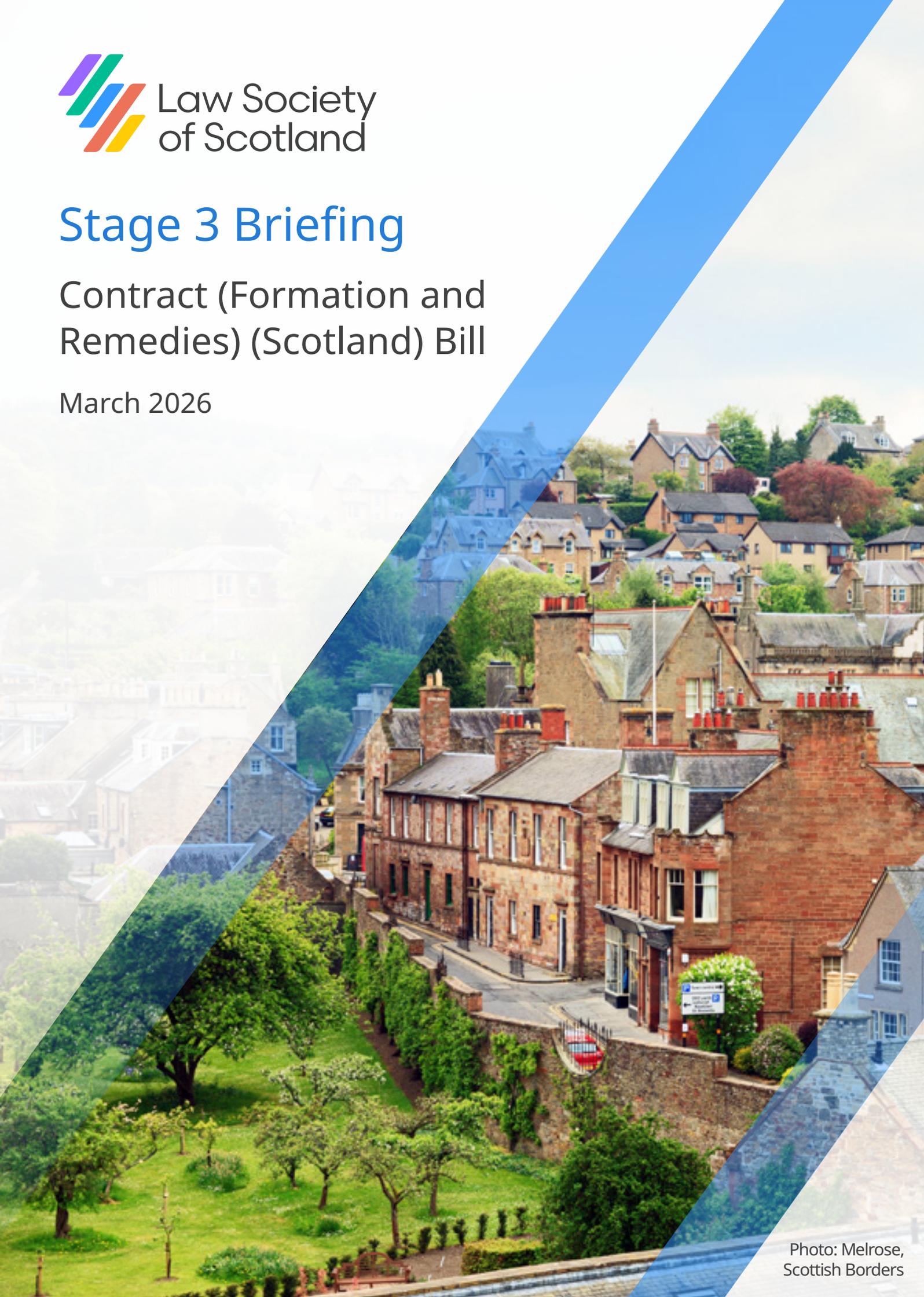


Stage 3 Briefing

Contract (Formation and Remedies) (Scotland) Bill

March 2026



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Contract (Formation and Remedies) (Scotland) Bill¹ (**Bill**) was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 2 October 2025. This Bill finds its origins in the work undertaken by the Scottish Law Commission (**SLC**) and their 2018 Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses² (**2018 Report**).

We submitted written evidence to the Delegated Powers and Law Reform Committee (**Lead Committee**) in November 2025³ and provided oral evidence as part of the Lead Committee's stage 1 consideration of the Bill on 18 November 2025. The Delegated Powers and Law Reform Committee Report on the Contract (Formation and Remedies) (Scotland) Bill at Stage 1⁴ (**Stage 1 Report**) was published on 10 December 2025. We issued a briefing ahead of the Stage 1 debate on the Bill⁵. The Parliament agreed the general principles of the Bill on 18 December 2025.

