The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 17 June 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
21st Meeting 2014, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
Mike MacKenzie (Highlands and Islands) (SNP)
*Margaret McCulloch (Central Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Alison Coull (Scottish Government)
Charles Garland (Scottish Law Commission)
Hector MacQueen (Scottish Law Commission)
Lord Pentland (Scottish Law Commission)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 17 June 2014

[The Convener *opened the meeting at 10:00*]

Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 1

The Convener (Nigel Don): I welcome members to the 21st meeting in 2014 of the Delegated Powers and Law Reform Committee. I ask members to switch off any mobile phones. We have received apologies from Mike MacKenzie.

Agenda item 1 is oral evidence on the Legal Writings (Counterparts and Delivery) (Scotland) Bill—a title that we had better get used to. It is the first Scottish Law Commission bill to be considered by the committee following the changes to the standing orders in June 2013 that altered the committee's remit to allow it to take the lead role in scrutinising certain Scottish Law Commission bills. Members will recall that the new process was put in place to improve the implementation rate of Scottish Law Commission reports. We will hear from the Scottish Law Commission shortly, but we will begin the process of scrutinising the bill by taking evidence from Scottish Government officials. I welcome from the Scottish Government Jill Clark, team leader of the civil law reform unit, and Alison Coull, deputy director of the legal directorate. I invite Jill Clark to make an opening statement.

Jill Clark (Scottish Government): We thank the committee for inviting us to give evidence. We are particularly pleased that the bill is the first one to be considered under the new Scottish Law Commission bill procedure. The commission published its report "Review of Contract Law—Report on Formation of Contract: Execution in Counterpart" in April last year, and in September of that year the conclusion of contracts etc bill, as it was then called, was announced by the First Minister as part of the programme for government. In February of this year, in a letter to Lord Pentland that was laid in the Scottish Parliament, the Minister for Energy, Enterprise and Tourism set out the Scottish Government's view that the bill would be suitable for the new Scottish Law Commission bill procedure. The letter also set out that the Scottish Government is wholly supportive of the policy aims of the bill and entirely content with the approach that the commission has taken.

Ministers have carried out further focused and specific consultation and some changes, which are mainly of a minor, technical nature, have been made to the draft bill as published in April last year. None of those changes alters in any way the policy aim as set out in the Scottish Law Commission report, and they have been made in close collaboration with and with the agreement of the Scottish Law Commission team.

In summary, the Scottish Government is of the view that the bill will modernise Scots law and ensure that it remains fit for purpose. As a consequence, the bill should result in the increased use of Scots law and will benefit business and the economy.

The Convener: Thank you—it is good to hear that. I suspect that there are few bills before the Parliament that have been consulted on quite so much and have been so consensually put together. Nonetheless, we would like to explore some issues, starting with the background to the law. John Scott will lead on that.

John Scott (Ayr) (Con): Good morning, ladies. I seek a bit of further background on the proposed law. Will you give an overview of how the current process of contract signing works in commercial situations and an explanation of the need for commercial contracts to be probative? Secondly, will you explain what delivery means in practice and how the current rules on delivery of hard-copy documents apply to specific agreements, given that certain documents, such as mutual agreements, need not be delivered in order to be effective?

Jill Clark: I will deal with the first question, which was on how the process works now. The SLC's report describes that very well. At the moment, if someone chooses to transact under Scots law, either they will have to have one of those round robins in which the document is sent to each party that is involved, or everybody will have to be brought together for a signing. The evidence that the SLC submitted last week shows that, more often than not, people choose not to use Scots law because of those practical difficulties.

I ask Alison Coull to pick up on the other question.

Alison Coull (Scottish Government): The bill also deals with delivery, which John Scott mentioned. That is delivery in a legal sense. The Law Commission witnesses, I am sure, will talk about the consultation on that in a great deal more detail than I can, but one of the uncertainties with Scots law at the moment is that it is not clear whether a traditional document may be delivered by electronic means, which can be an issue with the conclusion of missives. One thing that the bill does is to set out that a traditional document may be delivered by electronic means.

John Scott: Thanks very much.

The Convener: Could you expand on some of the other problems that you are seeking to resolve? It would be helpful to be clear about the list of issues that we are trying to deal with and how they will be dealt with. I understand the general issue, but apart from the difficulty of getting people together and the question whether the use of an electronic communication is valid, what issues are you trying to resolve?

Jill Clark: There is the issue of whether execution in counterpart is valid in Scots law, which is very unclear at the moment. By putting execution in counterpart and the delivery of a traditional document by electronic means on a statutory footing, we are putting the matter beyond doubt. The bill will also help with issues such as the timing of documents and when they are concluded—it will make that much clearer. It will add clarity and consistency that are lacking from the law and which have the effect of making people reluctant to use Scots law for such transactions.

The Convener: If that is the case, why would anyone choose to use Scots law at all?

Jill Clark: Some organisations have to. For example, Scottish Government procurement contracts must be carried out under Scots law, and there are other types of transactions for which Scots law must be used—in other words, the choice of opting for another system of law is not available. In those circumstances, Scots law must be used.

The Convener: Okay. We have seen quite a number of examples of people choosing to use other law. I confess that I am still a bit confused about why this is not an issue that people recognise before they start the process. I am just trying to understand some of the background to the bill; other members might want to explore the detail. If someone is in the commercial world and they know that the law is the way that it is, why would they even start to use Scots law and finish up using English law?

Jill Clark: In general, people do not do that—they opt for English law quite early on in the process, because of the difficulties that I have mentioned.

The Convener: So we have a real problem to solve.

Jill Clark: Absolutely.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to explore the subject of electronic signatures through some research that I have done. First, I looked at the Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83), which, essentially, say that an advanced electronic signature needs to be used. Those regulations make reference to the Electronic Signatures Regulations 2002 (SI 2002/318), which are United Kingdom regulations. They say that, with an advanced electronic signature, there needs to be a certification service provider, and they go on to establish a register of such service providers. I sought to find that register, which proved to be formidably difficult. I eventually found paper URN 09/642 from the Department for Business, Enterprise and Regulatory Reform. Although that paper does not say anything about the register, when I printed it out, I realised that the register was present on the very back page, despite that not being mentioned anywhere in the document. There is a single name on the register, and that is the point to which I am navigating.

That leads me to my fundamental question. A single name is on the register, but my experience is that most people who use certification do so through commercial suppliers other than that single name, which is British Telecom; they mainly use companies such as Verizon. What is the effect on an advanced electronic signature's legal certainty when people use certification that relies not on the name that is on the UK register but on commercial providers that are located in other jurisdictions?

