OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 2 December 2025

Session 6

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DELEGATED POWERS AND LAW REFORM COMMITTEE

34th 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:

Siobhian Brown (Minister for Victims and Community Safety)
Colin Gilchrist (Scottish Government)
Michael Paparakis (Scottish Government)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 2 December 2025

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 34th 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. Agenda item 1 is a decision on taking business in private. Is the committee content to take in private items 6 and 7?

Members *indicated agreement.*

Instrument for Approval by Resolution

10:01

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

Representation of the People Act 1983 Remedial (Scotland) Order 2025 (SSI 2025/353)

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

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

10:01

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

Education (Scotland) Act 2025 (Consequential Provisions) Regulations 2026 [Draft]

Official Statistics (Scotland) Amendment Order 2026 [Draft]

Common Organisation of the Markets in Agricultural Products (Fruit and Vegetables) (Miscellaneous Amendment) (Scotland) Regulations 2026 [Draft]

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

Members *indicated agreement.*

The Convener: In relation to the Common Organisation of the Markets in Agricultural Products (Fruit and Vegetables) (Miscellaneous Amendment) (Scotland) Regulations 2026, does the committee wish to note that it is content with the choice of the affirmative procedure for the instrument?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

10:02

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

Housing (Scotland) Act 2025 (Commencement No 1) Regulations 2025 (SSI 2025/355 (C 27))

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

Members *indicated agreement.*

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

10:03

The Convener: Under agenda item 5, we will take evidence on the Contract (Formation and Remedies) (Scotland) Bill from Siobhian Brown MSP, the Minister for Victims and Community Safety, who is accompanied by two Scottish Government officials: Michael Paparakis, policy and bill programme manager, private law unit; and Colin Gilchrist, solicitor, constitutional and civil law division. 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.

I invite the minister to make some opening remarks.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning. The bill that we are discussing today implements recommendations that the Scottish Law Commission made in 2018. It largely restates the current Scots law of contract formation while clarifying some doubts about the law that have crept in over the years.

Contract law is vitally important to our everyday economic life and for all types of transactions, involving businesses and individuals alike. Many contracts are made, carried through, and become the subject of disputes between parties who have no professional assistance. One of the bill's principal purposes is to produce legal rules that are clear, certain and accessible. Like most of the witnesses that you have heard from, I think that we have achieved that.

As you know, part 1 of the bill concerns the formation of a contract. The main reform that is proposed in part 1 is the abolition of the postal acceptance rule. Abolition of this rule has been a long-time recommendation that the SLC has made repeatedly over the past 50 years. I am glad to bring forward a provision that will, finally, give effect to this recommendation and bring Scots law into line with other international instruments that have no such rule.

Part 2 of the bill, meanwhile, deals with remedies for breach of contract. Although that part is not as wide as the consultation topics discussed by the SLC, it is in line with the SLC's recommendations and stakeholder opinion. The committee has heard from a number of witnesses about why the scope of the bill should not be widened.

There is one exception, which is the law of retention. I wrote to the committee in October to set out my intention to lodge amendments at stage 2 that would reform the law. That is the end result of a period of consultation, building on the considered work of the SLC and Lorna Richardson of the University of Edinburgh over the past decade or so. The law of retention is unclear, and we have in the bill an opportunity to introduce some much-needed clarity. Having listened to the evidence given to this committee, I am pleased that there has been broad consensus on the general purposes of the bill.

I look forward to answering the committee's questions.

The Convener: Thank you, minister. You have touched on some of this, but can you explain why the bill is needed and how it meets the main aim of making the law clearer, more certain and as accessible as possible?

Siobhian Brown: As the committee heard from a range of stakeholders, there is uncertainty in a number of specific points around contract law. I think that only one respondent to the committee's call for views was outright against reform. The overwhelming majority of consultees agree that law reform is needed in this area.

The bill largely restates the common law on formation of contract to improve accessibility to the law and make important reforms to clarify and modernise the law. As I said in my opening statement, the principal reform on contract formation is the abolition of the postal acceptance rule, which has been a repeated recommendation by the SLC for more than 50 years. We are going to make the law clearer and more accessible, and the committee and Parliament should take that on board.

The Convener: Can you expand on why the Scottish Government has chosen to carry out limited reform in this area of law instead of more wide-ranging reform?

Siobhian Brown: The provisions in the bill are the result of a significant law reform project that was undertaken by the Scottish Law Commission, which included four discussion papers on different areas of contract law. It was clear from the responses that the SLC received that it was not agreed that the law in the other areas of contract law should be reformed. It was thought that, in some areas, the law would be best left for the courts to develop. That includes issues such as the battle of the forms, interpretation and penalty clauses. When the Scottish Government consulted in 2024, respondents agreed with that position, with the exception of the law of retention, on which I intend to lodge amendments to reform. I see this

as a very focused bill, which introduces much-needed reform in contract law.

