OFFICIAL REPORT
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DRAFT

Delegated Powers and Law Reform Committee

Tuesday 25 November 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 25 November 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

33rd 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:

Andrew Agapiou (Royal Incorporation of Architects in Scotland)
Colin Borland (Federation of Small Businesses)
David Woods (Pinsent Masons)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 25 November 2025

[The Convener opened the meeting at 09:36]

Decision on Taking Business in Private

The Deputy Convener (Bill Kidd): Good morning, and welcome to the 33rd meeting in 2025 of the Delegated Powers and Law Reform Committee. We have received apologies from Stuart McMillan MSP. I remind everyone to switch off, or put to silent, mobile phones and other electronic devices.

Agenda item 1 is a decision on taking business in private. Is the committee content to take in private items 6, 7, 8 and 9?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

09:37

The Deputy Convener: Under agenda item 2, we are considering two instruments. An issue has been raised on the following instrument.

Management of Offenders (Scotland) Act 2019 and the Prisoners (Early Release) (Scotland) Act 2025 (Consequential Modifications) Regulations 2026 [Draft]

The Deputy Convener: This instrument concerns the early release from prison of prisoners who are liable or eligible to be removed from the United Kingdom. It would change the point at which such a prisoner can be removed from prison for that purpose, to align with the equivalent position for early release on licence.

The instrument would also create a new power for Scottish ministers to make subordinate legislation. This would be a power, by order, to change the minimum period of their sentence that a prisoner must serve before they can be removed in this way. The draft policy note states that the Scottish ministers would intend to use this power, if granted, to change the minimum period from one quarter of the sentence to 15 per cent of the sentence, to align with the equivalent rule for early release on licence.

The committee considers that the creation, by subordinate legislation, of a new power to make subordinate legislation is unusual, and is generally undesirable, because Parliament is unable to scrutinise and amend the proposal in the way that it would if that had been proposed in a bill.

The committee also considers that using an ancillary power to create a new power to make subordinate legislation is particularly unusual, and the committee will expect particular justification to be provided.

Does the committee wish to draw the present instrument to the attention of the Parliament on reporting ground (g), in that the conferral by regulation 2(2)(c) of a new power to make subordinate legislation appears to be an unusual and unexpected use of the enabling power?

Members *indicated agreement.*

The Deputy Convener: The committee will set out fuller consideration of the use of the enabling power in this instrument in its report to Parliament and to the lead committee on the subordinate legislation considered at this meeting.

Also under this agenda item, no points have been raised on the following instrument.

Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2026 [Draft]

The Deputy Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument subject to Negative Procedure

09:40

The Deputy Convener: Under agenda item 3, we are considering one instrument, on which no points have been raised.

Disclosure (Scotland) Act 2020 (Commencement No 6, Consequential Amendment, Saving and Transitional Provision) Regulations 2025 (SSI 2025/352 (C 26))

The Deputy Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

09:40

The Deputy Convener: Under agenda item 4, we are considering three instruments, on which no points have been raised.

Political Parties, Elections and Referendums Act 2000 (Non-Party Campaigner Code of Practice) (Appointed Date) (Scotland) (No 2) Order 2025 (SSI 2025/347)

Scottish Languages Act 2025 (Commencement No 1) Regulations 2025 (SSI 2025/348 (C 24))

Education (Scotland) Act 2025 (Commencement No 1 and Transitory Provision) Regulations 2025 (SSI 2025/351 (C 25))

The Deputy Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Deputy Convener: In relation to Scottish statutory instrument 2025/347, does the committee wish to note that this instrument revokes the Political Parties, Elections and Referendums Act 2000 (Non-Party Campaigner Code of Practice) (Appointed Date) (Scotland) Order 2025 (SSI 2025/288), which the committee drew to the attention of the Parliament on reporting ground (e)?

Members *indicated agreement.*

The Deputy Convener: Does the committee wish to welcome that SSI 2025/347 fulfils the Scottish Government's undertaking to revoke SSI 2025/288?

