



## **EXPLANATORY NOTES**

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### **Legal Writings (Counterparts and Delivery) (Scotland) Act 2015**

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

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

### **THE ACT – OVERVIEW**

3. Execution in counterpart is the process whereby each of the parties to a document signs (“executes”) a separate physical copy of it and all then exchange the resultant copies so that each ends up with a set of each of the copies signed by the other parties. The aim is to create a legally enforceable document rather than having to arrange for all parties to meet together for each to sign the same document. The Act provides a clear framework by which a document executed in counterpart will be effective under Scots law. The Act also creates a mechanism to enable documents created on paper (referred to in the Act as “traditional documents”) to be regarded as delivered by electronic means for legal purposes such as concluding a contract. The Act implements the legislative recommendations in the Scottish Law Commission (SLC) report Review of Contract Law – Report on Formation of Contract: Execution in Counterpart<sup>1</sup>, which was published in April 2013 (“the SLC Report”).

4. The Act has 7 sections with the following key provisions:

- execution in counterpart is confirmed as an optional process for validly signing (“executing”) documents;
- where execution in counterpart is used, the counterparts are treated as a single document;
- parties may either deliver their counterpart to each other party to the transaction, or nominate a person to take delivery of all counterparts but the Act requires delivery in some form to complete the effective execution of a document in counterpart;

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<sup>1</sup> [http://scotlawcom.gov.uk/index.php/download\\_file/view/1149/138/](http://scotlawcom.gov.uk/index.php/download_file/view/1149/138/)

- a copy of a document created on paper (whether or not executed in two or more counterparts) may be delivered for legal purposes by electronic means such as email or fax;
- delivery by electronic means of a document created on paper need not be constituted by delivery of the whole document (including, where the document is a counterpart, delivery of the whole counterpart): part of the document may be delivered, providing this is sufficient on its own terms to show that it is part of the document and comprises at a minimum the page on which the sender has subscribed the document.

## **THE ACT – COMMENTARY ON SECTIONS**

### **Execution of documents in counterpart**

#### *Section 1: Execution of documents in counterpart*

5. As set out in Chapter 2 of the SLC Report, it is possible to argue that Scots law already recognises the possibility of execution in counterpart. However the argument is dependent on eighteenth-century sources, and is not widely accepted within the legal profession. Subsection (1) therefore confirms the validity of executing documents in counterpart under Scots law. However, execution in counterpart is an optional process and existing methods of signing multi-party documents, such as gathering the parties together to sign a single version of the document, remain valid. Subsection (2) sets out what is meant by “execution in counterpart”. It provides that where a document is to be signed by more than one party, it will be validly executed in counterpart under Scots law if one party subscribes (i.e. signs in the appropriate place) its own copy (“counterpart”) of the document and the second party subscribes another counterpart (and so on), provided that each counterpart is a duplicate which is otherwise interchangeable with the others. Each counterpart may be signed in different locations and at different times though, in practice, counterparts are likely to be signed close in time to one another.

6. Subsection (3) provides that, once executed, the counterparts are deemed to form a single document. Subsection (4) provides that the single document may be made up of both or all the counterparts but also may be made up of a collated version of one entire counterpart together with the page or pages on which the other counterpart or counterparts have been subscribed. This has advantages for registration purposes, as explained in Chapter 3 of the SLC Report. For example, if there is a document to be executed by 5 parties, each of whom subscribe their own counterpart in self-proving form (i.e. before a witness who also signs), then that document can be registered in the Books of Council and Session as a collated version of one of the counterparts in its entirety and the subscription pages of the other 4 counterparts. Such an approach makes both registration and searching of the register more straightforward.

7. Subsection (5) specifies when a document executed in counterpart becomes effective. A document executed in counterpart becomes effective upon delivery in accordance with the delivery requirements under either subsection (6) or (7). Where the document is a traditional document, delivery by electronic means under section 4 (see paragraph 19 below) is also an option. “Delivery” is the term used in law to describe the step which the granter of a document may be required to take before he or she becomes bound by the document’s terms. In the common law this has usually been taken to mean

when the granter transfers possession to the grantee with the requisite intention that the document thereby becomes binding or enforceable.

8. Subsection (5) requires delivery of both or all of the counterparts without spelling out what constitutes delivery. This is left to the existing law save insofar as modified by the Act. The only modification in that regard is in section 4, which makes it clear that, where a traditional document (including a counterpart) is delivered by electronic means, this can be done either (a) by delivery of a copy of the whole document or (b) by delivery of a copy of part of the document by fax, email, etc. provided it satisfies section 4(3). See further paragraph 19 below.

