OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 18 November 2025

Session 6

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DELEGATED POWERS AND LAW REFORM COMMITTEE

32nd Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

Jeremy Balfour (Lothian) (Ind)
*Katy Clark (West Scotland) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Stephen Bogle (University of Glasgow)
Dr Jonathan Brown (University of Strathclyde)
Dr David Christie (Robert Gordon University)
Professor Hector MacQueen (Scottish Law Commission)
Lady Ann Paton (Scottish Law Commission)
Dr Hamish Patrick (Law Society of Scotland)
Rachel Rayner (Scottish Law Commission)
Lorna Richardson (University of Edinburgh)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 18 November 2025

[The Convener opened the meeting at 09:20]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning, and welcome to the 32nd meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off, or put to silent, mobile phones and other electronic devices. We have received apologies from Jeremy Balfour.

Agenda item 1 is a decision on taking business in private. Is the committee content to take item 6 in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

09:20

The Convener: Under agenda item 2, we are considering one instrument, on which no points have been raised.

Food Safety Act 1990 Amendment (Scotland) Regulations 2026 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

09:20

The Convener: Under agenda item 3, we are considering five instruments, on which no points have been raised.

Public Procurement (Agreement on Government Procurement) (Thresholds) (Miscellaneous Amendments) (Scotland) Regulations 2025 (SSI 2025/299)

Scottish Register of Tartans Fees Order 2025 (SSI 2025/334)

Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2025 (SSI 2025/335)

National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2025 (SSI 2025/337)

Charities Accounts (Scotland) Amendment Regulations 2025 (SSI 2025/341)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Document subject to Parliamentary Control

09:21

The Convener: Under agenda item 4, we are considering one document, on which no points have been raised.

Non-Party Campaigner Campaign Expenditure (Scottish Parliament Elections) Code of Practice 2025 (SG/2025/289) [Draft]

The Convener: Is the committee content that no reporting grounds are engaged?

Members *indicated agreement.*

The Convener: In relation to this document, does the committee wish to note that the original draft of the code of practice was withdrawn, as it appeared that one of the statutory preconditions had not been met, and that the present version has been relaid after the Electoral Commission formally consulted the Parliament?

Members *indicated agreement.*

Contract (Formation and Remedies) (Scotland) Bill: Stage 1

09:21

The Convener: Agenda item 5 is evidence taking from two panels of witnesses on the Contract (Formation and Remedies) (Scotland) Bill. I welcome the members of our first panel, who are from the Scottish Law Commission: Lady Ann Paton, chair; Professor Hector MacQueen, former lead commissioner; and Rachel Rayner, chief executive.

There is no need to worry about the microphones, which will be dealt with for you. If you would like to respond to a question, please raise your hand. There is no need to answer every question; you can simply indicate if you do not wish to respond. However, after the meeting, please feel free to follow up in writing on any question, if you wish to do so.

I am happy to hand over to Lady Paton to make some opening remarks.

Lady Ann Paton (Scottish Law Commission): Thank you very much. Good morning, everyone. It is my privilege, as chair of the Scottish Law Commission, to begin this session concerning the Contract (Formation and Remedies) (Scotland) Bill.

As you know, the relevant commission report, which I have here, was published some years ago—in 2018—but, since then, we have had the benefit of a new triage procedure, which was created by our sponsors, Jill Clark and Alison Mason. As a result of that new procedure, the Scottish Government, liaising with the Scottish Law Commission, has carried out a further, more recent consultation exercise to check whether there have been any significant changes in the law over the years, or any changes in business, attitudes or views over the past few years. It is a welcome update. Of course, we all have the responses from that reconsultation exercise. We are very grateful to the Scottish Government for all the work that has been done.

Against that background, I now have the pleasure of handing over to the former lead commissioner in the contract project, Professor Hector MacQueen.

Professor Hector MacQueen (Scottish Law Commission): I do not really have anything to add. I was involved in the triage procedure that Lady Paton has just described. The consultation was a very useful exercise that provided an opportunity to think again about the problems that are addressed in the bill, but it did not raise any issue that suggested that a big change was required at any point.

The Convener: Ms Rayner, is there anything that you would like to add?

Rachel Rayner (Scottish Law Commission): No.

The Convener: I will start the questioning. Can you explain why legislative reform is needed in this area of law? What are the advantages and disadvantages of such reform?

Professor MacQueen: In general, the main advantage of statutory reform in a common-law area is that a common-law area may carry various difficulties and issues that simply do not get resolved because no case comes up in court in which the matter is addressed, which means that, in between times, while waiting for a decision to arise, there is considerable uncertainty on various points.

When we began the exercise of reviewing contract law, I did not think that there would necessarily be many issues. The one that was uppermost in my mind was the postal acceptance rule, and it was not on only my mind: the commission has been recommending the abolition of that rule since the late 1960s. One beauty of the availability of the Scottish Parliament is that something can actually be done, whereas it was very difficult to bring up such matters in Westminster before devolution.

Discussion of the postal acceptance rule led on to consideration of various issues that would need, at least, to be clarified in legislation. It would not be enough simply to have a clause or a section that said, “Abolish the postal acceptance rule,” as you would need to make other issues clear, primarily the questions of revocation and withdrawal of the communications on either side.

Another problem that cropped up in that context was the question of the effect of a fundamental change of circumstances during the process of offer and acceptance, with the most fundamental of all those changes being the death of either the person who made the initial offer or the person to whom the offer was made. Other issues, such as the insolvency of the parties, were also raised. What came as a bit of a discovery as far as I was concerned was that there was uncertainty about what the rules were in those circumstances. It seemed to my team and my fellow commissioners at the time that it would be best to be able to cut the Gordian knot and say, “Here’s the rule”—the rule in the draft bill—to bring an end to the uncertainty.

Those were the sorts of issues that emerged in the course of the discussion about abolishing the postal acceptance rule. Some of the bill is just

about providing the context in which a new regime would operate—it sets out rules about what an offer is, what acceptance is and so on.

A further issue that I had in mind when I started on the project back in 2009 was the so-called battle of the forms, which is the situation that arises when two businesses deal with each other, but each deals on its own standard terms of business. You may well have seen such standard terms of business on the backs of invoices and so on. What frequently happens is that, when the parties exchange their standard terms of business in the process of contract formation, the two sets of terms do not match, but that does not seem to bother the parties very much, and they proceed to perform the real substance of the contract. However, it can later emerge that, because those things did not match, there was never a contract and the performance that was rendered was therefore not contractual, which can leave questions of liability very much up in the air.

We looked at various solutions to that issue but found none of them to be particularly satisfactory. Where they had been implemented in other jurisdictions, they did not seem to work well. During my period on the commission, our then chair, Lady Clark of Calton, decided a case on the battle of the forms and did so in a very commonsense way. She said that it did not really matter what was in the terms, because the parties obviously did not care what was in them and went ahead and did a deal, and that it was the real substance of the deal that should be looked at.

We could not write that solution directly into the legislation, but we have at least created the possibility of that solution being applied in the future by way of the provisions near the beginning of the bill that define contract as agreement, and which say that it is not necessary for every single item to be agreed, and that the court can find a contract in such circumstances.

09:30

Since the report's publication, there has recently been a further decision in the Court of Session, in the Caledonia Water Alliance v Electrosteel Castings (UK) Ltd case, which some of the submissions mentioned. To put it straightforwardly, it adopts that approach. It does not worry too much about what the standard terms of business might say; its concern is the substantive reality of an agreement between the parties and enforcing it accordingly. Our bill leaves open the possibility of that approach. It definitely does not say that the court must adopt that approach in such cases; it says that the court can adopt it, should it be minded to do so. I will be happy to elaborate on that point later.

Part 2 of the bill is essentially about issues that relate to breach of contract. Those issues were very much alive when I started my time as a commissioner, and I wrote about some of them as a professor of law at the University of Edinburgh. The fundamental issue is the one that is in—let me get my section numbers right—section 17, "Mutuality of contract". The idea is that a party that is in breach of contract cannot sue or enforce the contract so long as it remains in breach. In some ways, that is a children's playground rule, but it creates serious difficulties.

During my time at the commission, there were various cases that came up in relation to that issue, mainly in the employment arena. One was the McNeill case, and the other was about a solicitor in Stranraer. It might be worth saying a bit about the case involving the solicitor in Stranraer as an example of the kind of problems that can arise. I am afraid to say that that solicitor was one of the bad apples of the solicitors' profession: he had committed fraud with clients' money and so on. When his time at the partnership came to an end, the partners in his former firm refused to pay him the pension that he had undoubtedly contributed to for many years. By a majority—there was a split, which is always indicative of a degree of uncertainty—the court held that the solicitor could not sue his former partners to get his pension, because he was in breach of contract by virtue of his fraudulent behaviour with clients' money.

Views differ on the morality of the situation—it is obviously not an attractive thing to say that that solicitor should get his pension. On the other hand, the argument that impressed me more was that the solicitor had contributed to the pension fund for many years. He was no longer in practice, and he needed his pension to live. It seemed inappropriate—to me, at least—that he should be barred from recovering that pension.

The cases that arose during my time at the commission reinforced the view that I already held that there was something wrong with the law if it was really the case that the party that was in breach of contract could not sue to recover what it was owed. That is what lies behind section 17. The scenario is that both parties are in breach of contract. If you applied the basic rule as it was understood, neither party could sue the other, and they would be left in a state of suspended animation. We did not think that that was at all appropriate.

Section 17 says that a party in breach can claim what is owed to it, up until the time that the contract is terminated. The solicitor in Stranraer would have recovered his pension if that rule had been applied, as I think it would be in that particular case.

The second problem was the problem of restitution upon what section 18 calls "rescission", which is a technical term that lawyers use for terminating the contract. When a contract is terminated, you often find that loose threads are left hanging and that a performance by one party has not been met by reciprocation from the other side and is incomplete. It is sometimes helpful to think of that as the contract having failed, as it has not gone right through, with the result that bits are left hanging. The bill proposes that those bits that are left hanging can be restored, with the parties being put back in the position, with regard to those matters, that they were in before the performances were rendered.

What we found particularly useful was the work that had been carried out by the study group on a European civil code, of which I was a member. The study group produced a draft common frame of reference, which was intended to help the European Commission to ensure that its legislation had a consistent conceptual basis. Sections 18 to 21 essentially adopt that European instrument, the basic point of which has nothing to do with the European Union as such and creates no obligation whatsoever. A team of about 60 experts worked out the best solution to the problem of failed contracts that had been terminated and came up with a well worked-out system.

