



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 28 October 2014

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DELEGATED POWERS AND LAW REFORM COMMITTEE

29th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Alison Coull (Scottish Government)
Fergus Ewing (Minister for Energy, Enterprise and Tourism)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 28 October 2014

[The Convener opened the meeting at 10:31]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 29th meeting in 2014 of the Delegated Powers and Law Reform Committee. As always, I ask members to turn off their mobile phones, please.

Agenda item 1 is a decision on taking business in private. It is proposed that we take in private item 8, which is consideration of a paper by the clerk and of correspondence from the Cabinet Secretary for Justice in connection with instruments relating to the European Union opt-out. Does the committee agree to take item 8 in private?

Members *indicated agreement.*

The Convener: We should also note that, in line with previous decisions, items 6 and 7 will also be taken in private.

Instruments subject to Affirmative Procedure

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No 1) Order 2014 [Draft]

Public Bodies (Joint Working) (Integration Scheme) (Scotland) Regulations 2014 [Draft]

Public Bodies (Joint Working) (National Health and Wellbeing Outcomes) (Scotland) Regulations 2014 [Draft]

Public Bodies (Joint Working) (Prescribed Health Board Functions) (Scotland) Regulations 2014 [Draft]

Public Bodies (Joint Working) (Prescribed Local Authority Functions etc) (Scotland) Regulations 2014 [Draft]

Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 2015 [Draft]

Scotland Act 1998 (River Tweed) Amendment Order 2015 [Draft]

10:31

The Convener: No points have been raised by our legal advisers on the instruments, and members have not indicated that they have any comments to make.

The committee may wish to note that the versions before us of the draft Public Bodies (Joint Working) (Prescribed Health Board Functions) (Scotland) Regulations 2014 and the draft Public Bodies (Joint Working) (Prescribed Local Authority Functions etc) (Scotland) Regulations 2014 replace earlier versions, which were withdrawn by the Scottish Government as they contained errors. One of the instruments contained an error that the committee's legal advisers considered amounted to defective drafting and both contained large numbers of minor errors, most of which have been corrected.

Is the committee otherwise content with the draft instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258)

10:33

The Convener: The regulations contain a couple of minor drafting errors. Regulation 4(1), which prohibits the use of certain heavy fuel oils, states that it is subject to regulation 4(2), which limits the application of regulation 4(1) until 1 January 2016 for certain uses. Regulation 4(1) should also be specified as being subject to regulation 4(3), which limits the application of regulation 4(1) as from 1 January 2016 for certain uses.

Paragraph 6 of the schedule requires a person to whom a sulphur content of liquid fuels permit is intended to be transferred to notify the Scottish Environment Protection Agency of the intended transfer within 21 days of the intended date of that transfer. The references to “intended” in paragraph 6 are made in error. The Scottish Government intends that the notification should be given by the person to whom a permit has been transferred within 21 days following the date of the transfer.

Does the committee agree to draw the regulations to the Parliament’s attention on the general reporting ground?

Members indicated agreement.

The Convener: Does the committee agree to note, however, that the Scottish Government will correct the errors by amendment in due course?

Members indicated agreement.

Convener of the School Closure Review Panels (Scotland) Regulations 2014 (SSI 2014/262)

Members of a School Closure Review Panel (Scotland) Regulations 2014 (SSI 2014/263)

Royal Conservatoire of Scotland Order of Council 2014 (SSI 2014/268)

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

Members indicated agreement.

Instruments not subject to Parliamentary Procedure

Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No 2, Savings and Transitions) Order 2014 (SSI 2014/261)

10:34

The Convener: The meaning of the saving provision in article 4(1) could be clearer in the following respect: there could be a consistent use of tense in subparagraphs (a) and (b); and paragraph (1) could accordingly 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 of making the order.

Does the committee agree to draw the order to the attention of the Parliament on reporting ground (h), as the meaning of the saving provision in article 4(1) could be clearer?