Alison Coull: I will try to cover that. It is fair to say that the concept of electronic signatures is developing. You mentioned the 2014 regulations, which have just gone through the Scottish Parliament and which talk about advanced electronic signatures. There is an important distinction in relation to what those regulations deal with—land registration transactions and the process that was set up under the Land Registration etc (Scotland) Act 2012—and the amendments to the Requirements of Writing (Scotland) Act 1995, which deals with full electronic documents, documents for which writing is required under the 1995 act and the particular process and requirements that are set out in that act.

As you said, certain difficulties relate to the suppliers of advanced electronic signatures; arrangements are at an early stage. The bill generally does not deal with such transactions or the transactions for which full electronic signatures, as set out in the 2014 regulations, are required. A full electronic signature is possible under the bill but, in general, the bill deals with transactions that start by way of a traditional paper document, which might then be transmitted by electronic means. In those circumstances, an electronic signature may be applied in a variety of ways. That is not a full electronic signature that is certified in the way that you described; it might just be somebody's name typed into a document. Provided that the parties have agreed that that is

acceptable, that is a perfectly legitimate way of agreeing the transaction.

I am sure that the Law Commission will talk about that in more detail, but I hope that that clarifies the two electronic signature scenarios.

Stewart Stevenson: I understand the distinction between an electronic signature and an advanced electronic signature. An advanced electronic signature takes a longitudinal view of the whole document that ensures that not a single electronic bit in that document is changed after the signature is applied, so it reflects the document's content.

I am left somewhat puzzled about the legal value of what we are doing. What legal certainty is offered if the electronic signature is independent of the document's content? In general terms, the value of electronic signatures is that they reflect the document's content. Does the bill just contain a simpler provision to give legal certainty to something that already has practical certainty?

Alison Coull: The bill allows people to sign separate documents. That can be done in wet ink—with a pen—or it can be done with an electronic signature, which does not have to be a full advanced electronic signature.

Stewart Stevenson: Could a document not be signed in that way by agreement in any event? Given that, why do we need the bill?

Alison Coull: The Law Commission carried out a full consultation. It is uncertain whether parties to a legal document can sign separate duplicates of that document. That is not thought to be possible, so parties are reluctant to do that. The bill will fill that gap.

The Convener: I have a question as an observer. Are we being asked to provide legal certainty by statute for a process that might not change at all but whose legal validity is at least doubtful at present?

Alison Coull: Yes. The legal validity will be established from the date when the bill comes into force. We will not apply the changes retrospectively. It would still be possible for people who have signed existing documents to argue that execution in counterpart was a valid way of proceeding. However, in the SLC's experience, no one has actually signed documents in that way because of the uncertainty.

10:15

Stewart Stevenson: I could go on at some length, but I have one fundamental final question. Given that the electronic character of the document—and of the signature, for that matter—is not protected, in a technical rather than a legal sense, is it likely that people will wish to use the process? There is no provision for advanced electronic signatures that provide technical protection for the content of the document and the inscription of the signature.

Alison Coull: People sign documents at present with electronic signatures that are not full electronic signatures, so the bill will not change the law in any way in that respect. We will always be open to being shown that an electronic signature was not applied in an appropriate way.

Stewart Stevenson: Sorry—forgive me, but the concern is whether the signature, which is now being put into the legal process, is, when the validity is tested, the same signature that was applied. How would one know, in the absence of the protection that comes from having advanced electronic signatures?

Alison Coull: Yes, but that is the existing position when people sign documents. The fact that we are allowing documents to be signed by counterpart does not exacerbate that position in any way.

Stewart Stevenson: That is a helpful comment to hear.

Margaret McCulloch (Central Scotland) (Lab): Good morning. The SLC report indicated that there was merit in having an electronic document repository set up by Registers of Scotland. The bill does not deal with that issue, although the policy memorandum notes that the SLC's recommendations will be dealt with "in due course."

What are your thoughts on the need for an electronic document repository? What is the likely timeframe, and what steps would need to be taken, to set up such a repository?

Jill Clark: The bill does not cover that area because no legislation is required to establish such a repository. Our priority has been the recommendations in the report that require legislation, which the bill addresses. We have not returned to that particular chapter of the report yet.

In line with the SLC's recommendation, we are keen to get involved, and we are certainly happy to look at the matter further. I expect that that will happen after the bill has gone through, but I cannot give you a firm timescale.

Our understanding is that Registers of Scotland, which would have a big part in the electronic document repository, is still very interested in the whole issue. I am sure that Registers of Scotland will provide the committee with more information. We will be a willing participant when we are ready, but there has been no input from the Scottish Government up to this point.

Richard Baker (North East Scotland) (Lab): My question is on the issue of pre-signed signature pages. In England, it has been suggested that the application of a pre-signed signature page to a different contractual document could increase the risk of fraud. As such, signature pages could be attached to a document that is different from the one that was originally signed.

One specific case has led to a rule in the England and Wales Law Society's practice note that, for those pages to be binding, there must be clear evidence that the signatories have agreed to pre-signed signature pages. I am aware that the bill appears to follow that approach.

I am interested in exploring your views on the general issues with regard to the use of pre-signed signature pages, and specifically why you feel that the provisions in the bill on that issue are adequate to address any risks of fraud in relation to the use of counterparts.

Alison Coull: You mentioned the English case law that the Law Commission mentioned in its discussion paper. The basic position in Scots law is reasonably clear that a signature page cannot simply be used on a document without more. If I have put my signature on to a piece of paper, somebody cannot just apply that to a document and say that it has legal effect and that I have agreed to that document. It is necessary for there to be some sort of authority in relation to the use of my signature page, and the bill simply reflects that. The expectation would be that the document to which you have applied your signature page is the document to which the other party applies their signature in counterpart.

The Law Commission talks about the scenario in which a document changes during the signing process—for example, if typing mistakes are discovered or if the parties want to change other aspects of the document. That might happen when one person has signed the document and the other person still has to sign it, and parties may not want to start the process again. In those circumstances, provided that the person who has already signed the document authorises those changes, that will have legal effect, but the key thing is that the person has authorised the changes, otherwise the document would be legally invalid.

That is an entirely different situation from the one that the English case law dealt with, in which a signature page was signed independently of any version of the document—that is what caused the issue. It may be possible to agree that such a document is legally valid, but it would be necessary for the person whose signature had been applied to the document to agree that after the event.

During the consultation, it was suggested that one of the law firms was looking for a looser arrangement. I am not quite sure what it wanted—perhaps some greater authority for the use of pre-paid signature pages. It was not entirely clear, but I know that the Law Commission felt that there should be no change to the existing position, which was perfectly valid, and the Scottish Government certainly agreed with that approach.

Richard Baker: Are you confident that the measures that you have introduced do not increase the likelihood of fraud and that the current law is robust on those issues?