Before I leave that subject, I stress that it is about uncompleted performances—it is the unreciprocated bits, and no more, to which the obligation of restoration or restitution applies.

The last subject was contributory negligence, which is a well-known concept in the law and has been since the 19th century and before. Again, there is a certain childhood morality behind it. It involves the party in breach saying to the party making the claim, "Yes, I was in breach, but the loss that you suffered was not entirely down to that breach. You have some responsibility for the loss that you suffered." It is contributory negligence in that the party making the claim contributed to the loss that was suffered. Therefore, in fairness, the damages that are payable by the contract breaker should be reduced to reflect the contribution that has been made by the party making the claim.

This has got bogged down in the United Kingdom because of the language of the Law Reform (Contributory Negligence) Act 1945. There is now the rather curious situation where a defence of contributory negligence can reduce the pursuing party's damages if the breach of contract involved negligence in breaching a duty to take care, but not otherwise. That leads to the paradoxical outcome that the party who is defending the action for breach of contract must say, "I was negligent," which is a strange thing for someone to do. They must say that they were negligent in breaching a duty in order that they can plead contributory negligence against the party who is raising the action.

That is the current state of the law, not only in Scotland but in England and Wales. To say that it has been controversial is to understate the matter. We propose a simple amendment to the 1945 act to make it clear that, for any breach of contract—not just a negligent breach of contract—it is possible to raise the question of what contribution the pursuing party's own conduct made to their loss.

Otherwise, the law on contributory negligence is left as it stands. The view of the consultees on that was that it worked pretty well most of the time; there was just the odd blip, if you like, with regard to breach of contract. As you will see, the bill takes the form of an amendment to the 1945 act. It is a rather technical amendment. You would probably need to have the 1945 act in front of you in order to see its precise gist, but that is the way our legislative system works.

My final point is a very simple one, but it is an important one for a number of the people who are sitting behind me. All of this is subject to the parties agreeing otherwise; they are default rules. In particular, sophisticated contracting parties will probably have their own regime for almost all these issues. We are perfectly happy that the regime that such parties agree should be the one that applies between them. The provisions in the bill are, by and large, for less sophisticated parties—parties without legal advice.

Parties without legal advice will probably be taken by surprise by the postal acceptance rule in particular, but it should be possible for a party reading the bill to have a fair idea of what the law is, to be free of controversies and debates about what the law is, and to arrange their affairs accordingly.

The Convener: You covered a great deal of the bill in your opening comments. Colleagues will come back on some of the issues that you raised, but on your final point regarding parties without legal advice, do you think that the bill will make the law clearer, more certain and more accessible for the wider population?

Professor MacQueen: Yes. I fully accept that laypersons without legal advice might find legislation in general difficult. There is a question about how you make legislation sufficiently simple and accessible for it to be readable by the person in the street. I read the comments from the Scottish Motor Trade Association, which could be regarded as a fairly sophisticated user, to the effect that it could not understand the bill at all.

In fairness to us, the drafters of the bill seek precision so that it is crystal clear to a court what the answer should be. To my mind, the most important group of all are the advisers. My great hope would be that the bill's provisions never come into court because it has been possible for legal advisers to say, "This is the result that follows from the words that have been used, and that is the outcome." Disputes will get settled best in that way.

09:45

I do not have any doubt that people with legal advice will be able to handle the bill. It is very clearly expressed. I would say to whoever wrote the SMTA submission that they should perhaps come and take one of my master of business administration or construction law courses at the University of Edinburgh. Some of the most enjoyable teaching that I did during my university days was when I taught people who were professionals or were working in other fields. I was always asked to do contract law, and I did my best to explain it. The enthusiasm and, on the whole, understanding—although it was not always completely clear—were abundant and plain to me. I remember one student saying, "It's so beautiful!" That was music to my ears, because I think that it is beautiful.

It is about taking the steps that you need to take to get into the lawyer's groove—the thinking that underpins the bits of legislation that we are looking at. I hope that it is possible to read the bill and see what the rules are on the particular areas that are dealt with. We did our best—let me put it in that way.

The Convener: For clarity, other universities and other courses are available, too.

Professor MacQueen: Actually, I did some of my teaching in construction law at the University of Strathclyde, so I have no axe to grind on that score.

The Convener: Do you have a view on the arguments that Dr Jonathan Brown of the University of Strathclyde made in response to our call for views that the existing common law on contract does not need any reform or that any reform should have a wider ambit, taking into account other aspects of Scots private law?

Professor MacQueen: I have several things to say on that. I have a written paper that I can send to the committee—it is three pages long, so I will not read it out and take up your time. I have the greatest respect for Dr Jonathan Brown. He is a good friend of mine and I am very conscious that he is sitting in the room behind me. However, I think that his concerns are misplaced.

I will start with the postal acceptance rule, which was where my exercise began. I do not accept that the postal acceptance rule is intuitive or one that the person in the street immediately thinks of when thinking of the contract rule. To put it very simply, the postal acceptance rule means that, if an acceptance is posted, there is a contract from the moment of posting. It does not matter whether the addressee of the acceptance—the offeror—knows about it; all that matters is that the thing was posted.

I think that to say that that forms a contract is counterintuitive. The reality is that, for decades if not centuries, the practice has been that, when parties are setting up a contractual negotiation with professional advice, they exclude the postal acceptance rule by using a statement such as, "Your acceptance must reach us by such-and-such a date", and so forth.

I do not think that the postal acceptance rule is intuitive. It is commonly excluded by those who know about it. The people who will not exclude the postal acceptance rule are liable to be taken by surprise by the fact that they were in a contract that they did not know about. It is still a matter of dispute whether, if the acceptance letter is lost in the post, it nonetheless binds the party. Also, the courts have indicated from time to time that there are circumstances in which they will not apply the postal acceptance rule in its full rigour. I can go into that if needed.

I stress that that rule is where we began with our efforts in the area. All the rest on offer and acceptance is driven by a need to clarify what the position will be after that rule has been got rid of. There is so much focus on the postal acceptance rule that the underlying principles are sometimes overlooked.

In his note, Dr Brown argues that the postal acceptance rule was not really the exception to the general rule, which was that parties must communicate with each other in order to bind each other in a contract. I differ with Dr Brown on that point, because what he presents as the common law might have been the case before the Thomson v James case of 1855, but since then it has been quite clear that it is not the law just because each party emits a signal to say, "I like this contract," without necessarily communicating with each other that there is a contract. That was possibly the rule until 1855, but the case of Thomson v James was a decisive departure from it. That departure was recognised, and is still recognised, in all the books and textbooks on contract law.

Communication is key to the offer acceptance process working except in the case of the postal acceptance rule. That is my disagreement at root. I fully accept that other legally binding statements do not necessarily require communication in order

for the party to benefit from them. The prime example is unilateral promises law, which the bill carefully saves with section 4(3). It is also worth noting that the bill saves the general availability of common law—the law as it exists at the moment—with section 23(a). That means that common law will continue to apply when it comes to questions that the bill does not address.

It is worth noting that it is common law that will still say that an offer met by an acceptance is a contract, which is not said anywhere in the bill. When I tackled the draftsman and raised that, he said, "It's not a code." If it was a code, it would have to be complete, but given the existing state of the common law, it is sufficient to clarify how the law defines offers and acceptances. It is obvious from the bill that offer and acceptance constitute a contract. It is not the case that the bill sweeps away everything that has gone before.

My other point is that Dr Brown, who I am sure will raise this with you, makes quite a lot in his submission to you about a very interesting article that was published in 2018 in the *Scots Law Times* on the rights of disabled people, particularly those with mental health problems, and the question of when their wishes should be respected. It is a very interesting discussion of that particular issue. Adrian Ward, who was one of the authors, is a well-known lawyer in the disability field, and he has probably previously appeared before this committee or some other committee in the Parliament.

The article is interesting because he points out with his co-author that the Convention on the Rights of Persons with Disabilities says that we must not only respect but give effect to a disabled person's wishes as far as possible. The primary question that the article addresses is in which circumstances we should not only respect but give effect to such wishes and in which circumstances they can be overridden. It appears from the article that that issue had been discussed with People First, which is a group of disabled people that wishes to improve the way that disabled people are treated and handled.

The famous test from Stair's "The Institutions of the Law of Scotland" was put before the group: what is a definitive, committing act of the will? There is desire, which is that you would like to do something; resolution, which is that you are going to do it; and engagement, which is when you commit to doing it. It appears from the article that People First appreciated those differentiations and said that engagement was the point at which disabled people would want their wishes to be not just respected but given effect to. However, the article recognises that there are still problems. You would have to read the article to go through it all, but it adds the fourth stage of certain future will, which means that it is definitely going to happen. Desire, resolution and engagement are therefore not everything.

The article is very interesting and I commend it to anyone who wants to follow the subject through. It is not really about the formation of contracts; it is about a completely different subject. Nothing in the bill prevents people from reading Stair's institutions should they be so minded. In fact, I refer to the passage about desire, resolution and engagement in my textbook and I know that, in the event of the bill being passed, my textbook will continue to refer to it. The article also refers to decisions of the German Federal Constitutional Court.

What I dispute in Dr Brown's analysis is that it is evidence that the common law is somehow tied into general intuition about what makes a contract. The article deals with an important but different area than the law on the formation of a contract.

The Convener: Thank you, Professor MacQueen. I am going to have to ask the witnesses for shorter responses, please.

Professor MacQueen: I usually speak for about 50 minutes. [*Laughter*.]

The Convener: It is just that we will have a second panel of witnesses after this one.

Professor MacQueen: Yes—sure.

The Convener: Some of the proposals for the reform of contract law were made in the 1990s or even earlier, as has been highlighted. Why did it take so long for the proposed reforms to lead to a bill? Could anything be done to speed up the pace of reform in future?

Professor MacQueen: As I hinted in my earlier remarks, a crucial development was the institution of the Scottish Parliament in 1999. Most of the previous reports on contract matters were made in the 1990s, 1980s or even earlier. Getting time at Westminster is problematic, as is also the case here at Holyrood. There is a tendency in Whitehall to favour a uniform reform of the law on, for example, postal acceptances and argue that, if there is to be a reform, it had better be for the whole UK, but we are no longer trammelled by that. We have the procedure involving the DPLR Committee, which I am now experiencing for the third time, and that transforms things. It has been a major development, and I very much hope that it will continue into the future, whatever the fate of the bill might be.

