OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 25 April 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 25 April 2017

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DELEGATED POWERS AND LAW REFORM COMMITTEE

13th Meeting 2017, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Alison Harris (Central Scotland) (Con)
*Monica Lennon (Central Scotland) (Lab)
*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 25 April 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (John Scott): Good morning and welcome to the 13th meeting in 2017 of the Delegated Powers and Law Reform Committee. Agenda item 1 is a decision whether to take in private item 9, which is consideration of the committee's third quarterly report for the parliamentary year 2016-17. Does the committee agree?

Members *indicated agreement.*

Criminal Finances Bill

10:00

The Convener: Agenda item 2 is the committee's consideration of the powers to make subordinate legislation that are conferred on the Scottish ministers in the Criminal Finances Bill, as amended. This United Kingdom Government bill was introduced in the House of Commons on 13 October 2016, and amendments to it are being considered at report stage in the House of Lords today, having previously been considered at committee stage in that house on 3 April 2017. This committee previously considered and reported on the provisions in the bill on 13 December 2016, and a legislative consent motion was agreed by the Scottish Parliament on 2 March 2017.

Following the legislative consent motion, further amendments were tabled for consideration in the House of Lords and a supplementary legislative consent memorandum was lodged on 30 March 2017. In lodging the supplementary memorandum, the Scottish Government noted that the timescales for consideration would be tight, as the bill was already at committee stage in the House of Lords. Those timescales tightened further with the announcement of a UK general election on 8 June and the consequential dissolution of the UK Parliament. As a result, it is expected that the bill will now complete its passage through the UK Parliament by tomorrow. To comply with the very tight timescales, the committee is required to consider and report on the LCM today.

It is suggested that the committee could be content with the amendments from its perspective. Does the committee agree to find acceptable in principle both the amendments that were tabled at report stage in the House of Lords on 25 April 2017 to the powers that the bill delegates to the Scottish ministers in clauses 53 and 54, and the parliamentary procedure to which those amended powers are subject?

Members *indicated agreement.*

The Convener: Does the committee also agree that it is a matter of concern that the Parliament has not had a reasonable amount of time to fully scrutinise the changes? In particular, from the perspective of parliamentary scrutiny, is it agreed that it is regrettable that the committee will not be able to avoid publishing its report on the same day that both the amendments are voted on at report stage in the House of Lords and the Scottish Parliament votes on the supplementary legislative consent motion?

Members *indicated agreement.*

Contract (Third Party Rights) (Scotland) Bill: Stage 1

10:03

The Convener: Agenda item 3 is our final evidence-taking session on the Contract (Third Party Rights) (Scotland) Bill at stage 1. It is a very real pleasure to welcome to the meeting Annabelle Ewing, Minister for Community Safety and Legal Affairs; Catriona Marshall, solicitor, Scottish Government legal directorate; and Jill Clark, bill team leader, civil law reform unit, Scottish Government. Welcome back, Jill.

We will move to questions. First, what are the general benefits of the bill? We have heard from various witnesses that it will clarify uncertainty in the current law and give parties the flexibility to amend or cancel third-party rights. Can you explain why that is important, and can you outline any other benefits that you think are relevant?

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Thank you, convener, and good morning to you and members of the committee. I am pleased to be here to answer your questions about the bill.

I have read the reports of all the committee's evidence-taking sessions and it is clear that there is a lack of clarity in the common law and significant concern about predictability and flexibility. If one reads all the documentation, including the Scottish Law Commission's discussion paper of 2014, its report of 2016, and the submissions that you and the committee have received, it is quite clear that what we have in Scotland is a situation in which, although we have long-standing law on third-party rights, people are finding it increasingly difficult to invoke the benefit of Scots law as far as the third-party rights regime is concerned. Indeed, I believe that the SLC's 2014 discussion paper starts with the Moncur case, which dates back to 1590 or thereabouts, and I suggest that, if we are having to look back to a case from 1590, we might want to have a wee think about whether there are better ways of doing this.