Members indicated agreement.

The Convener: Does the committee agree to note that the Scottish Government has undertaken to amend article 4(1) and the similar provisions in SSI 2014/225 and SSI 2014/227, which have already been reported on by the committee, before the instruments come into force?

Members indicated agreement.

Housing (Scotland) Act 2014 (Commencement No 1, Transitional and Saving Provisions) Order 2014 (SSI 2014/264)

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

Members indicated agreement.

The Convener: Before we move on from consideration of instruments, the committee may wish to note that there have been a significant number of minor points again this week. There would have been significantly more had the legal advisers not drawn the Government’s attention to the minor points arising from the public bodies instruments that were subsequently relaid.

Historic Environment Scotland Bill: After Stage 2

10:36

The Convener: Item 5 is consideration of the delegated powers provisions in the Historic Environment Scotland Bill following stage 2. Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper. Stage 3 consideration of the bill is due to take place on Tuesday 4 November.

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

Members *indicated agreement.*

10:37

Meeting continued in private.

12:17

Meeting continued in public.

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

The Convener: We have the opportunity to take further oral evidence on the Legal Writings (Counterparts and Delivery) (Scotland) Bill. Today, we will hear from the Minister for Energy, Enterprise and Tourism, Fergus Ewing, and his Scottish Government officials. I welcome the minister, who is accompanied by Jill Clark, team leader in the civil law reform unit; Ria Phillips, civil law policy manager in the civil law reform unit; and Alison Coull, deputy director of the Scottish Government legal directorate.

Minister, I know that you have an opening statement to make, but first I will make a statement. This is the first time that we have done what we are doing, and I thank you and your officials for the fact that the process seems to have worked very well. Clearly, when we do something for the first time, we are never quite sure what will happen, but the process seems to have gone very well. Thank you very much for your engagement, one and all.

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): Thank you very much for that welcome, convener. Good morning, committee members and everybody else. I thank the committee for inviting me to give evidence on the bill.

As the convener just said, the bill is the first to be considered by the committee under the new Scottish Law Commission bill procedure. I acknowledge the thorough and careful approach that the committee has adopted, which bodes well. As the convener stated, we are obviously taking part in a piece of history this morning, albeit perhaps a minor footnote rather than a significant chapter.

I have, of course, considered the stage 1 evidence sessions, and I have been encouraged by the broad range of support for the bill. The evidence sessions have highlighted that the bill will not operate in a vacuum; rather, it will operate within the wider statutory and common-law frameworks that already exist. It is therefore worth touching on exactly what the bill is intended to do, which is straightforward.

First, the bill enables documents to be executed in counterpart. That puts beyond any doubt whether execution in counterpart is permissible in Scots law and will give the legal profession and the business interests that it represents the necessary confidence to use Scots law for such transactions.

The other provision that is made by the bill is the facility to deliver, in the legal sense, traditional—that is, paper—documents electronically. Therefore, any document that is created on paper may become legally effective by being delivered by electronic means, such as email or fax.

At present, there are conflicting authorities on whether a paper document may be delivered by its electronic transmission to the grantee or to a third party, such as a solicitor or agent for one of the parties.

The question has arisen mainly in respect of purported delivery of documents relating to land by way of fax from the 1990s onwards, and one of the bill's main aims is to resolve such uncertainty by saying that delivery of a copy of a paper document or a copy of part of that document by electronic means can constitute delivery. We are satisfied that that will meet a clear and pressing demand from those likely to be affected by the bill, and we should not underestimate the value in bringing such clarity to the law. Beyond that, however, it does not attempt to alter the law on delivery.

Having said what the bill does, I think that it is also worth briefly reminding ourselves of what it does not do. It does not deal with the electronic delivery of electronic documents; it does not deal with electronic signatures; and it does not alter the law in relation to the use of pre-signed pages. The Scottish Law Commission's paper "Signatures in Scots Law: Form, Effect, and Proof" provides a comprehensive account of the current law on the last two matters, and the first is now provided for in legislation.

