Submission from the Faculty of Advocates

Introduction
1. The Faculty of Advocates is grateful for an opportunity to offer evidence in relation to this Bill. The nature of the Bill is such that it is of direct interest to lawyers involved in transactional work. It is accordingly primarily for solicitors, who are more likely to be involved in transactional work, to comment on the policy need for the Bill. The Faculty notes the justification advanced in the Policy Memorandum for this reform and, for its part, does not regard the policy aims of the Bill as controversial.

Response to Questions in the Call for Evidence
Q1. There are two issues addressed in the Bill. It is convenient to address each in turn.
(i) The advantages and disadvantages of the approach taken to allow execution in counterpart
The approach taken has the advantage that it will allow parties separated by distance to execute documents conveniently and perhaps save some expense. It will allow parties to some circumstances a degree of precision as to when a multi-party document becomes effective.

The Faculty has identified some potential disadvantages. In particular, the proposal to allow execution by counterpart admits of the possibility that parties may execute different versions of the document, which they wrongly believe to be the same document, whether due to error or fraud. If this were to happen the discrepancy may often be discovered on delivery of the counterparts, although it may also be possible that the discrepancy would not be discovered where delivery is effected of only part of the document by electronic means. However, the Faculty is unable to quantify the potential effects of this apparent disadvantage; and recognizes that execution in counterpart appears to be used in England and Wales without widely reported material concerns.

The Faculty has two technical observations:
(a) The requirement that no part of the document can be subscribed by all the parties may limit the use of execution of counterpart (and potentially cause other difficulties) in certain contractual situations. Some contracts (e.g. construction contracts) commonly seek to incorporate a variety of documents, some of which may have been subscribed by the parties. This would mean that the contract could not be executed in counterpart.
(b) Section 2(3) imposes on a person nominated to take delivery of one or more of the counterparts to hold and preserve it for the benefit of the parties. It is not clear why this is necessary standing section 2(5). Nor is it clear how long this duty persists or what remedy there may be for its breach.

(ii) The advantages and disadvantages of the approach taken to allow delivery of traditional documents
Subject to appropriate safeguards, the proposed approach will permit delivery to be effected in a convenient and speedy manner. This would clearly be advantageous.
The Faculty has some technical observations:
(a) The phrase “requirement for delivery” in section 4(1) may be ambiguous. It is not clear, for example, whether it is confined to situations in which delivery is required as a precondition of a document becoming legally effective.
(b) The Faculty has reservations about the provision that delivery may be effected by electronic transmission of part only of a document. The person to whom it is delivered may not be aware of the full contents. It is not obvious, in the context of electronic transmission, why the full document should not be transmitted.
(c) Section 4(3) is liable to give rise to disputes as to what is sufficient to show that what has been delivered is part of the document. It would be more straightforward to require transmission of the full document.
(d) Section 4(5) is also liable to give rise to disputes about whether a particular method of transmission is “reasonable in all the circumstances”.

Q2. The Bill will improve the execution of legal documents in Scotland by:
   (i) permitting execution in counterpart; and
   (ii) permitting delivery of traditional documents by electronic means.

   These improvements are subject to the technical comment which we make above.

Q3. The Faculty would be sceptical of the suggestion that the change to the means of execution will, of itself, attract business into Scotland which does not otherwise have a connection with Scotland. However, the evidence gathered by the Scottish Law Commission suggests that, without these innovations, business otherwise connected with Scotland would be lost to the Scottish legal system and that is a good reason for making reform in this area.

Q4. The parties involved in the execution of documents may make some modest savings in expense. The uncertainties identified above may increase litigation costs in some cases.

   Other than when an arm of government is a party to such a contract, the public purse is unlikely to be affected.

Q5. The Faculty can see no equality issues arising.

Q6. The Faculty can see no material environmental impact.