The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 30 September 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
27th 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:

Anne-Marie Conlong (Scottish Government)
Dr Amanda Fox (Scottish Government)
Paul Hally (Shepherd and Wedderburn LLP)
Robert Howie QC (Faculty of Advocates)
Norman Macleod (Scottish Government)
Colin MacNeill (Dickson Minto WS)
Dr Hamish Patrick (Tods Murray LLP)
Rachel Rayner (Scottish Government)
Professor Robert Rennie (University of Glasgow)
Dave Thomson (Scottish Government)
Ian Turner (Scottish Government)
Alasdair Wood (Law Society of Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 30 September 2014

[The Convener opened the meeting at 10:01]

Decisions on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 27th meeting in 2014 of the Delegated Powers and Law Reform Committee. I ask everyone to make sure that they have turned off their mobile phones.

The first agenda item is to take decisions on taking business in private. It is proposed that we take items 9 and 11 in private. Item 9 will be further consideration of the oral evidence on the Community Empowerment (Scotland) Bill that we will hear today. It is also suggested that we take future stage 1 consideration of the bill in private. Item 11 is consideration of a draft report on instruments that were considered by the committee in 2013-14. Does the committee agree to take items 9 and 11 in private?

Members *indicated agreement.*

The Convener: Does the committee also agree to take in private further stage 1 consideration of the Community Empowerment (Scotland) Bill?

Members *indicated agreement.*

The Convener: Members should also note that, in line with a previous decision of the committee, item 10 will also be held in private.

Community Empowerment (Scotland) Bill: Stage 1

10:02

The Convener: Agenda item 2 is oral evidence on the Community Empowerment (Scotland) Bill. This allows the committee to follow up on matters in relation to the bill that it previously raised in writing with the Scottish Government.

I welcome the first panel of a cast of thousands: Ian Turner is the bill team leader, Norman Macleod and Rachel Rayner are from the Scottish Government legal directorate, Dave Thomson is from the land reform and tenancy unit, Dr Amanda Fox is food and drink policy leader and Anne-Marie Conlong is from the performance unit. Good morning one and all. We will test you a great deal this morning, but I hope that it will not take forever because we also have to hear from lots of lawyers later on.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to start by looking at how the legislation provides for determining the national outcomes, and the role of Parliament in seeing whether those are met. Before I ask my questions I want to go back to the progenitor of Scotland performs, which is, of course, the Virginia performs model. In particular, I want to explore, perhaps with Mr Turner and Ms Conlong, the extent to which the Virginia performs model has been examined. That model differs in certain ways from how our bill is constructed, in that the council on Virginia's future, which essentially determines the targets, is not simply a Government body, but requires the inclusion of the majority and minority leaders from each house—they are part of the body that sets the targets. In that context, there is a role for a more widely based, rather than simply Government-driven, setting of the targets.

To what extent have officials and ministers looked at the Virginia performs model and the council on Virginia's future in deciding how to take the bill forward?

Anne-Marie Conlong (Scottish Government): I am happy to take that question. Back in 2007—and before that, when Scotland performs was being developed—there was a huge amount of research and liaison with the people who were involved in Virginia performs. A lot of what happened there informed and led across to Scotland performs. Stewart Stevenson is absolutely right that the key difference is around the council on Virginia's future; that leads me to the difference between that approach and what we propose in the bill.

The Scottish Government believes that what we have set out in the provisions reflects the current separation of powers between the Scottish Government and the Parliament. It would be for the Scottish ministers to co-ordinate Government business and to set out the strategic direction for Government—within its overall accountability to the Parliament, of course—and the Parliament would exercise a scrutiny function, holding ministers to account on progress towards the national outcomes and objectives. Of course, the Scottish Parliament may wish to debate the national outcomes as set by Scottish ministers, and the arrangements that are proposed would not prevent that in any way.

I will pick up on your point about the widely based element of the outcomes in Virginia performs. Part of the work that we are doing under Mr Swinney and the round table that is chaired by him—which is quite a diverse group of stakeholders as it includes cross-party support from the Parliament, and key civic organisations in Scotland such as the Carnegie Trust and Oxfam Scotland, as well as some academics—involves working together to develop an improved Scotland performs. In fact, that is where the impetus to put provisions in the Community Empowerment (Scotland) Bill came from. The national outcomes will therefore be widely consulted on. In the provisions, we have left the basis for that consultation as open as possible so that as many people as possible, including the whole of the public of Scotland, where that is appropriate, can be consulted. That is a broad base for setting the national outcomes.

The fundamental difference from what we propose in the bill is that, as Stewart Stevenson said, the council on Virginia's future is quite separate. We are more than happy to take back for further consideration with ministers the committee's views on the respective roles of the Scottish Parliament and the Scottish Government in setting the outcomes.

Stewart Stevenson: This committee's role is restricted and is not to look at the broader policy issues. It simply relates to whether the construction in the bill that is before us is appropriate. The policy committee will perhaps pick up some of the points that you make.

I am simply trying to explore the process to ensure that what we have in the bill properly reflects the policy outcome. I note that the Virginia performs framework and the council on Virginia's future were established not by ministerial fiat but by the governing legislation that was passed in Virginia. I just want to be clear that that is forming part of the consideration. From the answer that I have had, I think that we as a committee should properly conclude that that is the case, even if there might be different views elsewhere, in respect of policy.

I note that the bill makes no specific provisions on persons or bodies that should be consulted about national outcomes. It seems that you would be able to identify particular bodies that you would consult. Is there any particular reason why we do not see a list in the bill?

Anne-Marie Conlong: The intention is to leave the potential scope for consultation as broad as possible. That is something that our stakeholders have been very keen on. In some cases, a review of the national outcomes might focus on a specialised or specific issue, in which case only certain bodies or persons would be consulted, because that would be the most appropriate thing to do. In other cases, the consultation might be much wider because the review of the outcomes is of a much more general nature.

The intention behind not listing bodies was not to limit or narrow in any way the scope of the bodies and people who can be consulted. However, if the committee thinks that the bill should include a minimum list of bodies, we can consider doing that, but we would be clear that we do not want to limit the scope of potential consultation in any future review.

Stewart Stevenson: It would not be for this committee to suggest who should be on such a list. That would be a policy matter.

The point on which I want to be clear is whether consideration has properly been given to the possibility of involving some people or bodies in looking at the whole thing, while ensuring that the bill does not restrict consultation. I assume that consultation has taken place on exactly that point. I see that you are nodding.

Anne-Marie Conlong: Yes.

Stewart Stevenson: Right. I will move on.

The bill makes no provision for regular periods of reporting, unless I have misread it. Is there a reason for that?

Anne-Marie Conlong: Again, the intention was to keep some flexibility. Currently, the Scotland performs website is the reporting tool for the national outcomes. The approach is unique, in that the website is constantly updated, as soon as new data become available. This might also be a policy matter, but we have debated with our colleagues around the table whether a report that is static in time would be helpful and whether such a report would add to the existing reporting process. How we might maintain the constant dynamic reporting of Scotland performs while providing regular reports, if there is an appetite for them, is still under consideration.

Stewart Stevenson: In the context of formulating policy, the bill provides that public bodies beyond Government will have a duty to "have regard to" the outcomes that are set, while not placing such a duty on the Government itself. Was there a reason for that? Let me characterise the position in the most extreme way: the Government gets to choose the questions for the exam sheet and then answers them, but that is not the case for other public bodies.

Anne-Marie Conlong: I assume that the Scottish Parliament's scrutiny role is to hold the Government to account on the national outcomes. If the outcomes are set based on broad public and civic consultation, there is a collective view of what they should be and progress against them would be tested on a wide consultative basis.

Stewart Stevenson: I will ask one more question. The Government has brought together a group, which includes Opposition representatives, but there is no direct parliamentary input. We have a range of bodies and individuals, who represent a range of political views, but there is no process in the bill for the Parliament to be part of that. Is that correct?

Anne-Marie Conlong: That is correct, as the bill stands.

Stewart Stevenson: Okay. It is important to get that on the record, so that we understand the position.

The Convener: I will pursue that issue. If we are talking about the outcomes providing a framework to which other people must have regard—I take the comment about things being subject to parliamentary scrutiny, as we would expect in a parliamentary democracy—it seems strange that there is no mechanism for the Government to bring to Parliament an affirmative statutory instrument setting out the principles, which we could consider and then reject or approve. I am struggling to understand why there will be no such process.

Anne-Marie Conlong: As I said, the position until now has been that the provisions reflect the Scottish Government view of the separation of powers between scrutiny and the setting of the strategic direction of Government. That has been the thinking up to now, but we welcome the committee's views and can consider the matter further with ministers.

The Convener: I argue that we will always scrutinise such things, but we must find them before we can do so. If the Government does not set out its approach in a form into which a parliamentary committee can get its teeth, there will be only peripheral scrutiny, which is not a good process.

Anne-Marie Conlong: At the moment, Scotland performs is set out publicly—all the information is publicly available. In fact, both last year and this year, we have assisted parliamentary committees with scrutiny of the draft budget by producing performance score cards for each of the committees. There are processes available, albeit that they are not laid out formally in statute. Scotland performs information is publicly available and has been well used by Parliament to scrutinise performance.

10:15

The Convener: At the risk of pursuing the issue too far, I make the point that, if a set of things to which public bodies must have regard is set out in law, they ought, I suggest, to be laid out in such a way that a parliamentary committee—ours or another—could scrutinise those things instead of having to work its way round and generate some debate about the general principles that we think we have. There seems to be a process point there, which I think is what worries us.

Anne-Marie Conlong: I am certainly happy to take that point away.

The Convener: Thank you. That completes that line of questioning, unless other members have questions on it.

We move on to question 5, which will be asked by John Scott.

John Scott (Ayr) (Con): Sections 4(6), 8(3), 16(2), 16(3) and 51(2) are all broadly concerned with the procedure to be applied to powers that enable bodies to be added to or removed from the lists in the schedules to the bill. In the bill, the power to add or remove a body is subject to negative procedure. In that regard, you draw a parallel with the Freedom of Information (Scotland) Act 2002.

However, a different approach has been taken in more recent acts, with the power to add a body being subject to affirmative procedure and the power to remove a body being subject to negative procedure. That approach has been taken in the Public Services Reform (Scotland) Act 2010 and the Regulatory Reform (Scotland) Act 2014. Why have you not adopted that more recent approach? In particular, why have you chosen to apply negative and not affirmative procedure to the power to add a body to a list?

Ian Turner (Scottish Government): The powers provide the flexibility to make changes, should that be necessary. Across the bill, the powers in the relevant provisions are limited to amending the list of public bodies that can be involved.

We believe that such regulations would be unlikely to generate any controversy, so because there is unlikely to be an issue at that stage, negative procedure would be the more appropriate procedure to use.

John Scott: Right.

Ian Turner: I appreciate the point that you made about more recent acts, and we would be happy to consider the views of the committee.

John Scott: I think that our view would be to ask why there should be a sudden reduction of standards, as it were. I am happy to have made the point; I will leave it at that and leave it for others to say more.

The Convener: The point is well made, but I suspect that the problem is that, without knowing the circumstances that are being referred to, it is not obvious which process it would be desirable to use. I suppose that we would tend to give the Government the benefit of the doubt and assume that it would consult on things that needed to be consulted on, and would not lay a negative instrument if it had not consulted the appropriate people.

Ian Turner: Absolutely.

The Convener: In practice, therefore, the procedures might be almost the same.

Ian Turner: Yes, I think that that is our view. The bill has gone through a hugely consultative process, with individual consultations being followed by more detailed consultation on the draft bill. That is what we intend to do with regulations in the future.

The Convener: I suspect that making the point is all that we can do for the moment.

John Scott: As parliamentarians, we do not want to see a reduction in parliamentary scrutiny, and the answers that have been given suggest that there will be a reduction in parliamentary scrutiny, which is a departure from what we have been used to. Is that a fair comment?

Ian Turner: Negative procedure would still be used. That certainly represents a reduction in scrutiny compared with the use of affirmative procedure, but we believe that the use of negative procedure is appropriate in relation to the powers as they stand.

Stuart McMillan (West Scotland) (SNP): Good morning, panel.

I have some questions about section 10 of the bill. There is a possibility that they may stray into policy matters, in which case I understand that you would not be able to answer them, but I will pose them and we will take it from there.

Section 10 provides that community planning partnerships and partners must carry out their functions in relation to community planning in accordance with any relevant guidance that is issued by the Scottish ministers. Why is it proposed that the guidance under section 10 will be binding on community planning partnerships and partners, rather than that they will be required to have regard to it?