I am aware of the criticisms that the Faculty of Advocates has levelled at the bill. That such a body has raised concerns has rightly caused us to pause and give them full consideration. Having done so, we remain of the view expressed in the policy memorandum that the bill does not create any difficulties with the law as it stands and will, in our view—which, I should add, is shared by the other stage 1 witnesses—do nothing to increase the prospects of fraud or error as a result of executing in counterpart, including in cases where only the signature pages are exchanged. I have four reasons for holding that view, and if members are interested in hearing them I can share them during questioning.

It might also be worth commenting on a particular possibility for error that was identified, namely that parties might inadvertently execute different versions of a document. In practice, transmitting a document to parties for signature in the form of a PDF, for example, will limit the risk of parties signing different documents. If, however, parties sign different versions of a document, they will not in fact have validly executed it in counterpart under the terms of the bill, which

provides that a document is executed in counterpart if it is executed in two or more duplicate, interchangeable parts. Nonetheless, that matters only if the transaction is by law one that should be in writing; in other cases, there might be sufficient agreement between the parties to constitute their contract.

I also want to say something more about the issue of exchanging only signature pages. The approach taken in the legislation is all about ensuring that it is permissive and as flexible as possible. Inherent in that flexibility is the ability of the parties to a transaction to set out how the process will work for them. The parties can agree the method of delivery and what will be circulated, which might be only the signature pages or, say, the signature pages plus one counterpart. A crucial provision in the bill is section 4(3), which applies only to delivery by electronic means and provides that if only part of the document is delivered by electronic means it must be clear that it is part of the signed document and must contain at least the signature page. If the parties agree to deliver only the signature pages electronically, that will usually happen because their solicitors are involved, and there is an implicit relationship of trust between a solicitor and their client, with tried and tested methods for addressing any issues of fraud or error.

In common with the other witnesses from whom the committee has heard, our view of the suggestion from the Faculty of Advocates that the bill be amended to require that, for electronic delivery, the full counterpart be delivered by each party in all cases is that it would just not work. As the committee has heard, it would also be unacceptable to practitioners and their clients and would effectively undermine the bill's objective.

I hope that, for those reasons, the committee is reassured that the bill's provisions do not in any way encourage fraud or increase the chances of errors occurring.

In summary, this is a bill that one witness described as having aims that are

"admirable in the sense that they are trying to address a specific problem and to achieve a specific outcome",

which

"is an admirable ambition".—[*Official Report, Delegated Powers and Law Reform Committee, 7 October 2014; c 28.*]

It will plug small but important gaps in Scots law and, in so doing, will punch above its weight and address the impact of the undesirable shift towards the use of other law, usually English law, to complete many business transactions that should for every other reason be transacted under Scots law.

I hope that those comments have been helpful to the committee. I and my officials are happy to answer any specific questions.

The Convener: Thank you very much, minister. Your comments have indeed been very helpful and have pre-empted some of—although I have to say not all—our questions.

I hand over to Margaret McCulloch.

Margaret McCulloch (Central Scotland) (Lab): Minister, the bill's potential benefits have been discussed by other witnesses, but can you expand on the benefits that the bill will bring and how it will meet the policy objectives set out in the policy memorandum of commercial expediency in saving time and money and providing consistency—in respect of which it has been argued that because certain procurement contracts and land agreements have to be subject to Scots law no workarounds are available—and of the promotion of Scots law? Does the bill itself bring any other benefits?

Fergus Ewing: I do not want to overstate them but I think that it is fairly clear and pretty much incontrovertible that the bill will bring benefits. In direct answer to Margaret McCulloch's question, I point out that in circumstances where Scots law should have been used but, because of existing doubt over the legality of executing a document in counterpart, it was not, parties will now have the confidence to use Scots law. That is a plain benefit. At the moment, there is doubt. If for practical business and commercial reasons parties wish to adopt this particular method of execution—perhaps because they are unable to be physically present in the same room—they will be able to use Scots law, safe in the knowledge that execution in counterpart is valid.