Alison Coull: Yes, exactly.

Stuart McMillan (West Scotland) (SNP): We are aware that the bill is inspired by English law and my questions about the consequences follow on from Richard Baker's. Have any other practical issues or difficulties been encountered in relation to the English law of counterparts?

Jill Clark: Not that we are aware of. The approach that we are taking is more robust because it puts the matter on a statutory footing. Some of the difficulties that have been experienced in England and Wales have arisen because it is not on a statutory footing. The practice note that exists now could become obsolete if judicial law changes at some point, so our approach is different and should overcome those sorts of difficulties, because it is more absolute and clear.

Stuart McMillan: How widely used are the procedures in England and Wales at the moment?

Jill Clark: I could not tell you in terms of numbers. I would expect that they are well used. I can try to find out, if that would be helpful.

Stuart McMillan: It would be. I certainly do not imagine that you will be able to find out the numbers for every single transaction, but a ballpark figure would be useful.

On a different note, paragraph 27 of the policy memorandum refers to the digital Scotland agenda. What is the estimated environmental impact of the bill, and what economic impact do you foresee for Scotland?

Jill Clark: The business regulatory impact assessment includes some figures for potential savings, but they are fairly small and depend on the extent to which a firm carries out lots of multiparty, multijurisdictional transactions of this nature. The savings for an individual firm could be quite significant or quite small, depending on how it uses such transactions.

As for the environmental impact, there will be much less travel, because people will not have to fly to signing meetings, and potentially less paper.

The impacts are not huge—they are at the margins—but they are positive on both fronts.

Stuart McMillan: If the bill's passage through the Parliament is successful, how will this new facility and these new statutory measures in Scotland be promoted to encourage businesses and trade to use Scots law?

Jill Clark: The minister has already written to a range of representative bodies to highlight what the bill will do and its benefits beyond its use by commercial practitioners to, for example, people who cannot get together but who have a legal document that they want to conclude. That work has started and will continue but, to be fair, I think that the practitioners are waiting for this to happen. In that respect, we have been pushing at a fairly open door.

Stuart McMillan: Thank you.

Stewart Stevenson: I am not quite sure where the European digital agenda stands both in this context and more generally. Is anything coming from the European Commission or the European Parliament that is likely to affect this area in future? Given the policy agreement that has been reached in Europe on the creation of a pan-European digital infrastructure, I wonder whether standards on this kind of issue would be of value. Where do we stand on that?

Alison Coull: I am not sure. As the Scottish Law Commission has said, we have, as it were, a mixed economy of traditional and electronic documents, and we have not yet moved to a full electronic system across the board. No doubt that will happen in future. We are certainly keen to ensure that the bill is future proofed in that sense, and we will no doubt have further discussions at a later date about the powers that we have included in the bill.

The Convener: I am very grateful for that response, because it answers the question that I was just about to pose about the future.

As members appear to have no more questions, I thank our witnesses for their contributions. I will suspend the meeting for a moment to allow for a changeover of witnesses. After our wee break, we will hear from the Scottish Law Commission.

10:28

Meeting suspended.

10:31

On resuming—

The Convener: We shall resume. I have huge pleasure in welcoming to the meeting representatives from the Scottish Law Commission: Lord Pentland, chairman; Hector MacQueen, commissioner; Malcolm McMillan, chief executive; Stephen Bailey, legal assistant; and Charles Garland from the Government legal service for Scotland.

Good morning, gentlemen. This is actually quite exciting, isn't it? [*Laughter*.]

Lord Pentland (Scottish Law Commission): It is.

The Convener: I think that those of us who do this work should recognise just where we have got to. It has been a long process—longer for the commission than for us, I should add—to reach the point where we can implement this kind of legislation.

If you wish to make some opening remarks, Lord Pentland, you may do so. John Scott will then lead the questioning.

Lord Pentland: I will say a few words of thanks and then make some remarks by way of introduction.

First, we at the commission are extremely grateful for the opportunity to give evidence to the committee at stage 1 of the bill's parliamentary consideration. I think that you know the different roles that my colleagues have played in the evolution of this project. Professor MacQueen is the law commissioner with responsibility for our project to review contract law across the board, and this bill has emerged as part of that. As the project manager for that project, Charles Garland has obviously been closely involved in the development of this legislation, and Stephen Bailey, our legal assistant, has also been working on the issue. In my relatively short time at the commission, I have been at the margins of all that work.

Before the committee begins its questions, I wish to make a couple of very brief observations. First and foremost, I put on record that the Scottish Law Commission is very appreciative of all the work that has been done by the Scottish Parliament, members of this committee, officials and the Scottish Government to put in place these new streamlined procedures for parliamentary consideration of certain law reform measures. We are convinced that this is an extremely valuable innovation that will greatly assist the process of systematic law reform in this country.

My second brief observation is that although the Scottish Law Commission is, of course, an independent body that stands apart from the Government, we fully recognise that we must work in close collaboration with others to ensure that our recommendations for improving the law are acted on and do not merely gather dust on the shelves.

Please do not think of us as ensconced in some sort of remote ivory tower in Causewayside. All our recommendations are built on detailed consultation and engagement with stakeholders and I believe that the bill is a good example of that. We know from those in the field of practice that their clients have very frequently not been prepared to make their contracts subject to Scots law because of the uncertainty about whether the modern system of execution in counterpart—which, as committee members know, is extensively used elsewhere in the world, particularly south of the border—is valid and effective as a means of concluding contracts here in Scotland.

As we understand it, based on the research and the discussions that we have had, that has been the reason why those clients have not chosen Scots law, despite the fact that there would be many so-called connecting factors pointing towards Scots law as the natural choice of legal system to govern the parties' contract, such as the presence of the parties and their advisers in Scotland and the subject matter of the contract affecting Scotland. We want that anomaly to be removed. We believe that once it is removed—if it is removed—there will be considerable scope for Scots law to be used much more extensively in commercial and other contracts that are concluded in and affect this country. That will bring about obvious economic benefits.

Finally, may I say, convener and members of the committee, that we at the Law Commission look forward to developing a strong working relationship with you and to giving evidence before you on many more law reform bills in the future.

The Convener: Thank you very much for your opening remarks. The rule of the road is probably that we will deal with number 1 first and worry about what comes down the rail afterwards. I invite John Scott to open our questions.

John Scott: Thank you very much, convener.

I thank Lord Pentland for his opening remarks. Although you may, to an extent, have covered my question, I will give you—as is, I think, common legal practice—the opportunity to answer it again.