The Convener: Can you briefly explain why the decision was made to allow parties to contract out of the rules of the bill?

Siobhian Brown: I will bring in Michael Paparakis, if I may.

Michael Paparakis (Scottish Government): Having default rules or parties agreeing their own contracts is a fundamental tenet of contract law. It is spread widely across different jurisdictions, and there was no real suggestion from stakeholders, or indeed the SLC, that a change of that nature should be made. It would be quite a significant departure from the current law and, judging by the responses that the committee has heard from a number of stakeholders, to go down that road would be a complete surprise, and would go against the views of a number of stakeholders.

The Convener: If that approach had been taken, I would imagine that it would have been considered to be a bit more political as a position, and thus this committee might not be sitting here, doing this work on the bill.

Michael Paparakis: Possibly, yes, but, fundamentally, contract law must take account of a vast range of situations, including different contracts between different types of parties, and one set of rules governing all those circumstances would create a largely inflexible system. When it comes to contract law, what you need is flexibility, and business people as well as individuals would consider that to be the case.

The Convener: You need flexibility but also clarity so that everyone understands what they are doing.

Michael Paparakis: Yes, and the bill contains a default set of rules to provide clarity, so that, if parties want to depart from that, they can do.

Roz McCall (Mid Scotland and Fife) (Con): Good morning. Minister, you have alluded to the dissenting view, which I think was from Dr Jonathan Brown of the University of Strathclyde, that legislative reform of contract law is not needed and that the bill risks damaging the coherence of common law. What is your view on that?

Siobhian Brown: I have considered carefully Dr Brown's comments, particularly the suggestion that reforming contract law inadvertently alters the wider Scots law of obligations and formation of trusts, wills and promises. Although the bill puts in statute law on formation of contract, it is not a complete codification of the law. Section 23(a) states:

> "The provisions of this Act are without prejudice to any enactment or rule of law which … regulates any question which relates to … the formation of a contract … but is not provided for by the provisions of this Act".

The law on other contractual matters is also saved by section 23. As Professor MacQueen told the committee, Dr Brown's concerns appear to be "misplaced", and I agree with that assessment. I also note that Dr Brown's view was not shared by the other stakeholders who gave evidence.

Roz McCall: Thank you for providing clarity on that. Stakeholders have stressed that the legislation in this area needs to be future proofed so that it can deal with new ways of forming contracts. Is the bill sufficiently future proofed?

Siobhian Brown: Yes, I think that it is. I might bring Michael Paparakis in, but I think that this relates to electronic communications and section 13. We have not been specific in the bill—for example, we have not referred to emails in the legislation itself, but the explanatory notes include guidance on, for example, an information technology outage and emails. I note that the Law Society of Scotland has also raised concerns, and if the committee or the Law Society have suggestions for strengthening the bill, I am open to those, but I feel that we have covered that aspect.

Roz McCall: Yes, I think that the issue relates to automatic out-of-office replies, for example, so you are looking to strengthen that, if needs be.

Siobhian Brown: It is in the explanatory notes, not in the legislation. We think that that covers things, guidance-wise. That is how we are future proofing the legislation, instead of being too specific in the bill itself, because who knows what the mode of communication could be in five to 10 years? We feel that that is sufficient, but we are open to suggestions, if the committee thinks that it can be strengthened.

Roz McCall: What are your comments on Jonathan Brown's argument that the postal acceptance rule should not be abolished?

Siobhian Brown: The postal acceptance rule means that contracts can be formed without one party ever knowing that their offer has been accepted, and I agree with the majority of stakeholders that that is at odds with common-sense expectations. The law causes uncertainty and confusion for anyone who is not aware of the postal acceptance rule, and I understand that, in practice, it is commonly excluded by well-informed parties. Abolishing the rule will mean that the law will align better with the reasonable expectations of most people, including small and micro businesses. As I have said several times, people have been calling for the rule to be abolished for more than 50 years.

Roz McCall: Do you have any views on Dr David Christie's counter-argument that abolition of the postal acceptance rule makes sense as parties accepting offers will be better placed to manage the risk of acceptances not arriving?

Siobhian Brown: Yes, I do.

Roz McCall: You agree with that.

Siobhian Brown: Yes.

Roz McCall: That is fine. Thank you very much.

10:15

The Convener: In the middle of last week, I received a piece of mail at home that was posted by the sender on 5 November. It was not a contract, but when it arrived and I opened it, I thought about that aspect of the bill. I cannot speak for colleagues, but I have had a number of constituents raise issues with me regarding the delivery of mail. From my perspective, the bill is timely, given the challenges that people face in getting their mail. Electronic means of communication probably afford more clarity and certainty, compared with people waiting for the mail.