The Convener: The committee certainly enjoys doing this type of work. It is a welcome change from the secondary legislation that we usually look at.

I hand over to Roz McCall.

Roz McCall (Mid Scotland and Fife) (Con): Professor MacQueen, why was the decision made to reform the law on formation of contract and certain aspects of the law of remedies for breach of contract, instead of contract law more generally?

Professor MacQueen: There is a long history here, but I will try not to go into it. Back in the 1960s, when the law commissions in Scotland and England were first set up, there was a project to have a UK contract code. That project failed. After seven years of very hard work, the project did not get to the end result that had been hoped for. Ever since then, both commissions have been wary of overly ambitious codes in general.

A code is desirable for the purposes of knowing what the law is—there is a case for it across the board. However, a code that covered the whole of Scottish private law or even the whole of Scottish contract law would take up an awful lot of the Parliament's time, and it would probably be contentious in relation to various areas.

10:00

In my experience, the Scottish Law Commission in particular has always been cautious, taking one step at a time, in, I hate to say it, the interests of the Parliament as much as anything, but also in our own interests. That is because the kind of work that you suggest would take a massive effort, and most commissioners are in post for only five to eight years, and they have other things to do with their lives. There was huge disappointment with regard to the UK code, which I happen to have been investigating for academic purposes; it really was a disaster when it fell apart in 1973. Therefore, we need to take one—small—step at a time, and, eventually, perhaps you will get there.

Roz McCall: That is very interesting. What is your view of the Law Society of Scotland's response to the committee's call for views that the bill's dealing with only certain remedies for breach of contract could lead to fragmentation and legal uncertainties in the long term?

Professor MacQueen: I very much hope that that is not the case and that, as I tried to explain my opening remarks, one is simply intervening in areas where there has definitely been difficulty. It is quite clear that uncertainty and problems exist for advisers, as much as for anyone else. Beyond that, yes, we reviewed the whole area in my exercise, but it was never the intent that the exercise should lead to a comprehensive statutory statement in that particular area. Even the formation is not a comprehensive statement. We were trying to solve real problems that we had identified.

Since the report in 2018, we have identified, with the aid of the Scottish Government, a problem in another area relating to breach of contract, which is what the amendment on retention relates to. That will be addressed, provided that the amendment is agreed to. However, there are other areas to consider, such as damages, which is huge and very problematic.

Roz McCall: That is interesting. Given that the idea is to take a smaller-is-slightly-better approach to reform, can you outline any plans that the Law Commission has for further reform of contract law?

Professor MacQueen: I cannot say anything at the present time. What I can say—Lady Paton, or indeed Rachel Rayner, who is here, will correct me if I go wrong—is that, next year, the Law Commission will consult on its next programme of work. My appointment followed a similar consultation and the proposal that there be a review of contract law. I read all the comments with great interest, and, in submitting to the Law Commission's consultation on its programme, I would intend that we could do more work on contracts. It will not be me doing that work, but it is worth doing, especially if the Law Society thinks so.

Bill Kidd (Glasgow Anniesland) (SNP): Abolition of the postal acceptance rule has been very well covered. However, to follow on from that, in a way, could you explain how the bill seeks to deal with contracts that are formed electronically, which I presume are the natural successor proceeding? What is the view on the Law Society's argument, in its response to the call for views, that it is not clear how the rules on notification by electronic means in section 13 of the bill will apply when someone has an out-of-office message switched on, or when messaging servers are not working at all?

Professor MacQueen: That is a good question and an important point. I need to check the precise wording of the bill and in which section it appears, but I think that section 13(3) covers it. Undoubtedly, all the rules that we are talking about will apply to electronic communications. Another of the benefits, if you will, of the bill is that it makes clear when an electronic communication is to be regarded as having reached the other side. The crucial aspect of section 13(3) is that a notification—an email or whatever it might be—reaches a person, that is to say, becomes effective,

"when it is made available to the person"

who is the addressee

"in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay".

In our report, we talk about an out-of-office message—"I'm on holiday", or whatever it might be—as an indication that it would not be reasonable to think that the person would immediately be able to access the communication. That is one of the facts and circumstances to consider with regard to reasonableness. We were chary of making explicit references, because it is all too familiar to me, at least, for out-of-office messages not to have been switched off when the person in question returns to the office. I remember one message from a dear friend in Aberdeen that indicated that he was out of the office for September, or whatever it was, and it still indicated that he was out of the office for September come the following January—so, not very efficient. We were wary about making an explicit reference to out-of-office messages and the like, but we have a provision about reasonableness, which would certainly encompass the fact that an out-of-office message is an immediate return, so that base is covered. I noticed what the Law Society said about that, and I have scribbled in the margins, "That's okay."

Bill Kidd: Sometimes, it might not be an out-of-office message as such. In the Scottish Parliament a couple of weeks ago, we had to bring everything in the chamber to a halt because Microsoft somehow gave up in Japan, America and here—effectively, everything collapsed. How would that be regarded? Would it be similar to an out-of-office message?

Professor MacQueen: I think so. The bill refers to

"in such circumstances as make it reasonable".

Obviously, there would be questions about the proof of the date and time that a message was sent, but that information would be easily found by virtue of the fact that the necessary details would be in a person's sent box. The generality of section 13(3) should cover most conceivable bases.

Again, one of the things that the commission explored regarding the bill is that we do not want to be too specific because, inevitably, there will be a gap in the middle. Having a general provision such as this for the kinds of circumstances that we are talking about is preferable. If a dispute breaks out, we would leave it to the judge, ultimately, to decide what is reasonable. If I may say so, it is the judge's job to take those kinds of decisions.

Bill Kidd: If it is too specific, it would leave nothing for lawyers to argue with each other about, anyway. [*Laughter*.]

Professor MacQueen: Possibly. They could still argue happily about what is reasonable.

Roz McCall: Hello again. Your opening remarks explained the information on the current problems with the battle of the forms very well, which I appreciate, so I will not go into that again. Equally, another of my questions was about breach of contract, which you also covered in your opening remarks.

What is your view of arguments made in response to the call for views that guidance will be needed on the legislation, for example on how the new rules will interact with areas of contract law that remain governed by the common law?

Professor MacQueen: I hope that it would not be too difficult, because the slots that we are looking at are fairly readily identifiable in the present law, and one simply puts this new unit, as it were, into place. I am sure that training and familiarisation will be required, and people like me are very happy to provide it. Actually, I do not really do that any more, but I am sure that colleagues from universities behind me are well accustomed to delivering update courses or things of that kind, so I do not think that there will be great difficulty. I am encouraged by the fact that many submissions seem to recognise that this is not a radical change that requires rethinking of everything one had ever previously thought about contract law—it just clarifies.

Roz McCall: That is excellent.

Katy Clark (West Scotland) (Lab): Can you explain whether the new rules on contract law will apply only to contracts that are entered into after the bill comes into force?

Professor MacQueen: I cannot as such, because that is not my responsibility. What will happen, if I have got it right—I could be corrected if I go wrong here—is that the bill, if it is passed by Parliament, will be brought into force by statutory instrument, and the statutory instrument will spell out what the transition provisions are. I think that the answer is reasonably obvious, but I am a simple professor, not a parliamentary draftsperson. The answer is that it should apply only to contracts that are in process of formation after whatever date is chosen, and likewise with the breach of contract provisions. That is in the hands of either the parliamentary draftsman or the Scottish Government lawyers who draft the statutory instrument.

Katy Clark: Is your presumption that it would not apply to pre-existing contracts?

Professor MacQueen: No, definitely not. I am strongly against that sort of thing.

Katy Clark: What is your view of the Scottish Government's proposal to amend the law of retention at stage 2?

Professor MacQueen: I am a fairly unqualified supporter, because I was heavily involved in the consultation that preceded the production of the amendment. In the 2018 commission, we thought of putting in provisions on the law of retention, because we thought that it was a bit of a mess. By setting out in the report that it was a mess, we thought that it would get picked up in the courts and the courts would then make their statement. Unfortunately, the case that was decided almost immediately after I left the commission, J H & W Lamont of Heathfield Farm v Chattisham Ltd, showed division of view. There were three different judgments. They all reached the same result, but by different routes. It was at that point that I thought, "We cannot depend on the courts to pick up the clear messages from the commission. We have to bring it forward as legislation," and I was delighted when the Scottish Government proved amenable to that proposition.

My colleague Lorna Richardson, who will be giving evidence in the next evidence session, is probably the principal inspiration behind the bill, so I am sure that she will be able to answer questions more fully than I can.

Katy Clark: What is your view of arguments made in responses to the committee's call for views that there should be a right to contract out of any new rules on the law of retention? Have you considered that?

Professor MacQueen: Yes, I would support that. It should possibly have been made clearer in the amendment itself, but part 2 of the bill has as its opening that everything is subject to the parties' agreement, and that is what I would say. One thing that parties will have to think about is how clearly you have to exclude that statutory provision. There has been a bit of unclarity about how you exclude the law of retention at common law. Nobody doubts that it is possible, but some of the attempts to do so have foundered when they got into court.

The onus will be on the drafters of contracts to be clear about what they want. Otherwise, I have no problems with subjecting the provision to the regime that applies to all the rest.

10:15

Katy Clark: Are there any other comments, arguments or drafting suggestions that were made in response to the call for views that you think are worth highlighting or that you would support?

Professor MacQueen: Some are certainly worth considering. I have submitted three suggestions to the Scottish Government team and, having read the submissions, there are one or two that I would like time to think about. On the whole, the issues that are raised are fairly minor. For example, there is a proposal to change "proposer" to "offeror" in section 4. I can see that that might be helpful, but such things need discussion and testing.

Katy Clark: There are quite a few suggestions regarding changing the terms that are used. Are you in favour of those?

Professor MacQueen: I am open to the terms being changed. I have a lot of question marks and notes saying "No", "Maybe" and so on in the margins of my print-outs of the submissions. They are issues for discussion. The crucial thing is that any changes should be helpful to the bill.