Members *indicated agreement.*

The Deputy Convener: We got through a wee bit there, so that is not too bad.

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

09:41

The Deputy Convener: Under agenda item 5, we will take evidence on the Contract (Formation and Remedies) (Scotland) Bill. For our panel today, I welcome Andrew Agapiou, chair of the contracts committee, Royal Incorporation of Architects in Scotland; Colin Borland, Scotland director, Federation of Small Businesses; and David Woods, partner in the litigation, regulatory and tax team at Pinsent Masons. I welcome you all to the meeting. There is no need to worry about turning on your microphones, because they are controlled by broadcasting colleagues. If you would like to respond to a question, please raise your hand or indicate to the clerks. There is no need to answer every question—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.

Before we move to questions from the committee, you may wish to know that Roz McCall is joining us online.

I will ask the first question. Can you give the committee some examples of how contracts are formed in the sectors that you represent—for example in relation to construction or where small businesses are involved?

Andrew Agapiou (Royal Incorporation of Architects in Scotland): I am happy to take that question. Contracts in the construction industry could be consultant appointments, building contracts, building subcontracts or warranties, and sometimes those run parallel in projects. Increasingly, many of those agreements are formed through emails, online portals, building information modelling platforms, or staged negotiations, so there are a variety of methods in which contracts are formed through offer and acceptance.

If the bill is about modernising the process of forming contracts, that is welcome, in the sense of moving away from the tried and tested, old-fashioned postal routes. That is a positive development in moving forward with contracts for the construction industry.

The Deputy Convener: Therefore, you see that as a positive.

Andrew Agapiou: Yes—it is positive.

The Deputy Convener: That is great.

Colin Borland, would you like to come in on behalf of small businesses?

Colin Borland (Federation of Small Businesses): There is a massive range—from very formal, standard form contracts that are signed and presented to you by a very large supplier or customer, which you do not have any opportunity to influence, right down to very informal contracts, such as spoken or WhatsApp messages, and everything in between.

You can have what used to be called a gentleman's agreement, which was always defined to me as an arrangement between two people, neither of whom is a gentleman, and both of whom are hoping that it is not an agreement.

However, in the middle, email exchanges and things like that are usually most common, although we encourage our members to use standard form contracts, which they can download from our legal hub.

09:45

The Deputy Convener: So, you also see the bill, in the way that it is presented, as a positive.

Colin Borland: Yes. The way that the bill has been put together is broadly sensible. Fair play to the Scottish Law Commission—it has managed to distil quite a big body of law down to a 26-section bill. It is quite sensible to have the bill to provide clear backstops where they have not been agreed in other terms by the parties. That makes perfect sense. As a general principle, anything that is done to codify, simplify or clarify the law and to make it easier for us as laypeople to understand has to be a good thing.

The Deputy Convener: David Woods, can you comment from a litigation and tax angle?

David Woods (Pinsent Masons): As my title suggests, I come at contracts from the dispute end. I do not negotiate or draft contracts, but I argue over them for our clients. The contracts that we tend to advise on and that our clients tend to have entered into tend to be heavily negotiated. That is not always the case, but they are largely quite sophisticated contracts, whether they are for construction, information technology or procurement. The issues that can spring out of them are, from a dispute perspective, very broad.

There can be disputes about whether there is a contract. In such cases, we would look to case law to try to establish what the precedents are and what the guidance is on the points of dispute. The issue of whether contracts have been entered into arises, although I find that it does so infrequently—the issues that tend to come up are more around performance or whether contract terms have been met. So far as the draft legislation goes on the points around offering acceptance and the formation of contracts, to my reading, it seems to codify—as has been said—what I understand to be the position at present.

The Deputy Convener: Youse have answered a bit of my next question, so I will ask a follow-up question. Do you think that the bill is sufficiently future-proofed so that it can deal with new ways of forming contracts that might develop going forward? David Woods, I see that you are nodding.

