Delegated Powers and Law Reform Committee (the “Committee”)  
Contracts (Third Party Rights) (Scotland) Bill (the “Bill”)  
Faculty of Advocates (the “Faculty”)  

1. On behalf of the Faculty I am extremely grateful for having had the opportunity to give evidence to the Committee on the Bill. Please convey my thanks to the Committee. The Committee’s convenor extended an invitation to those who had given oral evidence to follow up in correspondence on points of detail. I now take the opportunity to do so.

Written Evidence

2. In my oral evidence to the Committee I made reference to the written evidence which had been prepared by the Faculty. I understand that this evidence was, in fact, provided to the Scottish Government in October 2016 rather than to the Committee. It may be that some of the comments have been superseded in the text of the Bill as introduced. Nonetheless, I enclose a copy of that short submission for the Committee’s attention, which received input from a number of members of Faculty representing a range of experience and expertise. Those comments, I trust, are self-explanatory. Following my own oral evidence, I would, in addition, seek to make the following supplementary points. In the short time available, I have not had an opportunity to discuss these supplementary points with colleagues, so I emphasise that the views expressed in this document, in so far as they touch on matters not covered by the Faculty’s written evidence, are my own.

Policy and Implementation

3. It is a testament to the work, in particular of the Scottish Law Commission (“SLC”), that there is broad consensus in the legal profession that there are real policy benefits of reforming the law in this area. These benefits are addressed in the SLC’s Report. Where the policy objective is clear, I suggest there is much to be gained from focussing on expressing that policy in clear and simple way. There is nothing revolutionary in this. I referred in my evidence to a number of international benchmark instruments, and which have been extensively referred to by the SLC in its report.
What is striking about each of these instruments is how simply they are able to express the desired policy. I therefore set out the references I made to these instruments in my oral evidence before addressing the particular provisions in the Bill which I respectfully suggest might be improved upon.

**International Context**

4. I was asked in my oral evidence about international influence that the Bill may have. I referred to S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: OUP, 2nd edn 2015), where the commentary on Section 5.2 (on third party rights) is provided by Professor Vogenauer himself. In the introduction to Section, p 657, para 7, the Scottish Law Commission’s *Review of Contract Law: Discussion Paper on Third Party Rights in Contract SLC DP No 157, 2014* is favourably referred to for having much referred to the Articles on Third Party Rights in the PICC; the Discussion Paper is commended in a footnote as containing “detailed and rigorous discussion”.

5. I also mentioned in my evidence that Scots law is not alone in considering reform of its rules of contract law to bring them up to modern international standards. One example I mentioned in my evidence was the wholesale reform of the contract provisions in the French *Code Civil*. The full reference to that reform is the *Projet de réforme, du droit des contrats, du régime général et de la preuve des obligations* of 25 February 2015. It came into force in October 2016, amending the relevant provisions of the *Code Civil* and fundamentally altering the content of the French law of contract to bring the provisions (many originally enacted in 1804, though often heavily amended) up to modern international standards.

6. In relation to language, then, it may be observed that international benchmark instruments on third party rights use very simple language in provisions which would be equivalent of sec 1(1)(a) and (b) of the Bill:

(a) Art 5.2.1 PICC (“the parties … may confer by express or implied agreement a right on a third party”);

(b) Art 1205 *Code Civil*: A person may make a stipulation for another person. One of the parties to a contract (the ‘stipulator’) may require a promise from the other party (the

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1 I declare my interest as a contributor to that commentary on unrelated Articles.
‘promisor’) to accomplish an act of performance for the benefit of a third party (the ‘beneficiary’). The third party may be a future person but must be exactly identified or must be able to be determined at the time of the performance of the promise.  

(c) Art II.-9:301(1) DCFR: “The parties to a contract may, by the contract, confer a right or other benefit on a third party”.

7. Instead of these easily understood formulations, the Bill appears to have taken the Contracts (Third Party Rights) Act 1999 as a drafting model. The 1999 Act appears to work tolerably well, and was drafted before any of the above international benchmarks. The modern international instruments, however, I suggest provide better models for formulating the essence of a third party right in Scots law in simple and accessible language. It is instructive that Professor Beale, a highly distinguished English contract lawyer, reading the Bill in his native language, found the language to be on occasion, “overly sophisticated”. Extreme sophistication in legislation is rarely a virtue.

Simplifying the Language used in the Bill

8. There is always a difficult balance to be struck between clarity and concision. Legislative drafting is extremely difficult. Most legal texts can always be improved. That I consider that it would be possible to improve the Bill further with some focussed but limited revisions is itself a tribute to those who have discharged the difficult task of drafting the Bill in the first place.

Section 1

9. The Faculty raised the issue of the use of the word “undertaking” in its written evidence. Although the wording probably works, the word in this context is unfamiliar, both in a Scottish and in an international context. Section 1(1)(a) and (b) might be combined to read, in simple terms:

“A person who is not a party to a contract acquires a third-party right under it where one or more of the contracting parties intends to confer a right on the third party”.

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2 On peut stipuler pour autrui. L’un des contractants, le stipulant, peut faire promettre à l’autre, le promettant, d’accomplir une prestation au profit d’un tiers, le bénéficiaire. Ce dernier peut être une personne future mais doit être précisément désigné ou pouvoir être déterminé lors de l’exécution de la promesse.