What has grown up in Scotland is a body of law driven by case law that has presented very serious difficulties with regard to the key issues of clarity and flexibility. In short, those difficulties are principally to do with the revocability of these rights and the understanding in Scots law since the seminal Carmichael v Carmichael's Executrix case in 1920 that, in order to properly confer a third-party right, there has to be irrevocability. The case also made it clear that there had to be communication, notification or intimation of the right in order to establish it, but the key issue was that the right had to be irrevocable. That is a very inflexible position, particularly in modern-day commercial activity, and it does not make use of the law attractive in the slightest. Other issues that have arisen include lack of clarity with regard to the remedies that are open to the third party when enforcing their right and the defences that are open to the contracting parties when they seek to defend a third-party claim, and there is also a lack of clarity with regard to the application of prescription to third-party rights and so forth.

The result of all that taken in the round is that people have sought to find another way round this, and I think that the committee has taken significant evidence on what are termed workarounds. The two key workarounds in this area have been to make the third-party rights clause in the contract or, indeed, the whole contract subject to English law or alternatively—and sometimes cumulatively—to have recourse to collateral warranties. You have heard a lot of evidence that collateral warranties involve a big, long paper chase and many larger transactions and lead to unnecessary expense and time having to be spent on securing all the required collateral warranties. As a result, there has been a lack of confidence in Scotland in using the third-party rights regime as set forth in the common law, and this bill principally seeks to remove that obstacle to using third-party rights law as it is and has been for many centuries in Scotland.

Having read all the documentation and all the arguments that the SLC has put forward, I think that we could talk all morning about all the problems that have arisen with using the third-party rights regime under common law in Scotland, but I just wanted to give the committee a flavour of them. As I said, the principal aim of the bill is to remove that obstacle.

The Convener: Excellent. I think that we largely agree with your aims and objectives.

Throughout the meeting, we will elicit further statements from you. We look forward to amendments being lodged in due course; you might want to talk about those as we go through the questions.

I will hand over to my colleague Stuart McMillan, the deputy convener of the committee, who has some questions for you.

Stuart McMillan (Greenock and Inverclyde) (SNP): A few moments ago, you touched on the use of Scots law. The policy memorandum states that the bill

"will promote the use of Scots law".

Can you outline how the bill will achieve that?

Annabelle Ewing: We are seeking through the bill, if it is passed in committee and Parliament, to

provide an option. People will still have the freedom to contract—that is a fundamental principle of contract law in Scotland—and, within certain overarching limits, to do what they want with their contract. However, the bill provides an option that, over time—it will not happen overnight—will be seen as helpful and will lead to a change in behaviour from how we have recently approached third-party rights workarounds, to which I referred previously. As I say, that will not happen overnight, but there will be a change as people come to see the provisions in the bill as a helpful option that is available to them.

In addition, it is important to bear it in mind—this point emerged in evidence to the committee—that, aside from the administrative work and expense involved in collateral warranties, there are, increasingly, question marks about their scope and enforceability. As such issues come to the fore, it may therefore be necessary to look at what other options might be available. I think that, over time, the bill will help to change the culture of recourse to third-party rights workarounds in Scotland, which can only benefit the reputation and accessibility of Scots law in the eyes of parties in Scotland who are seeking to contract.

Stuart McMillan: Some witnesses have suggested in their evidence that lawyers often choose English law when setting up contracts because it is considered to be clearer than Scots law, as England is a bigger jurisdiction with more cases going through the courts. It has also been suggested that it is probable that, even after the bill is passed, lawyers will still choose to use English law. Could anything be done, when and if the bill is passed by the Scottish Parliament, to promote the legislation and encourage more lawyers to use Scots law?

Annabelle Ewing: Yes—there would be a job of work to do at that stage to ensure that practitioners in Scotland were aware of the new legislation and the alternative that they would have at their disposal. That could be done in a number of ways. I imagine that the Law Society of Scotland and the Faculty of Advocates would be involved in promoting information and awareness. The Royal Incorporation of Architects in Scotland suggested in its evidence to the committee that it would seek to proceed by way of a practice note. There are law conferences just about every day, which would provide an opportunity to raise awareness of the new option for parties in Scotland that are seeking to contract in a whole range of fields, given that the bill affects not only large commercial contracts but, potentially, any individual.