David Woods: I think that it is. Technology in particular has developed, and ways of contracting and of communicating have evolved, so it is interesting to query whether the law is keeping pace with those developments. We cannot necessarily predict all the future developments that are to come, whether in relation to technology or otherwise, but the guiding principles that are set out in the draft legislation appear to me to be fit for purpose, barring any unforeseen ways that things might developing in the future. That is always a risk, however, with whatever changes may come.

Andrew Agapiou: I will jump in and say yes also. As I mentioned before, I think that there is general support for the modernisation. Given that the construction and architecture industry work in a digitally mediated contractual environment, any steps that could assist that process will be welcomed. I am therefore quite supportive of the proposed measures.

David Woods: So, as we go further into the digital age, having the bill makes more sense.

Andrew Agapiou: Yes. In the future, if there were developments around retentions and updates to payment legislation, for example, there could be further linkages with, say, trusted project bank accounts. The developments around digitisation at this stage might be a prelude to the future contractual formation exercise.

The Deputy Convener: Colin Borland, for your members, especially smaller businesses, does this future proofing make them feel more comfortable?

Colin Borland: I think so. The bill is sensible in that it tries to stick to general principles and backstops. In reading the bill and the accompanying documents, we could see nothing that suggests that something is time limited or has a finite shelf life. From that point of view, I do not think that we have any concerns.

The Deputy Convener: Thank you. Anyone can answer this, but I have a wee follow-up question for the RIAS. Will you expand on the comment in your written evidence that the bill should be aligned with modern international instruments that many commercial parties already recognise?

Andrew Agapiou: I think that there is general recognition that construction is not limited to one particular jurisdiction. In particular, there could be

project supply chains that span beyond one jurisdiction. It is therefore important to understand which jurisdiction and legislation apply to the contract, and how different parties from different jurisdictions can work together with a common understanding of how negotiations and contracts are formed. It is important to have that understanding. Perhaps there needs to be an update of the construction policy notes in that direction.

In relation to the proposed bill, I would highlight that, across the board, there will need to be updates against many of the policy notes in order to reflect the changes.

The Deputy Convener: That is very helpful. Thank you very much indeed.

Jeremy Balfour (Lothian) (Ind): Good morning, and thank you all for coming this morning. I will move us on slightly. I will start with you, Colin Borland, on this one. What are your views on the fact that parties can contract out of the provisions of the bill? You mentioned that point in your written submission.

Colin Borland: As a general principle, the freedom to contract as you see fit is a good one. In our written evidence, we made the point that we need to be realistic and acknowledge that the idea that it is two people with completely equal bargaining power who arrive at terms can be something of a fiction. You can have instances in which one party is far more powerful and influential than the other, and the choice then is really to take it or leave it.

I accept that this point is outwith the scope of the bill, and that it is a bigger issue that we are trying to tackle here, but we think that there is a case in such circumstances for treating smaller businesses more like individual consumers and giving them the rights that consumers have. The Consumer Rights Act 2015 does not apply to business-to-business contracts, so we have to go back to pieces of legislation from the 1970s and the related case law.

Again, I am not a legal expert, but, as a layman, I can see a compelling case to update and modernise the law to cover those specific instances.

Jeremy Balfour: Thank you. As you point out, that is probably outwith the scope of the bill, but your comments have been noted and others can consider them.

David Woods, you are the legal expert. Are you happy that parties can contract out of the provisions of the bill?

David Woods: Yes; that is quite important. I anticipate that that might happen quite a lot—not because there are problems with the draft legislation but because it is not a universal and full codification of the law of contracting under Scots law. Because it deals only with certain parts, it might be that parties look at it and, rather than try to work out which bits of their contract are governed and which bits are not governed by the legislation, they instead remove the legislation wholesale from the contracts that they enter into. It may well be that what they end up negotiating and agreeing to in their contract is the same, but contracting out would avoid them having to sense check it and decide whether they are happy with what is contained in the legislation as well as with what they are negotiating between themselves. Therefore, instead of following the legislation, if passed, they would just contract and agree all the terms between themselves.