I seek an overview of how the current process of contract signing works in commercial situations and an explanation of the need for commercial contracts to be probative. I also seek an explanation of what delivery means in practice and how the current rules on delivery of hard-copy documents apply to specific agreements, given that certain documents—for example mutual agreements—need not be delivered in order to be effective.

Lord Pentland: Perhaps Hector MacQueen can address those points.

Hector MacQueen (Scottish Law Commission): I think that the answer that Scottish Government colleagues gave you to the same question is indeed the case. The round-table signing ceremony and the round robin are commonplace. It is also fair to say that commercial contracts do not require to be in writing at all. In the courts, one has seen increasing evidence of quite informal emails being enough to constitute a contract—the case usually comes to court because that has taken a party involved by surprise. Someone will be asking, "How can these informal emails saying, 'Okay—let's go for it,' possibly constitute a contract?" However, the answer is that they can.

That leads into your second point. You asked about the probativity of documents. Why do commercial people want to do it in writing when it simply adds a layer of complexity that need not otherwise exist? The simple answer is that, especially when very large sums of money and quite long periods of time are involved, people want a document that they can refer to as their guideline, if you like, in relation to the money and through the years of performance that may well be involved. The creation of certainty is why people want to use documents.

Increasingly, the traditional methods are seen to be either cumbersome or difficult to achieve, or too slow, when time is critical. We give some examples of that in our written evidence. The situation need not be international; it could be between Edinburgh and Glasgow, or even between different parts of Edinburgh. The fact is that there is not enough time and that things have to be done by certain deadlines.

When you asked your question, I thought of the story that I was told by an Aberdeen solicitor when I was giving a lecture on this subject in that city before Christmas. He told me that one of the reasons why he liked to get it in writing when his fishermen clients were doing expensive things such as buying fishing boats was to get them to take it seriously. Getting the fisherman into the office to sign the document in front of a witness who also signed the document made that delightful individual realise that he was doing something significant. The form can sometimes be of value with regard to ensuring that the client knows that they are signing up for quite a lot of money and time.

Lord Pentland: Based on my experience of commercial law, I would say that one is often dealing with clients—particularly those from outside Scotland—who, to begin with, are instinctively a little bit wary and suspicious of the fact that we have a separate legal system up here and are a little bit unconvinced about it. They do not really know much about it and they think that it

is a bit odd. If they are told that there is some, even slight, doubt about the rules that affect the legal validity of their contract, they are simply going to take the cautious approach, and there is an easy alternative available, which is simply to write it subject to English law. That may be their instinctive reaction anyway. It is, actually, a major consideration and, of course, one is dealing not only with parties who are inherently cautious and conservative but also with their advisers, who share that mindset.

John Scott: Good, so this is essentially a catching-up process that is putting us into the 21st century.

Hector MacQueen: I think so, yes. It is certainly possible that a court that was presided over by a judge such as Lord Pentland would find, if it had to, that execution in counterpart is already valid, but there are lots of people who take the view that it is not. We give some examples of well-known law firms that have expressed that view publicly, on websites and so on, for the information of their clients. There is an issue there. We could wait for ever for the case that decides that issue one way or the other or we could solve the problem by putting through this piece of legislation.

The Convener: I am conscious that you gave us quite a number of examples, and I have heard of others. I appreciate why the legislation is being proposed—that has been well explained. However, although this might sound unreasonably negative at the beginning of the process, are there issues that you are aware of that the bill is not going to solve?

Hector MacQueen: The major issue might be the delivery of documents. One could have an argument about whether we should have a rule about the delivery of documents being the necessary step to making them binding and effective. Perhaps we could do it by communication or some other system. However, I do not think that we are quite there yet. We are not in a position to say with confidence what the overall law on delivery, if it is to be there at all, should be.

We perceive a principled notion of what delivery is—the person who grants the document puts that document beyond their control, so that it can no longer be changed. But how exactly does that principle operate in all the complex contexts that we have today?

Certainly, one of the things that I would like to examine is the law on delivery in general. If you go and look at the books on it, you see that it is a horrible mess. We are straightening out one bit—the electronic bit. That is clearly the most significant issue in practice, but there are other questions and the contract project in the Law Commission programme might go on to consider the law on delivery over the next few years.

10:45

The Convener: So we still do not know what the law says about the message that says, "Okay, go for it," if I have sent it by text but the text never arrives.

Hector MacQueen: Not with any degree of certainty at the moment. We addressed some of those questions in other bits of the discussion paper that preceded the report on execution in counterpart, but we brought execution in counterpart forward to report and draft bill stage because it was clearly impressed on us that that was the most urgent issue.

There are many questions about what delivery, communication and so on are. They are not resolved. On the other hand, it is also reasonably clear that, at the moment, they are not causing major difficulty or people to withdraw their support for Scots law. There are similar questions in English law and many other legal systems around the world.

The Convener: Indeed.

Lord Pentland: On a more general level, I will add something in answer to the question that you ask about other parts of the law that might benefit from improvement in this area.

At the commission, we wrestle with whether it is better to go for relatively small, manageable short-term projects or whether a law reform body should focus its attention on large chunks of Scots private law, which may be the more traditional approach but which has given rise to difficulty in the past. Law reform agencies throughout the world have had to deal with that issue.

For what it is worth, my thinking at present is that we should focus our attention on the smaller, more manageable, more readily realisable projects. As the committee knows, that is an issue that crops up in the context of the formulation of our next law reform programme—the ninth programme—which is what we are doing just now. I am sorry that I am widening the discussion a bit, but I am taking the opportunity because this is the first time that we have come before the committee.

The Convener: That is a debate to which we will return but, mercifully, it will be on another day. I ask that we stick to the bill. I am talking to myself, because I drifted off it.

Stewart Stevenson: The witnesses heard the interchange that I had with the bill team, so I will cut to the chase on electronic signatures. The electronic signature to which we are now giving legal certainty is not of necessity electronically

connected to the document that it signs. How does that leave us in a more secure legal position? Should we not create a more ambitious legal system without, at this stage, mandating its use?

Hector MacQueen: Early on in the project, I thought that the answer to everything was indeed the electronic. I put that proposition to the law firms with which we were engaging and the universal answer, interestingly, was that there was no client demand for it. I am not 100 per cent convinced that there is no client demand. It was also reasonably clear that the solicitors were reluctant to engage with electronic signatures too far too quickly.

Part of the concern relates to the security of even the advanced electronic signature and the certification process, which was mentioned in your previous discussion. The problem has been brought about largely by commercial providers that are exposed to the hazards of the marketplace. In the discussion paper, we give one or two examples of certification service providers in the Netherlands that have gone bust, causing a lot of problems.