The Convener: One of those suggestions was from Sirko Harder, from the University of Sussex, who argued that the term "rescission" should be replaced by "termination", as that would make Scots contract law more accessible to the international business community. I know that one of the reasons why the committee's remit was expanded to include SLC bills was in order to support the Scottish economy and make Scotland more open and welcoming to the business community.

Professor MacQueen: Absolutely. Perhaps I should have addressed that in my opening remarks. If you read the business and regulatory impact assessment report, you will see that that purpose was set out at the very beginning of the process, with a Scottish business law experts group making recommendations in 2008.

I would favour using "termination" instead of "rescission". Rescission is used in the bill because that is a term that lawyers are familiar with. However, in the more ambitious moments of the project, we talked about trying to change the terminology. Had we dealt with rescission, we might have used "termination" in its place. In the end, however, what we have is a bill that will reform certain areas. It was not really possible to tack on to that a comprehensive reform that would bring the terminology up to date. It is the sort of thing that might well be done if there were to be a further exercise on the review of contract law. However, at the moment, it is not really possible to do that with the particular type of bill that we have in front of us.

On retention, we had a notion of using terminology such as "suspension" or "withholding performance". That kind of language appears in the substantive text, but we did not seek to change the technical term that is used in relation to that particular area. Obviously, by not changing the technical term, we emphasise the continuity, which was the subject of Ms Clark's question earlier.

In my ideal world, "termination" would be used, but we are not quite in an ideal world yet.

The Convener: As we have no further questions, I thank you all for your evidence this morning, and I thank you, Professor MacQueen, for your offer to send over the paper that was mentioned.

Professor MacQueen: I will do that—do I send it to the clerk?

The Convener: Yes, thank you. We may be in touch with you with some further questions.

Lady Paton: I thank the committee for giving us this opportunity to contribute to the debate. It has been a pleasure taking part in your proceedings.

The Convener: Thank you. I will now suspend the meeting briefly to allow a change of witnesses.

10:19

Meeting suspended.

10:23

On resuming—

The Convener: I welcome our second panel of witnesses, who are Lorna Richardson, senior lecturer at the University of Edinburgh; Dr David Christie, associate dean for academic development and student experience at Robert Gordon University; Dr Jonathan Brown, lecturer in Scots private law at the University of Strathclyde; Professor Stephen Bogle, professor of law and interpersonal justice at the University of Glasgow; and Dr Hamish Patrick, a member of the banking, company and insolvency law sub-committee of the Law Society of Scotland. I welcome you all to the meeting. You do not need to press any buttons, as the microphones will be sorted out for you. If you want to respond to any questions, please just raise your hand or indicate. There is no need to answer every single question if you do not feel that it is for you.

With that, we will move straight to questions. First, can you set out your experiences regarding contract formation and give the committee some examples of how contracts are formed in different sectors—for example in relation to construction, financial services and so on? We will start with Dr Patrick.

Dr Hamish Patrick (Law Society of Scotland): I am a solicitor in private practice with Shepherd and Wedderburn. I am a finance lawyer, so a lot of my experience—of more than 30 years—has been in relation to financial sector contracts of one sort or another. People will enter into a whole spread of different types of contracts, from the retail consumer or customer level up to the more sophisticated and complicated contracts that large businesses, government bodies and other entities enter into with each other.

For many contracts at the more sophisticated level, a lot of what is in the bill will be contracted out of, in effect. Most commercial contracts are not formed by offering acceptance; they are formed by means of a written contract signed by both parties. The contract itself will not normally come into effect until there is something like an agreed effective time concept. Everyone will sit on a conference call or a Teams call and will agree that things will all go live at that time, or that nothing will go live until everything goes live. At the more sophisticated level, various parts of the bill will not happen that way.

That also goes for some of the online stuff. There will be framework agreements under which contracts will be formed under a given system. For the various online trading platforms, you will have a framework agreement to enter into in one of those ways, and you will then enter into transactions under that framework by means of a mechanism that has been set up. You will click—or something like that. We have had some discussions already about what an acceptance is when you have emailed it. Will clicking “I accept” be the same? I agree with Professor MacQueen that it will be. There is a broad expanse of different sorts of contracts.

Similarly, on remedies, retention and so forth, the bill clarifies what is there already at the less sophisticated level. It changes some things in a manner that makes them more predictable for normal users—for small businesses and for individuals in their personal lives. It will probably work as people may predict, without their having to read and understand it. A lot of the result works for a lot of commercial situations.

At the more sophisticated level, there will be a lot of detail, including on retention, rescission and so forth. There will be lots of events, rather than breaches. Termination events, events of default and a whole series of things can happen, which may or may not be a breach of contract and which may or may not have a given event. We must bear in mind that it is not always straightforward to say that something is a breach of contract or not a breach of contract. Almost every breach of contract can be rewritten as an option or a termination event—for example, I could say that I will get planning permission in order to have a development go ahead and, if I have not got planning permission, I am in breach of contract. Alternatively, I could say that the development will not go ahead unless the condition of obtaining planning permission has been satisfied.

All those things are a bit more complicated in the larger commercial context: it is not simply a matter of breach. I would be interested to hear the comments of others about things such as rescission and termination. I might have got this

wrong but, in the old days, a contract was rescinded for a breach and, if there was not a breach, a contract could be terminated as a consequence of an option or a right to terminate.

10:30

We have to consider all those things. In sophisticated contracts, the various consequences of a breach or termination event will be set out in copious detail. There will be various variants, depending on the situation and who is in breach. At the moment, the issue that is covered in section 17 regarding not being able to do stuff because both parties are in breach does not happen in sophisticated contracts. The International Swaps and Derivatives Association standard agreement for derivatives and swaps contains huge amounts of detail on what happens in a spread of different situations—when one party is in breach, when both parties are in breach, when both parties are or are not in breach for a given reason, when a force majeure event is or is not a breach and so on.

From my perspective, the most critical issue is that what is in the bill can be contracted out of. At a large commercial level, that is critical.

The Convener: Does anyone else want to deal with my first question?

Professor Stephen Bogle (University of Glasgow): I thank the committee for inviting me.

It should be emphasised that a lot of the bill will not affect sophisticated commercial parties—whether they are in the construction industry, financial services or other areas in which there are high-value transactions and parties have control of the formation of contracts—but the default provisions will help small and medium-sized companies.

The key thing is that the provisions are based on solid principles of Scots contract law and on common sense. Of course, the bill is not articulated in language that you would use when talking to your friends in the pub, but the basic underlying law, which will, I hope, be passed, is about basic understanding. Hector MacQueen spoke about school-ground morality—what the bill does is, I hope, very basic, so that parties are not surprised by the outcome of the default rules if they do not have the benefit of legal advice.

In answer to your question, although I have not practised for 15 years—partly because my research notes in private practice were too long—I have researched this area for 15 years. The commission's proposals would not surprise people in the international community outwith Scotland. Over a period of 10 years or longer, the commission has looked at commercial instruments that reflect the standard operating practices of large organisations or the conventional ways by which people contract internationally. The proposals are a very modern and commonsense way of doing things.

I will stick my neck out here by saying that I think that we have a problem in Scotland in relation to the volume of case law that goes through the Court of Session. I do not think that we have enough case law to give lifeblood to a common-law system. I will not get into the statistics, but there is a lack of decisions that would give regular certainty on what the principles are. The principles are clear, and academics such as me can tell you what they are, but members of the business community need regular cases in order to feel certain, and I do not think that we have enough such cases in Scotland.

The proposal that is on the table will be really beneficial for the Scottish economy, and it will send out a clear signal that we are modernising and that we do not need to wait around for four appeal cases a year. In England and Wales, about 80 cases in the Court of Appeal might touch on the issue, whereas the figure is four for the inner house of the Court of Session in Scotland. That is not enough. The bill will, I hope, give certainty and will not surprise anyone.

The Convener: Thank you, Professor Bogle. Those remarks have stimulated others on the panel, who I will bring in in a moment. Your final point also came up clearly in the written submissions that we have before us today.

Dr Christie was the first to indicate that he wants to speak.

Dr David Christie (Robert Gordon University): I come at this from a construction law perspective and will explain why that is relevant here. At the top end, as Professor Bogle and Dr Patrick have said, big construction contracts will be technical and commercial contracts, but residential construction is the real fulcrum for testing the reforms, because that is the arena in which lay people contract with small and medium-sized enterprises. There may be written terms of contract, but those will not necessarily be that sophisticated, and, in that area, the economy of going to litigation is marginal. If you have an extension built on your house, the cost will, depending on which part of the country you live in, be at about the point at which it would be uneconomic to sue if it all goes horribly wrong. In that case, you need clarity in your contract so that you can make it work and keep the relationship going rather than having to go to court.

One question about the workability of the reforms comes from the issue of clarity. It sounds as if the committee is very concerned about clarity.

One basic point is whether the reforms will always be clear to a lay person. Perhaps not. Are they clearer than going through Professor MacQueen's excellent textbook? Yes, they are.

Dr Jonathan Brown (University of Strathclyde): Unlike Dr Patrick, Dr Christie and Professor Bogle, I have not been a practitioner and lack that experience. I am more of a thoroughbred academic, but I am in complete agreement with what Dr Patrick said about the central thrust of the useful element of the bill being that it would allow for contracting out of its provisions. Fundamentally, with sophisticated contracts, the bill really will not govern the rules of the game, but party autonomy will. That is crucially important.

I am in more disagreement with Dr Christie and Professor Bogle in respect of whether the legislation is appropriate in its current form, as will be clear from my submission. A lot of people will be thinking about the bill in terms of how it will affect the economy and businesses at a higher level. You asked about what contracts are. Dr Patrick alluded to the fact that, if you bought a can of Coke on your way to work this morning, you entered into a binding consumer contract. That is not something that the man in the street would intuitively regard as being a contract, but it is a contract nonetheless.

An altogether more unusual example that is well known to legal academics is the case of Robertson v Anderson from 2003. Two women who attended the bingo agreed with one another that they would split the prize money if one of them happened to win it. Lo and behold, one of them won and the other came calling for the money. It is safe to say that they are no longer friends, because that wound up litigating all the way to the Court of Session, where it was ultimately held that, although there was no commercial dimension at all, it was a binding contract. As Professor MacQueen eloquently put it, there is a kind of playground morality at the very root of the Scottish legal system that says that agreements must be kept and that you must do what you say you are going to do.