I do not anticipate that that would happen in every case, but I could see that parties would say, “We recognise that it exists, but we’ll park it and we’ll contract on terms that we’ve negotiated ourselves.”

Jeremy Balfour: Andrew, do you have anything to add?

Andrew Agapiou: What I picked up is that issues such as interpretation, penalty clauses and the battle of the forms have deliberately been left out of the bill. I think that that is positive, because we have a settled body of case law that we can rely on. In addition, when it comes to the architecture and construction professions, we use standard forms, such as the Joint Contracts Tribunal and the Scottish Building Contracts Committee forms.

Therefore, from the point of view of the architecture and construction industry, the proposed approach is a positive development. I think that it is the correct way to go.

Jeremy Balfour: As David Woods mentioned, the bill is limited to reforming certain aspects of the law of contract and providing certain remedies for breach of contract. Do you think that the bill should be broader, or does it do enough?

David Woods: When it comes to the area of contract law and, in particular, the issues that could develop that are in dispute or that need clarification by way of legislation in advance, there are potentially hundreds of issues. We have touched on the interpretation of contracts, the battle of the forms and penalty clauses. Those are three good areas to think about. I think that it would be a challenge to set down comprehensively in legislation everything that could possibly arise in relation to a contract or issues connected to a contract.

I propose that a preferred route would be to deal with discrete points, and to deal with those well, instead of undertaking the challenging task of

seeking to produce draft legislation that would deal with every possible contractual issue. There are hundreds of years of case law that deals with such issues. Every month, a point will be dealt with in a new decision by, in particular, the Court of Session or a sheriff court. It is not necessarily the case that the law is advanced every day, every month or even every year, but new precedent is set. Every dispute relates to the facts between the parties and the situation that they find themselves in and, through the common law, the application of established precedent to their situation is how the law is built up.

A more achievable task would be to set out discrete points, as the draft legislation does. It may well be that further legislation in future could deal with other points, but, as I have said, there are lengthy and voluminous textbooks on contract law, as well as lots of case law on the subject, so it would be a challenge to go too far, or even to go further.

Jeremy Balfour: Colin or Andrew, do you have anything to add to that?

Colin Borland: What David Woods has said is absolutely right. I am conscious of the matter at hand. In that respect, the bill does the job that it has been tasked with, notwithstanding the fact that, as I understand it, the Government has indicated that it will lodge stage 2 amendments to deal with some of the remedies, because case law has moved on. Subject to that proviso, we are pretty content with the current scope of the bill.

Andrew Agapiou: I have nothing further to add.

Jeremy Balfour: Do you have any specific comments on part 1 of the bill? I am sorry to start with you again, David, but do you have a particular view on the proposal to abolish the postal acceptance rule? Every first-year law student learns that rule. In the 21st century, would that be a good thing to get rid of?

David Woods: Yes—that is probably my short and my long answer.

The postal acceptance rule is a strange thing. It certainly made sense decades ago, but it is now pretty much standard for it to be taken out of contracts. Our position is that it is not fit for purpose in the modern age. If the bill does nothing else, it should abolish the postal acceptance rule.

Jeremy Balfour: Is there anything else that you would like to comment on in part 1 of the bill?

10:00

David Woods: Not particularly. My reading of part 1 is that it essentially sets out the law in writing. There is no real significant reform, but it sets down offer and acceptance; revocation of an offer; change of terms; and change of circumstance, which is difficult to predict. In years to come, I may have disputes in court on behalf of clients when I could be trying to apply or interpret the legislation but, sitting here today, it seems fine to me.

Andrew Agapiou: Two issues stand out for me in the bill. The first is staged formation of contracts and the second is the “subject to contract” wording. Many appointments in the architecture and construction sector are made on the basis of pre-construction service agreements, which evolve in stages. They may include wording such as “proceed on the attached terms”, followed by detailed schedules. There would need to be some guidance on how that would operate in an architecture or construction environment going forward.