In an increasingly busy world, the expectation that all the parties will be able to get together in one room to sign a document is, I think, unrealistic. When my mother was in practice, two solicitors would meet to complete a conveyancing transaction and—I was told this by my mother, so it must be true—enjoy a glass of sherry. Those days are long gone, and execution in counterpart, brought up to date through the use of electronic media and communication, can now, where the parties so choose, be used to execute a contract under Scots law. That has not been possible before, and the bill will make it possible. The Scottish Law Commission has probably put the matter much more elegantly than I just have, but I hope that I have described the bill's principal benefit.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): As your introductory remarks made clear and as you have expanded on in your answer to the previous question, much of the

activity between those who are contracting is delegated to lawyers, and the bill lays out processes in relation to that. I wonder whether in relation to some of the comments that the Faculty of Advocates, in particular, has made, it is in your view clear that any failure of process, whether minor or more significant, by those acting as nominees on behalf of the contracting parties will compromise the legal validity of the resulting contract that has come through the process, or do you think that, by being permissive, the bill simply creates a framework and does not make things that inadvertently fall outside that framework illegal in and of themselves?

Fergus Ewing: I hope that I have understood the question correctly, convener, and that I can answer it correctly—my officials will no doubt step in if I do not—but my understanding is that the bill makes no difference to the law in relation to the status of a contract and whether it is void or voidable where there has been fraud or error.

Alison Coull (Scottish Government): That is correct.

Stewart Stevenson: Just to play that back to you, minister, are you saying that the bill creates a legal framework that parties might select but, in practice, other approaches that are taken either deliberately or inadvertently will remain as they currently are under the law?

12:30

Fergus Ewing: That is correct. We need to be clear that fraudulent activity is a deliberate act and that the bill will not stop someone who is determined to carry out fraud—that is the nature of fraudulent activity. The situation with the bill will be no different from the current situation should individuals be determined to carry out fraudulent activity. One would be more likely to encounter examples of error, rather than fraud. Through human fallibility, the possibility of error is omnipresent, as I am sure we all appreciate very well.

As I understand it, the bill will make no substantive change to the law that determines whether, where there has been error, the validity of the contract—its enforceability—is affected in any way. I think that that is correct. My officials can confirm whether that is so.

Alison Coull: Yes, it is. As we have said before, we expect that in most cases the transactions will be carried out by a PDF being sent. I appreciate that there are means to alter PDFs, but that would require a deliberate act, and we are not in that territory. That minimises the scope for error. We have also said that there may not be a valid execution in counterpart if different documents are accidentally executed, but that does not detract

from the overview of contract law that there would still be sufficient evidence, depending on the circumstances, to constitute a valid contract. The bill does not cut across existing contractual rules and remedies and different ways of rectifying errors, depending on the significance of the error.

The Convener: Thank you. I think that Mike MacKenzie is next.

Mike MacKenzie (Highlands and Islands) (SNP): As you rightly said, minister, the committee has taken evidence from a range of witnesses and the only negative opinion about the bill was expressed by the Faculty of Advocates. All the other witnesses seemed to be pretty enthusiastic about the bill and welcomed it. We heard how the bill would enable a number of contracts for which people currently prefer to use English law to be dealt with under Scots law, but none of the witnesses was able to give us any data or feeling for the amount of potential business that the bill would direct to Scotland either in terms of the number of contracts that would be signed under Scots law rather than English law or, indeed, of their value.

We also heard that the bill would benefit the environment because of a reduction in paper consumption, which might not be hugely significant but would nevertheless be welcome. Perhaps more important, the bill would reduce the number of journeys required to sign contracts. Does the Scottish Government have any data on or is it able to make any assessment of the number and the value of contracts that will be written under Scots law because of the bill, and can it quantify the environmental good that will spring from the bill?