I disagree with Professor Bogle about the utility of the legislation. I take his point that England has the advantage of having a great deal of litigation in which a great many cases are deciding new matters as they come up. If we look at the common law of Scotland as being driven entirely by case law, we would appear to be at a disadvantage. It is certainly the case, as Professor Reid recognised in a Festschrift a number of years ago, that the engine of the Scottish mixed legal system has been driven by a big-C common law case-based approach. However, it is still a mixed legal system, which has two consequences.

First, we can and should rely more on learned writings about the law. There are many good academic works that debate and clarify the law in a way that is not prescriptive and that allows the courts to do what Lady Carmichael did, which is to say, "Here is the common sense, and here is how we can resolve the issue without recourse to prescriptive law that tells us what must be done." As Professor MacQueen says, you cannot legislate to say, "Just use common sense," but the courts can, in the absence of legislation, apply common sense.

Secondly, I disagree with Professor Bogle that the lack of cases in Scotland is a bad thing. The lack of cases is not as much of a problem as it may seem to be. More than that, the lack of cases is possibly indicative of the fact that the common law, as it stands, is working quite well. That is because there is litigation only when things go wrong and there is disagreement. Limited litigation is indicative of there being little uncertainty. As Lord Monboddo pointed out, points that have never been decided are probably the most certain in our law.

That is my opening salvo, as it were.

Lorna Richardson (University of Edinburgh): I will pick up on a couple of points that were made by my colleagues on the panel. What currently happens is that commercial parties that are well advised can contract out. The bill will not change the way that parties that have the benefit of legal advice or that are complex commercial entities will operate. As has been indicated, it is important for practitioners to feel that they can make their own rules. As Professor MacQueen said in the previous evidence session, the bill will allow that to happen in almost all instances.

However, complex commercial contracts still sometimes end up in court. There are a number of reasons for that, and you cannot deal in legislation with every situation that might arise. There are still some parties that end up in court that have complex contracts in relation to certain parts of the law of contracts—some of which are covered in the bill—and that have been legally advised by magic circle law firms. Therefore, there is a place for such rules as a back-up and to provide a set of default rules that are available to parties should they need to use them.

I also reiterate the point that was made by some of my colleagues on the panel that the law might not necessarily be clear and precise, and that people who are not lawyers may not always be able to look at the facts and say, "The outcome will be X." However, the law will certainly be much clearer with the bill than it is at the moment.

At the moment, if you need to understand how a contract is formed, you need, at the very least, to

be able to buy a textbook and to know which textbook to buy and what the terminology means. There are problems not just in getting people to understand those materials but to be able to access them. Together with the explanatory notes, the bill will go some way to helping someone who seeks to understand, at least at a basic level, what their rights are, whether a contract has been formed and so on.

To pick up on the final point that Dr Brown made, it is not the case that litigation does not happen because things are clear; litigation does not happen because it is expensive. It takes a long time and it costs a lot of money. Unless you have the time and money and unless the claim is worth it, you will simply not take those steps and risks.

The Convener: Thank you. That was a helpful answer.

That brings me to question 2. I was going to ask whether the proposed reform in front of us is necessary, but you have already answered that clearly. Will the bill provide clarity, transparency and certainty? I think that Ms Richardson highlighted that in her comments a moment ago.

Lorna Richardson: It will clarify certain parts of the law. As Professor MacQueen said in the previous evidence session, the bill does not provide a code and it will not be comprehensive or cover everything. However, it does pick up on what was highlighted in the Law Commission's work and the responses to its consultations, and it provides clarity in those areas that were causing difficulty or where there was real doubt. In other words, it sets out in clearer terms the issues that have been difficult.

10:45

For example, with the lack of cases going to court, what happens with emails? Are they subject to the postal acceptance rule? Why should they be, or not be? Emails are not instantaneous—there is a delay with them—so in that respect they are like the post; however, they are not the post. Such issues have not been clarified in Scots law. They have been clarified to some extent in English law, but only in very low-level cases.

The proposed legislation looks to deal with issues that have been tricky and unclear. It sets out the law as accessibly as it is possible to make it, for those who are minded to understand it, without trying to go into absolutely every situation, which is just not possible in legislation. I now think that someone without a legal background would be able to understand it, with a bit of work.

Also, the rules will be there not just for now, but, I would hope, for some time. We are now seeing not just emails but platforms and apps being used to enter into contracts. If the rules are very specific, they might become outdated very quickly, and that is not ideal.

A balance needs to be struck if we are changing something because it has been unclear. However, postal acceptance has been a tricky rule for quite some time now. It does not fit well with how we deal with other types of communications. In most cases, a contract on an offer that does not reach the offeree would have no legal effect; however, the postal acceptance rule creates the one situation in which something that does not make it to the other party can have such an effect.

The bill is clear about what it seeks to achieve, and it does so in a targeted fashion. I think that it is as clear in its terms as we can hope for legislation to be. It will cover a wide variety of contracts.

The Convener: Thank you for that. The comment that you just made about legislating for every eventuality is something that we heard in the previous session, too, and it is fair to say that, if the Covid experience proved anything, it was that, no matter who is in power, Parliaments cannot legislate for every eventuality. That became crystal clear very early on.

Dr Christie: I want to pick up on points that have already been made by Lorna Richardson and Dr Patrick. Given how technology is changing, this reform will help future proof the law.

The dynamic of offer and acceptance has been discussed. Reflecting on that terminology, I think that we have to use it, because that is what the law understands—the idea of offer, counter-offer and acceptance. However, that is not really how many commercial contracts are formed nowadays. We saw that in the recent inner house decision on the battle of the forms; people were basically emailing each other their standard forms and conditions, but nobody was really paying attention.

Thirty years ago, you would not have been able to generate a multi-page set of terms and conditions and accidentally send it, because sending it would have taken so much time and effort—you would obviously have had to have a degree of intentionality. That is changing. Now there is cloud-based negotiation, with everyone on the same document at the same time, and contracts can be formed on social media and through WhatsApp communications.

The way in which technology is speeding up communication is really relevant to the formation of contracts. Professor Bogle wrote the book on enlightenment values and the law of contract; what we are doing now is taking law that reflects the best of those values and applying them to a modern way of communicating, and the bill helps with that.

At the end of the previous evidence session, the committee discussed with Professor MacQueen whether there will be a need for further reform. We need to keep an eye on how, for example, artificial intelligence might change the intention of parties. I go back to the concerns that Professor Brown expressed—I am sorry; I mean Dr Brown. He is not yet a professor—one day, perhaps. [*Laughter*.] His concerns about the intention of parties and other forms of voluntary obligation might need a broader look when AI really gets going, because we will need to ask at what point people's intentions become subverted by generative AI.

However, we are not there yet. We have to deal with the best guess that we can have at the moment, and that is what this reform is trying to do—to future proof the law.

Dr Brown: Going back to what Lorna Richardson was talking about, I think that sections 2 to 9 of the bill provide an uncontroversial presentation of what the law already is. It very much enshrines, in statutory form, what is generally well understood to be the case. I do not think that it necessarily clarifies anything, but it definitely spells everything out all in one place.

However, where we begin to run into bother, in my view, is section 10, which I read as a codification of the decision reached in Countess of Dunmore v Alexander from about 1830. There is an issue where an offer and the withdrawal of that offer, or an acceptance and the withdrawal of that acceptance, arrive at the same time, with the requisite question of what effect it has on the relationship between the parties.

The thing about that decision, which, as I have said, section 10 appears to codify, is that it is not very well regarded. I do not think that anyone could make a serious, plausible argument that it would be followed today, unless the exact fact pattern were to recrudesce. As Professor MacQueen himself indicated in his writings, the basis of the decision is not actually entirely clear, and as other commentators—such as, I think, Gerhard Lubbe—have indicated, the decision is not very satisfactory and is one that, as TB Smith has made clear, was explained very much on the basis of its very special and very particular facts. There can be a utility to legislating on general principles, as sections 2 to 9 show, but section 10 would involve bringing in and solidifying what is quite a controversial rule.

My bigger concern relates to section 13 and what is associated with section 14, precisely because of what Lorna Richardson and Professor MacQueen indicated previously—namely, that it is quite easy for people to get hung up on the postal acceptance rule as an exceptional rule connected with His Majesty's postal service, and on the idea that anything that is not about giving mail into the hand of His Majesty's postal service is distinct and so the rule should not be applied and so on. That can lead to controversy, but the issue that I am really raising is given quite practical effect when one considers the issue that Bill Kidd highlighted of the application management service going down. If Microsoft is not able to facilitate the exchange of messages, the whole world comes crashing down.

That pointedly gives rise to an issue in respect of section 13(3), which says:

> "notification 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".

For one thing, if the AMS is down, notification does not occur, as a matter of fact. Therefore, you run into a real issue, and it is compounded by the fact that the person who attempts to send notification might be under the misapprehension that the message has, in fact, been sent.

We have to trust these facilitators to actually do the job that they are there to do. It is worth indicating that, for instance, Mr Scott Wortley at the University of Edinburgh has taken issue with the postal acceptance rule, because in the 19th century, the postal service ran multiple deliveries in big cities every day. It was not snail mail as we understand it now; it was very much an integrated system in which messages were conveyed not instantaneously, of course, but really very quickly.

In the case of Thomson v James, the court was flabbergasted that a letter could be posted and not be delivered, and it was talked about as being an utterly exceptional occurrence. Perhaps today we would not see it as necessarily exceptional that a letter would be delayed, take time to be delivered or not appear at all, but I certainly think that, today, we would regard it as quite exceptional that a message that you sent on WhatsApp or by email did not go through. An issue, then, arises with section 13(3), which is this: who is it "reasonable" to?

I understand that, if we, as many have, look narrowly at the postal acceptance rule as a particular doctrine that is concerned with the post, then spelling it out that it will be chucked out, because it is an archaic rule that does not make sense, is defensible. However, the bill seeks to clarify when an agreement will be held to have been reached. Section 14 becomes redundant if the bill is doing its job right, because the bill should explain the effect of posting a letter just as much as that of sending an email.

Moreover, with regard to section 13, it has not fully been appreciated that in construction contracts and complex contracts, those things simply do not matter at all because, as Dr Patrick has indicated, most people will just contract out of

those provisions anyway. I believe that section 13 will change the default rules quite considerably if it says that the notification unquestionably needs to take place, because it will mean that the common law's ability to develop with reference to the broader law of obligations will be stymied.