In many instances, particularly public sector funded projects, contracts include the wording “subject to contract”, or “subject to grant funding.” There, the danger—I use the word loosely—is that the bill should not accidentally convert those into binding agreements. A worked example of how the provisions could operate in the construction field could be required.

Colin Borland: I have nothing specific to add, except that the postal acceptance rule belongs to another age and is overdue for repeal.

Katy Clark (West Scotland) (Lab): Andrew Agapiou has already mentioned the formation of contracts electronically. What is the panel’s view on how the bill deals with contracts that are formed electronically?

Andrew Agapiou: What has been proposed is welcome. Moving away from the postal rule into the digital age is a positive development. I think that the bill deals that very well.

Katy Clark: Colin, do you have anything further?

Colin Borland: No. I think that an offer is on offer and that a qualified acceptance is a qualified acceptance; I do not think that the medium by which it travels makes much difference. However, it does link to the point that we talked about earlier, which is the extent to which the bill is future proofed. By sticking to those principles, the bill gives itself the best chance of doing that.

Katy Clark: David, do you have anything further to add, or are you broadly happy?

David Woods: I am in broad agreement. The exchange of emails for the formation of a contract is absolutely fine. From a contract dispute perspective, I can foresee that there would be issues around whether or not an email had been received, but that is not different from the position as it stands. Evidence would be led as to whether

or not a person could have opened an email or whether they had access to it, which is fine. From reading more widely outside the draft bill, I know that thought was given to whether a read receipt would be needed. However, I think that that gets into an unnecessary level of detail. Coming at it from a principles perspective works. The danger is in trying to micromanage and specify more deeply what would be required. In summary, the legislation is okay on that point.

Katy Clark: Picking up on that, views have been expressed to the committee that it is not clear how the rules on electronic notification will apply when, for example, there is an out-of-office message, or if messaging services are not working. Have you given any thought to that, David?

David Woods: Yes, that could arise in some cases. It would be a situation or scenario in which one party would be denying that they have entered into a contract. Evidence would need to be led to show that they had not received an email or that their out-of-office notification was on, which would be put forward in trying to establish the position that there was no contract.

However, if we are trying to address that in the legislation, we would need to get into a level of detail where we would say that the sending of an out-of-office email either does something or does not do something to the contract formation. I suggest that we keep it at the principles level, without trying to think of every possible scenario, because going down that path leads to missing out on some scenarios.

Taking the legislation as it stands and applying it to whatever situation the parties find themselves in would work. If I was arguing for a client who said that they did not receive an email, I would need to produce evidence to show that. The legislation suggests that it if that information was not available, the offer of acceptance would not have been formed.

There might be reasons to consider putting in some explanations, but I suggest not going into every possible scenario, because things will be missed.

Katy Clark: Colin Borland, do you have any further thoughts on whether there is a need for more in the bill?

Colin Borland: No, there is not. It is quite clear that we are talking about the process of offer and acceptance. In cases involving an exchange of emails, yes, things can go wrong and people can deny things, but the vast majority of cases will be fairly clear.

If I drop you a line and say, “Can you supply this?”, and you say, “Yes, at this price.”, and then I come back and say, “Actually, could you do it for a little bit less, and can I determine as well?”, and then you say, “Fine. Done. Deal.” There is back and forth, and that exchange of emails effectively forms the basis of the contract, and that is a very common business practice.

Katy Clark: What about a situation where there is not an exchange of emails and, as suggested, there an out-of-office message is received? Would it be helpful if there was further detail in the bill on that, or would there need to be evidence-led facts to support having such detail?

Colin Borland: I am not sure about that. I would need to see the extent to which that scenario is causing real problems for people doing business. We certainly do not have the evidence to demonstrate that that is happening at the moment.

Andrew Agapiou: I echo the points made by David Woods and Colin Borland, but I will speak about something that I touched on before. Principles or guidance are important. We should not be going into too much detail, because there could be various situations in various sectors, and there would be too much to put into the bill.

Katy Clark: Does the panel have any comments on the rules and remedies for breach of contract in part 2 of the bill?

