Response by the Faculty of Advocates

Informal consultation on the working draft of the Contract (Formation) (Scotland) Bill

Section 1

We have no comments to make on the draft section 1.

We should, however, indicate that we consider the order of the following sections to be a logical and coherent one, and we do not consider that any re-ordering of those sections is required.

Nevertheless, when reading the draft Bill as a whole, it appears to us that (for the reasons we have endeavoured to explain in our comments on the individual sections) there are some difficulties in understanding the concept of "notification" as it flows through the Bill, and in particular how it relates to agreement through conduct, and when conduct can be said to reach a person in terms of section 3.

Sections 2 – Formation of contract: general

We raise the prospect of an inconsistency between, on the one hand, the terms of section 2(2) as currently drafted and, on the other, sections 8 and 14.

In broad terms, section 14 provides that where party A makes an offer to party B and B's notified response differs in any way from the offer that response is taken to be a rejection of the offer and notification of a counter-offer. This clarifies the existing uncertainty in the common law position (for example, the apparently conflicting decisions in *Buchanan v Duke of Hamilton* (1878) 5R (HL) 69 and *Wight v Newton* 1911 SC 762) and is in line with the policy of the reform. We note the policy decision not to introduce a materiality provision so any difference, subject only presumably to a *de minimis* test, is enough to prevent a contract being formed.

The 'mirror-image' approach is reinforced by section 8(1): an acceptance must show the *'unqualified assent of the offeree to the offer'*.

However section 2(2) states that, provided an agreement satisfies the subsection (1) requirements, a contract is concluded on the parties coming to an agreement *'on all but one matter or all but some matters'*. Since there is no qualitative test for what such matters might be any difference between offer and

acceptance, no matter how material, could be disregarded under this provision if it is established that the parties nevertheless intended that the 'agreement' as it stands should have legal effect.

We would suggest that a tension therefore exists between the approach in the specific offer-acceptance provisions and that which is adopted in the generic contract formation provision. A party arguing against the existence of a contract is likely to rely on the former, citing any additional/different/omitted terms; whereas the contrary position is likely to be advanced by the other party on the basis that one or more 'matters' not having been agreed should not preclude the contract taking effect.

By way of exception to section 2(2), section 2(3) provides that partial agreement cannot constitute a contract if one party requires there to be agreement on a specific matter, and that has not been achieved. We observe that the relevant note states that there is no agreement 'until' that matter is agreed, whereas the draft Bill uses the word 'unless'. For clarity about the point at which conclusion of the contract occurs, it may be preferable for the wording to be consistent.

We have a further observation in relation to subsection (4). It may be prudent to state expressly whether statements and conduct which post-date the conclusion of the contract are relevant for inquiry. The words in parenthesis would suggest that that is the intention since statements and conduct which do not necessarily constitute acceptance of an offer must, one assumes, leave open consideration on an open-ended basis but it may still be open to doubt without express wording (especially given the current common law position).

Section 3 – When notification takes effect

We take the view that there may be some benefit in giving further consideration to the wording of section 3(2) which provides that a notification (of an offer, acceptance, etc) *"reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay."*

Had that draft provision made the deemed receipt of the notification dependent upon it being reasonable <u>for the notifier</u> to expect the intended recipient to be able to obtain access to it, or if the expression "by such means" had been substituted for "in such circumstances", we would have understood that to import an objective test which would fall to be applied having regard to the form of communication which had been used.

In the absence of those words we consider the expression "in such circumstances" is sufficiently broad as to be capable of being construed as imposing a subjective test in which the reasonableness of expecting the recipient to be able to obtain access to the notification may fall to be assessed in light of the recipient's personal circumstances or actings at the relevant time. If so, it might be argued, for example, that a recipient who is ill and confined to bed cannot reasonably be expected to be able to obtain access to a notification made in a form other than those specified in section 3(3) whereas the effect of section

3(3) is to make a notification effective on the occurrence of, for example, simple delivery regardless of the personal circumstances of the recipient at that time.

We note that views have also been requested on the question whether section 3(3)(d) provides sufficient protection for the recipient who has put in place an automatic email response indicating that he is absent and will not have access to emails for some specified period.