Ian Turner: That became an important point during the process of developing the bill. The intention is that section 10 will be used for community planning partnerships, which have been in place for a number of years, although we are putting them on a statutory footing under the bill. The section should ensure a consistency of approach to community planning throughout Scotland. We want local discretion and local innovation in how community planning is approached and dealt with, but there might be some matters that we feel are fundamental enough to apply on a national level, hence the reason to comply with national guidance.

Stuart McMillan: You are aware that I also sit on the Local Government and Regeneration Committee, as we met last week.

Ian Turner: Yes.

Stuart McMillan: Over the past few years, much of the work that has been undertaken by that committee has highlighted that point regarding community planning partnerships. Much of the community-facing work that we have undertaken has highlighted the stark differences in the public understanding and knowledge of community planning partnerships.

At the same time, one key issue that has been raised time and again has been the perception of a top-down approach, with the Government—of whatever hue—imposing restrictions on local government and community planning partnerships. What was the thinking, not so much behind putting community planning partnerships into statute, but behind what is proposed in section 10 in relation to guidance?

Ian Turner: The community planning part of the bill feels a bit top down, because it places duties on the statutory partners. It is not possible to place duties on voluntary or community bodies in that way. The proposed statute has the feeling of a top-down approach, but we are trying to use those duties to ensure that community bodies participate and resource the process properly.

There might be processes within that involving emerging best practice that we wish to be actively promoted and encouraged. As you heard at the Local Government and Regeneration Committee last week, that involves a culture change within the public sector, to some extent. The issue is how to

engage community bodies and how to get them to participate. We think that the guidance can help with that process of culture change.

Stuart McMillan: Could some of that culture change and some of those methods not happen through other routes, such as the benchmarking tool that the Convention of Scottish Local Authorities has recently established?

Ian Turner: Absolutely. Those routes are not ruled out; the guidance is in addition to those.

Stuart McMillan: How do you foresee the power in section 10 being utilised?

Ian Turner: It is hard to know at the moment. As I was saying in response to a previous question, the guidance will be subject to quite a lot of consultation before we put it out. There will be consultation with public sector and community bodies, and with all the interested partners that we have had throughout the bill process. It is hard to say what particular provisions will be used for, but that will emerge from the process.

Stuart McMillan: Is there an opportunity for Parliament to be involved in that consultative process and for it to discuss any guidance?

Ian Turner: There is always an opportunity for Parliament to discuss it. There is no specific provision on that in section 10, and we are aware of that. If the committee would wish to include such a provision, I am certainly happy to consider that.

Stuart McMillan: Would you consider it an appropriate use of parliamentary time to consider the use of guidance or scrutiny?

Ian Turner: It would sometimes depend on the guidance, which might go into a lot of detail. You might not necessarily want a negative or affirmative procedure; you might just want the guidance to be laid before you, and you might not require to use any further processes.

Mike MacKenzie (Highlands and Islands) (SNP): New section 97C(3)(a) of the 2003 act, in new part 3A, provides that

"Eligible land does not include ... land on which there is a building or other structure which is an individual's home"

other than buildings or structures that may be set out in regulations by ministers. It appears, therefore, that ministers may make regulations that have the effect of applying the provisions of the new part 3A to buildings or structures that constitute an individual's home. Can you explain in more detail why you have taken that power? In your response to written questions on the matter, you suggest that it is to allow for flexibility. What other factors did you take into account when taking that power?

Dave Thomson (Scottish Government): The flexibility on those powers is the key part at the moment. The policy intent is not to take people's homes away in any circumstances, but still to allow community bodies to take control of assets. Essentially, the powers that we are looking to take on through that provision are simply to allow that flexibility to set out in detail the types of buildings or assets that can be included or excluded. At the moment, we do not have specific examples, hence the current need for flexibility in the powers.

Mike MacKenzie: I am sure that you appreciate the need to get that right, though. There will be lawyers across the country scratching their heads and hanging on every word, I suspect. It is a wee bit disappointing that you have not got to a stage in your thinking where you are able to provide more detail.

I will move on. When previously asked to justify the width of the power in new section 97E(4) of the 2003 act, the Government cited examples of similar powers in sections 1 and 2 of the Transport and Works (Scotland) Act 2007. However, the connection between those powers and the powers in section 97E(4) is not wholly apparent to the committee. Can you shed light on that?

Dave Thomson: The connection between the two is largely to do with process. Rachel Rayner may be better at explaining the legal connections.

Rachel Rayner (Scottish Government): I can take you quickly through the power in the Transport and Works (Scotland) Act 2007, section 1 of which gives ministers a power to make an order relating to, or to matters connected with, construction of transport systems or inland waterways. Section 2 goes on to set out matters about which provision can be made in such an order, and the schedule makes it clear that that includes compulsory acquisition of land. Section 2 goes on to provide that the order that ministers can make can apply, modify or exclude enactments relating to those matters.

That is used as an example because the power that we are proposing in new section 97E of the 2003 act would enable ministers to make a process for acquiring land, and that could be done by modifying existing processes for compulsory acquisition, if that was thought to be an appropriate way of achieving what was wanted. The aim of taking the power is to ensure that, where ministers have the power to compulsorily acquire land, there is a fair, robust, open and transparent process for doing that. The detail that you are asking about is just a means of making that happen. Rather than writing out a process longhand, you could apply existing legislation but modify it to suit the particular purpose.

Mike MacKenzie: I am glad that you are talking about modification, because I am quite sure that you are aware that the existing provisions are not without their problems. How can you justify the width of the power in new section 97E(4)? I understand that it apparently makes sense to use something that works reasonably well in practice, but how can you justify the width of the power?

Rachel Rayner: It is so that the power is wide enough to ensure that the process that would need to be put in place should that happen is fair, transparent and robust. If you have concerns about the power, I would be happy to consider them.

John Scott: Is it subject to parliamentary scrutiny?

Rachel Rayner: Yes, it is subject to the affirmative procedure.

Mike MacKenzie: Why has the power in new section 97E(4) been drawn in such wide terms, and have you considered restricting it?

10:30

Rachel Rayner: We would be happy to take away any particular concerns and consider them further. I should point out, though, that this power for ministers to acquire such land compulsorily can be used only in limited circumstances. What the regulations will set out is not when ministers can acquire the land but the process for exercising the power, to ensure that the process is transparent and fair and includes the appropriate detail.

Mike MacKenzie: Do you have any examples of the kinds of modifications to primary legislation that the Scottish Government expects to make in the exercise of this power as permitted by the provision in proposed new section 97E(5) of the 2003 act?

Rachel Rayner: I cannot give you any such examples at the moment, although the power would give us the opportunity to modify and apply existing compulsory acquisition schemes, if that was thought to be the most appropriate approach.

Mike MacKenzie: I am sure that you appreciate that some of this is going to be quite contentious. Although that is a policy matter, there is nevertheless an interlinking between policy and this committee's work that is quite crucial to the successful operation of this bill—or the act, when it becomes an act. Thank you very much for your responses.

John Scott: Going back to a previous question that I think is linked to this issue, I am disappointed to hear that, despite the massive powers that you are assuming, you have no idea of the sorts of assets that you would be considering as eligible for compulsory purchase. Can you try a little harder to give us some idea? I should of course declare an interest as a landowner and farmer, which means that the issue is of specific interest to me and certainly to many others.

Dave Thomson: Going back to the issue of flexibility, I said at the beginning of the session that this provision will allow us to ensure that a person's home, for example, or the land that they use is not taken off them. As for the width of the powers, one of the changes made by the bill is that the Land Reform (Scotland) Act 2003 will now apply to urban as well as rural situations. That means that a whole different set of issues needs to be taken into consideration, and we are considering some way of ensuring that what we put in the bill covers both urban and rural areas. As you will appreciate, they are two completely different beasts as far as assets are concerned, and the bottom line is that we want to get things right.

We need flexibility at this stage until we manage to narrow down the sorts of buildings, land and other assets that we would like to include or exclude from this provision. At the moment, we are certainly not talking about homes or land that is being used constructively. The whole basis of the provision is to ensure the sustainable development of land; we want to include community purchases of assets or land that help us in that aim, and we are not interested in simply having some means of acquiring assets that do not result in the sustainable development of land. That is why we are still considering the issue and why, I am afraid to say, I cannot give you any more specific examples.

Rachel Rayner: Obviously any regulations made by ministers would have to comply with the European convention on human rights. As you will be aware, article 8 of the ECHR provides a right to respect for private and family life, which would include respect for a person's home, and that would have to be taken into account were the power to be used.

John Scott: My next question was actually going to be about whether the provision was ECHR compliant. The committee has, in its recent history, dealt with a problem with the legislation relating to 1991 tenancies. You have constantly referred to a transparent and fair process, but in that example there was a judgment by, I think, the Supreme Court that turned on the fact that the legislation was not fair to both parties. I trust, therefore, that this legislation will endeavour to be fair to all sides; otherwise we will be back in the position of making legislation that is subsequently knocked down.

The Convener: Thank you for your answers. Again, we are looking at a fairly wide-ranging piece of legislation that has fairly wide powers. Officials such as you come along, absolutely rightly, and in perfectly good faith, tell us that there is no intention of doing this, this, this and this. We understand that, and it is undoubtedly what the Government wants.

However, once upon a time, there was a principle that we only legislated for what we wanted and the man in the street was defended against the misuse of power because the Government was never given that power. Increasingly, we seem to be looking at legislation that gives Government very wide powers and Parliament is having to trust the Government not to abuse those powers, which is not difficult to do. I am conscious that the specific purpose of everything is in the top line of the bill and we could not use any of the powers in the bill for a purpose that was not within the purpose of the bill. Nonetheless, I get the impression that we are increasingly looking at bills that are just widening the scope of what the Government has within its discretion, and there is part of me, as a parliamentarian, that is slightly worried about that trend. However, as officials, that is not your problem of course.

I am grateful to you for your answers. We now go to a point of detail from Stewart Stevenson.

Stewart Stevenson: Thank you, convener. I want to explore the use of the word "prescribed" in the new section 97N that will be inserted in the 2003 act by section 48 of the bill. Section 98 of the 2003 act says:

"'prescribed' means prescribed by regulations made by Ministers."

However, the new section 97N uses the word "prescribed" on a number of occasions, particularly in section 97N(1), which says:

"Ministers may by regulations make provision for or in connection with prohibiting, during the prescribed period, prescribed persons from transferring"

and so on. It is not clear in the written answers that we have got that "prescribed period" and "prescribed persons" are subject to the definition in section 98 of the 2003 act and it will therefore have to be made clear through secondary legislation what the "prescribed period" and the "prescribed persons" are.

Rachel Rayner: Perhaps I can help you with that. We agree that "prescribed" will mean

"prescribed by regulations made by Ministers"

and that is what is intended in new section 97N. The use of the term "prescribed" that you have given will definitely be in regulations. The provision that you read out is a regulation power. Ministers may make regulations and those regulations may set out the period for which the restriction on a transfer of land may apply, and they may set out who can be restricted from transferring land. Those matters will be in regulations under section 97N(1) or 97N(3), both of which attract the affirmative procedure.

Stewart Stevenson: New section 97N(2)(b) mentions "prescribed persons" and "prescribed circumstances", section 97N(2)(c) mentions "prescribed circumstances" and "prescribed information", section 97N(3) mentions "prescribed period", and section 97N(4) mentions "prescribed circumstances". You are therefore confirming that, in each and every instance in new section 97N, the use of the word "prescribed" is as described in section 98.

Rachel Rayner: Yes. For example, new section 97N(2) sets out further detail of the regulations that may be made under section 97N(1). The same applies for section 97N(4), which has details about the provisions that may be made in regulations under section 97N(3). I can confirm that those examples you give will be matters in regulations.

Stewart Stevenson: Section 97N(3) uses the word "prescribed" without making backwards reference to section 97N(1).

Rachel Rayner: Section 97N(3) is a separate power. Section 97N(1) is about a power to make provision about restricting transfers of land during an application process. Section 97N(3) is about suspending rights over land such as, for example, possible rights to buy or pre-emption rights. That is a separate power in section 97N(3) and section 97N(4) provides further detail about that.

Stewart Stevenson: Right—I understand that. Let me test our mutual understanding of the issue by asking how many powers you think new section 97N creates for ministers to provide secondary legislation.

