

LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

Delivery of traditional documents by electronic means

Section 4: Delivery of traditional documents by electronic means

19. [Section 4](#) establishes a new mechanism to deliver a “traditional document” (i.e. one created on paper), namely by sending a copy or a part of a copy by electronic means, for example by email or fax. As already mentioned above, delivery is the term used to describe the step which the granter of a document may be required to take in order to become bound by the document’s terms. The present legal requirements for delivery remain unchanged, with section 1(5) and (6) making further particular provision to require delivery of counterparts (see paragraph 8 above). What section 4 of the Act does is to expand the ways in which, where required, delivery of a traditional document (including a counterpart) can be achieved. It establishes that a traditional document may now be effectively delivered for legal purposes by sending a copy of it or a part of a copy by electronic means. The typical scenario where part of a copy will be delivered is where the granter has executed a counterpart. Parties who wish for registration or other purposes to assemble a collated version of a document executed in counterpart may do so after delivery of copies of the counterparts (or part of each counterpart) by electronic means, although the person carrying out the assembly will have to gather in the pages actually signed by the parties in order to attach them to that version, as the electronically transmitted copies will be insufficient for that purpose.
20. Subsection (1) provides that this section applies to all traditional documents that require to be delivered for legal effect regardless of whether they are executed in counterpart or not. This means, for example, that missives will be capable of delivery by fax or email. Separately to this Act, electronic documents are deliverable electronically under section 9F of the Requirements of Writing (Scotland) Act 1995 under the [Land Registration etc. \(Scotland\) Act 2012 \(Commencement No. 2 and Transitional Provisions\) Order 2014 \(SSI 2014/41\)](#).
21. Subsection (2) provides that the requirement for delivery of a traditional document may be satisfied by delivery by electronic means of a whole or part of a copy of the traditional document. Subsection (3) further provides that, if only part of the document is delivered electronically, there are two conditions which must be met: firstly, it must be clear from what is delivered that it is part of the document which has been subscribed and, secondly, it must contain, as a minimum, the page with the subscription. The SLC Report noted that best practice would be to use PDFs to avoid any argument that different layout or pagination through different word processing versions does not constitute a copy.
22. Subsection (4) permits parties to come to an arrangement between themselves both as to the electronic means of delivery (for example, by fax or by PDF file attached to

*These notes relate to the Legal Writings (Counterparts and Delivery)
(Scotland) Act 2015 (asp 4) which received Royal Assent on 1 April 2015*

an email) and also as to the format of the delivery, for example, whether the whole or just a part of the document is to be delivered. By subsection (5), where no such arrangement has been made, or where the arrangement is uncertain or impracticable at the time of delivery, then the means of delivery and the question of what is to be delivered will be whatever is reasonable for the recipient to receive, viewed objectively in all the circumstances. This provision is drafted from the perspective of the party about to effect delivery so what matters is what is practicable at the time of delivery, not what was practicable when an arrangement was made. An example might be where it has been agreed that delivery will be by email but the recipient is left by supervening events such as travel delay or computer system failure in a place with access to a fax but not email. In this way, priority will be given to whatever arrangements parties reach amongst themselves with the possibility of fall-back arrangements should the need arise. Subsection (6) clarifies that the status of what the recipient receives following delivery by electronic means is not the executed traditional document and so cannot, for example, be registered. For those purposes, it will remain the case that either a fully electronic document has to be sent and received or a traditional document with wet ink signatures physically delivered.

23. Subsection (7) provides that, once a person has sent a counterpart or copy document by electronic means and therefore still retains the original traditional document, that person holds the wet ink version in accordance with whatever arrangements parties have made. For example, if the document is to be registered then it is likely that parties will agree that the version or versions with wet ink signatures are to be ingathered for that purpose. In other cases, parties may be content that the sender simply holds the wet ink version for a time and then disposes of it if no call has been made for it. The Act is not prescriptive about this; it is up to parties to decide what is best for their needs.
24. Subsection (8) modifies subsection (7) to take account of the situation where parties have nominated a person under section 2 to take delivery of counterparts. In that case, subsection (7) is to be read as if the “recipients” were those who made the nomination.
25. Subsection (9) lists the methods of delivery which constitute delivery by “electronic means”. Paragraphs (a) to (c) list specific methods of electronic transmission and paragraph (d) provides for other cases, having the possibility of future technological developments in mind.
26. The definition in subsection (10) of “traditional document” refers to a provision of the Requirements of Writing (Scotland) Act 1995 which was inserted by paragraph 2 of schedule 3 to the Land Registration etc. (Scotland) Act 2012 on 11 May 2014: see Part 3 of the schedule to the Land Registration etc. (Scotland) Act 2012 (Commencement No. 2 and Transitional Provisions) Order 2014. This provision defines traditional documents as those “written on paper, parchment or some similar tangible surface”.