The Lead Committee completed its Stage 2 consideration of the Bill on 3 February and the amended Bill⁶ was published on the same date.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 3 proceedings scheduled for 3 March 2026.

¹ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/contract-formation-and-remedies-scotland-bill/introduction/spbill76s062025.pdf>

² [Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses \(Report No 252\)](#)

³ <https://www.lawscot.org.uk/media/exjdkwot/02-11-25-cd-call-for-views-on-cfrb-written-evidence.pdf>

⁴ [Contract \(Formation and Remedies\) \(Scotland\) Bill at Stage 1](#)

⁵ [Stage 1 Briefing - Contract \(Formation and Remedies\) \(Scotland\) Bill](#)

⁶ [Bill as amended](#)



General Comments

We welcome the introduction of the Bill and its overarching policy aim of restating and reforming certain areas in the law of formation of contract alongside specific remedies for breach⁷.

In doing so, we welcome the attempts being made to produce a statutory set of default rules that parties can adopt. We believe that this will improve the law's accessibility for various types of users, both from within and outside of the legal profession. We also believe that the reforms will improve access to justice by enabling less sophisticated users of contractual agreements to agree terms that are best suited to their needs. We therefore also welcome the Lead Committee's emphasis on the importance of making legislation accessible and easy to understand for lay-people⁸.

Furthermore, we believe that the current draft of the Bill does not represent a radical departure from the existing common law regime. As a result, we anticipate that practitioners will be able to apply the legislation with relative ease as the terminology is generally clear, accessible, and readily understandable without reference to case law or commentary. We believe this contrasts with the current regime which can require consultation of a variety of case law and institutional writings in order to understand the core legal principles in question.

We are aware that this Bill does not fully codify Scots contract law in the areas of interpretation, penalty clauses, the "battle of the forms" alongside certain areas of remedies upon breach. These areas are to remain governed by the common law, which we are broadly supportive of. However, we would advocate that a cautious approach is taken as to how the new statutory provisions introduced by the Bill will interact with existing precedent, particularly in the early stages of implementation. We consider this to be a complex process, however, we do support the judiciary retaining an ability to balance the various principles of the Bill on a case-by-case basis. This is so the law can adequately deal with more complex factual scenarios that reflect the nuanced realities of larger commercial transactions.

We are pleased that the Scottish Government followed the Lead Committee's recommendation to engage with the Society and relevant other stakeholders prior to Stage 2 to consider the drafting suggestions mentioned in evidence⁹.

⁷ [Paragraph 6 - Policy Memorandum](#)

⁸ [Stage 1 Report, at Para 58](#)

⁹ [Scottish Government's response to Stage 1 Report: Letter from Minister for Victims and Community Safety dated 12 December 2025](#)



Specific Comments on Sections of the Bill

Part 1 of the Bill – Formation of Contracts (sections 1 to 15)

Part 1 deals with formation of the contract and attempts to codify existing common law principles in one place through its use of default rules. These default rules are to act as a starting point in negotiations insofar as they can be relied upon to provide for common contractual situations.

We welcome section 1 of the Bill and its recognition of party autonomy. We consider that this provides users the freedom to contract out of certain provisions of the Bill and thus allows parties the ability to determine the precise terms that will govern their legal relations. However, whilst we consider that these default rules are useful as a guide for certain individuals and smaller business transactions, we believe that there is a risk that these provisions may be too inflexible and restrictive for more complex contracts that govern larger corporate and commercial transactions. We therefore welcome section 1 and section 16 of the Bill which protect party autonomy and allow for the contracting out of these provisions.

We also welcome the express terminology at section 2(1)(a) that focuses on the parties' intent that their communications are to have legal effect. We believe that this is clearer and more readily understandable than the common law concepts of will, desire, and engagement. We believe this provision makes the law clearer, more certain and more accessible to users.

In order to improve certainty for the parties, we welcome the incorporation of our suggested amendment into the Bill which strengthens the wording at section 2(3) to include a requirement for *"explicit"* confirmation that the parties' agree on a specific matter prior to the contract being formed¹⁰. Without this, we believe that the Bill risked being interpreted as preventing formation where one of the contracting parties subjectively intends not to contract prior to agreement on a certain point (and thus could lead to legal uncertainty). We believe that this amendment will ensure that the Bill places a parties signalled intent as being central to the formation of their contractual arrangement.