Andrew Agapiou: Having read the wording of part 2 of the bill, the proposals are quite modest, which is welcome. There is always a danger when we get into the complete codification of matters, so modesty is quite important and means that we are not trying to codify everything.

I see three benefits of that. The first two are that there will be clearer rules on withholding and suspension and that there will be more clarity on keeping a contract alive after breach. Those are is important, because we saw what happened after the Carillion issue. It is important in the construction environment, because breaches of contract do happen there. The third benefit is that there will also be a reduced need for litigation and adjudication on minor cash flow disputes.

It is important—and maybe this needs to be referenced a little bit more in the bill—that the bill aligns with current legislation, such as the payment regimes under the SBCC or the JCT contracts, the Housing Grants, Construction and Regeneration Act 1996 and all the updates that have come from that. A little bit of work needs to be done in that area.

Colin Borland: Nothing specific came up for us in that part, but I reiterate the general principle that working to codify, simplify and make it easier to interpret the law in that area has got to be a good thing for small business owners who find

themselves in the position where they have to interpret.

Katy Clark: Do you have anything further to add, David Woods?

David Woods: The return of benefits after rescission or termination of contract for material breach is an interesting point from a disputes perspective. The bill certainly covers off or could cover off situations in which a thing that was to be delivered but has not been delivered or has been delivered but not paid for—in other words, relatively straightforward situations.

However, let us consider something more complex, such as the implementation of a sophisticated information technology contract involving software deployment, with services coupling that, too. That might require physical services to implement it, as well as software services, such as coding. That situation is more complicated when considering how to return the benefit of that or how to return what has been delivered. In practice, I do not think that that would work.

Under the bill, if you cannot give back the thing, you give back its value. In essence, I would already approach that by saying that I am acting for a client and suing somebody for damages because they have not paid for the thing that has been done for them, or they have benefited from it without paying for it. Those principles are already established in law.

The bill as drafted has to be quite complicated because the points that are being covered are not straightforward. The bill is fine in tackling a discrete point. It does that well, and does not try to overcomplicate matters by branching out, trying to foresee every situation that could arise between parties in a contract where there is a dispute and then legislating to deal with how that should be governed.

Katy Clark: Last week's witnesses seemed, in general, to consider that guidance would not be needed. Some of the evidence that the witnesses have provided today suggests that there might be a slightly different view here.

What is your view on the need for guidance on how the legislation will work in practice? I come to Andrew Agapiou first.

Andrew Agapiou: It is important that the legislation does not unintentionally narrow the right to suspend for non-payment where standard contracts already cover that. As such, there is a need to have guidance or maybe some sort of compatibility note referencing the existing legislation and how that is covered in construction contracts, particularly in the standard forms.

Colin Borland: I am not sure that that is something that we have a view on.

Katy Clark: Sorry?

Colin Borland: I do not think that we have a view on that.

Katy Clark: You do not have a view on that. David Woods, do you think that guidance would be helpful or is it not needed?

David Woods: I do not think that significant guidance would be necessary, certainly not for large parts of the bill, particularly for its front end—the offer and acceptance piece—as that is quite straightforward. Perhaps some guidance would be helpful for later parts of the bill.

It might also be helpful to clarify what the legislation is not doing. In other words, it might be useful to set out that it is covering certain areas but not others. If people were to read the legislation, they would work that out for themselves.

I do not think significant guidance is necessary, but it might be of assistance for some parts of the bill.

The Deputy Convener: We are going online to our colleague Roz McCall.

Roz McCall (Mid Scotland and Fife) (Con): Good morning, everybody. My apologies for not being at the meeting in person today. The evidence has been very interesting so far.

What are your views on whether the new rules on contract law should apply only to contracts that are entered into after the bill comes into force? Is setting that out in the commencement regulations sufficient?

I will just move down the line, starting with Andrew Agapiou.

Andrew Agapiou: Will you clarify that for me, Ros? Are you talking about the transitional provisions that might be required before and after the bill?

Roz McCall: Absolutely.

