

Contract (Formation and Remedies) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Contract (Formation and Remedies) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 76–EN);
 - a Financial Memorandum (SP Bill 76–FM);
 - a Policy Memorandum (SP Bill 76–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 76–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill implements recommendations of the Scottish Law Commission ("the SLC") published in its Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses ("the Report").¹ Contract law impacts on day to day economic life in relation to all types of transactions and for businesses and individuals alike. Many contracts are made, carried through, and become the subject of disputes between parties who have no professional assistance. The Scots law of contract has largely developed as a matter of common law, which limits the law's

¹ The Scottish Law Commission's [Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses](#), which was published in March 2018.

This document relates to the Contract (Formation and Remedies) (Scotland) Bill (SP Bill 76) as introduced in the Scottish Parliament on 2 October 2025

accessibility to those without legal training. It is therefore important economically and socially that the contract law regime in Scotland is fit for 21st century conditions. The overall policy aim is to produce rules that are as clear, certain and accessible as possible.

5. The Bill restates and reforms aspects of the law of formation of contract (Part 1), remedies for breach of contract (Part 2), and some general provisions (Part 3).

6. Part 1 comprises a comprehensive statement of the law on formation of contract, including a number of specific reforms. In a number of areas the law of formation of contract is uncertain because there is no clear and prevailing Scottish authority. A comprehensive statutory scheme ensures that there are authoritative answers and improves the law's accessibility to all types of users, within and outwith the legal profession, by bringing as much as possible of the law of formation of contract into one place.

7. Part 2 of the Bill contains provisions which reform the law of remedies for breach of contract in distinct areas: mutuality; restitution after rescission; and, contributory negligence.

Rationale for subordinate legislation

8. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

9. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

Delegated powers

Section 6(6) – Lapsing of offer on fundamental change of circumstances

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

10. Section 6(6) enables the Scottish Ministers, by regulations, to amend the list of circumstances in which an offeror or offeree becomes insolvent and to specify additional circumstances in which a person becomes insolvent.

Reason for taking power

11. This power enables the Scottish Ministers to update the legislative provisions mentioned in subsections (4)(a) and (b) by specifying further circumstances in which a person becomes insolvent, should that become required in the future. Subsections (4)(a) and (b) list the circumstances when an offeror or offeree becomes insolvent.

12. Section 6(3) provides that an offer in relation to the formation of a contract does not lapse where, after it is made, but before a contract is concluded, the offeror or offeree becomes insolvent and subsection (4) sets out when an offeror or offeree becomes insolvent. It is important that the definition of when a party becomes insolvent for the purpose of section 6(3), including through the examples in subsection (4), remains up-to-date with relevant insolvency legislation.

Choice of procedure

13. The affirmative procedure is considered to be appropriate given this regulation making power enables the modification of provisions in the Bill, particularly as it will allow changes to when an offer to form a contract is valid or otherwise.

Section 24 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

14. Section 24 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill or any provision made under it. Regulations made under this section may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

15. This power is to allow flexibility when implementing the Bill or otherwise to address any unforeseen circumstances which may arise. While the SLC and the Scottish Government have given careful consideration to the provisions of the Bill, this power is considered appropriate by the Government to ensure that any unexpected issues which require further changes are able to be dealt with effectively so the purpose of the Bill is not inadvertently obstructed following Royal Assent. The power is restricted as it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill or provision made under it.

Choice of procedure

16. Regulations made under this section which contain provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, they are subject to the negative procedure. This approach is typical for ancillary powers of this type and provides safeguards considered appropriate to the significance of the type of legislation which can be made.

Section 25(2) and (3) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no further procedure

Provision

17. Section 25(2) and (3) enables the Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Bill (other than sections 15, 23, 24 and 26) come into force. Regulations made under this section may make different provision for different purposes and may include transitional, transitory or saving provision.

Reason for taking power

18. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such date as Ministers appoint to be suitable. It is common for commencement provisions to be dealt with by subordinate legislation.

19. The coming into force of the Bill's substantive provisions will have implications for parties who are negotiating or who have entered into a contract. In order to allow parties to manage their affairs, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when appropriate.

20. It is preferable to ensure there is flexibility in the commencement powers in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice for Government bills, the commencement regulations should be capable of making transitional, transitory or saving provision or to make different provision for different purposes.

Choice of procedure

21. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. This is considered appropriate because the underlying policy will have already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

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