

# **CONTRACT (FORMATION AND REMEDIES) (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Contract (Formation and Remedies) (Scotland) Bill introduced in the Scottish Parliament on 2 October 2025.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 76–EN);
- a Financial Memorandum (SP Bill 76–FM);
- a Delegated Powers Memorandum (SP Bill 76–DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 76–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### **TERMINOLOGY**

4. A number of legal terms are used throughout and a glossary of these can be found at the end of this Memorandum.

### **POLICY OBJECTIVES OF THE BILL**

5. 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”).

6. 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 accessibility to those without legal training. It is therefore important, economically and socially, that the contract law regime in Scotland is fit for the 21<sup>st</sup> century. The Bill restates and reforms aspects of the law

of formation of contract and aspects of the law of remedies for breach of contract. The overall policy aim is to produce rules that are as clear, certain and accessible as possible.

## **National Performance Framework**

7. The policy objectives of the Bill contribute to the [National Outcome on the economy](#), helping to create conditions for a strong, competitive economy.

## **CONSULTATION**

8. The SLC published four Discussion Papers as part of its reform project, on [interpretation of contract](#) (2011),<sup>1</sup> [formation of contract](#) (2012),<sup>2</sup> [penalty clauses](#) (2016),<sup>3</sup> and [remedies for breach of contract](#) (2017).<sup>4</sup> A consultation on [a draft of Part 1 of this Bill](#), on formation of contract, took place from 1 September 2017 to 3 November 2017. The aim of the SLC's reform project was to assess the existing Scots law of contract against international comparators, in particular the Draft Common Frame of Reference (DCFR).<sup>5</sup> The Report was published in March 2018 and sets out the SLC's recommendations for reform.

9. Overall, the SLC made a number of recommendations for reform on formation of contract and some on remedies for breach of contract. No recommendations were made to reform the law on interpretation of contract, on the basis that the recent case law appeared to have addressed uncertainties in the law in this area. Similarly, recent case law as well as lack of support for reform meant that no recommendations were made in relation to penalty clauses.

10. In July 2024, the Scottish Government published [a consultation seeking general views on the Report](#). This is in line with the process that Scottish Ministers set out to the Scottish Parliament in respect of potential Bills implementing older SLC recommendations. The consultation sought to establish:

- whether the landscape around this area of the law had changed since the Report was published and, if so, whether the changes were material to the recommendations; and,
- that the consultation views received by the SLC were still broadly held.<sup>6</sup>

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<sup>1</sup> Responses were received from 16 consultees, including the Senators of the College of Justice, the Faculty of Advocates, the Law Society, academics, solicitors, law firms, other representatives of the legal profession and the Royal Bank of Scotland.

<sup>2</sup> Responses were received from 19 consultees, including members of the public, an MBA student, academics, the Senators of the College of Justice, the Faculty of Advocates, law firms and other representatives of the legal profession.

<sup>3</sup> Responses were received from 14 consultees, including academics, the Senators of the College of Justice, the Faculty of Advocates, solicitors, a barrister, law firms, other representatives of the legal profession, CCW Business Lawyers Ltd, the Competition and Markets Authority and the British Parking Association.

<sup>4</sup> Responses were received from 11 consultees, including the Senators of the College of Justice, the Faculty of Advocates, the Law Society, academics, law firms and other representatives of the legal profession.

<sup>5</sup> The DCFR is a model law which was prepared as part of an effort to promote more consistent and coherent legislation across the EU in the field of contract law.

<sup>6</sup> Responses were received from 9 consultees, including Hector MacQueen, Lorna Richardson, Morton Fraser MacRoberts, Dumfries and Galloway Council, the Centre for Scots Law, the Competition and Markets Authority (CMA) and CMS.

11. [Analysis of the responses](#) found that the majority of respondents expressed continued support for the SLC's recommendations and were not aware of material developments in the law or practice that required those recommendations to be revisited, with one exception. The exception was the law of retention<sup>7</sup> which respondents felt was less clear now than when the SLC made its recommendations. The Scottish Government [consulted on a statutory scheme for the law of contractual retention](#) in March 2025.<sup>8</sup> The Scottish Government intends to introduce provisions on the law of retention by way of amendment. Draft provisions, together with an Explanatory Note and Policy Note can be found on the [consultation webpage](#), together with an analysis of responses.