Rachel Rayner: In practice, I think that it provides two powers, because although the details about the prescribed period and the prescribed persons will have to be set out in regulations, they will all fall within regulations that are made under subsections (1) or (3).

Stewart Stevenson: What about "prescribed circumstances", which is mentioned in subsection (4)?

Rachel Rayner: That is the same, because it relates back to regulations that are made under subsection (3). I would be happy to put the matter in writing if that would be of assistance.

Stewart Stevenson: It would be of assistance to me; the convener will decide whether it is of assistance to the committee. It is right to flag up

the issue. It is technical, but we will have to be satisfied that we understand what we have been told today and what you subsequently write to us. At present, until we discuss the issue, we probably remain a little uncertain as to the effect of the use of the word "prescribed".

The Convener: If you are able to set that down in writing, Ms Rayner, that would be helpful, not least because it would absolutely guarantee to you and your colleagues that you really have got it. I do not doubt you.

Rachel Rayner: Certainly—I am happy to do so.

Stuart McMillan: Section 54(1) gives the Scottish ministers a power to make further provision by regulation about asset transfer requests. The Government has explained that the power has been drawn relatively widely to allow for flexibility in the making of regulations relating to asset transfer requests. However, the committee still seeks clarity on the power. For example, could the power be used to make any further provision as long as it is about asset transfer requests?

Ian Turner: I think that that is for me again.

You are correct that the power has been deliberately drawn widely to deal with asset transfer requests—it is wide in the sense that it deals with that part of the bill. The detail that is set out in section 54(2) provides an indication of the areas in which we think the provision will mostly be used: the manner of requests; the procedures to be followed; and the information to be included on requests. However, section 54(2) does not provide an exhaustive list and issues might emerge during consultation on the regulations or during practice and in the light of experience. Potential problems or issues might arise that require regulations to do with asset transfer requests as a whole, which is why we think that the power might be useful. It is to ensure flexibility of approach.

Stuart McMillan: Has consideration been given to restricting the power in a way that still allows a degree of flexibility?

Ian Turner: Not at the moment, although we are happy to consider any improvements that could be made to the bill. Because asset transfers happen at the moment and we are putting in place a statutory framework for what they can do, issues might arise in the way in which the provisions are used by community transfer bodies or public sector organisations. We want to ensure that, without having to return to the bill as a whole, we can deal with some of those problems, if they arise, through regulations.

Stuart McMillan: Scotland is made up of a wide variety of communities. My take on what you have said is that the flexibility is to allow for, say, an island community to go through an asset transfer request process that might be somewhat different from the process in the likes of Glasgow, Edinburgh or Dundee. Is that correct?

Ian Turner: That is potentially the case. We want the process to be as consistent across Scotland as possible, but there might be instances in which communities require different things to get their transfer application going and into the procedure as defined by the bill. Often, such issues are about the pre-transfer process, and are to do with setting out the business case, how the community wants to use the asset, how it will maintain the asset and the income streams that there might be. That is probably not the sort of thing that we are talking about in the bill; it is probably to do with other guidance and funds that might be available to community transfer bodies.

Stuart McMillan: Is "probably" an accurate word to use, or should it be "definitely"?

10:45

Ian Turner: The word is probably "probably" at this stage.

Richard Baker (North East Scotland) (Lab): My questions relate to sections 58(4) and 59(4), which concern the powers that are laid out in sections 58(3) and 59(3). We asked you in correspondence about those powers and about why it is deemed appropriate for appeal procedures to be left to the discretion of the Scottish ministers or local authorities. Will you explain further which aspects of appeals or reviews the Government considers might be subject to the discretion of the Scottish ministers or local authorities?

Norman Macleod (Scottish Government): What exactly the regulations will contain has yet to be formulated, but there are powers to make regulations in connection with procedure. The provisions in the bill mirror closely the provisions that apply to appeals under planning legislation. Parallels with that can be drawn: the processes will be set out in the regulations under the bill, and the discretionary element will be up to the decision maker, who will decide in each case which of the processes should apply and how they will apply within the flexibility that the regulations allow. The model that is being used works in exactly the same terms for all appeals under planning and listed buildings legislation.

Richard Baker: Is that why the Scottish Government believes that it is adequate to leave the appeal procedures to the discretion of ministers or local authorities rather than to specify them in subordinate legislation?

Norman Macleod: I will give a more concrete example. The purpose is to allow the decision maker who is faced with determining the appeal or review to choose the process that they consider is best suited to enabling them to have in front of them the information that they need to reach a decision. Typically, that might involve a choice between using a written submissions procedure, which is likely to be set out in the regulations, or a hearings procedure, for which a process will be set out in the regulations.

Richard Baker: Why is the negative procedure considered appropriate, given that aspects of appeals and reviews will be left to the discretion of ministers or local authorities? Did you consider using the affirmative procedure?

Norman Macleod: The negative procedure is fairly standard for such procedural regulations. All the regulations on planning appeals are subject to negative resolution.

Ian Turner: We want the process to be as transparent, effective and efficient as possible. We have talked about having a fair process for all parties; that applies to the appeal procedures, too.

The Convener: Are we clear that the appeal process will be sufficiently disconnected from the Government to satisfy the requirement of being fair? When one party—the Government or a public organisation—is in any sense involved in the appeal process, it is always a worry that the process might be perceived to be biased in that body's direction. Are we clear that the process will be adequately independent?

Ian Turner: The bill does not change much, as the decision maker is the authority in the end. The appeal process reviews the process that the authority followed. The bill does not change who makes the decision.

The Convener: I take it that the Government's lawyers are confident that the process will be ECHR compliant.

Norman Macleod: Yes—certainly. We are confident of that. I make the general observation that somebody must be the appellate body. ECHR compliance in such contexts relies on the courts' oversight. Ultimately, the courts have the power to consider how decisions were made, which makes any such administrative decisions ECHR compliant.

John Scott: Throughout the bill, there is a far greater assumption of powers by the Scottish ministers. Usually the sort of appeals that we are talking about are decided by the Scottish ministers. Unless I am missing the point, there is an inherent contradiction in there.

Norman Macleod: I do not see the contradiction. It might be helpful to draw a comparison with planning appeals. Ministers are the final port of call for planning appeals. There is judicial authority for these powers all being compliant with the ECHR. The reason for that is that the courts have the oversight necessary to ensure that the powers are exercised in accordance with law and through fair and transparent processes.

The Convener: But the potential difference in this case is that, whereas a planning appeal would only allow somebody to use land on the presumption that they owned it by the time that they wanted to use it, we are talking here about the ability to expropriate people's land, are we not?

Ian Turner: No, not in the asset transfer provisions.

The Convener: Okay.

John Scott: Would it be fair to say that there is a significant assumption of extra powers by the Scottish ministers throughout the bill, without apparent justification—such as in respect of asset transfer and the power of compulsory purchase—along with an apparently reduced level of parliamentary scrutiny? Would that be a fair summary?

Ian Turner: I do not think that that is true in relation to asset transfers. Asset transfers can happen at the moment, and they often do.

John Scott: I mean in the generality. Things that were previously looked at under the affirmative procedure are now to be looked at under the negative procedure. There seems to be a great deal of movement towards that. I am certainly no expert—I am the first to admit that—but it appears to me that the level of parliamentary scrutiny is reducing. Is that a fair comment?

Norman Macleod: It is not, in the context of the question that we were originally asked on section 58.

John Scott: I am sorry—I was widening it out to the generality, rather than asking about the particular. I was perhaps too early in my summary of the points.

Ian Turner: We do not think that there is a general reduction in parliamentary scrutiny. In fact, including a statutory process for things such as asset transfer requests means that there is an increased amount of scrutiny in the process generally.

Richard Baker: I have a final quick question regarding the process and the appeal of decisions. You talked about ECHR compliance, which ultimately would be determined by the courts. It does not strengthen the hand of ministers and local authorities if the process is laid out more

clearly in primary legislation and there is therefore a standard process to follow, rather than what seems to be a potentially quite ad hoc arrangement.

Norman Macleod: There is a power to make regulations to set out processes and how appeals and reviews will be conducted. Those will be set out and transparent. The discretionary element that will not be set out is really a matter of choice in relation to processes, including choices within those processes. There needs to be that flexibility for the system to work efficiently.

Stewart Stevenson: I seek officials' confirmation about the difference between affirmative and negative instruments. It seems to me that the opportunity for scrutiny is the same for both. What is different is that a negative instrument can have immediate effect, whereas an affirmative instrument requires the consent of Parliament before it has effect. In fact, the distinction between the two lies in when they take effect and the process by which they may be undone, rather than the parliamentary process around scrutiny. Do I have the wrong end of the stick or the right end of the stick?

Norman Macleod: You are absolutely correct. A negative instrument could come into force immediately. Obviously there are rules—for example, there should be a 28-day period before it comes into force—which are normally adhered to. An affirmative order would have to have the Parliament's approval before it could come into force. How quickly that could happen would be a matter of parliamentary process. No doubt it could happen quickly, and could indeed happen faster than some negative instruments that allow 40 days or more before they come into force. You are quite correct in your understanding.

Stewart Stevenson: In essence, there is no difference in the opportunity for scrutiny.

Norman Macleod: A negative instrument is laid before Parliament, parliamentary committees consider it and it is for members of Parliament to choose whether to have a debate on whether or not it should stand.

Margaret McCulloch (Central Scotland) (Lab): The Scottish Government has explained that the power in section 80(7), which will allow ministers to make further provision in relation to the removal of unauthorised buildings from allotment sites, as provided for in section 80(2), is required in order to allow for flexibility. Can you give more detail on the intended purpose of the power in section 80(7)? In particular, can you provide examples of the types of further provision that the power in section 80(7) may be used to make?

Dr Amanda Fox (Scottish Government): Section 80(7) will permit, but not require, Scottish ministers to expand on the detail in the procedure that is cited in sections 80(5) and 80(6).

On flexibility, the current procedure provides for local authorities to give a period of notice to the tenant and details the tenant's right to make representations and the local authority's duty to take account of those representations and inform the tenant of the outcome. The provisions also give the tenant the right of appeal through the sheriff court.

The additional power could be used to add timeframes to those areas that do not already have specified timeframes. For example, it could be used to detail a timeframe in which the local authority might take account of representations. It might also be used to detail the methods through which tenants might make representations. We would expect the power to cover that type of thing.

Margaret McCulloch: When the committee wrote to you to ask that question, why did you not provide that level of detail when you wrote back?

Dr Fox: I do not know why we failed to provide that level of detail. I can only apologise for that.

Margaret McCulloch: Can anybody else answer that question?

The Convener: I think that a point has been made there.

We have covered everything that the committee wants to consider at this stage. I thank the team for its extensive answers and its patience with us.

I suspend the meeting to enable everybody to change places.

10:58

Meeting suspended.

11:08

On resuming—

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

The Convener: Agenda item 3 is an oral evidence-taking session on the Legal Writings (Counterparts and Delivery) (Scotland) Bill. I welcome from the Faculty of Advocates Robert Howie, Queen's counsel, who has agreed to give us an opening statement. I think that of those who provided us with written evidence on the bill, the Faculty of Advocates had the most concerns about it, so I look forward to hearing what you have to say, Mr Howie.

Robert Howie QC (Faculty of Advocates): Indeed, sir.

Thank you very much, ladies and gentlemen. I should indicate at the outset that the faculty perhaps deals with far fewer large international transactions than some of the larger commercial firms, particularly those cross-border English firms that have taken over Scottish ones. Our involvement in the making of contracts tends to be with contracts to settle litigations. As they are formed on the floor of Parliament House, and everyone is present, the problems at which the bill is directed of necessity do not exist.

However, we see litigation with regard to a number of contracts that are made in Scotland. They are perhaps among the larger contracts that are made in Scotland, such as large building contracts, private finance initiative contracts—if I dare mention them—commercial shipping contracts and sales of company contracts. In a number of such contracts, one sometimes sees unhappy consequences.

We rather fear that a danger is lurking in the bill. That is not necessarily a reason for rejecting it, but the committee perhaps ought to contemplate matters that are in danger of being overlooked, in view of the desire that has been expressed, particularly by a number of the larger commercial firms, that what is proposed should go through pretty much as proposed.

The faculty's main concern is the risk that the proposed form of execution in counterpart, as opposed to a situation in which everyone executes the same document, can lead to opportunities for fraud and, more probably, given how much more common they are, downright error and mistakes. If enough people sign enough different copies, the copies might not be identical and someone might think that some of the contract either is in or has been deleted. A computer glitch might lead someone to think that something is there, while the other side thinks that it is not there. Only later, when the matter comes before the courts—which is where we tend to see these things—will it be discovered that people did not sign up to the same things or others maintain that they did not sign up to the same things.