Andrew Agapiou: That is a critical issue for the construction sector in particular. Many contracts, whether they are building contracts or consultancy contracts, that are entered into by architects or other consultants can run for multiple years, particularly long framework-based contracts.

The legislation must make it absolutely clear that the law that is in force when a contract is made will continue to apply, to ensure that projects are not forced midstream into new rules. That is an important issue that I think needs to be clarified.

10:15

Roz McCall: That was really interesting. Could there be a big problem with continuation?

Andrew Agapiou: Yes. I deal with lots of large projects in a practical and professional capacity, so I know that some contracts can run five or six years. Depending on when they start, the legislation might switch the game, so it will be important to have some clarification on that. There needs to be some unambiguous transitional wording to cover such situations.

Roz McCall: Okay. That was very interesting.

Colin, what is your federation's perspective on this?

Colin Borland: Andrew Agapiou hit the nail on the head when he used the word "unambiguous". I do not think that we have particularly firm views on the matter one way or the other, but whatever you decide to do, it needs to be very clearly communicated in the sort of simple, refreshing language used in the bill to ensure that people who enter into contracts know exactly what rules will govern them. Obviously, there is also the general point about the need to be careful about making retrospective changes after people have already agreed a set of terms and obligations.

Roz McCall: Thank you for that. Do you have anything to add, David?

David Woods: It is important that the legislation applies only to contracts that are entered into after it has been passed. If it has retrospective effect, a scenario might develop with regard to party autonomy, which is a principle in the bill, in which parties who enter into contracts afterwards might be able to contract out while parties who had entered into contracts prior to the legislation will find themselves bound by it. That, I think, would be a bizarre outcome.

For the sake of clarity, I will just say that party autonomy appears to be important—it is a principle set out in the bill—but if it is imposed retrospectively on parties that have already entered into contracts, not knowing that this legislation would come, they will find such an outcome difficult.

Roz McCall: Thank you.

What is your view on the Scottish Government's proposal to amend the law of retention at stage 2? I will start with you this time, David, and then move back down the line

David Woods: On the law of retention, I would just make it clear that my bias is towards not legislating strongly in the area of contract law. We will need to see what is being proposed in order to form a firmer view on it, but I do have some hesitation here. As I have mentioned, if the legislation is not going to comprehensively codify the law of contract in Scotland, I am certainly not in favour of a kind of piecemeal approach being taken to tackling different bits of it in Scots law and its being removed from the common law and put into legislation, just for the sake of it.

I am sure that this is always the case, but if there is an issue to address or a point that needs to be clarified in legislation, legislation should step in and deal with it. Otherwise, I would hesitate to overlegislate in the area of contract law.

Roz McCall: That was very interesting. So, you are saying, "If it ain't broke, don't try to fix it."

Colin, do you have anything to add from your federation's perspective?

Colin Borland: The only thing that I would say is that, as I understand it, the reason for these amendments is that, between the Scottish Law Commission report in 2018 and subsequent case law, the waters have been muddied a little bit, so it has been determined that there is a need to clarify the situation. That makes sense, and it is in keeping with the bill's general principles. If the intention of the amendments is, basically, to restate, clear up and clarify the law and to make it easier for us to understand, that seems sensible.]

Roz McCall: Thank you. Andrew, do you have anything to add?

Andrew Agapiou: Perhaps I can give you a bit of context. Retention is widely used in construction to secure the completion of projects; to deal with or manage snagging and defects; and to ensure that there is handover information. However, what we have seen historically in the industry is poor practices undermining payment flow.

In general, there are some caveats. Supporting reform is good, but only where such reform clarifies when retention or suspension is proportionate, where it does not undermine the retention mechanisms that are in the current standard form contracts and the JCT and SBCC forms, and where it aligns with policy directions on fair payment in Scotland. On that last point, there is a UK-wide consultation on payments within the construction industry, which the Royal Incorporation of Architects in Scotland has responded to.

It is important to emphasise that poorly drafted clauses can either make retention meaningless or allow for continued abuse. Some proportionate construction-tested drafting may be essential in that regard.