An interesting development that we mentioned briefly in our written evidence is that the Law Society of Scotland is now issuing all its members with a smart card, which will provide an electronic signature for every solicitor who is registered with the Law Society. Clearly that opens up certain possibilities. So far as we were able to establish with the Law Society and with Registers of Scotland, which is also significantly involved in this because of the land registration rules that were referred to—I have lost my thread, I will try to regain it. The point is that solicitors could use those electronic signatures on behalf of their clients, provided that they had the appropriate mandate to do so.

Another point that was put to us in discussion as, at that time, an abstract possibility—it is now a slightly greater possibility—was that a solicitor requires a mandate every time they apply the advanced electronic signature that Mr Stevenson was referring to. Of course, it may well be that you apply your advanced electronic signature to what you believe is a final version of a document in its electronic form and then the next person who comes along to apply their advanced electronic signature will say that their name is spelled wrongly on page 13 or the wrong company number was given or—as I found recently in a conveyancing transaction in which I am involved—their national insurance number was not given correctly, and so on.

Those are the sorts of things that happen and they hold up transactions. It is important information—it is important that it is correct—so the solicitor then has to go back to the beginning. They have to get a fresh mandate to apply that advanced electronic signature to the document again as it is now a new document. It was said in discussion that that would be much too cumbersome. Doing it to the paper document, which is provided for in the Requirements of Writing (Scotland) Act 1995, is slightly easier. It is not exactly easy but it is a lot easier. It is basically the famous process of putting your initials in the margin at the place where the document has been manually corrected.

There are obvious advantages to the electronic option, but there are drawbacks from a purely practical and pragmatic point of view. My sense overall as we went through the consultation process was that we are still in a transitional phase, which may go on for many years yet. The mixed economy was mentioned previously—paper is still important and paper still has certain advantages.

The transactions in which we see the new process operating primarily—to begin with, at least—are the ones where the parties will often have been negotiating with each other for years before they get to that particular stage, so they are in a pretty close and basically trusting relationship. They know each other and they are expecting a signature page to come from, say, Stewart Stevenson Ltd to Hector MacQueen Ltd at the other end of the line. They have their lines of communication well established through their solicitors so there is a close relationship of trust. That is why I am not unduly concerned, in that particular context, about some of the issues that have been mentioned in relation to signature pages and so on.

We will have to rely on the law as it is for other transactions between parties who are less familiar with each other, as may well be the case. However, I think that the same issue of security exists as the law is at present and it is not an issue that one can clearly see a solution to without creating all sorts of burdens on business and on people who know each other perfectly well and are carrying out perfectly reasonable transactions. We have to be very cautious in this area, but we need to keep an eye on developments. That is where the ancillary powers in section 5 of the bill may be useful.

Stewart Stevenson: I want to follow up on the subject of remandating.

I am a layperson, so although I have been exposed to specific things at specific points, I do not have a comprehensive understanding. However, in relation to the process of purchasing property, for example, it is my understanding that the agents for each side talk to each other and eventually eliminate all the concerns and reach an agreed position. Every time that happens, the

agreement always seems to go back to the client, who remandates. That is not an unfamiliar process, whether it is done electronically or on paper.

Hector MacQueen: That is certainly true.

Stewart Stevenson: Similarly, I have just re-signed my will in the past few weeks, having updated it after quite a long time. I found myself signing every page. If there was an error, I would expect to be called back to re-sign a page.

You are trying to characterise a difference between the practical application of signatures in the electronic world and their application in the paper world, but I am not sure that I recognise the difference. Would you like to comment on my observations?

Hector MacQueen: I take the point. I suggested that solicitors could perhaps take a more general mandate in a client's affairs. The argument against that, from the client's point of view, is that it means that they must place a very significant degree of trust in their lawyer. That is something that lawyers would like to think all clients should do but, for some reason, they do not invariably do so.

It would be quite incautious to give a general mandate with regard to an electronic signature and its application to documents. The mandate must be specific and precise.

The point that I rest on is that the differences between electronic and paper signatures are not significant, although there are practical difficulties. In commercial transactions in particular, time is critical. That is one of the key questions. To be going to and fro between client and solicitor is not desirable if there are only hours or minutes left to meet particular deadlines. That is the argument in favour of paper: paper can be quicker than electronic means.

Stewart Stevenson: Having been project manager for our electronics system, I remember watching our first clearing house automated payment system transaction of more than £1 billion, which was to deliver the exchange of ownership of an oil rig. Because that was done with CHAPS, it took less than 10 seconds.

Hector MacQueen: That must have been very well set up in advance, I think.

Stewart Stevenson: Correct—of course it was—but is that not precisely the point that you are making?

Rather than indulge in reminiscence, I will move on. Is the Scottish Law Commission considering taking the matter further, in particular by creating legal certainty around a more robust use of electronic signatures—especially the advanced electronic signature, for which there is a legal framework already?

Hector MacQueen: That is certainly one of the issues that we have identified as a general theme, which could inform the ninth programme of law reform. The chairman may wish to say a bit more about that.

Lord Pentland: We readily understand why the measure has given rise to an interesting discussion about the electronic conclusion of contracts, the use of electronic signatures and so on—the issue is at the cutting edge of legal practice, I suppose. It is worth reiterating that the focus of the measure before us is rather more limited. It concerns the authorisation of the conclusion of contracts in counterpart form and permitting electronic delivery.

As you will perhaps have seen from our discussion paper, we inevitably got into questions about electronic signatures and so on. On a general level, we are extremely interested in ensuring that our law follows closely the pace of technological development. It is very easy for a legal system inadvertently to fall behind the rapid rate of technological development. We are thinking about that quite closely in connection with the ninth programme, as Hector MacQueen said—although I do not want to get into that. However, it ties in well with the Government's digital Scotland strategy.

11:00

Stewart Stevenson: In an article that appeared in Practical Law's *PLC* magazine in April 2012, two authors from Slaughter and May gave three tests for whether electronic signatures work. The authors wrote:

"To achieve a level of certainty comparable to a handwritten signature, an electronic signature needs to be:

- Unique to the signatory.
- Created using means within a signatory's sole control.
- Capable of being linked to the relevant document or data in such a manner that any subsequent changes to that document or data would be detectable."

Would what is proposed meet the three tests? I suspect that the problem lies with the third requirement.

Hector MacQueen: I think that I accept all three tests. A further issue, which has been hinted at, is that it is not easy to look at the issue in a purely Scottish context. It has to be done on an international basis; it is not enough to do it on a UK basis or even a European Union basis, although the powers that be in those respects might not think that. The basic point is that we have an international, global economy, and what we do must tie in with what happens elsewhere.

What I know of the Law Society of Scotland's smart card suggests to me that that is very much the Law Society's thinking. It has looked for a card that will have global recognition, as far as that is possible in the present, rather fragmented state of things legally.