That is why we have reservations. If one permits execution by the exchange of the back pages of a contract, each signed by a particular party, plus the front page, it is all too easy for the rogue or fraudster to amend the critical stuff in the middle of the sandwich. Once upon a time, one was required to execute or at least initial every page. Our forefathers were not stupid; there was a reason why one had to do that, and we suggest that human nature has not changed so much in the intervening years that that risk has gone away entirely.

There might, of course, be countervailing advantages. We freely concede that we can see some advantages in the bill. It might save a degree of cost, although we confess that we are inclined to be sceptical as to just how much it will save. Most of the contracts that are made under Scots law are smaller-scale contracts, which are made not in Glasgow, Edinburgh or Aberdeen but in small towns around Scotland. In such cases, we suspect that the saving of cost and the convenience that are envisaged as a result of the electronic execution and exchange of counterparts, instead of simply having people come into the office to do all that, will be limited.

We also invite the committee to question the number of contracts governed by Scots law—those to which the bill will apply—that, as has been mentioned in discussions, involve eight or half a dozen parties in as many parts of the world. I venture to suggest that not too many contracts governed by Scots law involve American banks in New York, Japanese banks in Tokyo, underwriters in London and a seller and purchaser in Edinburgh and, say, Berlin.

We suspect that it is unlikely that the bill will bring to Scotland any increase in legal business. It will not make a great difference to people's decisions about whether to make their contracts subject to the law of Scotland rather than the law of England—or anywhere else, for that matter. As a general rule, people decide on the contract-governing law on the basis of its effects on the substantive matters in the contract instead of the ease or convenience of execution.

11:15

We venture to suggest that if the case is big enough, if it involves a very big transaction of many millions of pounds and if all the people involved are in different places, the savings in cost

and convenience that would be achieved by the bill might be so infinitesimal in comparison with the size of the contractual sums at issue that the parties would likely have their great big settlement meeting—or their two settlement meetings—in any event because the relative increase in cost would no longer be worth the consideration. For those reasons—but primarily because of our big concern about error and fraud—we suggest that the bill might usefully be subject to your consideration.

If execution in counterpart and delivery are to proceed as proposed, one possibility is that the bill could provide for only the entire document to be exchanged, which would avoid or at least reduce the risk of people slipping things into the middle of it or the risk of finding that, through error—which, as we have suggested, will much more commonly be the case—parties have not agreed to the same thing or do not realise that they have not agreed to the same thing. One would not wish an increase in the number of cases in which parties come to court asking for their documents to be rectified. In such instances, the first problem is finding out what they have agreed to, never mind what they were supposed to have agreed to.

We suggest that those issues have to be weighed against the undoubted increase in convenience in a number of cases and some degree of cost saving, although there is a question mark over how much cost saving there might be, how many cases the bill will make any material difference to and whether there will be any great advantage through the business that it will bring in. At best, it might partly slow the flow of business away from Scots law cases.

I hope, sir, that that has put in a nutshell what we have said elsewhere at rather greater length.

The Convener: I think that it has, and I am grateful for that. Stewart Stevenson has a question on a point of detail.

Stewart Stevenson: I just want to test the Faculty of Advocates' views on the financial size of the issue. I heard a substantial attempt to downplay the amounts of money that might be involved. As a rule of thumb, the United Kingdom's clearing banks turn over their net asset value in transactions every three days. When I was involved in these issues 15 or 20 years ago—as, I should say, a technologist rather than a banker—the daily turnover of the Scottish banks could be as much as £100 billion. Does the Faculty of Advocates have a sense of what proportion of that traffic is under contracts that would be signed mutually by parties? That turnover is clearly commercial rather than the turnover from individuals' wallets, as the value of notes that the Scottish banks issued 20 years ago—I know that I am substantially out of date—was only about £2 billion. I wonder what quantum of transactions might be covered by the contracts that we are thinking about in relation to the bill.

Robert Howie: It is extremely difficult to provide an answer to that question, sir, particularly from a bar such as ours, which, as I have indicated, deals largely in litigation. I suggest that, as we do not have the degree of chamber practice that obtains in, for example, London, it is wrong to believe that the faculty would have an immediate grasp of exactly how much money is being turned over in given contracts. Nevertheless, I venture to suggest that our very inability to say that large quantities of such cases come across our desks arises because large quantities of the work that you are discussing is written under foreign law—English law, in particular—and will continue to be so whether or not the legislation is passed.

The reasons why people choose to have their contracts governed by a given law are generally substantive and relate to the transaction that they are trying to carry out and where those involved in funding and underwriting it are based. As that work is undertaken largely in London, people tend to have a familiarity with and a concentration on English law and use English firms, and they have merchant banks that are much more comfortable using people whom they know, recognise and have dealt with for the last 30 years. With respect, I rather fear that nothing the committee does or does not do in connection with the situation will make any material alteration to that.

With a view to that, we suggest that the financial saving that is being contemplated in this case and which has been suggested in the Finance Committee's questionnaire is open to considerable doubt because, as one will find, only a small number of such contracts are written under Scots law. Given the number of contracts that will be thus created and the unlikelihood of their being at a level that would make any material difference, we suggest that it is unlikely that there will be any great saving at all over what would be achieved today if, for example, parties wanted to execute a document by round robin through the post. Again, to be realistic, we suspect that many of the contracts that will be formed under Scots law and within Scotland will still be taken round to the other chap's office for him to sign and vice versa, particularly if the people involved live in one of the big cities. That will give them the advantage of being more certain about what exactly everyone is signing up to.

Margaret McCulloch: I want to run a possible option past Robert Howie with regard to the issue of fraud. Could the original document be sent to the clients, but be protected by ensuring that no one could add to or amend the information in it? It would be the same as, for example, reading something online and then agreeing to the terms

and conditions. Once the document had been read, the individual would tick it to agree that it was correct and would sign a sheet that detailed the document—in other words, the business that they were doing, which would be included in an attachment—and recorded the fact that they had read the document and agreed that it was correct. Could that be considered as a means of doing away with the opportunity for people to add to or amend the original document?

Robert Howie: I am sure, madam, that anything can be considered that is thought likely to reduce the risks of fraud—or, indeed, downright error, such as people getting things wrong or using different copies or drafts from different times, which I ask members to think about as being far more likely.

I am sure that people can bend their minds to finding methods of trying to reduce the risks, and they should by all means do so. However, the Faculty of Advocates is concerned that if the bill were to be passed on terms that would allow other things to be done—we had in mind the front and back pages—the process would be all too unpleasantly open to roguery. I am sure that one could try to find methods that electronically or otherwise would reduce that risk. Of course, the rogues will try to find ways around them; we just have to accept that that is the way of the world. The question that we suggest the committee will want to satisfy itself about is whether the proposed legislation reduces that risk, in so far as it could, relative to whatever advantage the committee thinks it could get out of the bill in terms of time, convenience or anything else.

With respect, I do not think that it is for the Faculty of Advocates to say that things should be done this way or that. There are people with greater technical knowledge who know better than we do whether things are secure or not, and there are others more immediately involved in the direct drafting of things who might be better able than we are to say whether matters are more readily capable of being fixed.

It has to be admitted that we have a somewhat skewed view of the world, given that an issue crosses the desk of someone like me only if it has gone wrong. We all tend to be storm petrels, immediately saying, “But what about this risk, that risk or the next risk? What happens if these people do this or that?” I freely accept that, because we see not the 100 things that go perfectly well but the one that goes wrong, we might have a skewed view of the world, but the trouble is that the damage caused by one that goes wrong can be very considerable. We want to see what we can do to try to reduce the risk of that one thing going wrong.

Margaret McCulloch: Okay. Thank you.

John Scott: Good morning, sir. Notwithstanding your skewed view of the world and given that error and fraud are the principal concerns of the Faculty of Advocates and that, notwithstanding your reservations, we are likely to proceed with the bill, what improvements to the proposed legislation can you suggest from either your perspective or the faculty’s?

Robert Howie: The improvement that we have suggested, sir, if one is to proceed in the manner proposed is that one should require deliveries to relate to the entire document. Furthermore, if there is to be immediate effect for contracts—that is, if they are to come into effect at a precise moment that can be more readily identified, which is one of the proposed advantages of the legislation, as it means that one can say that they came into effect on such and such a date—that should be followed up by a full postal version of the document. The full original should go through the post to ensure that somebody at least has the opportunity to identify an error. I apologise for repeating myself but, as we have suggested, error is far more common than fraud. Errors happen much more commonly, and they get picked up and corrected. That is a great deal cheaper than their being picked up and corrected when everyone has fallen out for other reasons and the whole thing ends up in the Court of Session, which takes a lot longer and costs a great deal more to sort.

That is the suggestion that we have offered. Others who are more immediately involved in current practice and doing these things for the big commercial firms might be able to assist you further, because they might have experienced problems on a number of occasions and might have been able to sort them out to ensure that they did not come across the desks of persons like me. Again, because of our skewed view of the world, we see the ones that have gone wrong—perhaps badly wrong—and we tend to suggest stronger remedies because we see the more ill patients, if I may borrow that metaphor.

The Convener: Thank you very much. Of course, we will hear from other organisations’ representatives later on, which will be helpful. I think that Mike MacKenzie will ask the next question.

Mike MacKenzie: I was interested in Mr Howie’s use of the sandwich analogy. The analogy is probably pretty good—if I order a steak sandwich and ask for it to be rare but it comes to me well done, that would fall under the description of an error, whereas if I order and pay for a steak sandwich but end up with a Spam sandwich, that would be fraud.

Given that the impetus for the bill arises from the benefits that we accrue as a society through our technology, can you cast your imagination in

the direction that would look to that same technology to provide safeguards against both error—which we know happens already, otherwise you would not have any work to deal with—and fraud? Again, if there was no fraudulent practice, I respectfully suggest that you might find yourself out of work. Are there ways in which the same technology can be used to prevent the kind of problems that we experience in any case?

Robert Howie: There are those who would smile, having heard you ask me of all people that question, and suggest that you had asked the very last man in the world whom you should have asked about it.

11:30

Mike MacKenzie: Or perhaps the first.

Robert Howie: I am reluctant to get involved in saying, "Yes, we suggest this, that and the next thing," because frankly the necessary technological know-how as to how fraudulent practice could be prevented, if that could be done, is not our business. Other people are better qualified in those matters and could give you better and more useful answers about the technology that one could or could not use to protect oneself from alterations and changes, and whether such technology could be got round readily. With respect, your question seems to be about computer technology rather than fraud and would be better directed elsewhere.

Ultimately, the trouble with fraud is that it is a crime of deliberate intention. If people are going to commit fraud, they will set out to get round whatever protection you have put in. The question is how difficult you can make it for them. As I indicated to Mr Scott, we have presented one suggestion in that regard. One can perhaps add the tweak that, if one is to have the ability to execute in counterpart, the originals have to follow, so that one can find the errors and spot them more quickly and more cheaply than one would otherwise do.

I would have thought that the aim is to draft legislation that reflects the evidence that the committee gets about the extent to which technology will protect parties and about how cases that are not done technologically can be protected. One has to allow for the fact that if the legislation simply allows people to execute in counterpart, there will be people who execute in hard copy in counterpart, who will present the front and back pages, as I said.

On such occasions, I tend to use the example of Banff. If a contract is made in Banff, what will happen, given that that is not where we will get large contracts that have a big technological background or which involve large-scale organisations? Perhaps that is unfair on Banff; I should indicate that I make no particular accusation against Banff but simply take it as an example of a small Scottish town that nonetheless will have some degree of contractual work in it.

The legislation must be able to cope not merely with the large-scale deals that involve the big commercial firms that were in the Scottish Law Commission's original consultation list and which will no doubt give evidence to you, but with much more low-level contracting work. The committee must allow for the fact that the legislation will be used by people who are operating at such a level. You must ensure that, in protecting and thinking about the top slice of the work in Glasgow and Edinburgh and the stuff that is being done with London and elsewhere, you do not overlook the ability to use the approach in smaller-scale transactions elsewhere, without necessarily using technology. You must ask, "If that is being done, are we satisfied that we have not opened the door to a raft of potential errors and troubles that we will come to regret, because contracts that were executed in what people deemed to be the simplest and cheapest available method have got into difficulty?"

