LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Legal Writings (Counterparts and Delivery) (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill implements the legislative recommendations set out in the Scottish Law Commission (SLC) report Review of Contract Law – Report on Formation of Contract: Execution in Counterpart, which was published in April 2013 (“the SLC Report”). The Bill makes provision for a clear framework by which parties may ‘execute a document in counterpart’ under Scots law and a mechanism to enable documents created and signed on paper to be delivered by electronic means for legal purposes.

4. The Bill has 7 sections which make provision in particular for the following:

- 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 Bill requires delivery in some form to complete the effective execution of a document in counterpart.

- 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.

5. Further information about the Bill’s provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 50-EN, and in the Policy Memorandum published separately as SP Bill 50-PM.

Rationale for subordinate legislation

6. The Bill contains two delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament, and
- the desire to allow adjustments to the technical detail of the law relating to the execution and delivery of legal documents in Scotland without the need for further primary legislation.

Delegated powers

Section 5 – Ancillary Provision
Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative if it amends an Act, otherwise negative

Provision

7. To provide the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Subsection (2) provides that such an order may modify any enactment, including any provision made by the Bill.

Reason for taking this power

8. To provide the flexibility to make any ancillary provision when commencing the provisions or that may arise in light of experience on the operation of the Act. The Scottish Government recognises the potentially broad application of this power, which includes the facility to modify primary legislation, and to alter the provisions in the Bill. Any supplementary use of the power would though need to be appropriate for the purposes of, in connection with or
for giving full effect to the Act. The SLC did not identify the need for any such provision and its
draft Bill did not include this power. The Scottish Government has likewise not identified the
need for any such provision. However in the course of developing the Bill, given the technical
nature of the Bill and some of the legislation it relates to, it was considered safer to have these
powers in case there is a need for any fine-tuning to ensure the workability in practice of the
matters addressed in the Bill, particularly the interaction with the Land Registration etc.
(Scotland) Act 2012 and related amendments to the Requirements of Writing (Scotland) Act 1995 which have not yet been fully commenced.

Choice of procedure

9. Where the power is used to modify primary legislation, it would require the level of
parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative
procedure which would be the normal procedure for the exercise of these powers. These
procedures are typical for ancillary powers.

Section 6 – Commencement

Power conferred on:  the Scottish Ministers
Power exercisable by:  Order
Parliamentary procedure:  Laid, no procedure

Provision

10. To enable the Scottish Ministers to commence the Bill, including transitional, transitory
or saving provision.

Reason for taking this power

11. The SLC report provided for the Bill to come into force 2 months after Royal Assent.
The Scottish Government considered that in accordance with usual practice, the Bill should be
commenced by Commencement Order to ensure that it is satisfied that those affected by the
legislation have sufficient notice of the provisions of the Bill to be able to plan for them coming
into effect.

Choice of procedure

12. No procedure is provided for aside from laying in Parliament in line with the
Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for commencement
powers. The power includes the usual ability to make transitional, transitory or saving provision
in the commencement order. Whilst the Bill does not affect documents whose execution has
been completed before it comes into force it is possible that the need for saving or transitional
provision may be required on commencement.
This document relates to the Legal Writings (Counterparts and Delivery) (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 14 May 2014

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