12. The responses to relevant consultations will be discussed at the appropriate points throughout this Memorandum.

## **OVERVIEW OF THE BILL**

13. The Bill restates and reforms aspects of the law of formation of contract (Part 1), some aspects of the law of remedies for breach of contract (Part 2), and contains some general provisions (Part 3 - saving, ancillary and commencement provisions.)

### **Part 1 – Formation of Contract**

14. Part 1 contains a statement of the law on formation of contract, bringing as much as possible of the law into one place. The scheme set out in this Part ensures that, as far as possible, there is clarity in the law while improving its accessibility to all types of users.

15. There are three general principles that underpin the restatement in Part 1. These are:

- party autonomy;
- contract as agreement; and,
- communications taking effect when they reach the party they are addressed to.

### ***Party autonomy***

#### ***Current law***

16. Contracting parties currently have the power to make their own rules about when obligations come into existence between them, about their enforcement, and about remedies for breach of those obligations. This is referred to as the principle of freedom of contract. Once a contract is formed, though, the autonomy of parties is constrained by the terms of the contract.

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<sup>7</sup> Retention is a “defensive” or “self-help” remedy which is based on the principle of mutuality. A contracting party confronted with a breach by the other party has a right to withhold temporarily performance of its own obligations under the contract until such time as the contract-breaker cures its breach.

<sup>8</sup> The consultation was open for 8 weeks and Scottish Government officials arranged two seminars to discuss the proposed statutory scheme, which were attended by academics and legal practitioners. Responses were received from 12 consultees, including legal practitioners, the Scottish and Northern Ireland Plumbing Employers Federation, a local authority, the Scottish Law Agents' Society, and academics.

### *Reform*

17. Sections 1 and 16 of the Bill restate this principle by providing that the majority of provisions in both Parts 1 and 2 are default provisions.<sup>9</sup> The result is that the default provisions in those sections apply unless otherwise provided in the contract. Having default rules are a useful starting point for negotiations in so far as they can be relied upon for common situations. This, in turn, might reduce transaction costs and enable parties to focus on where they want to make alternative provision.

### *Consultation*

18. The Scottish Government asked consultees whether they were content with the approach to having a default set of rules that parties to a contract could alter to meet individual circumstances. All those who responded to this question agreed. In addition, the SLC consulted on a draft Bill which contained a provision giving effect to the general principle of party autonomy and the Scottish Government is not aware of any adverse comment from respondents.

### *Alternative approach*

19. An alternative approach to restating the general principle would be to do nothing and/or follow the Bill with a non-statutory option, such as publishing guidance on party autonomy. The effect of this would be that the general principle would be left to the common law and in so doing would undermine one of the principal objectives of the Bill – that is, accessibility of the law – because the fundamental general principle allowing deviation from the Bill’s default rules would be elsewhere. Even if the general principle were to be published in guidance, this would not fully resolve the issue of accessibility for the same reason that the fundamental principle would not be found together with the legislation.

20. Another option would be to provide that parties to a contract cannot make alternative provision in their contract, i.e., that the Bill’s provisions are compulsory. The Scottish Government’s view is that a change of this nature would impair the existing flexibility that contracting parties have to cater the terms of a contract to individual circumstances, with consequent impact on the day-to-day economic transactions of individuals and businesses.

## ***Contract as agreement***

### *Current law*

21. In order to create a contract, there must be an agreement on the essentials of the contract,<sup>10</sup> an intention to create legal relations, and certainty of terms. As long as these are agreed then it is possible for the courts to hold that, objectively, parties have concluded a contract, even if they continue to negotiate on other matters or have a different view of what the contract involves. For example, Party A supplies a piano to Party B with an agreed value and payment in monthly instalments. Party B fails to pay an instalment and, as a consequence, Party A seeks to repossess the piano. Party A thinks the contract is one of hire purchase (so ownership of the piano had not

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<sup>9</sup> The exceptions are the abolition of the postal acceptance rule (section 14), provision regarding contributory negligence (section 22) and other more general sections, such as interpretation of terms used in Part 1 (section 15) and commencement provisions (section 23).