We have made one suggestion on how we might put that right. I do not venture to suggest that there are not other approaches, which might commend themselves to the committee as being better. However, I recommend that you consider whether the problem is sufficiently grave to justify making alterations to the bill in an attempt to reduce the risk and, if it is, what alterations might be made.

The Convener: The member for Banff might want to comment.

Stewart Stevenson: It is perhaps particularly unfortunate that Banff was chosen, given that it is the location of the specialist court for cases to do with fishing, which is an industry that has a turnover of some £460 million a year. Recent fines that have been levied in the pelagic sector have been in seven figures, so Banff's work is not quite as small in scale as the town's position in relation to Dornoch and Glasgow might suggest.

Robert Howie: As someone who does shipping cases, I know what you mean.

Stuart McMillan: I listened carefully to what you said regarding the economic aspects of the bill and what it may or may not offer. If the bill were to pass through the parliamentary process and become an act of Parliament, either in its current form or as amended, surely that would take Scotland on to a different platform. On whether the large transactions come to Scotland, it would be up to those who operate within Scotland to promote their skills and their services. I suggest

that if we do not have this piece of legislation, the opportunity for further work to come to Scotland would be taken away. Would that be a correct assumption?

Robert Howie: It is a possibility, but I suspect that it is rather an unlikely one. As I have said already—I apologise for repeating myself—I venture the suggestion that people decide the law that they want to govern their contract by reference to matters to do with the substantive matter that they are dealing with. How one executes a contract falls—or certainly should fall—a very, very long way down the list of priorities. It is an also-ran—or it should be—because one ought to be thinking about matters such as whether the legal background in relation to the area of work in which one is dealing will be helpful. People will be concerned with issues around the standard of the court system where they are and the standard of dispute resolution. They will be interested in matters such as whether that will cause them needless difficulties with conflicts of law problems relating to other bits of their transaction if it is a big international transaction with bits that are governed by New York law, English law or whatever. A reason that is frequently given for not using Scottish law is that it is easier to put everything into the same law if at all possible, because that makes it administratively easier and cheaper.

Lots of people will want to pick a governing law with which they are familiar. The merchant banks, the underwriters and all those people have dealt with English law for many a long year and they are familiar with it and do not want to move from it. In some ways, it is just inertia, I grant you, and lawyers in Scotland might make all sorts of comments of an unkind variety about it all, because we have all suffered at the hands of it. I venture the suggestion that whether one passes this bill or not, it will not really have much attractive effect. Neither do I suspect that people will not have as much reason to go elsewhere as they do at present. Of course it is possible that there might be some case in which the bill makes a marginal difference, but I venture the suggestion that that case will be very rare and that the amount of commercial advantage, if you will, of bringing work into Scotland that will be achieved by it is limited. One might ask, "Well, why not do it because if there is any advantage we cannot have it now?" That is one of the decisions that you have to take. It is one of the things that you are charged with doing.

The faculty suggests that it is distinctly sceptical about the idea that there is a considerable financial benefit to altering the law relating to the execution or delivery of deeds. That is highly unlikely to bring work in or to dissuade work from being done here. However, I read what has been said by others who deal in big-value transactions, because they will have more up-to-date knowledge of them and more direct involvement with them. Our overall view is that we are inclined to be sceptical that there is much of a financial benefit to this at all.

Stuart McMillan: Do you have a view on the likely benefits of setting up an electronic document repository maintained by the Registers of Scotland?

Robert Howie: The short answer is not particularly. However, we would be of the view that if one were to create a repository, it would be of help if that repository were of some official variety, such as the Registers of Scotland. Some of the responses that the committee has received have clearly grasped that. One would want to be able to ensure its security and confidentiality so that it could not be a place where those of ill intent could get in and make use of things or alter things electronically.

One has read in the newspapers recently all too unhappy tales about unfortunate things happening with electronic communications and clouds and what have you. It is likely, I should have hoped, that if one were to do this the Registers of Scotland or some such official governmental organisation would be the kind of large place that would be able to provide the security and confidence in its confidentiality that I should have thought would be critical to making that work.

The Convener: I take you briefly to the original submission from the Faculty of Advocates, which I have in front of me. I hope that you have it, too. At the end of your response to question 1, the faculty has two technical observations. It talks about documents that

"have been subscribed by the parties."

The last sentence says:

"This would mean that the contract could not be executed in contract."

I wanted to confirm that that should read "in counterpart" rather than "in contract". That seems an obvious read.

Will you expand on why the legislation fails if documents are produced by the parties? I am genuinely confused about what that point means.

Robert Howie: You have the advantage of me in that you have a version that is different from mine. Would you excuse me for a moment, while I read it?

The Convener: Indeed.

Robert Howie: Do I understand, Mr Don, that you are asking in connection with the second part

of technical observation (a), which is about, among other things, construction contracts?

The Convener: Yes.

Robert Howie: Section 1(2) says:

"A document is executed in counterpart if ... no part is subscribed by both or all parties."

The concern that has arisen here is based largely in relation to construction contracts—although it may apply to other types of contract—in which one ends up with a document that, if one stood it on its end, would stand pretty high off the table because it includes lots of subsidiary documents. Sometimes those documents are very important in themselves and they may already have been executed by the time that one gets to the big construction contract. Imagine a PFI or a development contract that incorporates within it the actual building contract or the specification and base plan for the building contract—the specification and base plan may have been negotiated and agreed in advance, and it is all signed up and initialled and all the rest of it before one gets to the stage of this big document.

11:45

Therefore, because the bill provides that no part shall be subscribed by both or all parties, and the specification in my hypothetical example is already so subscribed, that PFI or development contract, whatever it is, cannot be executed in counterpart. That cannot happen, because the bill has provided that

"A document may be executed in counterpart"—

and the evidential advantages to that have been given later on—and that a document is executed in counterpart if

"no part is subscribed by both or all parties."

In my hypothetical case, the specification has been executed by both parties, but without noticing that, everyone has done the great, new electronic execution in counterpart. The net result is that the contract is not properly executed and is defective.

The Convener: Indeed, it is totally invalid, because the legislation specifically provides, in section 1(2)(b), that a document cannot be executed in counterpart if part of it has been executed by both or all parties.

Robert Howie: Correct. It will be incompetent. That is what that is about. I apologise if that was not—

The Convener: No, it is okay. For the record, will you clarify that the final words of paragraph (a) in the part of your submission that gives technical observations in response to question 1 should be "executed in counterpart", rather than "executed in contract"?

Robert Howie: It is quite obvious that it should say "counterpart". I do apologise.

The Convener: Thank you. We can probably amend the submission.

Robert Howie: Certainly.

The Convener: In the next part of your submission—paragraph (b)—you make the interesting point that although a duty is imposed in section 2(3) the bill says nothing about who might be liable if they do not carry out that duty. On reflection, does the section need to be amended, or does the general law of the land—the law of trust, or whatever—mean that it is okay?

Robert Howie: A difficulty was identified, in that subsection (5) of section 2 provides that, for the purposes of the document having effect, it does not matter whether subsection (3) applies. However, subsection (3) says:

"A person so nominated must, after taking delivery of a counterpart by virtue of subsection (1), hold and preserve it for the benefit of the parties."

If the document's having effect does not depend on that, why are we saying that the person must hold and preserve the counterpart? What does that do? Let us suppose that the person does not hold and preserve the counterpart, not because there is a fire in the office but because he simply forgets about it—it is thrown out in an office move, or something of that order. That clearly does not affect the document's effect, because of subsection (5), so what does subsection (3) achieve? Why is it there? What advantage does it bring?

It might be that the intention behind subsection (3) is that a person who has been nominated and who is an agent of one of the parties must hold the counterpart to the benefit of both parties, so he cannot be put in a conflict-of-interest position and told, "You are my agent and I want that destroyed. Destroy it." If the object of the exercise is to prevent that from happening, that is all well and good. However, section 2(3) does not seem to sit with section 2(5).

The Convener: It might be better if subsection (3) said "both parties". That would not change the sense, but it might change the implication—the purpose.

Robert Howie: Yes, if the object of the exercise is to ensure that if the solicitor of one of the parties is nominated, as will frequently be the case, he is protected from being put in an impossible position as a result of a subsequent dispute between the parties. The bill might provide that he must hold the counterpart for the benefit of both parties,

which would give him a statutory duty that would protect him against his own client if there was a fall-out and he was instructed to destroy the counterpart.

The Convener: Thank you for those observations. I suspect that we will return to that point.

Robert Howie: You might want to do so, in the context of considering the remedy for a breach and whether the law relating to the duty on solicitors is affected. In that connection, you might want to check a very recent case—it was last week—in the inner house of the Court of Session, which was about the difficulties in relation to unhappy frauds and documents being taken and not taken and so forth. The case indicates that there can be quite an issue when a solicitor finds himself considering his duties to the other side after that party and his client have fallen out. No doubt you will want to talk to people who are perhaps more directly affected by such matters than—fortunately—I am.

The Convener: Thank you.

If members do not want to explore the bill further, I thank Mr Howie for the extensive advice that he has given us.

11:50

Meeting suspended.

11:53

On resuming—

The Convener: It is my pleasure to introduce Professor Robert Rennie and Alasdair Wood. Professor Rennie is the chair of conveyancing at the University of Glasgow, and Alasdair Wood is a member of the Law Society of Scotland's obligations law committee. Thank you very much for your presence here, gentlemen. Thank you also for ensuring that you were here to hear the previous evidence, which saves us from having to play it back to you. We will have many questions on the same subjects, led by Margaret McCulloch.

Margaret McCulloch: Good morning. You heard Mr Howie question the number of contracts under Scots law that would come into effect with the new electronic system. Do you agree with his comment? He did not feel that there would be an increase in business. Do you have any evidence to contradict that?

Professor Robert Rennie (University of Glasgow): We disagree.

Margaret McCulloch: Can you tell me how you disagree?

Professor Rennie: We have experience of commercial contracts that start off on the basis that they will be governed by Scots law because one of the parties—perhaps the main party—is based in Scotland and the subject matter of the contract is Scottish. We get to three weeks, say, before the final completion of the contract, when it is suggested that it will be necessary for everybody to convene in one particular place so as to execute the document at one time. We both have experience of being met with resistance at that point and, in a number of cases, the clause that says, "This contract shall be governed by Scots law" is changed to, "This contract shall be governed by English law." That is simply to allow the execution of the document by counterpart.

I was surprised in some ways to hear Mr Howie say that that did not matter a great deal. Not only does it alter the law governing the interpretation of the contract; it also alters the forum in which any disputes can be litigated. It takes bread and butter out of the mouths of the Faculty of Advocates. I am clear—I think that my colleague is also clear—that there is a significant commercial issue.

Alasdair Wood (Law Society of Scotland): I echo that view. In a number of transactions that we work on, the sole reason to change the law to English law or to that of another jurisdiction is the inconvenience of creating a valid document when people are based in different countries, different towns or even different offices in the same city or town, late at night, for instance.

Margaret McCulloch: Mr Howie also mentioned his concern about the procedure being less secure among smaller law firms, rather than multinationals, perhaps. Would that be the case? I would think that, when it comes to documentation, if there is a certain standard for a large law firm with multiple branches, the checks in place for a smaller business would be the same. Do you understand where Mr Howie is coming from when he says that he is concerned that small businesses would possibly be more open to fraud or error when using the electronic system rather than the paper system?

Professor Rennie: I disagree with that view. I worked in what would be regarded as a small firm for 30 years before moving to what would now be regarded as a large city outfit. The same checks and balances applied in both. I am quite confident that a small to medium-sized legal firm would be as secure as a large firm.

On the point about fraud generally, in 1970, when an act of Parliament was passed to allow ordinary conveyancing documents to be signed on the last page only, there was a terrible kerfuffle among the legal profession about what was going to happen. "My goodness!", it was said. "People will take out the pages in front of the signature, put

in other pages to change the whole sense of the document, and it will be the end of western civilisation as we have known it." I defy anybody to produce any evidence to the effect that anything like that has happened since 1970.

I also point out that execution in counterpart is a feature of the English jurisdiction and of European and American jurisdictions. They seem to have managed to operate it without any substantial increase in fraud. I make a third point—and it is the obvious one—that people will commit fraud no matter what you do or what the process is. No bill, and no safeguard in a bill, is ever going to prevent fraud absolutely. I do not consider that the measure substantially increases the risk of fraud in commercial transactions.

12:00

Margaret McCulloch: Finally, what kind of impact would the change have on Scottish property transactions? My understanding is that the law does not permit parties to change the law of contract to English law.

