I remember I offered to come back to the Committee on two points. The first related to the issue of there being multiple defenders who are jointly and severally liable. The question was relatively straightforward, as I understood it; if the pursuer secures satisfaction of his debt from one defender who is jointly and severally liable, what is the effect of the prescriptive periods on the liability of the others? To that question I think I’ve found a fairly straightforward answer. Claims for relief against fellow wrongdoers are subject to a two-year prescriptive period under s.8A of the 1973 Act. A discussion of the matter is found in paragraph 8.09 of David Johnston’s book, *Prescription and Limitation* (2nd edn, 2012):

“Under the old law it was sometimes useful to raise declaratory proceedings in order to establish the existence of a right to relief [against a fellow wrongdoer] which might otherwise cease to be enforceable, for example under a special statutory regime, even before the court had made a determination of the parties’ liabilities. This problem does not arise under the current law. This is because: (1) the court is concerned with the question whether a person from whom contribution is sought could have been liable to make contribution to the person seeking it at the time that that person was himself sued by the victim of the wrong; and (2) the obligation to make contribution becomes enforceable only once a determination of liability has been made by the court. Two years from that time to obtain relief from a joint wrongdoer may well be sufficient. But if there is any risk that a person may cease to be liable before the court is able to make a determination of liability, a declaratory may serve the practical purpose of extending the prescriptive period to 20 years.”

The second question concerned whether or not the Faculty of Advocates was right to raise concerns regarding the effects of the proposed s.7 of the bill on the extinction of property rights like servitudes. On reading through what the Faculty says I think that it does have a point. As you’ll be aware, the Faculty considers one particular problem. Suppose litigant A attempts to secure a declarator of the existence of a servitude after it has not been used for nineteen years – i.e. very close to the end of the prescriptive period. The new s.7 would, undoubtedly, prevent prescription from taking effect until the end of the action, even if it were to take another year to conclude it. Yet the new s.8(1B) states that “[t]he prescriptive period is extended so that it expires (a) when the claim is finally disposed of”. Read literally, that may well indicate that extinctive prescription takes effect regardless of the outcome of the claim. That in turn would mean, as the Faculty suggest, that one who succeeds in obtaining a declarator of servitude could still face the extinction of his right by virtue of the new rule brought in by s.7. This does not affect the parallel regime for obligations proposed in s.6 of the bill for the reasons given by the Faculty. Nonetheless, the position as outlined here as regards servitudes cannot be consistent with what the legislator would want. I think this could be usefully revisited, which broadly accords with what Dr Russell said on the day we gave evidence.