Siobhian Brown: Absolutely. I think that, both in our constituencies and personally, we are all dealing with the fact that Royal Mail is totally different from what it was 20 years ago. We have to move with the times.

Katy Clark (West Scotland) (Lab): Good morning. What is your understanding of the main benefits of the new rules on remedies for breach of contract in part 2?

Siobhian Brown: One thing that they will provide is more scope for remedies to solve any conflicts. That will be clearer. I do not know whether Michael Paparakis has anything to add on that.

Michael Paparakis: If I can focus on the law of retention in particular—

Katy Clark: I was going to come on to that in my next question, but if you want to deal with those issues as a whole, that is fine.

Michael Paparakis: As the minister pointed out, there will be clarity on the remedies, including the new remedy for restitution after rescission. The provisions cover gaps in the law, and they also make clear the position on contributory negligence, which is an area where the law can be improved. Those are the benefits. Retention is what is known as a self-help remedy. It is a remedy that does not necessarily need to involve the court but is something that parties can take forward themselves. There is scope for part 2 to help people to keep litigation away from the courts and deal with matters themselves, which is in keeping with the broad thrust of bringing clarity.

Siobhian Brown: Some of the proposed reforms to the law of remedies for breach of contract relate to mutuality of contract. The bill seeks to abolish any rule of law to the effect that a party who is in breach of contract is not entitled to exercise any right or pursue any remedy arising from a breach of contract by the other contracting party.

A key feature of the bill in relation to the law of remedies concerns the restitution of benefits after termination of the contract for a party's material breach. The bill provides that, where a contract is rescinded for breach and a party to the contract has received any benefit from the performance by another party of an obligation under the contract, the benefit must be returned, provided that the other party concurrently returns any benefit that it has received. The bill includes detailed rules on the valuation of non-money benefits for compensation, including payment for use of benefits that have been improved by the recipient.

Another provision concerns remedies for breach in relation to contributory negligence through amendment of the Law Reform (Contributory Negligence) Act 1945.

I know that this is all very technical, but that is a bit more detail on exactly what the bill goes into.

Katy Clark: It is helpful that that has been put on the record.

On the provisions on the law of retention, I note that proposed new section 21A(4) states that the effects of retention

"must not be clearly disproportionate to the effects of the breach"

of contract. Can you clarify exactly what "clearly disproportionate" means? Why is that going to be included in the bill?

Siobhian Brown: I will bring in Michael Paparakis to speak to the technical side.

Michael Paparakis: That was consulted on. Currently—and Colin Gilchrist can keep me right here—the law of retention already contains a "disproportionate" element, so that provision largely restates the current position. Essentially, if one party breaches a contract and the cost to the other party is £200, for example, the other party should not be withholding performance that might involve goods to the value of, say, £1 million. Clearly, that would be disproportionate, and it is not what we are looking for; indeed, parties should not be using the law of retention to deal with that kind of breach.

It is also partly to do with the issue that the Federation of Small Businesses highlighted last

week about the inequality of arms between parties. This is a kind of protection to stop the economically stronger party trying to withhold performance for what is essentially just a relatively minor breach.

Katy Clark: Proposed new section 21D(b) gives courts the power

"to refuse the exercise of … retention where that … would be inequitable."

Can you explain what is meant by that and what you envisage will be covered by that provision?

Michael Paparakis: Again, it is a restatement of the current law. The court already has the discretion in all the circumstances of the case to refuse the exercise of retention. It is difficult to come up with an example off the top of my head—perhaps I could write to the committee once I have had a chance to think about it.

Katy Clark: That would be fine. Your position, then, is that this is a codification of current law. There is no intention to change the law—this simply codifies what is already there.

Michael Paparakis: That is right.

Katy Clark: Obviously, if you want to write to us further on that, that will be very helpful.

Jeremy Balfour (Lothian) (Ind): Good morning, minister, and thank you again for coming.

What is your view of arguments made by the Royal Incorporation of Architects in Scotland that the draft rules on retention need to take into account the United Kingdom Government's consultation on the use of retention clauses in construction contracts?

Siobhian Brown: I understand that the RIAS wrote to the committee, expressing its view that provisions on retention should not be included. Its response to the committee seems to imply that the provisions introduce construction-specific rules into general contract statute, but that is not the case. Retention is a general remedy in the Scots law of contract, and it is in need of clarification, as the responses to our consultation will attest to.

The RIAS also states that the provisions risk incoherence with existing construction legislation, but any specific legislation on construction would take precedence over these more general provisions. To my mind, then, there is no risk of incoherence.