Margaret McCulloch: In your report, you recommend that an electronic document repository be set up, which the bill does not deal with. Your recommendation says that you would deal with that in due course. What did you mean by that?

Hector MacQueen: I do not think that it was the Scottish Law Commission that said that it would deal with the issue in due course. We took it as far as we could in the context of this exercise, and it is for others—not just the Government or Registers of Scotland—to take it further.

From what we saw during our consultation process, we have no doubt whatever that law firms could run electronic document repositories. There is absolutely nothing to stop them doing so. Indeed, they probably have electronic document repositories of the kind that we envisage in our report.

The problem is that if there are multiple parties—if I am your solicitor, Charles Garland is Mr Stevenson's solicitor and so on—why should any of us trust the other person's solicitor to hold the precious document that we are all trying to create and negotiate? That is why we thought that it would be attractive if Registers of Scotland could provide such a service. The consultation suggested that Registers of Scotland is the trusted third party; it is known across the legal profession in Scotland; and it already has the technology and capacity, given its electronic registers and so on—Registers of Scotland is very much going in the direction of electronic records.

The most recent intelligence that we have had from Registers of Scotland is that it remains interested in an electronic document repository but it is concentrating on implementing the Land Registration etc (Scotland) Act 2012. I think that 30 November is the scheduled start date for the new, all-singing, all-dancing electronic land register.

Once the land register is up and running and the inevitable teething problems have been resolved, Registers of Scotland will start considering an electronic document repository, which is an interesting business proposition for it. In our report, we discuss the major things that solicitors would look for from such a repository. There might well be other issues, and I am sure that there will be wider consultation.

However, we are certain that there is no need to change the law to enable an electronic document repository to be set up. Registers of Scotland has the power to do that under the 2012 act, and there is nothing in that act or the amendments that it makes to the Requirements of Writing (Scotland) Act 1995 to stop people using electronic documents and applying electronic signatures of the appropriate standard.

The one issue that we think might be relevant—we expressed this in our response to the Registers of Scotland's consultation—is the level of advanced electronic signature that Registers of Scotland will require, because certain levels may be higher than is needed to have the legal effect that it wants. Our understanding is that it will review the position in two years' time, I think—I cannot quite remember when; it might be two years from 30 November or whenever the electronic land register comes into effect. However, that is the one bit of law that we think would benefit from another look in due course.

Margaret McCulloch: Excellent. Thank you for that.

Richard Baker: I raised with the first panel issues around pre-signed signature pages. It has been suggested in England that the risk of fraud could be increased because a pre-signed signature page could be applied to a different contractual document from the original one. There was a case in England that led to a change in the practice note issued by the Law Society of England and Wales.

I understand from what you said earlier, Professor MacQueen, that you are not too concerned about some of the issues around pre-signed signature pages, but it would be good if you could expand on that and say what wider issues you have had to consider with regard to pre-signed signature pages. More fundamentally, why do you think that the bill provides a robust challenge to any risk of fraud in relation to the use of counterparts?

Hector MacQueen: The present law is reasonably robust, in the sense that if a signature is challenged in general terms, it is for the person who says "That is my signature" or "That is your signature" to prove it. The onus is on proving that the signature is genuine—that is the starting proposition. For whatever reason—I do not know why—there are very few cases in which the issue has arisen. However, I think that the Scottish courts would undoubtedly reach the same result that the English court reached in the case concerned.

That clearly means that, just as we would not advise a client to sign a blank cheque or set of blank cheques and leave it with their closest friend, their worst enemy or whoever, people should not sign signature pages ahead of knowing

what document those pages will be attached to. The person's signature would simply not be effective, although doing that might expose them to quite a lot of trouble.

We think that the issues arise with a document that is changed in progress—perhaps it has already been signed by some or all of those involved, but a mistake of the kind that I mentioned earlier is discovered. Such things are not uncommon. Whereas in the good old days a document was carefully typed out and checked and compared by very skilled typists in typing pools, it is all done today by word processor. That is a wonderful machine, but it leads to degrees of slippage that perhaps did not exist in the world as it was when documents were purely printed.

It is quite common to discover a mistake in a document. However, when we have the signed document, the easy solution is to go into the computer, correct the error on the relevant page, print that page and, as the saying goes, slip it into the document. So far as the naked eye is concerned, there is nothing wrong with the document. However, our view is that if an error was established as a matter of fact, that would mean that the signature had been applied to a different document, which would no longer be valid.

One must therefore think about pre-signed signature pages in different contexts: the context that is really pre-document; and the context that is not really pre-document, but where the document itself has been changed in some way during the progress of the signing ceremony. We are quite clear that the present law says that there is no valid signature or document in that context, unless there has been authorisation by the signatory in advance.

For example, if I had pre-signed a signature page because I was going on holiday to France next week, I would have to be informed as to what document was being signed. How that would be done would be a matter for the party and the agents involved.

The more typical situation, however, involves the ratification of something that happened after the document had been signed. An example would be the slipped page that I mentioned, which is a much more common situation in the transactions with which I am familiar as a result of this exercise. In such cases, ratification is required to show that you know that page 93 now has "Hector MacQueen" as opposed to "Hector McQueen". That is generally much less troublesome than someone leaving a blank signature with no idea of what document it will be attached to. How you get authorisation in advance for that is a complicated and difficult matter.

Richard Baker: In the case in England, the courts found that the documents were not legitimate. Is that approach already established in Scots law, as far as you are aware, or does it need case law to establish it?

Hector MacQueen: Yes. I think that a Scottish court would have gone down exactly the same route and would have reacted as Mr Justice Kitchin did.

Lord Pentland: I do not think that the Scottish courts would have any difficulty with that reasoning at all; they would regard that decision as persuasive, although it is not, strictly speaking, binding.

To add to what Hector MacQueen said, it is important to appreciate that ratification is something that is usually inferred from evidence about conduct subsequent to the alteration to the contract.

Richard Baker: Thank you.

John Scott: Forgive me if this is a naive question, but although what is proposed will be much more convenient in the electronic world that we live in, will documents be more open to manipulation after signing?

Hector MacQueen: Documents have always been open to manipulation on signing. We were told many tales, which were always, of course, not personal experiences but simply stories that people had been told by others about others again who had done things with documents. I fear that documents are probably changed every day, and because it is in nobody's interests to raise the question it does not get raised.

It is a difficult question. The example that I gave from my own experience was something that happened in the past couple of weeks, when I had to change a national insurance number, as my wife's national insurance number was on a form that had to be returned to Her Majesty's Revenue and Customs so that stamp duty land tax appropriate to the purchase that I am making was paid. We changed it and I initialled the change, and we thought that that was probably enough. So far, HMRC has not come along and said, "Hey, what about this?"