We do not consider that it is necessary to make some further provision for recipients of email communications in those circumstances. It is made plain in section 3(b) and (c) that, adopting the approach of the common law, a notification will be deemed to have been received as a result of the simple delivery of the notification to the recipient's place of business or habitual residence. It is implicit in that approach that a person engaged in entering into a proposed legal transaction is expected to make reasonable arrangements to enable him to become aware of communications relating to that transaction delivered to his home or business premises.

We are not persuaded that parties who chose to communicate by electronic means require some special additional protection. In any event, if a person who has offered to contract (or communicated some contractually significant notification) does not wish to be bound by an acceptance (or other notification) during some time in which they are absent it will be open to them, in terms of section 1(1), to stipulate to that effect.

Section 4 – Abolition of rule of law as to when postal acceptance takes effect

The Faculty considers that this section gives effect to the policy of the reform.

Section 5 – What constitutes an offer

Our concern in relation to section 5 is that an "offer" is defined, in section 5(1)(a), as being one in relation to which the proposer *"must intend that it will result in a contract if accepted".* That would appear, on the face of it, to make the test the subjective intention of the person making the offer. Such an approach would, in our view, subvert the long established principle that "…commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say": *Muirhead & Turnbull v Dickson* (1905) 7 F 686, *per* LP Dunedin. As we understand it, it is not the policy of the reform to make such a change.

Section 6 – Revocation of offer

The Faculty considers that this section would give effect to the policy of the reform.

It appears to us, however, that there is potentially a difficulty in the concept of "notification" by statements or conduct as provided for in subsection (2)(b) and, by extension, subsection (5).

As we understand it, the effect of section 2(4) is that a contract may be concluded even where there has not been acceptance of an offer. Moreover, such a contract may be formed by conduct. There is no requirement of "notification" provided for in section 2(4). See also section 9 which deals with conclusion of contract by "unnotified acts". Yet section 6(2)(b) refers to "notification" of "statements or conduct of the offeree by virtue of which it may be determined (as mentioned in section 2(4)) that agreement has been reached". Section 3, which deals with when notification takes effect, provides for notification to take effect in relation to an "offer, acceptance, counter-offer, withdrawal, rejection, revocation or declaration" (and so is clearly of assistance in relation to section 6(2)(a)) but does not deal with when notification takes effect in relation to "statements or conduct of the offeree by virtue of which it may be determined … that agreement has been reached" and so does not appear to be of assistance in relation to section 6(2)(b).

This potential difficulty could be elided if section 6(1) were to be redrafted to provide simply that an offer in relation to the formation of a contract may be revoked by the offeror but only if it is revoked prior to a contract being concluded between the offeror and the offeree. Similar drafting would be required in relation to section 6(4).

Section 7 – Lapsing of offer on material change of circumstances

The Faculty considers that this section would give effect to the policy of the reform. It appears to us, however, that the interaction of subsections (3) and (4) potentially creates a doubt, which might usefully be removed.

It is not entirely clear to us whether subsection (4) is intended to contain an exhaustive definition of what constitutes "insolvent" for the purposes of subsection (3). If this is the case, then we consider that this could helpfully be clarified by adding the words "in any of the ways described in subsection (4) (but not otherwise)" at the end of subsection (3).

Sections 8 and 9 - acceptance of offer and conclusion of contract by unnotified acts

Subject to what is said above about the relationship between sections 2 and 8, the Faculty considers that these sections give effect to the policy of the reform.

We consider, however, that it may be helpful if section 8 is expressly stated to be without prejudice to section 9.

Section 10 – Withdrawal

The Faculty considers that this section gives effect to the policy of the reform.

Sections 11 and 12 on Time Limits

The Faculty does not have any comments to make on the drafting of these sections, which appears to lead to the correct balancing of the risk of the choice of method of notification between the offeror and the offeree.

Section 13 - Rejection of an offer

The Faculty considers that this section would give effect to the policy of the reform.

It appears to us, however, that the section could usefully be expanded to make clear that a rejection can be in the form of conduct as well as words. The situation is probably covered by the section, as the offeror will need to be aware of the conduct, but the word "notification" does appear elsewhere in the Bill in a context very much associated with the various forms of writings that may pass between the parties.

Section 14 on counter-offers

Subject to what is said above about the relationship between sections 2 and 14, the Faculty considers that this section gives effect to the policy of the reform.

Sections 15 to 18

We have no comments to offer on these sections.