9. Subsection (5)(b) is a reminder that any additional requirements under the current law (whether under the common law or statute) which are needed for a particular class of document to become effective continue to apply. For example, the law requires that a document containing a guarantee must be delivered to the beneficiary before it is effective. So, if two co-guarantors execute the guarantee in counterpart, it does not take effect until each party delivers its counterpart to the other and, in addition, the counterparts (or a single document made up of or from the counterparts, as described above at paragraph 6) are also delivered to the beneficiary.

10. Subsection (6) imposes a requirement that a counterpart must be delivered to every other party to the document whose signature is not on that counterpart. Section 2 of the Act allows a party to nominate a person to take delivery of one or more counterparts. Where that has happened, subsection (7) requires the counterpart to be delivered to the nominee instead. In this way, execution in counterpart is subject to the existing requirement of Scots law that a written document must generally be delivered before it can become obligatory. That general requirement is not altered in any way; rather, an additional class of writing (i.e. documents executed in counterpart) is brought within its scope.

11. Subsections (8) and (9) make clear that parties may control the date and time at which their counterpart is to be treated as delivered (i.e. will become legally effective) so that this could be a later time than the point at which possession is transferred to the party or parties to whom it must be delivered. Existing Scots law permits this for documents executed in another way and that law remains unchanged. This is in keeping with the general policy in the Act of allowing parties the greatest amount of freedom to make their own arrangements as is consistent with the minimum requirements of the law. Subsection (9) deals with the situation where a counterpart is to be held by a recipient as undelivered. It provides that in such circumstances the document is only to be treated as delivered for the purposes of subsection (5)(a) either (a) at the time when the sender indicates to the recipient that it is to be so treated (e.g. the sender may indicate at the time of sending at what future time the counterpart is to be treated as delivered, in which case it is to be treated as delivered for the purposes of subsection (5)(a) only at that time) or (b) if a specified condition (e.g. a condition specified by the sender at the time of sending or a condition specified in the document itself) is to be satisfied before the counterpart may be so treated, the condition has been satisfied.

*Section 2: Nomination of person to take delivery of counterparts*

12. This section makes provision for the scenario where parties wish to nominate a person to administer the execution of their document. Such a scenario is most probable where a document is to be signed by multiple parties (who would otherwise have to deliver a signed counterpart to every other party) and has been negotiated with the input of legal advisers. In this scenario, it is common for the legal adviser to one of the parties to act as administrator for the signing process. That person will send out the agreed documentation and collect back the subscribed counterparts. In order to remove any doubt as to the efficacy of such an arrangement, subsection (1) provides that parties may nominate a person to take delivery of the counterparts (or certain of the counterparts). Subsection (2) provides that that person may be a party to the document or an agent (e.g. solicitor) acting on behalf of a party to the document but this is not a requirement.

13. Subsection (3) sets out the duties of a person who is nominated to take delivery of counterparts. The nominee must hold and preserve what has been delivered, and must do so for the benefit of the parties involved. Subsection (4) provides that this is subject to any alternative arrangement made by parties. For example, parties might agree that the nominee is to advise parties of the successful delivery of all required counterparts or to forward what has been delivered to one of the parties. These provisions allow parties to make whatever arrangements they consider most suitable and ensure that, in the absence of any agreement, the delivered counterpart or counterparts will be held safely. If what is delivered contains a wet ink signature, then there is utility in the recipient (who may not be a party to the document) being obliged to hold the counterpart pending further instruction, for example to collate the counterparts in order to produce a single document for registration purposes. If what is delivered is an electronic copy of a signed traditional document, for example in the form of a PDF file or a fax, then there may also be utility in holding that pending further instruction; for example, because the time of its delivery may determine the point at which the document becomes effective.

14. Subsection (5) clarifies that a nominee's failure to meet the obligations under subsection (3) or (4) does not alter the effectiveness of a document's execution. In other words the document has its intended legal effect, even if the nominee's non-compliance with the duty to hold and preserve the counterparts makes it more difficult to prove such things as delivery.

*Section 3: Use of counterparts: electronic documents*

15. Section 3 provides that sections 1 and 2 apply to both traditional and electronic documents. References to execution in section 1 therefore mean execution of a traditional document or an electronic document. This means it is competent to execute an electronic document (by means of an electronic signature) in counterpart and, if desired, to nominate a person to take delivery of the counterparts. It also follows that it is competent for a document to be signed in various counterparts some by electronic signature and some in wet ink. However, given that Part 3 of the Requirements of Writing (Scotland) Act 1995 as inserted by section 97 of the Land Registration etc. (Scotland) Act 2012, provides for execution of electronic documents by electronic signature, it is unlikely that execution in counterpart will be used frequently for transactions where the parties deal entirely in electronic documents as parties can simply apply their electronic signature to the agreed electronic document wherever it is. Execution in counterpart does not provide any

advantage in this scenario. However, in applying sections 1 and 2 to electronic documents, section 3 covers the mixed situation noted above where some parties execute their counterpart on paper and others apply an electronic signature to the counterpart sent to them and return that to the nominee.