<sup>10</sup> The essentials of a contract will vary according to individual circumstances but in general these tend to be the parties to the contract, the subject-matter of the contract, and the price (if any).

passed to Party B) while Party B thinks it is a contract of sale (so ownership of the piano has passed to them and cannot be repossessed). In these circumstances, the court will have to determine which, if either, view was objectively correct.<sup>11</sup>

### *Reform*

22. Section 2 of the Bill restates the current law as part of the comprehensive statement on formation of contract. It provides that a contract is concluded when parties reach an agreement which they intend to have legal effect and which has the necessary content for it to be given legal effect. Whether an agreement exists is to be determined from the statements and conduct of the parties. So long as parties are agreed on the necessary content, then there can be a contract even although the parties are continuing to negotiate on other matters that might be relevant to their transaction.<sup>12</sup>

23. One of the fundamental ways of determining that an agreement has been reached, or of determining whether one exists, is by means of offer and acceptance. It is important that the rules in this area are clear because they indicate to parties what steps they can take to reach agreement, particularly in cases where it is disputed whether or not there is a contract. These rules are set out in sections 4 to 11 of the Bill.

- Definition of an offer - section 4 defines an offer as a proposal made to another person that contains sufficiently definite terms to form a contract and indicating the intention of the offeror to be bound if the offer is accepted by the other party.
- Definition of acceptance - section 7 is consistent with current Scots law and provides that any form of statement or conduct by the offeree should be an acceptance if it indicates assent to the offer. For example, Party A offers to pay Party B a sum of money for delivery of some goods. Party B can accept by writing to Party A confirming the same or they could deliver the goods and seek payment from Party A.
- Modified or qualified acceptance - section 8 of the Bill clarifies the law on what happens if a supposed acceptance is not a simple outright assent to the offer. If an offeree replies to an offer with what is supposed to be an acceptance but which contains terms materially different from those in the offer, the reply is not an acceptance. Instead, it falls to be treated as a rejection of the offer and a new (or counter) offer.
- Revocation of an offer - section 5 provides that an offer can be revoked so long as the revocation reaches the offeree before it has been accepted or, in cases of acceptance by conduct, before the notice of the conduct has reached the offeror.<sup>13</sup>
- Lapsing of offer on fundamental change of circumstances - section 6 sets out the rule that if the offeror dies or is otherwise incapacitated after an offer is made but before it is accepted then the offer terminates. Also, the death or other loss of capacity of either party renders ineffective any acceptance that has been dispatched but has not been received by the offeror.

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<sup>11</sup> See the case of *Muirhead and Turnbull v Dickson* (1905) 7 F 686.

<sup>12</sup> A party can guard against being found to be in a contract by specifying the matters on which it and its co-contractors must be agreed before any contract is concluded.

<sup>13</sup> Offers can also be irrevocable (see subsection (4)).

- Rejection of an offer - currently, Scots law holds that an offer falls when it is outright rejected by the offeree. Section 9 makes clear that when the rejection reaches the offeror, the offer is deemed to have lapsed.
- Withdrawal of offer and acceptance - section 10 provides that an acceptance may be withdrawn if the withdrawal is communicated to the offeror before or at the same time as the acceptance. This follows logically from the rules on acceptance set out above, i.e., that acceptance takes effect when it reaches the offeror.
- Time limits for acceptance - section 11 allows the offeror to fix a time limit for acceptance or, failing which, then the offer must be accepted within a reasonable time after the offer was made. Time begins to run from the moment that the offer reaches the offeree. This, though, is subject to any contrary express statement in the offer or to anything implicit in the offer which indicates otherwise.

24. Taken altogether, these sections of the Bill provide legal clarity and certainty while also being sufficiently flexible to allow parties to cater for their individual circumstances.

### *Consultation*

25. The SLC's recommendation that there should be a statutory statement of the law on formation of contract was well supported, but as part of their policy consideration, it noted that some respondents had raised concerns that such a statement "might contribute to a potentially damaging perception that Scots law had diverged in some non-obvious way from English law."<sup>14</sup>