Sections 4 – 12 outline the rules governing offer, acceptance and time limits. We have no comments to make on these provisions.

In terms of notification and the provisions found at section 13, we believe that sub-section (4)(d) does raise certain complexities that will require consideration by the parties. This provision asserts that it is reasonable to expect that a person accesses a notification *"transmitted by electronic means, when it becomes available to be accessed by the person"*. We are aware of issues that can arise in practice in relation to *"out of office"* messages and believe it is unclear whether the Bill should be interpreted so as to provide that an email is available (i) upon

¹⁰ [Marshalled List of Amendments for Stage 2, page 1](#)
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delivery to the recipient's inbox i.e. instantaneously upon the sender sending the email; or (ii) upon delivery to the recipient's inbox and assuming that no "out of office" is received (with an anticipated return date).

Whilst we acknowledge that this issue was considered in the 2018 Report (alongside various other academic commentary on the point¹¹), and that the Lead Committee agreed that the Bill provides a reasonable general rule for when notification takes effect¹², we believe that caution must be exercised and that parties need to be made aware of the implications that flow from this provision. This issue is further complicated by the underlying technology and infrastructure that supports email or instant messaging in that servers are subject to outages from time-to-time and thus communications may be subject to delay or instances when they are not actually received. We believe that these issues could be resolved through issuing guidance to lay-persons and other small businesses who may not have the financial means to appoint legal representation to explain the more complicated provisions of this Bill.

Linked to this is the abolition of the postal acceptance rule at section 14 of the Bill. We note that the Minister has confirmed that the Scottish Government supports abolishing this rule given it "*means contracts can be formed without one party ever knowing that their offer has been accepted*"¹³ and that this "*is at odds with common-sense expectations*"¹⁴. We agree with these points and support the Bill's intention to abolish the rule.

In support of this, we point to changes to the way that contracts are now agreed by electronic means which were not available at the time when the rule was first introduced. In view of this (and the increasing use of digital technologies in contract law), we believe there remains little justification for retaining complex protections for acceptance sent by post. Furthermore, we also point to the widespread use and ability of parties to incorporate transactions to hold contracts as "undelivered" allowing them the flexibility to conclude agreements without being subject to the risks of outdated (or unreliable) forms of document transfer.

Finally, we welcome section 15 of the Bill which sets out definitions applicable to Part 1. We believe that this facilitates a better understanding of the Bill, particularly for lay persons and smaller businesses who may not have the means to engage with legal practitioners to explain the provisions of the Bill.

Part 2 of the Bill – Remedies for Breach of Contract (sections 16 to 22)

Part 2 of the Bill contains provisions to reform certain aspects of the law of remedies in relation to mutuality, restitution after rescission and contributory negligence. Whilst we are supportive of reform to these specific remedies, we do

¹¹ See further H G Beale (ed), *Chitty on Contracts* (32nd edn, 2015) – paras 2.080 & 2.084 and Mik, "*Problems of Intention and Consideration in Online Transactions*", paras 6.37 & 6.38

¹² [Stage 1 Report, at Para 75](#)

¹³ [Stage 1 Report, at Para 86](#)

¹⁴ *Ibid*



also acknowledge wider concerns that this could lead to fragmentation in the law of remedies when navigating both statute and the common law. This could lead to legal uncertainty for practitioners, wider business and individuals alike.

We would therefore welcome further reform to address the full range of remedies that are available such as damages, specific implement and interdict so as to ensure that the statutory provisions are both comprehensive and consistent in application. We note that further work is planned by the SLC in other areas of contract law not covered by the Bill, and that it will consult on its next programme of work in 2026¹⁵. We are supportive of this and will be happy to engage with further consultation on these areas.

In terms of the proposed restatement of the law of retention, we welcome that amendments have been made at Stage 2 to include this remedy in the Bill¹⁶. These provisions clarify the general provisions of the law and make them more accessible to individuals and small businesses. We believe it is important that this type of remedy is also available in a flexible manner to facilitate more complex transactions and contractual arrangements that Scottish financial institutions (and other large Scottish business entities) are routinely party to.

In support of this view, we point to the example of derivatives and similar sophisticated financial instruments which depend on the precise operation, in an international context, of complex contractual mechanisms in the event of breach (and on the occurrence of various events that may or may not constitute breach or a termination event). Similar complex arrangements are also used in other types of commercial contract. The powers available to the parties upon the occurrence of a given breach or non-breach event (and combinations thereof) can be highly structured and bespoke to their specific arrangements. We therefore welcome the amendments which specifically preserve contractual set-off, closing out rights and the netting of obligations alongside those other provisions found at the new section 21D¹⁷.