Is it wrong to do that? In the vast majority of cases, it is absolutely harmless and simply facilitates a transaction, but there will be cases where it matters, and in the English case—the one and only case of its kind of which I am aware—it mattered quite a lot, because quite a large sum of money was at stake, and the tax authorities were on the case.

John Scott: I come from a farming background, and I know that there will be documents that have been deliberately falsified, where the insertion of a

comma or changing a comma into a semicolon could make a difference. Such examples will, presumably, have existed in Scots Law hitherto.

Hector MacQueen: There are examples of that.

John Scott: Will the bill essentially make the process safer?

Hector MacQueen: I do not think that it will make the process safer, but I do not think that it will make it any worse than it already is. Lord Pentland and his colleagues in the Court of Session are pretty astute at detecting dodgy documents.

There are often cases in which a judge will say that they have the strongest suspicions that documents have been manipulated or destroyed. Judges are astute, and they are alert to such possibilities. Particularly in the recessionary period that we have recently experienced, many cases have gone to court involving people who have tried to get out of deals that they did or who had tough deals enforced on them. I could certainly find cases in which the judges identified, I presume with the help of counsel, that, on the balance of probabilities—which is a much less demanding standard than beyond reasonable doubt—a document was not what it purported to be. There are plenty of rules in place to allow the validity or invalidity of documents to be tested and the right decision to be reached in court, which, ultimately, is where it really matters.

11:15

Stuart McMillan: I want to follow up on the question that I asked the first panel. Will the bill put Scots law on a level playing field or will it give us a competitive edge in the global market?

Hector MacQueen: My sense is that the bill will certainly put us on a level playing field, and that it might give us a competitive edge by virtue of its statutory formulation.

The law in England is by no means free from doubt; it has emerged through practice. Although the English courts are very good at recognising good practice, every now and then they discover that a particular practice is not that good. The case that has been mentioned is an excellent example of that. It triggered the practice note in England, but if you read that practice note, you will see that it says things such as, "Make a photocopy at this point," or whatever. That is all very helpful, but the world moves on. We want to have general rules that leave the individual with the flexibility to decide what they need, and which are future proofed.

We think that there is a possibility that Scotland could have a competitive advantage—"edge" is perhaps the right word to use. People may be attracted by the fact that, under the bill, the Scottish procedure is clean and clear cut, which might—along with the fact that it is based on clear legal principles—lead them to execute their documents under that system. In a sense, it will be for our lawyers to rise to the challenge that will be presented. They are certainly hungry enough to make that happen.

What would clinch Scotland's having a competitive edge is something that has been left out of the bill—the setting up of an electronic document repository, which is not a matter of law reform. The availability of such a repository would be seriously attractive for businesses around the world. It would not matter to businesses where the repository was; they could make contracts under any law that they liked using that electronic facility, which would bring many benefits. The potential exists for Scotland to have a genuine competitive advantage in that context.

Charles—did we identify something similar in Spain?

Charles Garland (Scottish Law Commission): We certainly identified that there is in Spain an equivalent of the smart card that the Law Society proposes to issue, which allows secure exchange of information between people who hold such signatures. We discovered something akin to that, which has had very great benefits in unexpected areas that the bill does not address. For example, I think that in criminal law it enabled instruction of counsel in a very secure way that had not previously been available.

Lord Pentland: I would not want to get the bill's potential out of proportion, but in answer to Mr McMillan's question, it will certainly put Scots law on a par with accepted good international practice, and it could be used as a selling point by imaginative and creative legal advisers because, as far as we are aware, the bill will represent the first statutory formulation of the rules governing the practice of execution in counterpart anywhere in the world. We need such selling points because in the real world we are up against a much larger and more dominant legal system south of the border.

Stuart McMillan: You might or might not want to answer this next question. You will understand why after I have asked it. With regard to the global economy and our competitors, are there any countries—apart from, of course, south of the border—where there might be a great deal of competition and from which we might gain additional business if the bill is passed?

Hector MacQueen: Yes. One of Paul Pentland's predecessors—Lord Drummond Young—was on a plane crossing the Atlantic and found himself sitting next to a Texan businessman.

When he told this chap about our proposed electronic document repository, the Texan really liked the idea and was extremely enthusiastic about it. Texas might therefore be a good place to start.

The crucial thing for Scots lawyers is to look at the places that are already doing business in Scotland and with which Scottish businesses themselves are already doing business. One should make no mistake: this sort of thing is very widespread, and Scotland and Scottish businesses are playing their part in the global economy. Of course, they could do more. In any case, I would start by looking at where we are doing business, which might mean not only the European Union, but the United States and Canada, both of which are pretty accessible.

Our research shows that execution in counterpart is also widespread practice in Australia and New Zealand. Of course, that should not come as a surprise, given the scale of those countries and the fact that a lot of business is going on there. All those countries are very familiar with the process and, particularly those in the northern hemisphere, are places that Scots do a lot of business with.

Lord Pentland: It is also worth reminding the committee that international legal practice is largely driven by the very large English law firms that were originally based in the City of London but which are now global in every sense of the word. I am sorry to keep harping on about this, but we must ensure that we are not falling behind the game with regard to basic rules of practice.

Stuart McMillan: I will go back to the mandate issue, which Stewart Stevenson asked about. I know that we have been talking about electronic signatures for contracts, but should the mandate, too, be in electronic form or should it be in wet ink?

Hector MacQueen: Solicitors will tell you that they want the mandate in a form that they can produce later to justify what they have done. It would therefore be unwise to depend on an oral mandate. However, I am not sure that they would be particularly concerned beyond its being in a form that could be used later as evidence, if necessary.

The Convener: That concludes our questions. I thank our witnesses for coming along and for being so forthright in what is the first step in the parliamentary process for this bill and what we all hope will be—as I think I detect—the first step in the process of reforming Scots law. There is clearly quite an amount to be done in that respect.

Again, I briefly suspend the meeting to allow our witnesses to leave.

11:24

Meeting suspended.

11:30

On resuming—

Instruments subject to Affirmative Procedure

Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [Draft]

Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations 2014 [Draft]

The Convener: No points have been raised by our legal advisers on the instruments. Is the committee content with them?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2014 (SSI 2014/142)

11:30

The Convener: We come to agenda item 3. The drafting of the amendment order appears to be defective in two respects. First, paragraph (5) of class 9B in part 2A of schedule 1 to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as inserted by the schedule to the instrument, inter alia, purports to define the terms "enclosed shopping centre" and "retail park" for the purposes of class 9B. However, those terms are not used in the class, although they are used within the definition of

"shop or financial or professional services establishment"

in paragraph (5) of class 9A.