16. Subsection (2) provides that where the electronic document is one that requires to be in writing under section 1(2) of the Requirements of Writing (Scotland) Act 1995 (writing required for certain contracts, obligations, trusts, conveyances) the references to subscription of the counterpart in section 1 mean that it must be subscribed according to the standards of authentication for those documents set out in section 9B of the Requirements of Writing (Scotland) Act 1995. Section 9B(2) sets out that the electronic signature must, amongst other matters, meet prescribed requirements. The Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) prescribe that it must be an advanced electronic signature.

17. For electronic documents that do not require to be in writing it remains for parties to determine what level of electronic signature should be sufficient to constitute subscription of the counterpart.

18. If parties nevertheless choose to authenticate an electronic document that does not require to be in writing in accordance with section 9C of the Requirements of Writing (Scotland) Act 1995, they will get the benefit of the document having self-proving status. However, such a standard of electronic signature is not necessary for the valid execution in counterpart of an electronic document under section 1 of this Act.

### **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 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”.

## **General**

### *Sections 5 to 7: Ancillary provision, commencement and short title*

27. Section 5 provides that the Scottish Ministers may exercise various ancillary powers by order to give full effect to the Act.

28. Section 6 provides that sections 5 to 7 come into force the day after Royal Assent. The Scottish Ministers may make a commencement order bringing the remaining provisions of the Act into force on a day they specify in the order. A commencement order may include transitional, transitory or savings provisions. The changes to the law are not retrospective. The Act will not affect documents already executed or delivered before it comes into force. The current law will continue to apply to those documents. The argument that counterpart execution was recognised from at least the eighteenth century on (see paragraph 5) will remain open for consideration if ever necessary.

29. Section 7 provides the short title, which is the name by which the Act may be cited.

## PARLIAMENTARY HISTORY

30. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings of that Stage took place and the references to the official report of those proceedings. It also shows the dates on which the Committee Reports and other papers relating to the Act were published, and references to those reports and other papers.

<b>Proceedings and Reports</b>	<b>References</b>
<b>Introduction</b>	
Bill as introduced – 14 May 2014	SP Bill 50 - Session 4 (2014) <u>Bill (As introduced)</u>
<b>Stage 1</b>	
<b>(a) Delegated Powers and Law Reform Committee</b>	
18th Meeting, 27 May 2014	In private
21st Meeting, 17 June 2014	<u>Cols 1509 – 1534</u> Official Report of Meeting 17 June 2014
23rd Meeting, 05 August 2014	<u>Col 1572</u> Official Report of Meeting 05 August 2014
25th Meeting, 19 August 2014	<u>Cols 1600 – 1620</u> Official Report of Meeting 19 August 2014
27th Meeting, 30 September 2014	<u>Cols 21 – 51</u> Official Report of Meeting 30 September 2014
28th Meeting, 07 October 2014	<u>Cols 2 – 33</u> Official Report of Meeting 07 October 2014
29th Meeting, 28 October 2014	<u>Cols 6 – 18</u> Official Report of Meeting 28 October 2014
Stage 1 Report, 14 November 2014	<u>Stage 1 Report</u> Stage 1 Report on the Legal Writings (Counterparts and Delivery) (Scotland) Bill
<b>(b) Finance Committee</b>	
17th Meeting, Wednesday 28 May 2014	In private
<b>(c) Consideration by the Parliament</b>	
Stage 1 Debate, 25 November 2014	<u>Cols 34 – 64</u> Official Report of Parliament 25 November 2014

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

<b>Proceedings and Reports</b>	<b>References</b>
<b>Stage 2</b>  <b>Delegated Powers and Law Reform Committee</b> 3rd Meeting, 20 January 2015	<u>Col 2</u> Official Report of Meeting 20 January 2015
<b>Stage 3</b>  <b>Consideration by the Parliament</b> Stage 3 Debate, 24 February 2015  Bill as passed	<u>Cols 8 - 28</u> Official Report, Meeting of the Parliament, 24 February 2015
<b>Royal Assent</b>  <b>01 April 2015</b>	<u>Legal Writings (Counterparts and Delivery) (Scotland) Act 2015</u>

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