However, we believe it is crucial that the parties retain the ability to contract out of these provisions should they elect to do so. The newly inserted section 16(1A) is therefore very welcome. Section 16(3) as currently drafted applies to “subsections (1) to (2)”. It is understood that section 16(3) is intended also to apply to the new section 16(1A) and that this will be clear in the final numbering of relevant subsections and cross-referencing. It is important that this is done so as the newly inserted section 16(1A) enables both implied as well as express contracting out of the default retention rules as well as the default mutuality and rescission rules in Part 2 of the Bill.

Alongside this, we also believe that the wording of section 16(1A) could have also been strengthened so as to avoid any issues in the way it is interpreted in applying

¹⁵ [Stage 1 Report, at Para 35 and 59](#)

¹⁶ See Amendments 14 – 17 in [Marshalled List of Amendments at Stage 2](#)

¹⁷ [Bill as amended](#)



to contractual retention, particularly in relation to amendment (14)(1)(c)¹⁸. In order to explain, we note that the now section 21A(1)(c) reads (from the start of section 21A(1)):

“A party to a contract (“PA”) may temporarily withhold or suspend performance of an obligation that is due to be performed under the contract (“contractual retention”) ... in relation to an obligation subsisting when the contract is ended by PA as a result of PB’s breach or an anticipatory breach”

However, we flag that the breach or anticipatory breach relates to the termination of the contract and there does not need be a breach of the “subsisting obligation” relative to which contractual retention is exercised. Under the current drafting of the now section 16(1A), the parties can agree that section 21A(1)(c) will not apply to the breach or anticipatory breach giving rise to the termination. Whilst it may be implicit that an agreement which provides for the withholding of performance (and the associated calculation of financial remedy) will prevail over the section 21A regime (even if there is no clear disapplication of the regime in the context of a given breach or anticipated breach of a separate obligation giving rise to the termination), we believe it would have been clearer if section 16(1A) had been worded:

- *“Sections 21A to 21C apply in relation to any ~~breach, or anticipatory breach of contract~~ contractual retention¹⁹ except in so far as the parties to the contract have agreed otherwise”;* or
- *“Sections 21A to 21C apply in relation to any breach of contract, anticipatory breach of contract or contractual retention²⁰, except in so far as the parties to the contract have agreed otherwise”.*

We believe that either would have resulted in improved clarity in this remedy’s use in more complicated agreements. Therefore, we would welcome confirmation of the Bill’s intention to provide for the implied contracting out of contractual retention in these sections in the explanatory notes to the Act to facilitate interpretation of these provisions by the Courts.

We have no comments to make on section 22 and its amendment to the Law Reform (Contributory Negligence) Act 1945.

Part 3 of the Bill

On section 23, we particularly support subsections (e) and (f) which preserve relevant protections against unfair contract terms and for vulnerable persons.

However, we have concerns that the ancillary provision at section 24(2) of the Bill is too wide in giving Scottish Ministers the powers to amend the legislation retrospectively. We consider this extension as being unwarranted, particularly given the importance that is placed on party autonomy contained within the Bill.

¹⁸ [Marshalled List of Amendments for Stage 2, page 3](#)

¹⁹ Delete *“breach, or anticipatory breach of contract”* and insert *“contractual retention”*

²⁰ Insert *“or contractual retention”*



As a result, believe it is important that any further regulations or secondary legislation made under this provision which add to, replace or omit any part of the text of an Act will be subject to the affirmative procedure and scrutinised carefully in Parliament.

We have no further comments to make on this Part.

Concluding Comments

We are supportive of the Bill and believe the reforms represent a new and modern approach to this area of Scots private law. We agree with the Minister's view that the proposals will make the law clearer, more accessible and address uncertainties on a number of specific points around contract law²¹. We also believe these reforms will better enable less sophisticated users to effectively govern their contractual arrangements without the need for a detailed understanding of the common law or wider institutional writings. Further guidance on the Bill may assist those who are unable to afford legal representation to explain how these provisions will impact already established principles in contract law.

Whilst we acknowledge that it will be difficult to predict how parties to more complex contractual arrangements might perceive the value of a statutory regime in Scots law, it is hoped that a modernised and clarified law will ultimately encourage parties to conclude their contractual agreements using Scots law (and in turn submitting to the jurisdiction of the Scottish Courts).

²¹ [Stage 1 Report, at Para 27](#)
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For further information, please contact:

Richard Male
Policy Team
Law Society of Scotland
DD: 0131 476 8113
richardmale@lawscot.org.uk