Professor Rennie: The bill is intended to apply to what I call bilateral or multilateral deeds. Property transactions, in the sense of conveyances, are not bilateral or multilateral. A disposition transferring property from A to B, be it a house or an enormous factory or retail centre, is signed by one person, so counterpart does not come into it. The same is true of a document for a mortgage over a house or a bank lending document for commercial lending over a factory; such a document is signed only by the borrower. The bill will have no effect on ordinary property conveyancing. It will have effect if there is a bilateral agreement or a multilateral agreement involving two or more parties.

Margaret McCulloch: Do you have any comment, Mr Wood?

Alasdair Wood: I am not an expert on property law, so I defer to the professor.

Stewart Stevenson: To tie off that issue, would it be fair to say that many of the property transactions that commercial companies undertake are actually about purchasing the company that controls the property? There is a process that delivers control over a property without affecting what is in the Registers of Scotland and probably avoids such things as stamp duty, so there could be instances of larger transactions where the provisions before us may well matter when it is de facto about transferring control over property, if not necessarily legal ownership.

Alasdair Wood: That is correct. For company transactions where a single purpose vehicle may own a property, the bill will enable those contracts to be entered into by two parties in different locations. The same goes for a company where the transfer of shares would require a stock transfer form, which is also a single, unilateral party deed.

John Scott: Mr Howie suggested that, in his view, the law of the country was more important than the convenience of the signing. That is a position that you evidently do not agree with but, given the differences between Scots law and English law, I am inclined to his view rather than yours—that it is a reasonable position for those making major deals to consider which legislation they would rather work under, particularly considering the increase in devolved powers, rather than the convenience of signing in counterpart or the inconvenience of not being able to.

Professor Rennie: I do not disagree with that. There will be cases where one of the parties will want to have a particular jurisdiction. I am talking about the technical aspect—cases in which the parties have already agreed that the contract comes under Scots law.

In such a case, we can be six months down the road with the negotiation and the contract is due to be Scots law from day 1, but three weeks before the end the parties say all of a sudden that it is a terrible inconvenience for them all to come up to get the contract signed here, so they ask just to make it English law because it does not make that much difference.

John Scott: I am surprised to hear that, which is probably a reflection on my naivety more than anything else.

Professor Rennie: Alasdair Wood probably has more experience of that than I do, but it is a factor. I canvassed colleagues in my corporate department before I came to the committee, and they confirmed that that has happened to them on a number of occasions.

John Scott: Forgive me for being impertinent, but you seemed to suggest that that was the norm, rather than something that has happened "on a number of occasions".

Professor Rennie: I am not suggesting that it happens on every occasion—if it did, one would not bother putting Scots law in the agreement at the start—but it does happen on some occasions.

Why should we not be as up to date electronically as other jurisdictions? If other jurisdictions think that this approach is commercially good and legally safe, I see no particular reason for saying that we should stay where we are. Are we the only jurisdiction that has a monopoly of legal truth?

John Scott: I suspect that we could discuss that question for some time.

Stuart McMillan: Good afternoon, gentlemen. I posed a question earlier to Mr Howie regarding an electronic repository. Do you have any views on the likely benefits of setting up an electronic document repository, maintained by the Registers of Scotland?

Professor Rennie: I suppose that that is really a matter for the Registers of Scotland, representatives of which are giving evidence to the committee next week.

At the moment there are such registers: books of council and session is a preservation register, although it is not used very much now and it is a physical hard copy register, which would not suit this situation. The problem with repositories is that IT systems change and are updated from time to time. I agree with Mr Howie in this regard: we would want to be sure that whatever system was used was never going to be completely outdated, meaning that we could not access what was there.

I gather that there is a system in Spain called Adobe X, which Adobe has guaranteed will always be accessible, no matter what changes there are. I am not IT literate to any great extent, so I cannot evaluate the worth of that statement. In due time, a repository might be a good thing, but the bill stands on its own and does not depend on having a repository at all. We should not get away from the focus of the bill, but in the longer term, yes, a repository might be a good thing.

Stewart Stevenson: Before coming to the issues that I was intending to address, and as the subject has come up, I want to ask about the repository.

Although it may not be necessary for the repository to hold all documents in whatever form, are you of the view that the algorithms and methods by which electronic signatures are provided to documents, wherever they are held, could usefully be held in a central repository, thus allowing future generations access to the means to understand and verify documents wherever they are held subsequently? Could a central repository be important, besides the holding of the documents themselves?

Professor Rennie: In the longer term, yes. I see no reason not to have something of that nature. However, you are asking the wrong person—I kind of lost the place when you said "algorithms", but I understand that you are talking about how the digital signature is verified.

Stewart Stevenson: Do forgive me. I spent 30 years in technology, but of course I am somewhat out of date because those 30 years started in the 1960s.

I am sorry—I cut across Alasdair Wood, who wanted to respond.

Alasdair Wood: I was merely going to say that that is an interesting concept. It seems to be of historical value to be able to maintain the probity of signatures into the future. It seems a logical step from the signature to the electronic signature.

Stewart Stevenson: Perhaps it is something that you gentlemen may take away to think about while we do the same.

Moving on to the subject of electronic signatures as a whole, I take it that you would be of the view that it is helpful if we have a permissive environment that allows electronic signatures and electronic verification of the validity of the content of documents to be part of Scots law.

Professor Rennie: Yes.

Alasdair Wood: I agree.

Stewart Stevenson: That is concise and unambiguous.

The Law Society is developing a smart card and digital signature scheme. I am not sure that the committee knows all that much about it. Is either of you in a position to give us a little more insight into where that stands in the process of development and implementation, without necessarily giving us insight into the mathematical algorithms on which it will depend?

Professor Rennie: The position at the moment is that digital smart cards are being handed out to members of the profession. I understand, although I am not directly involved in this, that criminal practitioners—I use the phrase advisedly—are getting the cards first because they will also be used as security passes to enter Her Majesty's penal institutions. The cards will be handed out to individual solicitors as the year progresses.

The Convener: We were hoping to have James Ness, who is the deputy registrar, along this morning, but he was unfortunately not able to come. I suspect that this is an area of expertise that we would like to interrogate somehow or other.

Professor Rennie: Yes, he would be the person to ask.

The Convener: We can perhaps get Mr Ness along or get some written advice on that subject, which is perhaps for another day.

Richard Baker: Professor Rennie, you said that you do not see any huge additional risk of error or fraud from the provisions. Do you think that there would be any specific risk of error or fraud with the use of pre-signed pages—or do you think that there is sufficient protection in the proposed legislation in this area?

Professor Rennie: Yes, I do.

Richard Baker: That answers my question very succinctly.

The Convener: Thank you for that succinct answer.

I want to take you gentlemen to the last subject that I raised with Mr Howie. It is about a situation in which, if a bundle of papers already contains a document that has been subscribed by the parties, it appears not to be competent to execute it in counterpart, which is clearly not what anybody would have intended. Does that strike a chord with you, or is there an immediate fix?

Professor Rennie: That is not my interpretation. My interpretation of section 1(2) is that it relates to the document that is to be executed, which is the main document. What Mr Howie was referring to was the possibility that there might be annexed to the main document another subsidiary agreement, such as a building contract.

Let us consider a big development contract involving developers, funders and whoever, and annexed to it are a series of other subsidiary agreements, which, because the parties are proximate, have simply been signed by both in the normal way. That is an annexation to the main document that is being signed in counterpart. The section refers to the document that is being signed in counterpart; it does not refer to any annexation. I do not therefore accept the interpretation as given.

12:15

The Convener: That is very helpful—thank you.

Stewart Stevenson: In my non-legal ignorance, I seek clarity as to what an annex looks like.

I will give some context to my question. For my grave misfortune, I had to be involved in many such cases in my previous life. Indeed, I had to travel to other continents to sign things with other people. Often, commercial contracts will include many schedules, which are separately signed and which may be expected to be changed during the course of the contract—what equipment might be delivered, and so on. Are those what you are describing as annexes, or does "annex", in the legal terms that I am sure you are using, mean something different?

Professor Rennie: No, it is exactly the same. An annexation is simply something that is outwith the body of the agreement, but which is referred to in it. An annexation could be a plan, a list of parts for a machine, a list of employees or a copy building contract that has already been signed—you name it.

Stewart Stevenson: So it is exactly as I am familiar with.

Professor Rennie: That is so.

Stewart Stevenson: In most commercial contracts to which I have been party, the schedules are substantially bigger, in aggregate, than the contract itself.

Professor Rennie: Absolutely.

The Convener: That makes perfectly good sense.

I will pick up on the issue of section 2(3), which reads:

"A person so nominated must, after taking delivery of a counterpart ... hold and preserve it for the benefit of the parties."

There seems to be a suggestion that solicitors would normally be holding the agreement once it has been executed. You will have heard our previous discussion about whether that refers to both parties and about the question of what that provision is for. Does that subsection give you any concerns?

Professor Rennie: Not really. Section 2(3) is a technical provision, which is designed to cover the situation in which a single person holds a document for the benefit of both or all parties to that document. It is designed to make things clear.

Let us say that the solicitor acting for party A is the nominated person to hold the document. The provision is designed to prevent party A going to the nominated solicitor and saying, "You've got that document. You act for me. I'm not happy now. Tear it up." The solicitor for party A cannot do that, because he or she is not holding the document in the capacity of a solicitor; they are holding it for all the parties. That is why the provision is there.

The Convener: And it is sufficiently accurate to say that.

Professor Rennie: Yes.

The Convener: I think that it is. I am not doubting it, but I wanted your thoughts.

Stewart Stevenson: I am familiar with the use of the term "escrow" in certain other contexts. Is it the generality that, in this case, the agreement of the two parties would be required as to the instructions that are given to the person holding the document? Is that the way that it generally works?

Professor Rennie: Yes. Section 2(1) states:

"Parties to a document executed in counterpart may nominate a person".

I emphasise "Parties" in the plural. All the parties to the document must agree to nominate a particular person.

Stewart Stevenson: And they must agree to any subsequent changes in the nature of the nomination.

Professor Rennie: Yes.

The Convener: Thank you, gentlemen. That completes our questions. Are there any other issues that you think we should have covered but have not asked you about?

Professor Rennie: No. This is a very useful bill.

Alasdair Wood: I agree. It is a very useful bill. It is very useful for Scottish law.

The Convener: If something else occurs to you in the next few days and you wish to write to us about it, that would be appreciated. Thank you very much for your responses.

12:19

Meeting suspended.

12:21

On resuming—

The Convener: I welcome Paul Hally, who is a partner in finance and restructuring at Shepherd and Wedderburn LLP; Colin MacNeill, who is the corporate partner at Dickson Minto WS; and Dr Hamish Patrick, who is a partner on the banking and finance team at Tods Murray LLP. Thank you for coming along, gentlemen, and thank you for your patience while waiting.

Who wants to fire straight in? Would Margaret McCulloch like to come straight back in on the subject she asked the Law Society about?

Margaret McCulloch: I am more than happy to do so. We have already asked the following questions of other witnesses, but it would be useful to hear from you.

Can you give examples of difficulties that your organisations or you have experienced because of an inability to get everyone together to sign contracts? Can you state the advantages to you if your firms could go down the electronic route?

Paul Hally (Shepherd and Wedderburn LLP): I should come in, as someone with an interest in this subject. My name is plastered all over the Scottish Law Commission report as being someone who suggested that the bill be written in the first place. Colin MacNeill and Hamish Patrick will be able to support me.

There has been a lot of talk about whether the change will bring work into Scotland. The evidence that was given earlier by the Law Society about the way in which contracts are now conducted is pertinent. Colin, Hamish and I have all sat round boardroom tables for the last 20 to 25 years, and the nearer to today that has happened, the more disparate have been the parties to contracts. If a person is selling a Scottish company, the law that logically should govern that contract is Scots law. However, time and again firms change that to English law because there are four or five parties, and the director may be on holiday—he may be sunshining in the Cayman Islands—and the last thing he wants to do is turn up in a wet, dreich Glasgow to sign the contract, despite the fact that it is selling his company for millions of pounds.

The points that were made by the Law Society are valid in that, although the bill may not bring work into Scotland in terms of people choosing Scots law, there have been countless times over the past 20 or 25 years when I, my partners and—I am sure—Colin and Hamish have changed the law of a contract from the law of Scotland to the law of England, precisely for the reasons that were outlined by the Law Society. When I started in law 20 or 25 years ago, when we got to the end of a transaction, all the parties met round the table and we all signed the documents in duplicate. Parties getting together to sign contracts to end a transaction—no matter what type of transaction—now never happens. Under English law it never happens. We need to have a legal system that facilitates the way in which businesses and companies want to do business.