3 C von Bar and E Clive (eds) Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). The clear drafting style of the DCFR bears the indelible influence of the former Professor of Scots Law in the University of Edinburgh, and former Scottish Law Commissioner, Professor Eric Clive.
10. “Intention” is already the key concept in s 2(3) of the Bill. The “to do or not to do something”, presently employed in s 1(1)(a), is already covered off in s 2(6). This is the approach in other instruments, such as eg the PICC Art 5.2.3. Sections 1(2) and (4), as with other sections throughout the Bill, could be improved by replacing “the undertaking” with “the contract” or “the third party right” depending on the context. But that should not be a major exercise and, in my view, would considerably improve the accessibility of the language to domestic and international audiences alike.

Section 2

11. In Section 2, section 2(1) can be deleted since the heading serves that function. In s 2(2) the reference to “the undertaking” could be replaced by “the third party right”. Section 2(4) is unnecessary (see comments in paragraph 15 below). In section 2(5), “an undertaking to do something includes an undertaking” would be replaced with “a third party right may include a right to an indemnity”. In section 2(6), the words “an undertaking not to do something includes an undertaking…” would become: “a third party right may include a right (a) to enforce or invoke an agreement not to hold a person liable;”. Section 2(6)(b) would remain.

Sections 3 & 4

12. Turning to sections 3 and 4, the Bill, having already used two different words – right and undertaking – to refer to the third party’s right, then introduces a third word: “entitlement”. Once upon a time it was doubtful whether it was legitimate to look to headings and side-notes in any exercise of statutory interpretation. But that is no longer the case: see R v Montila [2004] 1 WLR 3141 at para 34 per Lord Hope of Craighead (a Scottish Lord of Appeal in Ordinary, albeit, in this case, speaking in the context of an English criminal appeal). In Montila it was suggested that, in Westminster, section headings cannot be amended in a Parliamentary debate. I do not know whether there is a such a rule in the Scottish Parliament and it is difficult to understand what rationale there could be for such a rule. For the sake of simplicity, consistency and clarity, therefore, I suggest that the wording can be simplified to refer consistently to “right” or “third party right”, as the case may be. Additional references to “undertakings” and “entitlements” are superfluous.

13. Section 3(1) and (2) could be expressed simply as:

(1) The contracting parties may agree to confer a third party right which may be cancelled or modified by the contracting parties.
The contracting parties may agree that the third party right shall not be cancelled or modified by the contracting parties.

14. Section 3(3) would remain.

Sections 4-6

15. These sections are not at all easy to follow. I observe that the PICC encapsulates almost everything in these three sections in a single sentence which, slightly modified to reflect the language of the Bill in square brackets, would read: “Art 5.2.5. The [contracting] parties may modify or [cancel] the rights conferred by the contract on the [third party] until the [third party] has accepted them or reasonably acted in reliance on them”. This style is preferable, although the wording employed in these provisions could reflect the terms of s 1(4) of the Requirements of Writing (Scotland) Act 1995.

Sections 7&8

16. These require only consequential amendments to replace the use of “undertaking”. Sections 7(1) and 8(1) appear superfluous. Section 7(2) requires replacement of “the undertaking” with “the third party right”. Section 8(2) requires replacement of “the undertaking” with “the third party right” in each place it occurs.

Section 9: Arbitration

17. Section 9(3) – as both the SLC Report para 7.38, and the Explanatory Notes, para 38, correctly recognize – seeks to address a situation where a third party does not have a substantive third party right under the contract at all, but the arbitration agreement in the contract may be intended to extend to the third party. The references presently found in s 9(3)(c) and (d) of the Bill to a “third party right to enforce or otherwise invoke the agreement” is wrongly expressed, since, s 9(3), by definition, is intended to deal with a situation where the third party does not have a (substantive) third party right, in terms of s 1 of the Bill, under the contract. Section 9(3) is rather dealing with a procedural right in terms of the quite separate arbitration agreement.

18. As the Faculty has suggested in its written evidence, attached herewith, matters can be resolved by deleting the words “third-party” in s 9(3)(c) and (d). I refer in this regard to the Faculty’s written evidence which is attached. These small amendments, I suggest, will bring the text of the Bill into line with the intention set out in paragraph 38 of the Explanatory Notes to the Bill and, indeed, that expressed by in the Scottish Law Commission’s Report.
Conclusions

19. I commend again to the Committee the policy contained in the Bill. The policy behind the Bill, indeed, I did not understand – at least from the oral evidence to the Committee on the morning of 21 March 2017 – to be contentious. The key, then, is to ensure that this policy is implemented in terms which make the law as user-friendly as possible. In an area such as this, where there are well-known international benchmarks, I suggest that there is much to be said for trying to formulate Scottish legislation in terms that are readily intelligible to local and international audiences alike. There is often an information cost to finding out about Scots law which may put potential users off. Adopting simple and clear language, which is internationally recognized, in my view, would go some way to addressing the concerns raised by members of the Committee in relation to how to make Scots law more attractive to potential users.

Yours sincerely,

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