For instance, in the case of Cawdor v Cawdor Castle (Tourism) Ltd in 2007, which was concerned with unilateral promise, Lord President Hamilton indicated that, although the question whether a promise has in fact been communicated to and received by the other party is an adminicle of evidence that will very much help the party who wants to rely on the promise, if they can show that it was delivered to them, it is no more than that. Communication is not necessary to engage.

To sum up, then, in relation to the situation in which one party has made an offer to another at a distance and expects the other to reply, not in person or verbally, but by way of some messaging service, we are dealing with a policy question of who bears the risk of something going wrong with the messenger or delivery platform. The postal acceptance rule is based on what I believe the Lord Chancellor referred to in Dunlop v Higgins, which is, in essence, the commonsense principle—again, courts can talk about common sense, but legislation cannot. The commonsense principle is that someone who puts a message in the post—or, to update it for the present day, someone who sends a text message or an email—cannot really be held at fault if the service provider fails to do what they should have done.

As for the allocation of risk, it seems to make sense that the default rules—whether or not they are contracted out of—should be that the person who says, "I want to hear whether you agree to these terms, and I want you to signify that you will agree to them," should be the one under the risk of the other party accepting. The principle as it stands, and the principle that would be retained by the bill, is that the person who makes an offer can withdraw it at any time prior to acceptance. If we are to move to setting out in statute that actual notification of withdrawal is required, we will end up with the person who makes the offer literally holding all the cards, and I do not necessarily think that that is the fair position to wind up in.

Professor Bogle: Jonathan Brown has given quite a sophisticated analysis, which is workable, and we benefit from his taking us through it. However, if we accepted his proposal, we would leave today potentially keeping the postal acceptance rule, which, for me, would be quite a startling outcome. Let us consider the Vienna sales convention—that is, the United Nations Convention on Contracts for the International Sale of Goods. Goods are sold internationally using either English law or that convention; section 10 of the bill is what is in the Vienna sales convention, which does not have a postal acceptance rule—that is clear.

I share Jonathan Brown's respect for our heritage and for the prestige of earlier decisions, as well as for where we have come to with Scots law. He has given a good explanation of some of the reasoning behind the approach that has been taken, and we should be proud of that history. However, although that approach worked well in the 19th century, and kind of worked before email, we are in a different situation in 2025. We should be proud that we managed to maintain a common-law system that could deal with that for a while, but now, with the benefit of the Scottish Parliament, the Delegated Powers and Law Reform Committee and an exceptionally thorough SLC project, we can create legislation that is modern and contemporary and which keeps up with international standards in terms of the expectations of parties when it comes to default rules.

We might be leaving behind our heritage in one way, but we are also continuing it by allowing our system of contract law in Scotland to thrive. I think that legislation is the best way for us to do that in the 21st century. I disagree with Jonathan, but I do admire his respect for the heritage of Scots common law.

11:00

Dr Patrick: I will just reiterate a number of things that I said at the outset. If I had been asked to give a formal legal opinion on a number of the relevant issues—as I quite often am—I would have written down quite a lot of the stuff that is in the bill, because it reflects what we think quite a lot of the law is.

There are a number of aspects where specific changes have been proposed to deal with certain problems or to update certain things in this context, and the postal rule is one such aspect. I completely agree that there is a risk allocation in that regard, but I think that the current risk allocation is wrong. It brings me back to Professor MacQueen's argument about the rules of the playground: what would people predict the answer to the issue to be? Are you going to be taken by surprise when you discover that something did not come through the postal system and, lo and behold, you are now bound by an agreement when you have acted on the offer not appearing at such-and-such a point?

That is probably all that I have to add. We are picking off and clarifying specific things to make the results more predictable for people in normal circumstances.

The Convener: The bill is quite limited in scope, as we discussed with the previous panel. Your written submissions are quite clear about what you think about that, but it would be useful to get on the public record your thoughts and views with regard to the limits of the bill. Should the bill be broader, or should a different approach taken with regard to wider contract law?

Dr Christie: The bill consciously excludes issues that are relevant in construction contracts. In particular, issues around the battle of the forms are not dealt with in the bill. The Law Commission has also discussed the issue of liquidated damages, and I am of the view that it is correct and that they should stay out of the bill. The general trend in the case law is away from creating little bodies of rules within contract law. For example, a while ago, when we were at university—and some of us were at school—the rules around the battle of the forms would be in a little chapter in a book that simply said, "Here is the law around the battle of the forms."

The general trend is to try to simplify the law of contract around a clearer assessment of the parties' intention in a particular situation. In my submission, I included a reference to a recent inner house decision concerning the Caledonia Water Alliance. That was a battle of the forms case, but the court went down the road of considering the more fundamental idea of whether the parties agreed a contract and what the terms of that contract were. We do not need to have a separate body of rules around the battle of the forms on that analysis.

The issues around things such as liquidated damages speak to an interesting feature when we look at the development of common law in the UK as a whole. The sort of areas that you might want to legislate on are areas of controversy, and they are such across the UK. We also have the benefit of recent UK Supreme Court decisions on them, because the UK Supreme Court is taking up such issues.

There is relatively recent case law on liquidated damages in Cavendish v Makdessi that the Law Commission has considered, and that has seemed to prove a workable solution. We have recent case law—well, it feels recent, but it was 10 years ago—on the interpretation of contracts, which seems to provide a reasonable basis for moving forward, so we would not necessarily want to run against that trend.

Last week, the Supreme Court distinguished the law of Scotland—or, at least, it said that something that had been treated as the law of England was not the law of England but that it remains the law of Scotland. There are areas of difference.

It comes down to questions about the underlying values of contract law, which are very interesting, but maybe not for today. The general scope of my answer is that we should fix the things that we need to fix, but we should let the law continue to develop where it is developing. That is a sensible way forward.

The Convener: Professor Brown.

Dr Brown: I am not a professor yet, unfortunately—I am just a doctor.

The Convener: Sorry.

Dr Brown: I am in complete agreement with what the newly minted Dr Christie said, but although my view is equivalent to his and I say let us fix what needs fixing, I am not convinced that the bill will fix anything that needs fixing.

As I said, the law is already clear as it stands, until you get to sections 13 and 14, in particular, at which point you will be making a policy decision, on which people can and will have different views. However, that is not necessarily a problem for the law; it is a matter of politics, so I will leave that to you.

The Convener: Professor Bogle.

Professor Bogle: You can just call me Stephen—that is what my kids call me.

I completely agree with David Christie's point, particularly in relation to the recent case law, so I do not have much to add. However, I will say that the strategy is sensible. Execution and counterparty legislation was introduced in 2012, followed by third parties legislation, and now we have this. I do not want to say that we should do this in a piecemeal way, but doing it a strategic way allows us to look at every individual reform in a clear way and build up slowly. Potentially, in 20 years' time, there might be more. I agree with what David Christie said about the decision on the individual bill but, overall, what we are doing is sensible.

Lorna Richardson: I echo the comments that have already been made. As Professor MacQueen indicated, there is a shortage of time for some of these matters, so we should be sensible and make the most use of the time that we have by fixing areas where there are problems.

In relation to other areas that were looked at by the Law Commission in its discussion papers and the report, there have been issues with some areas but, with one exception, they have been developed appropriately by the court. The bill is targeted and looks at particular issues, and it seeks to do so in a way that, as Stephen Bogle indicated, has become familiar work to the Law Commission.

Dr Patrick: I am in favour of an incremental approach, rather than a piecemeal one. The Law Society's submission indicated that there were various other pieces or increments that might be added in relation to interpretation, the battle of the forms and remedies, but, equally, I agree with Professor MacQueen's view that we will never get there with it all and the best is the enemy of good, and so on. Those other fires are not burning quite as brightly. We might come on to some of them. The courts will solve some of them, so we will not do so yet, but doubtless we will be considering other increments at some point in the future.

Professor Bogle: Can I clarify something? My kids call me "Dad". [*Laughter*.]

The Convener: I am not calling you "Dad".

Professor Bogle: What I meant to say was that my students call me Stephen, but I think that it shows you how much I care about my students that I misspoke by calling them my children.

The Convener: I will come back to Dr Patrick for a moment. You touched on the Law Society's submission and used the word "incremental". Does the Law Society consider that, if the bill in front of us deals only with certain remedies for breach of contract, it could lead to fragmentation and legal uncertainty?

Dr Patrick: I suspect that it would not do that to a great degree. Rather, as Professor MacQueen, the areas that are being looked at are relatively discrete. For example, when you start creeping into the area of buying off retention claims with damages, is that a mixing of remedies?

Overall, I do not think that fragmentation is a problem. The law is fragmented in the sense that part of it is sitting in the common law and part of it is sitting as fallbacks in the legislation. I do not think that fragmentation is an issue that we need to be overly concerned about.

Bill Kidd: I do not have a great deal to ask because, between you, you have covered such a vast area. That is great—it is why we are here.

An issue has been raised at one point in relation to the battle of the forms. Do you think that section 2(2) of the bill could provide a solution to the current problems in contractual negotiations that are caused by the battle of the forms? Maybe I have asked something that naebody knows.

Dr Brown: I am sceptical—you might say that I am a bit of an outlier among the five witnesses giving evidence. I am sceptical of the legislation; it might not surprise you to hear that I do not necessarily think that section 2(2) could do that—and, more importantly, I do not think that it should or should try to do it. The point that Professor MacQueen raised earlier is a good one: he said that, in her judgment, Lady Clark of Carlton solved most of the issues. As Dr Christie indicated, the more recent Caledonia Water Alliance case took the same kind of trajectory. That shows that what might at one time have been perceived to be a problem is not a problem now.

More pertinently, that problem has been solved by virtue of the fact that, as I indicated earlier, the courts can use common sense to solve problems as they come up. Legislation cannot do that because, by its nature, it is general—it does not deal with the particular situation. This kind of situation is best left to deal with using common sense, because—in this, if nothing else—common sense appears to be prevailing.

Dr Patrick: It is an interesting question. We will run both sets of standard terms through an AI comparison tool and see which terms are common to them both. I suspect that that is almost what the courts were doing to come to their sensible results.

What do you do with the contracts that have been thrown out because they say two things that are completely contrary to each other? Does that fall within the scope of section 4 of the bill, triggering the provisions in section 3? You could apply section 2(2) to battle of the forms rather than including something specific to say who wins the battle of the forms. As others have said, that is the way that the courts are going anyway, so whether there is something in the bill about it or not, there will probably end up being a similar result.