Colin MacNeill (Dickson Minto WS): My firm was also involved in a relevant case. It is a useful example because everything in this particular transaction pointed to use of Scots law.

A fairly large Scottish company that had operations north and south of the border was refinancing its bank facilities with Scottish banks. The head offices and registered offices of all the parties concerned were in Scotland and yet, at the last minute and for the reasons that Professor Rennie explained, the choice of law was changed from Scots to English, not because of a minor inconvenience or minor travelling cost for the parties to get to one place—the costs of travel are insignificant—but because we could not contemplate asking many busy people to take a day or half a day out of their lives to get to one solicitor's office. The effect is multiplied when you deal with parties in places outside Scotland.

That case is an example of a contract on which we should hope that litigation never transpires; if it does, the Faculty of Advocates has lost that business.

Margaret McCulloch: I have a few questions on the back of your answers. How confident were those businesses about transferring from Scots law to English law, taking into account the security aspect of the electronic signatures?

Colin MacNeill: They were utterly confident. Such businesses transact under both jurisdictions all the time. The benefit is that English law and Scots law are in almost all respects the same for the average commercial transactor. It was no difficulty for them, and there was certainly no difficulty in doing it electronically because, as Professor Rennie said, that is what happens. As Hamish Patrick and Paul Hally will confirm, contracts under English law are done electronically and have been done that way under a recognised procedure for a number of years.

Margaret McCulloch: Mr Howie questioned the number of contracts that would actually convert from Scots law to English law. Can you give a ballpark figure for how many contracts your organisation converted from Scots law to English law over the past year in order to get electronic signatures?

Dr Hamish Patrick (Tods Murray LLP): We see issues arising in relation to documents and obligations that cannot be written under another law, so the asset is moved to a different jurisdiction. When things have to be done under Scots law and are a pain to do under Scots law, people just say, "Well, it's not worth it." They may move a bank account to England because that makes it easier, or they may exclude certain assets from the Scottish multijurisdictional element of the transaction.

I spend quite a lot of my time apologising for the inadequacies of Scots law. For example, if you have a multijurisdictional financing transaction with assets in England and various European countries or the United States, all the parties involved will sign their documents electronically in counterpart, and they will do them in advance, with a signing date several days before the closing date. I have to tell them, "Sorry, we can't do that." I have to explain that we need separate Scottish documents that operate differently, and that we must then work out how to get our footwork right so that they work, and it is not uncommon for us to have to get signatories out again on the day of completion to sign a series of documents, in a specific order, to comply with the requirements of Scots law as to counterpart or delivery. Escrow is also a big issue.

What is proposed will make life a lot easier for some of my junior lawyers, who will not have to jump through all those hoops. We will look a little bit less embarrassed in such situations, where we currently, to be frank, appear backward. We have to do it.

Margaret McCulloch: Can you give me a rough percentage of your business in a year for which you choose the English rather than that Scottish model, for ease of business and efficiency?

12:30

Paul Hally: I am not sure that I have figures for that. In writing a contract for which we know that it is highly unlikely that the parties will come together to sign, we would predominantly choose English law rather than Scots law. It is not a question of how many documents there are or whatever; it is about the fitness for purpose of Scots law against the expectation of the global community.

Colin MacNeill: We all advise on English contracts as well as Scots contracts. A contract might be a properly English contract from the start of the transaction, so it is difficult to give a percentage. In looking back over the past 20-odd years, I would say that it is not an insignificant percentage.

Dr Patrick: There is another angle to this. In some more systematised situations, people will choose English law for convenience. There are some situations where they cannot do so, for consumer protection reasons or whatever. Vehicle leases, for example, are often written under English law. One reason for doing that is that it is easier to execute them.

There are other reasons for people to use one law for their business if they operate throughout the UK. The convenience of the system when considered as a whole might tip the balance towards where contracts of one sort or another are originated. They could save large amounts of money, and it is preferable if their origination system does not require people to sign things, send them off and get them back again.

I can think of a mundane example. My son has just moved into halls of residence at university, and he has to sign a lease, as do I. He had to download two copies, sign those two copies and send them to the residence. When he got to the residence, he picked up one of them, which had been countersigned. It would have been very much easier for him to download one, sign it, scan it and email it. Then, the other party would countersign it and send it back again. That works in England. His lease had to be made under Scots law, so it had to be done that way. Why would a vehicle lease not be written under English law, given its systematic convenience?

Paul Hally: I have another example. During the summer, I was on holiday in South Carolina. My son is at the London School of Economics, and he woke me up one morning and said, "Dad, we've got two hours to sign the contract for the lease." Using an electronic document system called DocuSign, the landlords sent us the lease and the guarantee that I had to sign for it. All three parties—there are three tenants and three guarantors—signed up using that electronic system. That is not an advanced signature

system; it is simply an electronic system that people in England are using for commerce—for leases. That is an illustration of the things that are already happening, and Scots law has to keep up with that.

Margaret McCulloch: If you had the option of using electronic signatures for your business, would all your contracts then be under Scots law, as you would not have to use English law?

Colin MacNeill: Electronic signatures are perhaps a separate point. If the bill were passed to allow counterparts, that would take out the percentage of contracts that are changed to English law but which would otherwise be under Scots law. It would make a difference in that respect.

Margaret McCulloch: How long has the bill been in practice in England?

Colin MacNeill: There is not a bill in England. There was a case that drew attention to the problems of electronic delivery and signing in 2008. In 2009 or thereabouts, the Law Society in England and various other bodies agreed a number of approaches that practitioners could use to ensure certainty. One of those approaches is almost universally used.

Margaret McCulloch: The approach is working in England; do you see any reason why it should not work as efficiently in Scotland?

Dr Patrick: No. We are trying to make the approach work in England at the moment. There has been some discussion in the papers about whether or not emailing signed unilateral documents in portable document format counts as delivery. We do it—whether we will be sued at some point as a result, I do not know. Practice varies, although I am sure that other firms do the same thing. We take multilateral documents and turn them into unilateral documents, so that we can do that sort of thing. It makes things much more complicated in other respects, but we do it so that we can fit in with what people are trying to do. We see emails from the south and ask, "How do we make our system fit in with that?" Just because a system operates in England does not mean that we must have it, of course, but we want our system to interact effectively with other systems.

The Convener: Richard Baker wants to ask about fraud.

Richard Baker: Thank you. The witnesses heard the Faculty of Advocates's concerns about fraud and error. What do firms currently do to mitigate the potential for fraud and error? To what extent will that change when signing in counterpart is possible?

Colin MacNeill: Let us take the example of a simple bilateral contract that is negotiated between two law firms. Even though the firms might be geographically close to each other, there might be no reason to meet throughout the transaction. All documents are transferred in Word format by email until they are agreed, and the final version is agreed and signed off as the final version, by both sides. That follows best practice in England: one firm will then convert the document to a PDF. At that point, if there is to be a physical completion meeting, the solicitor prints off however many copies are needed and takes them to the meeting to be signed. If completion is to be done electronically, the solicitor sends the PDF, which of course cannot be changed, round all the parties, who agree that that is the document to be signed.

Richard Baker: In effect, you foresee no material difference in what firms will do in the future.

Colin MacNeill: I foresee no material difference.

Richard Baker: Concern has been expressed about the use of pre-signed signature pages and the potential for fraud—that might relate to the case that was mentioned that led to a change in the rules down south. Professor Rennie was adamant that the bill contains sufficient protection. Are the witnesses also satisfied in that regard?

Dr Patrick: It is very unusual to use pre-signed signature pages. In practice I would be reluctant to do so, other than very exceptionally. In an advised transaction, where lawyers were involved, I would ensure that I had a clear trail of authorisations indicating approval of the document to which the page was attached. I would want the PDF to be accompanied by an email that said, "You can attach this page to this document" if I was the person who was doing the attaching. I would also want to know why we had to do it that way.

Richard Baker: Will a lot of the responsibility for such work fall on firms and practitioners?

Dr Patrick: I suspect that it will do, at a practical level.

Colin MacNeill: The bill's purpose is not to permit the pre-signing of contracts. The Scottish Law Commission looked into whether that would be a desirable aspect of law reform. My firm did not think that it would be desirable, because there are more concerns than advantages in relation to pre-signed pages. There are other ways to get round someone's inability to sign once the document has been agreed.

Stewart Stevenson: Here is a wee test. Can companies in Scotland get insurance to cover the risk of fraud and error? Do they do so?

Dr Patrick: I do not think that I know the answer to that.

Colin MacNeill: I suspect that that is not possible, other than in relation to general fraud by employees.

Fraud on the part of an officer entering into a transaction or—perhaps worse to contemplate—on the part of an adviser may well be difficult to insure against. I do not think that companies consciously do so. I ask Paul Hally whether he thinks think that that is covered by commercial insurance.

Paul Hally: I would not know. I do not think that it enters into people's thinking.

Again, I think that we should be careful about what we are looking at. In many cases, for commercial parties to make a contract, the contract does not need to be reduced to writing. Much of this is about contracts that are facilitated by lawyers and therefore there is a huge degree of probity already in the system because of the fact that there are lawyers on either side.

I have heard concerns about the provision being used by parties themselves, and that could happen under the bill. However, many of the contracts that ordinary parties undertake without legal advice do not need to be reduced to writing. I could agree with you tomorrow to buy your company—we could do that verbally and shake hands, and that would be a binding contract. I just do not understand the fraud concerns around all of this.

Stewart Stevenson: I was only asking the question to see whether someone external to the profession had done a risk assessment.

Paul Hally: No.

Stewart Stevenson: That was my only reason for asking. Equally, I can see that it might be cheaper to self-insure—that is, to carry the risk on your own books.

Paul Hally: Again, we need to look at the bill as being facilitative. People will use the bill to do counterpart execution and will follow the steps in it. Sometimes they may sign the last page and use those provisions and sometimes they may decide to ask for the whole document to be sent through.

The other thing that is of comfort in all this is, as you have heard in evidence from the Law Society of England and Wales, that there is no evidence of the practice in England, which comes from the common law, being abused or open to fraud. What we have tried to do here is to build on the policy statements in England and make the system even better.

Stewart Stevenson: That is fine. I did not want to make a meal of it. By the way, I hope that you are not relying solely on PDFs, but are using secure PDFs. I have software that enables me to edit PDFs, which I do for my own reasons.

How widespread is the use of electronic signatures currently? Is there enough in the bill to allow electronic signatures to be used as widely as the profession might find useful?

Colin MacNeill: They are not used at all. Pen and paper are used the world over, whatever jurisdiction people are in. That is true for the contracts that I get involved in, and I suspect that that is the case for Paul Hally and Hamish Patrick as well.

Paul Hally: Yes.

Stewart Stevenson: For my sins, I was one of the project managers for the clearing house automated payment system—CHAPS—which introduced electronic signatures 32 years ago. I make that passing observation.

Colin MacNeill: That is a good example of something that was innovative at the time and has become commonplace. Who knows, in 32 years' time we may all be looking like the dinosaurs. We are reflecting what our clients do.

Dr Patrick: I suppose that overlying CHAPS will be something with a signature on it, under which the account has been opened.

Stewart Stevenson: No—not even in 1982 when we went live. Believe me.

The Convener: Would John Scott like to come in?

John Scott: I have a more general point that I would like to make at the end of the questions.

Stuart McMillan: Having heard evidence from the previous two panels, I have been looking through your submissions again. Regarding the current system in which we work, the word "antiquated" comes up in the submissions from Shepherd and Wedderburn and Tods Murray. Two of the initial bullet points in the submission from Dickson Minto state:

> "There are no disadvantages to the approach taken in the Bill"

and

> "The Bill is comprehensive and we do not believe that there are any missing provisions".

That suggests that Dickson Minto's position is very clear. If possible, I would like to have it on record whether Tods Murray and Shepherd and Wedderburn agree with the comments from Dickson Minto and believe that the bill is accurate and there are no missing provisions.

Paul Hally: I am happy to support Mr MacNeill and Dickson Minto in the clarity of their submission.

Dr Patrick: As am I. The bill was gone into in great detail by the Law Commission before it came here.

12:45

Stuart McMillan: I anticipated that you were going to say that.

My next question, which I also put to the previous two panels, is on a different subject: the electronic repository. Will there be any benefits from the setting up of an electronic document repository maintained by Registers of Scotland?