Fergus Ewing: The financial memorandum makes it clear that the bill is permissive by nature. It does not force or require anybody to do anything but simply makes it clear that if parties so desire, they can use execution in counterpart as a modern and effective way to enter into a contract. At the moment, that is not clear under Scots law. Because the bill is permissive by nature, it is not possible to predict with any certainty what its commercial value might be.

The bill should have benefits in some situations, and Mr MacKenzie mentioned or foreshadowed some of them: reduced expenditure on travel, postage and stationery, which is a fairly obvious benefit; a reduction in the expenditure of time; convenience; and speed. It is very difficult to arrange multiparty meetings, so if matters can be dealt with satisfactorily through the use of PDF documents, which are of course in widespread use at the moment, and that can form the basis of a validly executed contract in counterpart, that is a useful tool.

We are providing a useful tool. It is not really possible to state what its benefit will be; it depends on how the business world in Scotland uses it. However, it has been broadly welcomed by the legal profession, by the Law Society of Scotland and by the witnesses from whom the committee has heard, so I believe that it should have value.

I was pleased to note that *The Press and Journal*, which likes to cover stories that are perhaps of less interest to other newspapers, promoted the bill recently. Plainly, the more we can promulgate the change that I hope Parliament will choose to make, the better will be the appreciation of that new device that is open to business.

The Convener: Thank you, minister. I cannot help but feel that the saving in time is the factor that people will eventually decide was most important. We tend to undervalue our time and the opportunity to do something else, particularly if we are travelling.

Stuart McMillan (West Scotland) (SNP): Good afternoon, minister.

On 7 October, when we took evidence from representatives of Registers of Scotland, they explained that they had not had any more detailed discussions with the Scottish Government about the possibility of setting up an electronic document repository. Can you provide us with any information regarding detailed plans for such a repository? If it goes ahead, what is the likely timeframe?

Fergus Ewing: My officials can probably help you out with that question.

Jill Clark (Scottish Government): When colleagues from Registers of Scotland gave evidence, they spoke about other on-going work to do with the implementation of the Land Registration etc (Scotland) Act 2012, which was their priority at the time, and they said that they would timetable their information technology-related work after that. We are taking that as our cue as to when they will be in a position to discuss the repository proposal, but we have not had any further discussions. We were certainly interested in the evidence that was given to the committee and in the views of the legal profession and some of the concerns that were expressed, and we will consider that further. There is nothing more to add at this stage, but we will be taking the matter forward when colleagues from Registers of Scotland are in a position to do so.

Fergus Ewing: Officials have pointed out to me in private discussions preparatory to this meeting that, by their very nature, many of the documents in question will be confidential, so there may not be a desire for the contracting parties to submit the contracts to be registered in any public form. It

is possible to register any document that one wishes in the books of council and session, and solicitors regularly use them for registering wills after the death of the testator.

In general, it may well be the case that many of the documents that will be executed in counterpart will cover commercial matters in respect of which the contents would be intended to remain confidential. That is a factor that would need to be considered in respect of any electronic document repository and in deciding whether, if there were to be such a repository, it would provide for parties to preserve the confidentiality of contractual documents, which would be necessary and desirable.

Stuart McMillan: Thank you for those responses. As the bill goes through the parliamentary process, it would be useful for the committee to be kept up to date on any progress on the matter.

Fergus Ewing: As it has been raised by a member of the committee, I will ask the keeper to see whether there is any further information that we can provide preparatory to the stage 1 debate.

The Convener: Thank you, minister. I am slightly concerned that we do not confuse an electronic signature with an electronic repository, but I am sure that the officials will separate the two issues in their thinking.