Bill Kidd: On the basis that you are all involved in the educational side of law, would it be useful to train students about such elements? Even if section 2(2) does not resolve everything, would it be useful to give them guidance on that and a general idea for where to look? That is going off at a tangent, but it might be interesting to know.

11:15

Dr Brown: I do not necessarily think so. One of the main things that I put across in my submission was that, in terms of education, when you are dealing with a subject such as Scots private law and not merely contracts within the broader framework of Scots private law, it is more useful to look at the points that are general and have implications and effects far beyond the narrow situation that you are dealing with.

For instance, this afternoon I am meant to be teaching an aspect of the law of trusts, which, in many cases, are typically formed by contracts. If you are dealing with succession, for instance, a last will and testament is dealt with via the creation of a written document. Those sorts of contracts and testaments, such as general contracts for the sale of land or anything else, have certain formalities that need to be observed under the

Requirements of Writing (Scotland) Act 1995. More than that, they are all general principles that apply, as Professor MacQueen very eloquently puts it, along with Professor Thomson in his book on contract. If you are dealing with the creation of an instrument of that kind, you cannot be doing something impossible, illegal or trifling.

All those features come up again and again in private law. From a pedagogical standpoint, it would be quite harmful to say that we take a contract and remove it from the fabric of those general principles of private law, and that we have in section 2(2) the rule that relates to the formation of contracts and only the formation of contracts—forget about trusts, promises, succession and everything else. That would be unhelpful.

More than that, as I was taught the battle of the forms—it is stuck in my head and I remember it, so it must have been quite useful—if you look at the offer of acceptance analysis, either the solution could be that the winner is whoever fired the last shot, because you are operating on the basis that they sent their acceptance last, so a contract was formed and it can be treated as that, or, as I say, the much more pragmatic solution is reached, which is that you are acting as though you are in agreement, and therefore we can construct an agreement out of what you can be reasonably taken to have agreed to.

Lorna Richardson: I teach contract law to undergraduates, and I teach them that a contract is an agreement that is intended to have legal effect. I teach them section 2. I do not tell them that it is section 2, because it is not section 2 yet, but it is the common law of contract that parties enter into an agreement that they intend to have legal effect. Offer and acceptance is one way that we use to identify whether the parties have reached that agreement but, to my mind, section 2 is not restating the law in a way that is controversial. It sets out what the law currently is.

In relation to the battle of the forms, the offer and acceptance analysis has predominated to date, although not in the more recent cases. The court is saying that there has to be a contract: there has been performance of a contract, and we cannot say that that has happened for some other reason—it must be on the basis of the contract. The last shot rule has predominated in Scottish cases, which is the idea that, if you get your terms over last, the other party, by sending the goods or performing the service, has accepted them by their conduct. We are looking not just at what the parties are sending to each other but at how the parties are acting. Contracts can be by express terms but can also be inferred from the parties' actions.

The Scottish courts can use common sense to an extent, but we are bound by a system of precedent in Scots law. It is important to bear in mind the fact that it is not just that each case comes up and the judge can decide what seems more sensible in a situation. Courts and judges are bound by prior decisions that have been made higher up the judicial hierarchy. If some decisions are troublesome or difficult and are contrary to the expectations of people who are using the law of contract, whether they realise that they are using the law of contract or not, that is when we have an opportunity to step in. Although people might have queries about whether the law is sufficiently clear when it is set out in a bill and it does not deal with particular eventualities, we can and should do something with this opportunity so that we do not have rules in Scots law that people are shocked by, and that we undo or move beyond the types of rules that would cause someone genuine confusion or shock to realise that that was the legal rule that was applying.

Bill Kidd: There was a lot of nodding going on there, so thank you for that.

Dr Christie: Some of these things rely on somewhat outdated metaphors such as "battle of the forms" or "last shot", which come from a 20th-century approach to warfare. As Hamish Patrick said, the way in which parties contract nowadays is far more asymmetric, so it is appropriate that the legislation should help to move us past old metaphors.

Roz McCall: Hello everyone. I am not bothered about who wants to start, but I am looking for general comments on the bill's role regarding remedies for breach of contract. Who would like to go first?

Lorna Richardson: That part of the bill makes more changes, whereas earlier parts make some changes and include some points of clarification. The changes are necessary.

In relation to mutuality, we have had a number of cases in Scotland that have indicated that, if you are in breach of a contract, you cannot sue on that contract. That can cause windfall benefits. If party A breaches a contract and the consequence is £100 and party B breaches a contract and the consequence is £1,000, then the person who breaches and causes the loss of £1,000 gets a gain from the other party not being able to sue. That creates some difficulties, so what is proposed in section 17 of the bill would make it clear that the fact that you have breached a contract does not mean that you are out of that contract, and you can still rely on, and sue on, that contract. That provides clarification in relation to a number of cases that may have taken us down the wrong route in Scots law, creating some difficulty in practice.

The aspect of the bill that deals with the return of benefits received draws on the work of the draft common frame of reference, as Professor MacQueen indicated. There is seen to be a difficulty where there is unreciprocated performance from the other party and there are some rules to try to deal with that. We have some cases that are at a fairly low level at first instance indicating that it is part of the law of contract, but it has been a matter of doubt for some time, so this would move the law in the direction of saying that this is a remedy, and that the remedy does not sit in enrichment but sits in the law of contract.

The final issue relating to remedies is that of contributory negligence. The bill as drafted makes a clear classificatory point about something that has caused quite a lot of difficulty. There does not seem to be any controversy about saying that, if there is a breach of contract, and regardless of whether that is also a delict or a breach of a statutory duty, contributory negligence can be taken into account.

One thing that is missing and that has been alluded to as a possible area for forthcoming amendments is the idea of retention. There are a number of problems with the law of retention as it is currently understood. Professor MacQueen indicated that, shortly after the Scottish Law Commission had looked at that part of the law of remedies and produced its report, the inner house issued a judgment that, frankly, raised more questions than it answered. Instead of enabling the courts to move forward—as we have seen with interpretation, liquidated damages or penalty clauses—the judgment took a less desirable turn. The bill would give us an opportunity to deal with some of those difficulties in a remedy that is practical and useful. I would support that being taken into account.

Roz McCall: There might be another line of questioning a little later about future amendments on the law of retention.

Does anyone want to add anything to Lorna Richardson's comprehensive contribution about breach of contract?

Dr Brown: Some of the confusion has been in connection with why the bill deals with certain remedies and only those remedies. Many of the remedies that are being dealt with cross into judicial remedies. There is an element of self-help, but as Lorna Richardson indicated, a connection to the law of unjustified enrichment is also at play here.

One of my concerns with the bill is that it is about sequestering contract from the broader Scots law of obligations. I am concerned that the bill might continue to lead Scots practitioners down the wrong path of thinking about contractual remedies as having a degree of primacy, where, really, from the 1990s onwards, with the unjustified enrichment revolution, the law of unjustified enrichment could be prayed in aid in a broader range of circumstances. I am not as absolutely set on that compared with some of the other views that I have expressed, but that is an immediate concern that I have.

In connection with that is the observation that Dr Patrick made in his written submission about the amount of time that is available for submissions on the bill to be made. Combined with the fact that there is talk of amendments at stage 2, that leads me to be quite concerned that such an important area of the law is perhaps being dealt with in a bit more of a slapdash manner than it should be, given its importance.

Professor Bogle: The Scottish Law Commission considered these remedies and consulted on them widely. As has been explained, in 2018 the inner house made a decision on retention that made things considerably unclear, which meant that a lot of the research of the Scottish Law Commission was then pertinent to the amendment that is being proposed.

I think that this is about agility. I do not think that this is about being slapdash at all; it is about seizing a moment to clarify the law. I know that we are coming on to this, so I will stop, but it certainly seems to me to be a sensible way of proceeding.

Dr Patrick: I was only bothered about the retention at the last minute, when I saw it and thought, "What is this?" Obviously, the commission report has been there for ages. Otherwise, I am pretty much in agreement with Lorna Richardson. Clearly, there are various subtleties around the issue. If the remedy for rescission is kind of restitutionary, we are sticking people back where they were before, but for many contracts, that is not the answer. The legislation tries to do something about it, but it cannot do everything. What is proposed, which we will come on to, is helpful. Without the proposal, people could contract out and then say, "We are five years into this contract and you got a hospital off me. What are we going to do about it now, since you have rescinded the contract? We had better take the hospital to bits." There will now be a contract that says what happens in that circumstance.

Roz McCall: I understand.

Lorna Richardson: I do not think that it is fair to say that the reforms would be slapdash if they were brought in, given the work of the Law Commission and the consultation process that was undertaken last year by the Scottish Government on the draft bill and on retention itself. Yes, the consultation period on the bill after its introduction has been fairly short, but that was

preceded by quite a bit of consultation and discussion.

Dr Brown: I will jump in on that point—"slapdash" is definitely too strong a term, but it was said in essence not so much as a criticism of the work of the Law Commission or, indeed, the Parliament, but more in connection with the reality of the situation, which is that, although these consultations may take place, there is a general sense, given how busy absolutely everyone is, whether in academia or in practice, that a lot of folk will not engage with such a consultation process unless it seems to have a degree of immediacy and people think, "Oh, right, they are going ahead with this." My concern is that, for all that there has been a lengthy period, perhaps not everyone who may have had views submitted them.

I came in at a very late stage in the day, especially in respect of my submissions to this committee. I missed the boat on the call last year because I was too busy writing a book about exactly this subject. I am not saying that everyone is in that position but I know that some people are. "Slapdash" was not the correct word to use there; my point was not a criticism of the work of the Law Commission or the Parliament.

Roz McCall: Understood. Dr Christie, do you have anything else to add before I move on to the next question?

Dr Christie: No. Lorna Richardson's paper on retention is excellent and, as the foundation for the reform, builds on the Law Commission's work well. I acknowledge that Jonathan Brown regrets using the word "slapdash", and we can add Lorna Richardson's report into the mix of things that are not slapdash.

11:30

Roz McCall: I understand.

What are your views of arguments that have been made in response to the call for views that guidance will be needed on the bill—for example, on how the new rules would interact with areas of contract law that would remain governed by common law?