26. The Scottish Government asked consultees to its consultation paper whether they were satisfied that the restatement does not differentiate Scots and English law in a way that might deter cross-jurisdictional business. Of the six respondents who answered this question, four were satisfied that the approach taken does not differentiate Scots and English law in the way highlighted. Of the 2 respondents who disagreed, The Centre for Scots Law provided a view that legislation could lead to unexpected divergences or interpretative dilemmas in areas of law which had hitherto been relatively clear and on which Scots and English law had been substantially the same. At paragraph 3.8 of the Report, the SLC addressed the concern raised by some consultees that its draft Bill might contribute to a potentially damaging perception that Scots law would diverge from English law by highlighting that its recommendations for substantive law reform are limited to formation and remedies for breach rather than more wholesale reform of underlying legal principles. The concern appears to be that any such divergence will result in contracting parties opting for English law to govern their contracts rather than Scots law. The major change relates to the law on postal acceptances, to bring the law into line with general legal practice on both sides of the border. If the postal acceptance rule is abolished as provided for in the Bill, then this would be an example of divergence between Scots and English and Welsh law, although, as already mentioned, it is understood that most contracting parties already opt out of this rule in their contract. The SLC did not consider that a statutory statement of the law on formation of contract would result in Scots and English law diverging any more than they do at present.

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<sup>14</sup> See paragraph 2.12 of the Report.

***Communications taking effect when they reach the party they are addressed to***

*Current law*

27. When forming a contract it is important to know whether a statement from one party has reached the other party, such as an offer or acceptance of an offer. Under the current Scots law, generally it is only when a statement reaches the other party that it has legal effect, although the postal acceptance rule is an exception. The postal acceptance rule provides that a contract entered into through letter or telegram is held to be concluded when acceptance of the offer is posted.

28. The rule is at odds with the general expectations of business people and consumers who do not expect to be bound in contract without their knowledge. It causes uncertainty, confusion and difficulties with the law of contractual formation, and the Scottish Government understands that in practice it is commonly excluded by parties.

*Reform*

29. Section 13 sets out that any notification in relation to formation of contract takes effect when it reaches the person to whom it is addressed. A notification includes offers, acceptances, counter-offers, withdrawals, rejections and revocations. This is a broad and flexible test which enables contracting parties to deliver notifications to each other in the way which suits their needs best and is capable of adapting to future developments in technology.

30. Subsection (4) includes an illustrative list of examples of when reaching might occur in what is expected to be some of the more common circumstances, although it is open to parties to use other means to deliver a notification so long as it meets the general test. These are default rules, and so parties who want to have different outcomes can make arrangements for that in their contract.

31. Section 14 abolishes the postal acceptance rule. The Scottish Government is of the view that this aligns better with the reasonable expectations of most persons, including those of the commercial community in Scotland. By virtue of section 1's application to section 7, however, parties can agree that a postal acceptance will conclude a contract upon the former's dispatch.

*Consultation*

32. The SLC sought views on doing away with the postal acceptance rule and respondents unanimously agreed that it should be removed.

*Alternative approach*

33. An alternative approach is to do nothing and allow the current law on when communication takes effect to continue. This though would be against the clearly expressed views of all the respondents to the SLC's discussion paper. It would also be at odds with the general expectations of business people and consumers who do not expect to be bound in contract without their knowledge, and may also trap the unwary.

34. Alternatives such as requiring parties to agree the method of communication in advance of negotiations or making one form of communication (such as electronic) the default unless

otherwise stated were discounted by the Scottish Government, given that these would run contrary to the SLC's recommendation and would involve less flexible arrangements for contracting parties. The Bill is sufficiently flexible that parties who wish to make such arrangements can agree to do so.

## **Part 2 – Remedies for Breach of Contract**

35. When a contract is breached a party can take steps to seek a remedy. Part 2 of the Bill contains provisions in some distinct areas that reform the law of remedies for breach of a contract:

- mutuality;
- restitution after rescission; and,
- contributory negligence.

### ***Mutuality of contract***

#### *Current law*

36. If both parties under a contract have rights and duties then these are interdependent and this principle is known as the mutuality of contract. For example, if Party A agrees to sell a second-hand vehicle to Party B and Party B agrees to pay a certain amount then both parties have obligations: Party A is obliged to deliver the vehicle and Party B is obliged to pay the agreed amount.

37. Two important consequences for remedies of a breach of contract follow from this principle. First, if one party does not perform then the other party need not perform. Second, if a party has not performed, or is not willing to perform, its obligations then they cannot compel the other party to perform theirs.