Secondly, "raised platform" is defined for the purposes of class 9A to specify the minimum height of platform, but it should also have been defined for the purposes of the use of the term in paragraph (2)(f) of class 9C.

Does the committee therefore agree to draw the instrument to the attention of the Parliament on reporting ground (i), as the drafting appears to be defective?

Members *indicated agreement.*

The Convener: Does the committee agree to note, however, that the Scottish Government has undertaken to make an amending instrument shortly, to correct the errors?

Members *indicated agreement.*

National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) Regulations 2014 (SSI 2014/154)

The Convener: Several points have been raised by our legal advisers in relation to the regulations. First, there has been unjustifiable delay in laying the regulations before Parliament; they were made on 16 May and laid on 30 May 2014. Although the delay does not affect the validity of the regulations, it amounts to a failure to comply with the laying requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, that an instrument must be laid as soon as is practicable after it is made. The

period of delay in laying the regulations is unusual and is not satisfactory.

Does the committee therefore agree to draw the instrument to the attention of the Parliament on reporting ground (d), as there has been an unjustifiable delay in the laying of the regulations?

Members *indicated agreement.*

The Convener: Does the committee also agree to draw the instrument to the attention of the Parliament on reporting ground (j), as the laying requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with?

Members *indicated agreement.*

The Convener: The committee may wish to indicate its disappointment that the aforementioned delay follows a similar delay in the laying of the National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43). Does the committee agree to do so?

Members *indicated agreement.*

The Convener: The committee may wish to note, however, that the Scottish Public Pensions Agency is again contacting the Treasury with a view to steps being taken to seek to ensure that the omission is not repeated.

Further points have been raised by our legal advisers in relation to the regulations, as they contain minor drafting errors. First, regulation 11(c), and the consequential references to the provision that that will insert, have been included in error. The Scottish Government has confirmed that the provisions have no substantive effect and that an amendment will be lodged to make the appropriate provision, as and when the Finance Act 2014 is commenced and the relevant regulations under it are made.

Secondly, regulation 24, which adds new regulation 2.J.14(12) of the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013, refers to "host Board" when it should refer to "contracting Health Board". The Scottish Government has undertaken to amend the provision in due course.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on the general reporting ground, as they contain minor drafting errors?

Members *indicated agreement.*

Stewart Stevenson: In the light of your en passant reference to the Treasury, convener, I point out that you were, of course, making it clear that the Treasury provided the appropriate signature on 16 May but did not advise that that had been done until 30 May, so the delay to which we have referred was entirely down to failure of processes in the Treasury, albeit that accountability to the Scottish Parliament of course lies with the Scottish Government and not the Treasury.

The Convener: Indeed.

Does the committee agree to note that the Scottish Government has undertaken to correct the errors in due course?

Members *indicated agreement.*

Land Register Rules etc (Scotland) Regulations 2014 (SSI 2014/150)

Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment (No 2) Regulations 2014 (SSI 2014/157)

The Convener: No points have been raised by our legal advisers on the instruments. Is the committee content with them?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Regulatory Reform (Scotland) Act 2014 (Commencement No 1 and Transitional Provision) Order 2014 (SSI 2014/160)

Act of Adjournal (Criminal Procedure Rules Amendment) (Regulatory Reform (Scotland) Act 2014) 2014 (SSI 2014/162)

Children and Young People (Scotland) Act 2014 (Commencement No 2, Transitional and Transitory Provisions) Order 2014 (SSI 2014/165)

11:35

The Convener: No points have been raised by our legal advisers on the instruments. Is the committee content with them?

Members *indicated agreement.*

Historic Environment Scotland Bill: Stage 1

11:36

The Convener: Agenda item 5 is consideration of the Scottish Government's response to the committee's stage 1 report on the bill. Members will have seen the briefing paper and the Scottish Government's response. As members appear to have no comments, are we content to note the response and, if necessary, to consider the bill again after stage 2?

Members *indicated agreement.*

Housing (Scotland) Bill: After Stage 2

11:36

The Convener: We come to agenda item 6. Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper.

Stage 3 is due to take place on Wednesday 25 June. The deadline for lodging amendments is 4.30 this Thursday—19 June. The committee may therefore wish to agree on its conclusions today.

Newly inserted section 77A provides that elected and certain other politicians are disqualified from hearing housing cases that are transferred under the bill to the first-tier tribunal. Newly inserted section 77B amends the Rent (Scotland) Act 1984 to provide that the same elected and other politicians are also disqualified from being appointed as, or remaining, a member of the Private Rented Housing Panel. Both provisions confer power on the Scottish ministers, by order, to modify the list of disqualified offices. Does the committee agree to recommend that the Scottish Government lodge amendments at stage 3 to make the new powers in section 77A(3) and proposed new paragraph 1A(2) of schedule 4 to the 1984 act, which is inserted by section 77B of the bill, subject to the affirmative procedure?

Members *indicated agreement.*

Stewart Stevenson: I certainly agree with that recommendation, but I make the more general point—I have made it elsewhere—that it would be good practice, if and when the Government amends the list, for it to republish the entire list in the amending order rather than to publish just the amendments. That would avoid the subsequent need to restate the list after large amounts of amendments. It is useful to have that on the record.

The Convener: That is a familiar plea, with which I suspect we all agree.

Does the committee agree to report that it is otherwise content with the newly inserted powers in sections 77A and 77B of the bill?

Members *indicated agreement.*

The Convener: It is suggested that the committee may be content with all the other provisions in the bill that were amended at stage 2 to insert or substantially alter provisions that confer powers to make subordinate legislation and other delegated powers. Are we content to report accordingly?

Members *indicated agreement.*

The Convener: We understand that relevant stage 3 amendments might be lodged, but we will have the opportunity to consider them next week.

Buildings (Recovery of Expenses) (Scotland) Bill: After Stage 2

11:39

The Convener: We come to agenda item 7. Members will have noted that the member in charge, David Stewart, has provided a supplementary delegated powers memorandum and members will have seen the briefing paper.

Stage 3 is due to take place this Thursday—19 June. The committee may therefore wish to agree on its conclusions today. One might go a bit further and say that we need to do so.

Does the committee agree to report that it is content with the provisions in the bill that have been amended at stage 2 to insert or substantially alter provisions that confer powers to make subordinate legislation and other delegated powers?

Members *indicated agreement.*

The Convener: We will go into private session to consider agenda item 8.

11:40

Meeting continued in private until 11:48.

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e-format first available
ISBN 978-1-78457-664-6

Revised e-format available
ISBN 978-1-78457-679-0

Printed in Scotland by APS Group Scotland