John Scott (Ayr) (Con): I take you back to the evidence from the Faculty of Advocates on concerns about fraud and error. You said that you had four reasons, which you would give us by way of reassurance, that the fears that were raised were not real. Perhaps you might do that in your response to my question. Does the bill make it more likely or less likely that there will be error or fraud? We have just discussed that a bit, but could you develop that theme a little more, please?

Fergus Ewing: I see no reason why the bill should either increase or decrease the likelihood of any instance of fraud or error, but I can expand on the four reasons why we do not share the analysis that the witness from the Faculty of Advocates offered the committee. Out of respect for the faculty, it would be useful for me to do so. I am therefore grateful to Mr Scott for having provided me with an opportunity so to do.

First, the issue of fraud and error is not new. The risk of a document used at a signing ceremony being incorrect because of error or fraud exists currently. There are means to deal with that already in the civil and criminal law, and the bill does not need to add to those. There is an existing risk and, in our opinion, the bill does not alter that.

Secondly, for the most part, clients will have placed their trust in solicitors or professional advisers for the sort of contracts that are likely to be executed in counterpart. Should an error go unnoticed that results in a loss to the client, they can have reasonable confidence that their solicitor is insured—as they are required to be—and will be able to make good any loss. Indeed, that applies both in cases of negligence and in cases of fraud. There are two separate funds to which solicitors must contribute to protect their clients. The fact that a solicitor is used is the second reason why I think that the bill poses no additional risk.

Thirdly, there is no evidence from other jurisdictions where execution in counterpart has already been used that there has been an increase in fraud or error. I understand that such usage has been legal in England and Wales and that there has been no increase in the risk of fraud or error so far as we know. The witness Warren Gordon gave evidence broadly to that effect.

Fourthly, Professor Rennie made a good point in his evidence when he spoke of the example of 1970 legislation that allowed ordinary conveyancing documents to be signed on the last page only. He indicated that, at that time, there was concern that the change might increase the risk of documents being changed after signature by the removal of pages that had not been signed and the insertion of other pages, but he said that there is no evidence to suggest that anything like that has happened. I am not entirely sure whether that is 100 per cent correct, as I am aware of the case of *Brebner*, in which the dispositive clause—the disposition—was altered by fraudulent means. Had each page of the contract been signed, that would not have been possible. By and large, however, that is an extremely rare occurrence.

We remain of the view, which is expressed in the policy memorandum, that the bill does not create any additional difficulties with the law as it stands and will do nothing to increase the prospects of fraud or error as a result of executing in counterpart. If, when the Faculty of Advocates reads this evidence, it has any additional evidence that it may care to adduce, for the benefit of the committee, prior to or after stage 1, we will of course accord any such additional evidence, should it be produced, with extremely careful consideration.

John Scott: I hesitate to challenge a distinguished person such as you, minister, but the Faculty of Advocates was quite determined that signing in full counterpart is important. You have been quite dismissive of that, although I understand that, on practical grounds, it may not be easy. Perhaps you would like to elaborate a little as to why you were so dismissive of that view in your opening statement.

12:45

Fergus Ewing: Although we do not accept the analysis of the Faculty of Advocates, we do of course respect its views, but we are not aware that, in its evidence, it cited any clear example of any instance in which the measures that are proposed in the bill would increase the likelihood of fraud. I have already said that fraud is something that no Parliament or Government can eliminate. As long as we have criminals who are prepared to engage in fraudulent activity, that is, sadly, a reality, but in our opinion, the bill, if it becomes law, will not increase the likelihood of fraud, because the issue is not new; solicitors will usually be involved; there is no evidence from other jurisdictions, particularly England, that the practice has led to more instances of fraud; and, since 1970, it has not been a requirement that every page of a document be signed.