38. It must be shown that the obligations and rights in question are actually interdependent. Two recent decisions of the Inner House of the Court of Session suggest that there is a lack of clarity on the scope of mutuality of contract.<sup>15</sup> On the one hand it has been said that a contract should be regarded as a whole and that, therefore, all the obligations on parties are interdependent of each other. On the other hand, it has been said that not every obligation on a party is interdependent with the other party's obligations and so it depends on an interpretation of the particular contract. The difference between the two approaches means that the party who raises court proceedings may have to prove both or either approach, with the resultant time and legal costs this entails.

#### *Reform*

39. Section 17 clarifies this principle by setting out that party A, who is in breach of a contract with party B, is nevertheless entitled to exercise any right, or to pursue any remedy, arising out of party B's breach. This is provided that Party B is not lawfully withholding its performance in response to Party A's breach. Also, Party A cannot seek performance of an obligation of Party B

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<sup>15</sup> *Forster v Ferguson & Forster, Macfie & Alexander* 2010 SLT 867 and *McNeill v Aberdeen City Council* (No 2) 2014 SC 335.



that would have been due in the period following the termination of the contract (for Party A's breach). These are default rules and the parties can agree alternative provision in their contract.

40. Using the same example above, if Party B has not paid the agreed upon amount for the vehicle because Party A has failed to deliver the vehicle, then Party A cannot exercise any right or pursue any remedy as a consequence of Party B's failure.

#### *Consultation*

41. The SLC consulted on the provision that is now section 17 for which there was almost unanimous agreement from respondents. The Scottish Government did not, in its consultation, ask a specific question about the mutuality principle but nonetheless no issues were raised by respondents.

#### *Alternative approach*

42. An alternative is to do nothing but the contrasting principles set out in the two Inner House decisions mentioned above would mean that the law will remain less clear and certain than is desirable.

### ***Restitution after rescission for breach of contract***

#### *Current law*

43. Rescission is used to bring a contract to an end without the need for court proceedings. The party invoking the remedy declares themselves no longer bound to the terms of the contract and they may refuse to carry out any further obligations due. In the example above regarding the sale and purchase of a second-hand vehicle, if Party A fails to deliver the vehicle, then Party B can 'rescind' (terminate) the contract.

44. If, though, it turns out that the vehicle is delivered but faulty then Party B can terminate the contract and reclaim the price paid for it, but must also return the vehicle to Party A. This is an example of 'restitution' after rescission, the aim of which is to redress any economic imbalances that might result from the termination of a contract.<sup>16</sup>

45. However, the current law on this matter is uncertain. In one of the more recent judicial considerations of restitution, while it was held that a party to a contract who has made payment in anticipation of a counterpart performance which never occurs has a remedy of restitution in Scots law there was an absence of consensus as to the legal basis for this remedy.<sup>17</sup>

#### *Reform*

46. Section 18 of the Bill clarifies the law by making it clear that where Party A has terminated a contract for Party B's breach, Party A should be put back into the position they occupied prior to the breach occurring. This is done by returning any benefit that Party A has provided to Party B for which Party B has not in return performed their obligations under the contract.

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<sup>16</sup> Unless the transfer would cause unreasonable effort or expense, in which case the vehicle's actual value can be paid instead.

<sup>17</sup> See *Stork Technical Services (RBG) Ltd v Ross's Executor* [2015] CSOH 10A, 2015 SLT 160, paras 33, 34.

47. For example, if a non-money benefit (for example, a vehicle) remains transferable, it is to be returned unless to do so would be unreasonable or impracticable, in which case its value is to be paid instead. If it is a non-money benefit which is non-transferable, then its value is to be paid. Sections 19 and 20 set out the rules for how the value of a non-money benefit is to be determined. If the relevant performance was a payment of money, then the amount received is to be repaid.

48. Section 21 makes clear that the recipient is also entitled to payment of the value of any improvements made to the benefit which the other party can readily obtain by dealing with it. In the example above about vehicles, if the purchaser had made improvements to the vehicle delivered by the seller, but it is then found out that the vehicle is somehow deficient, the purchaser could terminate the contract and return the vehicle. Not only would the purchaser be entitled to the return of the money paid, but if the seller rectifies the fault and is able to sell the vehicle for more value because of the improvement, then the difference should be paid to the purchaser.