Dr Christie, who has an interest in construction law, did not in his evidence to the committee raise concerns about the coherence of the law, nor have such concerns been raised by others.

Jeremy Balfour: That was helpful. Thank you.

Just to tidy things up, can you confirm that the new rules on contract law will apply only to contracts that are entered into after the bill comes into force?

Siobhian Brown: Yes—I am sorry; I did not mean to say yes to that. The Scottish Government, at this stage, has not given full consideration to whether the bill's provisions, or some of them, might apply to existing contracts. That is not unusual for Government bills, as questions about transitional provisions are often looked at once a bill has been fully considered by Parliament.

Once the provisions of the bill have been agreed by the Parliament, officials will turn to questions of what transitional provisions might be needed. There are provisions to enable that in sections 24 and 25. My provisional view is that the bill's provisions will apply for contracts that are entered into after the measures come into force. That has been echoed by witnesses who have given evidence to the committee.

Jeremy Balfour: I want the minister to follow up briefly. When will you take a view on that? Will it be at stage 3, or will it be post stage 3?

Siobhian Brown: It will be post stage 3.

Jeremy Balfour: Once the bill has passed, there will be a bit of uncertainty about when it will come into force.

Siobhian Brown: My understanding is that it is normal for transitional provisions to be considered after the Parliament has agreed the final content of the bill. That allows us to consider the best approach to commencement. If some detailed transitional or other ancillary provisions are needed that are better left for regulation, it gives us time to engage with stakeholders on the best way forward.

Bill Kidd (Glasgow Anniesland) (SNP): In response to the committee's call for views, the Law Society of Scotland argued that the proposals on retention risk creating uncertainty for sophisticated financial contracts. It is about sophisticated financial contracts and how the proposals on retention could risk creating uncertainty. That is the Law Society's point of view. What is your view, please?

Siobhian Brown: If the provisions are agreed by the Parliament, they should be the default. As I said, I will lodge any necessary amendments at stage 2, but I am willing to listen to the Law Society, if it has any suggestions on that area.

Bill Kidd: Have you had any engagement with the Law Society on that issue?

Siobhian Brown: I will ask Colin Gilchrist and Michael Paparakis, because they have been dealing on the official side.

Michael Paparakis: I have nothing specific to say about the retention provisions and the financial contracts that Dr Hamish Patrick talked about. As the minister pointed out, the intention is that the retention provisions would be the default, so parties would be able to contract out of them. That is the point that the Law Society was trying to make.

As the minister pointed out, our provisional view is that transitionals would apply to contracts that are created after any date for coming into force, which would give any parties who are entering into those contracts time to take into account the changes that are made, and, if they so wish, to contract out of them or make alternative arrangements.

Bill Kidd: On that basis, your view of the arguments that have been made to the committee is that there should be a right to contract out of the new rules on the law of retention. Do you stand by that?

Siobhian Brown: Yes. It allows a certain degree of flexibility.

Colin, do you want to come in on that?

Colin Gilchrist (Scottish Government): There would certainly be a right to contract out. The amendments will take into account that the provisions are default provisions, and the sophisticated contracts that the Law Society referred to can make different provisions. The witnesses that you have heard from in the past couple of weeks have said that there has been support for that in relation to sophisticated contracts that could be contracting out, and that will be clear in the retention amendments.

Bill Kidd: Minister, as you mentioned, Dr Christie was one of our witnesses and he specialises in construction contracts. What is your view of the arguments that various witnesses, including Dr Christie, have made that guidance should be published on how the legislation will work in practice before we reach the stage of introduction?

Siobhian Brown: I am confident that the bill will make the law more accessible and legally certain than what we currently have, and that guidance will not be needed. I understand that that was the majority view heard by the committee. We will publish the explanatory notes with the bill, which will provide a clear and accessible explanation about what the provisions do.

Contracts are widely used, and it would be a huge undertaking to publish and maintain guidance that accommodates the breadth of the purposes of contracts. For example, the RIAS has suggested that guidance should be prepared for the construction sector, but any such guidance would be of limited value for other business sectors, and vice versa. I therefore feel that, at the moment, the explanatory notes and the guidance that we will be giving are sufficient.

The Convener: Minister, there have been a range of suggestions to tidy up the drafting of the bill. Are you minded to consider that?

Siobhian Brown: Absolutely. If the committee has recommendations about drafting and it thinks that they can make the bill stronger, I am always happy to consider them.

The Convener: Thank you. As there are no other questions, I thank the minister and her team for giving evidence. We might come back to you if we have any further points.

That concludes the public part of the meeting.

10:31

Meeting continued in private until 10:57.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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