Lorna Richardson: The bill is not a new code. It slots in rules that I suggest are fairly uncontroversial into the current common law, so the common law will continue to operate around it. That is clear from the drafting of the bill, which uses terms and concepts that are familiar to contract lawyers.

Lawyers are sometimes a bit reticent to change. There will be something new and we will have to see how it works but the bill is not particularly problematic. It is something new to get to grips with but it is designed to sit with the existing law. It is almost like there has been a new case and the question is how it fits into the existing law. You would need to do the work and understand it but it is not especially problematic.

Dr Christie: It is quite a wordy bill but that is because it tries to do something a bit different from most legislation. Most legislation looks to solve a problem or to tell people what they should or should not do, whereas this bill sets up the conditions in which things happen legally. To capture the variety of things that it does, it needs to do what it needs to do.

I have been thinking about how you could try to simplify the bill but I do not think that you can. You have to go with the level of complexity that you have because, as Professor MacQueen said, the bill tries to capture common sense. Perhaps it tries to capture what common sense was in an era when you did not always have to spell it out, and there were codes of understanding—with high-context and low-context communications. However, in a world where people do not necessarily have the same understanding, the bill needs to spell out those things in a bit more detail, which it does. That is just the way it is because of what it tries to do.

Dr Brown: In respect of what Lorna Richardson said, a lot of the bill can be treated almost like a new case. That was a good way of putting it.

I come back to section 13(3). "Reasonable" is one of those words that lawyers love but I come back to the question: reasonable to whom? If the wording in that section was retained, the guidance would absolutely have to spell that out because what is reasonable to one party is not always reasonable to the other and what is reasonable to both parties might not be what is reasonable from the perspective of the judge or decision maker.

Professor Bogle: I do not think that guidance is necessarily needed because it is a solicitor's job to update themselves on developments.

Roz McCall: That makes perfect sense.

Dr Patrick: We do not need much guidance. I am not sure that I agree on the need to define "reasonable". That is what the solicitors and courts are for. I am not even sure that I agree that the bill is wordy. I draft lots of stuff that is far wordier. It is a model of clarity, in fact.

Roz McCall: I can see dissension in the panel. Thank you for your answers.

Katy Clark: What are the witnesses' views on whether the new rules on contract law should apply only to contracts that are entered into after the bill comes into force?

Lorna Richardson: That makes perfect sense. It would give people an opportunity to get up to speed with the changes. It would mean that, when somebody entered into a contract, they would have done it on the basis of the law as it was at the time that they did so and with the understandings that went along with that. To my mind, it makes sense that the bill's provisions would apply only to contracts that were entered into after the bill comes into force.

Dr Christie: Absolutely. That is not unusual. You always have it with contract law reform. It might feel a bit weird, but there is always a transitional phase.

Dr Brown: It comes back to the point that Dr Patrick raised at the beginning: party autonomy is the lodestar of this area of law. The parties who entered into an agreement did so on the basis of what the law was. If that were to change, it could not change retroactively, because that would have a serious effect on their autonomy. Therefore, it should apply only prospectively.

Dr Christie: From the point of view of the rule of law, it needs to apply after.

Katy Clark: You have already given some views on the Scottish Government's proposals to amend the law of retention at stage 2. Would you like to make any additional points in relation to that?

Lorna Richardson: I am supportive of the change, for the reasons to which Professor MacQueen alluded, and which have come up in some of the discussions today. Since the Law Commission made its proposals, there have been significant developments—which, I would suggest, have not been welcome—in relation to the law of retention. With this bill looking at remedies, there is an opportunity to deal with something that is causing quite a bit of practical difficulty.

Retention operates in some respects as a self-help remedy, and people should be clear, if they are not going to court, about when they can use a particular remedy—they should be clear about that even if they are going to court, but especially so if they are not. We have an opportunity, during the passage of the bill, to deal with some of the problems that have arisen.

Dr Christie: With my construction law hat on, I would say that it is a very important remedy for residential construction cases, because it provides a self-help remedy for both parties. It enables the contractor to have some security for payment, and the occupier who is procuring the work to have some security that the work will get done. The key there is that it does not go too far and is not used frivolously, with regard to the safeguards that the legislation sets out.

There is a balance between safeguards and usability, because the more safeguards there are, the more complex the legislation becomes, and the more difficult it is for lay people to use it. It is important, therefore, where we have this remedy, that everyone knows what it is for and what they are trying to do with it. I think that the balance as set out now is appropriate. In my submission, I had a slight panic about substantial completion, which is the current safeguard for many construction cases, but I think that that has been picked up in the way that the legislation works, which is not disproportionate.

Katy Clark: Are there any further points?

Dr Patrick: I would just come back on the point about contracting out; it is otherwise predictable in most circumstances.

I would also suggest that, while people talk about retention as a remedy, it is actually a bit more substantive than a remedy. That would concern me slightly in a context where the Scottish courts might apply it to a contract under English or New York law, or something like that. A Scottish energy company, bank, or whatever, may be entering into a swap with a New York bank under New York law and they are suing them in Scotland—"What's your remedy? Oh, your remedy is retention, is it? Oh, is that a remedy?" The Scottish courts must apply it because it is a remedy, while applying New York law or whatever it is to the rest of it. However, in actual fact, retention is, in many respects, a very substantive thing. In a lot of these situations, it will not matter, because the party autonomy means that they have written it out in such copious detail—because they can contract out of it—that the court would then be able to say, "Well, this is what the parties agreed should happen."

Dr Brown: I suppose my concern is to emphasise, again, that the approach should not be slapdash. Again, I am not saying that the work that was done was slapdash; my concern comes down to the fact that there are not all that many days left in this parliamentary session before the election next year. I am concerned not so much about the intellectual work that has been done as I am about the appropriateness of bringing something like this into a bill at stage 2. I know that I am the outlier on the panel in saying that I think that there are controversial aspects to the bill, but I have concerns about doing things on the basis that is proposed.

Professor Bogle: It is rare that one gets an opportunity to make such a meaningful and yet uncontroversial change to the law, and the opportunity is here right now.

Lorna Richardson's research over the past 10 years has identified the problems that the courts

have had in controlling the self-help element. She has made a suggestion about proportionality and the need to sit everyone down and consider whether the response to a breach was proportionate. That is what the courts have been trying to do. The amendment has been proposed because of developments in the courts, and we have a great opportunity to make that change now. Lorna Richardson has done the work and the Scottish Government consulted on the issue last year, so we are in a good position to make that change, with the caveat that Hamish Patrick mentioned, which was that it must be made clear that section 20(1)(a) is to be taken as part of part 2 so that parties can contract out of it.

Katy Clark: Lorna Richardson, do you think that there should be a right to contract out of any rules on the law of retention?

Lorna Richardson: I do. It relates to the whole idea that parties voluntarily enter into contracts. To a large extent, we let them make contracts about what they want and in the way that they want to make them. That would follow on, so I agree that there would need to be a change to the opening wording of part 2 to make it clear that the amended sections are also default rules and can be contracted out of.

Katy Clark: Does anybody have anything to add on that particular issue?

Dr Christie: I have nothing to add on that issue, but I will say something about the role of the committee and the parliamentary opportunity. In relation to the language on what is disproportionate, what are the safeguards? Can people understand the safeguards? Members of the committee are people, so do they understand them? If the safeguards make sense to the committee, that shows that they have been worded in a decent way, with account taken of the need to retain flexibility. There might be slightly different ways in which the line can be drawn, which is why it is useful for the bill to be subject to parliamentary scrutiny, rather than just having us, a bunch of experts, coming in and saying, “It must be that.” There are benefits to the precise wording being considered as part of the parliamentary process, but I think that we all stand behind the scholarship that has led to the bill that is in front of us today.

Katy Clark: Would you like to put on the record any other comments about the bill’s drafting or the arguments that have been made in the responses to the committee’s call for views? Perhaps there are points that have not already been made in this morning’s evidence session.

Professor Bogle: The committee should be commended for considering the matter, because it fits squarely within the remit of what we should be doing, if I may say so.

Katy Clark: Thank you.

The Convener: I have a question for Dr Brown, which is not focused only on this bill. Following your consideration, you did not support the Leases (Automatic Continuation etc) (Scotland) Bill, which was withdrawn, and you are not supportive of this bill. I am just trying to understand whether you think that the SLC is looking at the correct areas of law to be improved or updated, or whether there is some other aspect.

Dr Brown: I absolutely think that it is looking at the correct areas, and I fully appreciate what Professor MacQueen said earlier. There was a project to attempt UK-wide codification in this area very soon after the two law commissions were created, and that would have had a psychological effect. My concern is not about what the SLC has looked at in this case but about some of the conclusions and the approach. It has taken a very long time to get the bill here, although I appreciate that the commissioners have limited time. In the 1970s, the commissions produced a comprehensive code, which was not simply about English law being transplanted to supersede Scots law but involved combining the best elements of Scots law with some of the best elements of English law. In the end, the code did not go anywhere because, when we are dealing with that kind of cross-border situation, it is an inescapable fact that Scots lawyers and English lawyers often talk in completely different languages, even when they are using the same words.

My concern is that the bill could have been much more ambitious. It was prompted by a recognition that the postal acceptance rule was archaic and outdated, and people then thought that there should be a statutory restatement of the rules of formation of contract. However, that is problematic because of the bill’s limited ambition. Scots private law is unlike the law in a purely common-law system. It has been developed much more rationally and intersects in ways that the systems in other jurisdictions do not. Scotland has a unique legal system, particularly in relation to the formation of voluntary obligations and in the fact that it continues to recognise a unilateral promise as being binding. That is, of course, saved in the bill as it stands.

With any legislative project, there can be a useful role for piecemeal legislation in fixing piecemeal problems, such as those involving the law of retention, as they emerge. However, I do not think that a statutory statement on a very narrow aspect of the broader law of obligations is useful. If there is a need to solve a targeted problem, legislation can be useful, even in a very piecemeal form. However, if we are talking about a

more general principle, legislation can have a detrimental effect on the overall coherence of the law. Part 2 of the bill deals with the interaction between contractual remedies and remedies for unjustified enrichment, but those issues are subsumed under the heading of a contract bill. That is indicative of the intellectual problem that I have set out.

The Convener: As there are no further questions, I thank the witnesses for their helpful and insightful evidence. The committee might follow up some issues in writing in due course. That concludes the public part of the meeting.

11:47

Meeting continued in private until 11:52.

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