49. All these rules are default in nature and so parties may agree otherwise.

### *Consultation*

50. The SLC asked consultees if they agreed that where parties have rendered conforming performances under a contract but not received the reciprocal counter-performances, there should be reciprocal restitution of the uncompleted performances after termination for breach.<sup>18</sup> If they agreed, the SLC then asked if the system of rules set out on this matter in the DCFR provided a satisfactory approach to the issue. Finally, the SLC asked if, alternatively, consultees considered that the law in this area should be left to develop by way of court decisions.

51. The majority, including the Senators of the College of Justice, the Faculty of Advocates, the Society of Solicitor Advocates, the Law Society of Scotland and Morton Fraser, agreed that there should be reciprocal restitution of uncompleted performances after termination for breach.

52. There was also majority agreement amongst those consultees who responded that the system of rules set out on the matter in the DCFR was in general a satisfactory approach to the issue. The Faculty of Advocates commented that some expressions used in the DCFR could be improved upon and the Law Society suggested that alternative drafting should be considered. These comments were taken on board by the SLC and some minor changes to the wording of the DCFR, where thought appropriate, were made.

### *Alternative approach*

53. An alternative approach is to do nothing. Given the uncertainty caused by the lack of consensus as to the legal basis for this remedy, this would not be a sensible approach to take.

## ***Contributory negligence***

### *Current law*

54. In an action for damages a court may decide that both parties are in some way at fault. Contributory negligence is when a pursuer is found, to some extent, to be responsible and this can

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<sup>18</sup> See the 2017 Discussion Paper on Remedies for Breach of Contract, paragraphs 4.27 to 4.33.

lead to a reduction of the amount they might otherwise have been awarded. For example, Party B purchases a new car from a reputable dealer, Party A. Party B asks for the vehicle to be supplied with winter tyres. The car arrives without them, but Party B does not notice and shortly thereafter has an accident due to losing traction on black ice. Party B's damages from Party A for breach of contract may be reduced because of their failure to check that the winter tyres had been fitted. The question of whether and by how much Party B's damages should be reduced would be a matter for the court to decide in all the circumstances of the case.

55. It is uncertain whether contributory negligence is available as a defence to claims for damages based on breach of contract.

### *Reform*

56. Section 22 clarifies the law by introducing a form of contributory negligence as a defence for all claims of damages for breach of contract. The result is that in cases where the pursuer in a claim of damages for breach of contract suffers loss partly through their own fault and partly through the fault of the other party, then the damages recoverable in respect of the breach will be reduced to the extent the court considers appropriate.

### *Consultation*

57. The SLC asked respondents about introducing a contributory negligence defence, which was supported by a majority of respondents, including the Senators of the College of Justice, the Law Society of Scotland, the Society of Solicitor Advocates and Morton Fraser. Pinsent Masons supported reform, but favoured a different model for reform (see below). The Faculty of Advocates, though, explained that it considered that a defence of contributory negligence should not generally be available in claims for damages for breach of contract as it has the potential of allowing the court to rewrite parties' contracts and that parties were best placed to allocate risk. The Scottish Government disagrees with the approach suggested by the Faculty of Advocates because it does not address the difficulties with the current law and because of the support for the provision from a majority of consultees.

### *Alternative approach*

58. An alternative approach would be to introduce contributory negligence as a defence in purely contractual claims but only where the debtor owed a duty of reasonable skill and care. For instance, contributory negligence would only be a relevant defence where a contract or the common law requires a party to exercise reasonable skill and care, e.g. an architect taking reasonable care to produce a design. This approach was consulted on by the SLC but it was preferred by only one respondent (Pinsent Masons).

## **ALTERNATIVE APPROACHES**

59. An alternative approach to reforming some aspects of the law of remedies would be to codify this area of law, in a way similar to formation of contract in Part 1 of the Bill. For instance, the SLC asked respondents to its discussion paper on remedies for breach of contract whether there should be a general statutory restatement of the law on remedies for breach. This would have included the bulk of the law of retention, anticipatory breach, rescission and damages.

