, with signatories using qualified electronic signatures (QES), and that legislative change should be brought about to facilitate the registration of electronically signed deeds in Scottish land registers.

59. The Competition and Market Authority (CMA) provided an update on relevant developments in consumer protection law, and in changes made by the Digital Markets, Competition and Consumers (DMCC) Act 2024.

Annex - List of respondents to the consultation

60. Responses to the consultation were received from:

- Hector MacQueen
- Lorna Richardson
- Respondent A
- Respondent B
- Morton Fraser MacRoberts
- Dumfries and Galloway Council
- Centre for Scots Law
- Competition and Markets Authority (CMA)
- CMS