Roz McCall: I will come back to that point, if I can. Maybe other witnesses would like to answer my next question. Should there be a right to contract out of the new rules on the law of retention? Would that solve the problem?

Andrew Agapiou: I go back to the need to align with what the industry already has in place—that is, alignments with the standard form contracts that are widely used in the construction industry. There could not be a departure from that.

Roz McCall: Okay. Will you expand on the comments that you made in your written evidence that there needs to be separate consideration of the problems with retention clauses in construction contracts? You said that the UK Government is currently looking at the payment process. Are your concerns purely about the payment issue?

Andrew Agapiou: There is certainly an explicit case for reforming the law of retention. There are insolvency issues, non-payment issues relating to delays and opaque supply chains that are operating. Cash retention is having a disproportionate impact on small and medium-sized enterprises, which are largely the companies that operate in the industry. There is also a weak regulatory framework to cope with that.

We can look at international practice in this area, because New South Wales and the Republic of Ireland have gone much further. The Scottish Parliament may also consider this area in the future.

The danger of considering and proposing new reforms at this point is that it might create administrative burdens on the industry. There needs to be extensive consultation with industry if any changes will be made in this area.

Roz McCall: So, you are saying that, in that regard, amending the bill at this point would be the wrong way to go.

Andrew Agapiou: It is not the right time to do that.

Roz McCall: Okay, thank you. Colin Borland and David Woods, do either of you want to comment on the possibility of the right to contract out of the new rules on the law of retention? Would that make sense?

David Woods: On the point about party autonomy, as the draft bill indicates, parties should be able to contract out of the new rules if they wish to do so.

Colin Borland: My only note of caution is on the point that we started off with about the relative bargaining positions of the two parties. We need to be careful that people are not using the rules to say, "Because one tiny part of this contract has not been delivered, the whole thing is void and you are not getting a penny from me." That is unethical and probably illegal, but it is something that goes on.

There needs to be a way to ensure that, when there is a gulf in the bargaining position between two parties, you are not strengthening the hand of the more powerful party by allowing them to remove themselves. We do not have the same level of rights as individual consumers. If such a right would help with that—again, we do not know what that would look like—I would worry about making it easier for large corporations to sidestep their obligations.

Roz McCall: Thank you very much indeed, gentlemen. That was very interesting.

The Deputy Convener: Finally, do the witnesses have any comments on the drafting of the bill or want to make any points that we have not raised today but that you mentioned in response to the committee's call for views?

Andrew Agapiou: I made a few points that I would like to bring to the committee's attention. The value in the bill lies in what it supports. It supports the standard forms—the SBCC and JCT forms—but does not interfere with them. That is an important issue.

I also noted the need for worked examples, which I highlighted earlier. Those might relate to dealing with letters of intent, tenders, emails and digital workflows. Maybe a little bit of work could be done there, to ensure that postal acceptance aligns with modern practice. We talked about digitisation earlier.

Also, it is good that the bill does not open or reopen any debates on issues that are settled under current Scottish case law.

Those are the points that I wanted to make the committee aware of.

David Woods: I have no comments on the drafting. As I mentioned, from my perspective, it is important that the bill takes a relatively light touch. It picks up on discrete points and seeks to clarify. As I read it, it is not a reforming piece of legislation, at least in large part, but it provides clarity, which is good. As I said, I stress the importance of continuing to allow parties to contract out and not have the bill, or any other similar legislation, apply retrospectively. That could create quite a chaotic situation between parties. I suppose that that might be good for me from a disputes perspective, but it would not be good for parties in general.

The Deputy Convener: Colin, do you want to come in?

Colin Borland: No. I have nothing to add.

The Deputy Convener: That rounding-up brings us to a good place. I think that the whole understanding is that the bill is heading in quite a positive direction, and it is great to have your contributions to that. There are no further question, so I think that we have covered

everything. Thank you very much for coming—you will be welcome back next time.

I now move the committee into private.

10:28

Meeting continued in private until 10:55.

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