60. Although there was some support for the idea (for example, from the Senators of the College of Justice), it met with much more substantial opposition than the proposal for a restatement on formation: in particular, from the Faculty of Advocates, the Society of Solicitor Advocates, the Law Society of Scotland, and a number of commercial law firms.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

61. An Equality Impact Assessment (EQIA) has been carried out and has been published by the Scottish Government. The EQIA concluded that, overall, the Bill will have no significant impact on identified groups. The proposals in the Bill are overall neutral and would apply equally to any person who makes the decision to contract. There is no compulsion on any persons to enter into a contract, and for those not wishing to do so alternatives might be sought. Further, many of the provisions in the Bill are default provisions that apply where parties have not agreed an alternative or where the contract might be silent.

### **Human rights**

62. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR). In particular, the Government has considered the effect of the provisions of the Bill in relation to Article 1 of Protocol 1 and Article 6 ECHR. The Bill is not considered to have an effect on the peaceful enjoyment of possessions or the deprivation of possessions under Article 1 of Protocol 1, nor affect the right to a fair trial or hearing under Article 6.

### **Statement of compatibility under section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024**

63. The Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, has made the following statement regarding children's rights:

“In accordance with [section 23\(1\) of the United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Act 2024](#), in my view the provisions of the Contract (Formation and Remedies) (Scotland) Bill are compatible with the UNCRC requirements as defined by [section 1\(2\) of that Act](#).”

### **Island communities**

64. The Scottish Government does not anticipate any significant impact on island or rural communities as a consequence of this Bill. The provisions will apply equally to all communities in Scotland, whether situated on an island or the mainland. The Bill will affect those who have entered into, or are considering entering into, a contract, or a party handling a breach of contract where the remedy sought relies on mutuality, rescission or contributory negligence. An impact assessment has been carried out and has been published on the Scottish Government website.

## **Local government**

65. The Scottish Government does not expect any impact on Local Government, except insofar as a local authority enters into a contract using Scots law. The changes brought about by the Bill will ensure that the rules of Scots contract law are as clear, certain and accessible as possible. This will ultimately benefit local authorities that enter into contracts using Scots law, although there may be costs associated with staff training about the reforms.

## **Sustainable development**

66. Given that the Bill is concerned with reforming the Scots law of contract the Scottish Government does not anticipate any significant impact on the environment. The National Performance Framework is Scotland's way to localise sustainable development goals, in this case the goal of decent work and economic growth. The policy objectives of the Bill will contribute to the National Outcome on fair work and business, by providing a necessary legislative framework as part of helping to make our economy more stable, productive and efficient.

## **CROWN CONSENT**

67. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

68. For the source of the requirement for Crown consent, see [paragraph 7 of schedule 3 of the Scotland Act 1998](#), and [rule 9.11 of the Parliament's Standing Orders](#). For further information about the considerations that go into determining whether Crown consent is required for a Bill see [Erskine May](#), the guide to procedure in the UK Parliament.

## **GLOSSARY**

69. In this Memorandum, the following legal terms are intended to be read by reference to the descriptions of those terms set out below.

Acceptance	Expression, by words or conduct, by the recipient of an offer or unqualified assent to the terms of the offer with the effect that a contract is concluded. As a general rule silence or inactivity on the part of the offeree does not in itself amount to acceptance.
Common law	The body of law derived from custom, Roman law, the writings of Institutional writers and the reasoning of judges in court cases that create precedents. It stands in contrast to statute law, where the law is set down in Acts of the UK or Scottish Parliaments or regulations, orders or rules made in the exercise of powers granted by such Acts. Scots law exists as both common law and statute law.

Contributory negligence	Some careless or blameworthy act or omission by the pursuer which contributed, with the defender's fault or negligence, to the pursuer's loss or injury. Since 1945 the court may reduce an award of damages in proportion to the pursuer's share of responsibility for what happened.
Offer	A statement of terms which a party (the offeror) proposes to another party (the offeree) as the basis of a contract between them, coupled with a promise, express or implied, that the offeror will adhere to these terms if the offer is accepted. An offer contemplates the constitution of binding contractual obligations as from the moment when it is met by an unqualified acceptance.
Qualified acceptance	An acceptance of an offer subject to a qualification so that until the qualification is itself accepted or withdrawn, the contract is not concluded.
Rescission	The termination or cancellation of a contract which has been rescinded.
Retention	The withholding by one party to a contract of performance of its obligations under the contract until the other party performs its obligations under it.



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

# **CONTRACT (FORMATION AND REMEDIES) (SCOTLAND) BILL**

## **POLICY MEMORANDUM**

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