Paul Hally: I am not sure that that is my area of expertise and, as has been said before, it is separate from the provisions of the bill, although the bill facilitates moving towards such an arrangement. Because we often transact cross border, any form of depository would need to gain a degree of universal acceptance. Registers of Scotland, or someone else, may be able to provide that—I do not know. It might be possible for such a register to become universally accepted, which would be very helpful—the situation is similar to that of CHAPS, which has been discussed. I imagine that setting up such a repository is possible, although I do not have the technical knowledge to know how that would work.

Colin MacNeill: I agree with Paul Hally. For cross-border transactions, it is difficult to see how and why Registers of Scotland might have a role—and that is to presuppose that an electronic repository would be accepted anyway. In the areas in which the three of us work, it probably would not be at the moment.

Dr Patrick: Very often, law firms have their own systems, which operate in parallel. I can certainly see the advantages of having a central repository rather like the books of council and session, but whether it would be an answer to everyone's problems is another question. It would be useful, but it is not everything.

John Scott: Further to Stuart McMillan's question, as laypeople—notwithstanding Stewart Stevenson's obvious, albeit historical, expertise in this area—we all have to take the advice of experts such as yourselves. Mr Howie raised concerns about the bill that you gentlemen and Professor Rennie discount and disagree with. Do you have any reservations about the bill? As it appears that you have none, are you therefore inviting us to discount and dismiss Mr Howie's concerns? Are there any of his concerns that you would support and uphold?

Colin MacNeill: Perhaps I can go first. I had the benefit of sitting through all his evidence. His first concern was about fraud and error. I suspect that we have covered that. His second was that he was not sure how many contracts would be affected, and I think that we have covered that, too. It is difficult to put a percentage on this, but, nonetheless, the bill would affect a percentage of the contracts that we all come across. If litigation arose in relation to those contracts, and if they remained under Scots law, the benefit would be that the cases would be litigated in Scotland.

Mr Howie did not think that the bill would influence the choice of law. I think that, in other evidence, we have demonstrated that that is not the case. Although there are often very clear factors determining the choice of law between Scotland and England, for parties that operate throughout the UK, that choice often comes down to mundane matters such as convenience of execution. The bill therefore will influence the choice of law.

Finally, Mr Howie said that, in large multiparty international deals, cost is not an issue. As I said earlier, travelling costs are not an issue, but the time cost for clients is an issue—they are not in a position to travel to Edinburgh, Glasgow or wherever from their own offices. Very often, as we indicated, whole transactions involving billions of pounds can be covered without people leaving their offices. That is a common feature of commercial life just now.

Although I do not feel that any of the concerns that Mr Howie raised are valid, others might have other things to add.

John Scott: Others will speak for themselves, doubtless.

Dr Patrick: I do not have much to add to what Colin MacNeill has said.

Paul Hally: I am afraid that I was shaking my head in disbelief through all of Mr Howie's evidence. I understood the concerns, but I do not agree with them in practice. It would be incomprehensible not to introduce such a bill to put us on a level playing field.

Colin MacNeill: Mr Howie suggested that one protection might be for the bill to require the whole of the document to be sent back electronically as a counter to error or fraud. I was party to a discussion with the Law Commission when the proposed provisions were being formulated. I will illustrate our concern about the matter using the example of when Paul Hally was on holiday. I do not know how long his document was, but let us say that it was 100 pages. Consider the situation of someone who is on holiday, or even just sitting by their printer at home. It is a gross inconvenience to ask a company director to print

off 100 pages at 2 o'clock in the morning and then rescan them all to send back, whereas printing off a single signature page to get the deal done is not an inconvenience.

Paul Hally: If the company director is staying in a hotel somewhere, finding the necessary facilities in the small hours of the morning—even if he happens to be staying in a five-star hotel—is not what he wants to do. He will ask, "Why am I doing this under Scots law, and why am I using your legal firm to do this?" That would be a positive disincentive to using Scots law.

John Scott: Thank you. That is clear cut.

The Convener: That completes our questions. Thank you again, gentlemen, for being here. I particularly thank Mr MacNeill for arriving very early. The fact that you heard all the previous evidence is very much appreciated—that was helpful to us. I am grateful for that.

12:52

Meeting suspended.

12:55

On resuming—

Instruments subject to Affirmative Procedure

Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014 [Draft]

Bankruptcy (Money Advice and Deduction from Income etc) (Scotland) Regulations 2014 [Draft]

Common Financial Tool etc (Scotland) Regulations 2014 [Draft]

Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [Draft]

The Convener: The legal advisers raised no points on the instruments. The committee may wish to note, however, that the second and fourth instruments replace earlier drafts that were laid before the Parliament on 21 and 22 August respectively, but withdrawn by the Scottish Government following correspondence with our legal advisers. Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225)

12:56

The Convener: The regulations contain a couple of minor drafting errors. Regulation 19 refers to section 54D(4)(b) or (6)(b) without specifying that those are provisions of the Bankruptcy (Scotland) Act 1985. Page 27 also contains notes for the completion of form 4, the statement of assets and liabilities, which is contained in schedule 1, but the page is duplicated with page 26.

The Scottish Government has undertaken to correct those errors by means of amending regulations, which would be laid before the Parliament before the regulations come into force on 1 April 2015.

There has also been a failure to follow normal drafting practice, as various provisions in the notes within the forms in schedule 1 are not drafted in gender-neutral terms. That applies at pages 34, 37, 39, 41, 124 at paragraph 3 and 127 at paragraph 3.

The Scottish Government has undertaken to correct those provisions if and when other amendments to the relevant forms in schedule 1 are to be made or if, in future, the regulations were to be revoked and the relevant provisions re-enacted. However, the committee may consider that the various non-gender-neutral references should be amended at the same time as the minor drafting errors to which I previously referred and, so, before the regulations come into force on 1 April 2015.

Does the committee agree to draw the regulations to the attention of the Parliament under the general reporting ground?

Members *indicated agreement.*

The Convener: Does the committee also agree to recommend that the provisions that are drafted in non-gender-neutral terms should be corrected prior to the regulations coming into force?

Members *indicated agreement.*

The Convener: Furthermore, the meaning of the saving provision in paragraph (a) of regulation 24(1) could be clearer. There could be a consistent use of tense in subparagraphs (i) and (ii). Accordingly, it could have been made clearer that paragraph (a) applies to sequestrations proceeding either on a petition for sequestration presented or on a debtor application made before 1 April 2015, regardless of whether the date of presentation of the petition or the date of making the debtor application was before, on or after the date of making the regulations.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (h), as the meaning of the saving provision in paragraph (a) of regulation 24(1) could be clearer?

Members *indicated agreement.*

John Scott: Is it likely that the different tenses will be amended? I am unclear.

The Convener: We are asking the Government to consider that they should be. We are telling it that they should be.

John Scott: We are seeking that the Government amend them.

The Convener: I am sure that the committee would like me to reiterate that it would prefer that subordinate legislation says what it means and means what it says every time.

John Scott: Absolutely. Thank you.

The Convener: The Scottish Government has said that it might have been more consistent to use “is” instead of “was” in regulation 24(1)(a)(ii), but it has not indicated that the provision will be amended. However, the previous comment stands. Does the committee agree to recommend that regulation 24(1) should be amended at the same time as the minor errors that I previously referred to are corrected, to provide better clarity and consistency of provision?

Members *indicated agreement.*

Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227)

13:00

The Convener: There could have been a consistent use of tense in subparagraphs (a) and (b) of regulation 13(1). Accordingly, the regulation could have made it clearer that it applies to sequestrations proceeding either on a petition for sequestration presented or on a debtor application made before 1 April 2015, regardless of whether the date of presentation of the petition or the date of making the debtor application was before, on or after the date when the regulations were made. Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (h), as the meaning of the saving provision in regulation 13(1) could be clearer?

Members *indicated agreement.*

Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 (SSI 2014/233)

The Convener: Regulation 17(13)(a)(i) specifies a condition when, for the purposes of the calculation of a survivor pension that is payable in accordance with the requirements of regulations 17(10) to 17(12), membership of the local government pension scheme shall include additional membership under certain provisions of the 1998 or 2009 scheme. The specified condition is that a surviving spouse or civil partner was married or in a civil partnership at any time while the deceased was in active membership of the scheme after 31 March 1972, but the instrument should also provide—although it does not—that the spouse or civil partner was married to or in a civil partnership with the deceased member of the scheme. Does the committee agree to draw the regulations to the Parliament's attention on reporting ground (i), as the drafting of regulation 17(13)(a)(i) appears to be defective?

Members *indicated agreement.*

The Convener: Our legal advisers have raised two minor drafting errors in the regulations. First, regulation 1(4) contains an error in the definition of "the 1998 Transitional Regulations", as the citation of those regulations is incorrect. The words "(Scotland)" and "(Transitional Provisions)" are inverted. Secondly, in regulation 17(13)(a), the reference to

"regulation 41(a) to (d) of the 1998 Regulations"

should be to regulations 41(4)(a) to 41(4)(d) of those regulations.

The committee may wish to note that the Scottish Government has undertaken to lay an amending instrument to correct those errors timeously before the regulations come into force. While noting that undertaking, does the committee agree to draw the regulations to the Parliament's attention on the general reporting ground, as they contain minor drafting errors?

Members *indicated agreement.*

Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014 (SSI 2014/226)

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

Members *indicated agreement.*

Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 (SSI 2014/243)

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

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Rules of the Scottish Land Court Order 2014 (SSI 2014/229)

13:03

The Convener: The order contains minor drafting errors. First, the reference in rule 20(1) to the rights conferred by paragraphs (2) and (5) of that rule should be to the rights conferred by paragraphs (2) and (6). Secondly, the reference in rule 50(1) to

"the process in the case under rule 49"

should be to "the process in the application", as that is the term that rule 49 defines. Thirdly, the reference in rule 97(3) to

"a written submission under paragraph (1)"

of that rule should be to "a written submission under paragraph (2)". There has also been a failure to follow normal drafting practice, as various provisions—rules 7(1), 58(4), 96(8) and 106(4) in the schedule—are not drafted in gender-neutral terms. Given the matters that I have highlighted, does the committee agree to draw the order to the Parliament's attention on the general reporting ground?

Members *indicated agreement.*

The Convener: Separately, the committee may wish to note that it would have been useful had the order's planned timing allowed a period of longer than two sitting days between the date when it was laid before the Parliament and the date when the provisions were brought into force, to afford the committee the opportunity to scrutinise the order before the commencement date. The committee may wish to note the explanation of the timetable that the Scottish Land Court gave and to note that the court regrets the inadvertent failure to allow time for scrutiny.

I see that members have no comments.

Public Bodies (Joint Working) (Scotland) Act 2014 (Commencement No 2) Order 2014 (SSI 2014/231)

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

Members *indicated agreement.*

Act of Adjournal (Amendment of the Criminal Procedure (Scotland) Act 1995 and Criminal Procedure Rules 1996) (Miscellaneous) 2014 (SSI 2014/242)

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

Members *indicated agreement.*

The Convener: Before we move on from consideration of instruments, the committee may wish to note that a total of 39 minor points have been identified in the instruments under consideration today. Although those errors are minor, the committee may nevertheless consider such a high number of mistakes to be unsatisfactory. We shall merely note that and move on at this point.

Criminal Justice and Courts Bill

13:05

The Convener: Under item 7, the committee is invited to consider the powers to make subordinate legislation conferred on the Scottish ministers in this bill. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect. Does the committee agree to report to the lead committee that it is content with the delegated powers conferred on the Scottish ministers in the bill and with the procedure to which they are subject?

Members *indicated agreement.*

Stewart Stevenson: It might be useful to draw the attention of the Standards, Procedures and Public Appointments Committee—as part of that committee's consideration of the legislative process—to this being another instance in which something touching on subordinate legislation is not accompanied by a delegated powers memorandum.

The Convener: Thank you for that comment.

Deregulation Bill

13:06

The Convener: Under item 8, the committee is invited to consider the proposed powers to make subordinate legislation conferred on the Scottish ministers in this bill.

Apart from one clause that is already in the text of the bill, the clauses that will introduce these new and extended powers are contained in an amendment that will be considered at committee stage in the House of Lords on 21 October 2014. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect.

Does the committee agree to report to the lead committee that it is content with the proposed delegated powers conferred on the Scottish ministers in the bill and with the procedure to which they will be subject?

Members *indicated agreement.*

13:07

Meeting continued in private until 13:17.

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