If the faculty has any specifics about why the arguments that I have just set out are wrong, I would be very keen to see them. This section of my evidence today arose from a fairly lengthy pre-meeting that we had, which was convened primarily—in fact, almost solely—to discuss this issue, because we take what the Faculty of Advocates says extremely seriously. Therefore, I would welcome any further evidence if it feels that what I have said today is in any way defective, because that would be a very useful contribution to the process with which we are all engaged, which is to pass good law.

John Scott: Thank you. That was very helpful.

The Convener: Thank you, minister. I am also aware that the faculty suggested that there might be a complication with annexes that had documents in them that were themselves subscribed, which might not be allowed in the bill. The Government response clearly indicates that you disagree with that. Is there anything that you want to add to that?

Fergus Ewing: I do not think that that is the case, but I draw attention to the provision of the bill that says that unless the document is executed in duplicate, it is not executed in counterpart and will not be protected by the bill. In other words, the documents that are signed and executed in counterpart must be the same. If they are different, there will be no valid execution in counterpart. I have not addressed myself to the specific issue of appendices. Officials may have something to add on that point.

Alison Coull: In the note that we sent to the committee in response to the points made by the faculty, we said that we did not think that that was the effect of the bill. What is the part that is signed in duplicate? It is the counterpart and not the individual annexes that may be associated with

the counterpart. In terms of section 1(2)(b), the reference to “part” means that the counterpart part sounds at the level of the document. We note that Professor Rennie also took that view when he gave evidence.

The Convener: I am grateful to you for putting that on the record.

There are a couple of other points that I would like to put to you. I am thinking about some of the evidence from Dr Gillian Black and whether there is anything else to be said about a document that is not correctly signed. Forgive me, minister—I have a feeling that you have probably addressed that issue. The bill is only facilitative and the general law addresses that point, so there may be nothing else to say on that.

On the particular issue of counterparts as a single document that is dealt with in section 1(3), does anything need to be said to make it clear that it is one document, even though there is more than one copy of it?

Fergus Ewing: Your first point is answered by stating that if parties inadvertently sign different versions of a document, they will not have validly executed in counterpart in terms of the bill. That is because the bill provides in section 1(2)(a) that a document is executed in counterpart if

“it is executed in two or more duplicate, interchangeable, parts”.

Therefore, the effect on the transaction will be determined under the existing law, as you rightly said, and much will depend on the particular facts and circumstances.

I think that I am right in saying, in response to your second question, that the answer is very simple. The parties in gremio of the document will describe what the document contains. In other words, the contract will give a description within the documents of what documents are part of the contract. There will be a list of contents, including appendices. That is required for clarity. I think that that is the answer to the question. That is perhaps just good drafting or conveyancing practice. However, I do not know whether officials have anything to add on either of those questions.

Alison Coull: I think that Dr Black was concerned about the bill suggesting that two documents were to be treated as a single document. We thought of that as a convenient way of describing the situation, particularly when parties want to register the document in the books of council and session, when it is important to explain that it is regarded as a single document. In some sense, it is a legal fiction, but it has precedent in other legislation.

The Convener: So, on reflection, it causes us no difficulties.

Alison Coull: That is our view.

The Convener: It is a view with which we would want to agree.

That takes us to the end of the questions from members. Is there anything further that you wish to add, minister?

Fergus Ewing: I have never had the opportunity to use the phrase “in gremio” before.

The Convener: I thought that that was very impressive, minister. Some of us will have to go and look it up.

John Scott: For those of us of a lazy disposition, could you perhaps enlighten us as to what it means?

Fergus Ewing: It means in the body of the deed—within the deed itself.

The Convener: I am grateful for that clarification.

Fergus Ewing: That will be 5 guineas, please.
[*Laughter.*]

The Convener: That is a wonderful point at which to stop. I thank the minister and his officials for being with us today. This has all been very easy from our point of view. It is great to have had co-operation all round and it seems to have worked. We all, as a committee, have the opportunity to reflect on the evidence that we have heard for our draft report, which I think we will get to look at next week.

I thank everybody for attending.

Meeting closed at 12:51.

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