We as a Government would seek to facilitate the promotion of information and the awareness-raising work that would be carried out by the relevant professional bodies. At the end of the day, as I said, it will be a matter for the parties to the contract to choose how they wish to structure their contract and what they wish to do. We are saying, "Look, there will in due course be an attractive option for you. This is what the option is; you may wish to consider it as a more cost-effective way of drafting your contract."

Stuart McMillan: On your point regarding the relevant professional bodies, would the Scottish Government be open to working with the likes of the Confederation of British Industry Scotland, the Federation of Small Businesses Scotland and other non-legal professional bodies to promote the legislation?

10:15

Annabelle Ewing: Absolutely. It is not the case that, once the bill is passed, all responsibility for it will suddenly be put to one side. If the bill is passed, we will all have an interest in ensuring that it is made use of. We will be happy to consider what we can do to help to facilitate the actions of other relevant bodies—including the business organisations that you rightly mentioned—in that regard.

Stuart McMillan: Thank you very much.

The Convener: Monica Lennon has a series of questions.

Monica Lennon (Central Scotland) (Lab): You touched on the benefits of the bill to individuals in your answer to Stuart McMillan. In much of the evidence that we have taken so far, much of the focus has been on the benefits to the business sector, which is understandable. To what degree does the Scottish Government expect the bill to benefit individuals as well as businesses?

Annabelle Ewing: The scope of the bill is not limited to large corporates; it applies to everybody who seeks to enter into a contract in which the relevance of conferring a third-party right would arise. In evidence to the committee, reference has been made—including by the SLC—to holiday contracts, whereby one member of a family will contract the holiday and all the arrangements pertaining thereto. If something mega goes wrong, the other members of the family might not have any right of recourse, because they did not personally conclude the contract. That is an obvious example of a situation in which making the law accessible to everybody could be a help, particularly to individuals.

I know, too, that the SLC gave the example of an informal carer for an adult with mental incapacity. The informal carer might enter into a contract for the benefit of the incapacitated adult, but if there is a problem, it will not be the carer

who has suffered the loss. There is a need to ensure that it is possible to properly confer a third-party right that can be invoked and enforced. I have cited two examples of cases in which the applicability of the new regime to individuals is evident and would be beneficial.

Monica Lennon: Thank you for that helpful answer.

Some concerns have been raised about the impact of the bill on smaller businesses. For example, Professor Beale suggested that small businesses might not always realise that the rights of third parties are subject to cancellation or variation, particularly if that is tucked away in the small print. Is that a matter that the Scottish Government has considered? If so, do you have any plans to ensure that smaller businesses are properly protected?

Annabelle Ewing: Regardless of the size of someone's business, if they were entering into a contract, they would want to ensure that they knew what the contract entailed. Normally, the advice would be that the person should seek legal advice on what it was that they were contracting to do, although that would not be the only route. At this stage, I should perhaps declare that I am a member of the Law Society of Scotland and that I hold a practising certificate, but as I am not practising, that advice does not benefit me. It is always important that an individual or a small or large business knows exactly what they are signing up to. There is no short cut to that. If someone felt confident that they could make that judgment without getting legal advice, that would be up to them, but legal advice in that regard would always be helpful.

An issue that was raised in a submission from a subcontractor—I do not know the size of the subcontractor concerned—was that a smaller subcontractor at the end of a very long chain might not feel that they had an equal say. However, I suggest that that issue does not fall within the scope of the bill; it relates to the relative contracting power of each contracting party. The bill does not impose obligations on third parties; it simply confers rights on them. A third party is not bound to accept those rights. In that regard, the bill does not act to the detriment of a smaller subcontractor or a smaller business. That is an important clarification to make.

Monica Lennon: So you think that there are benefits in providing clarity on what the remedies will be.

Annabelle Ewing: Yes. It is all very well having a right, but if it could not be enforced and we could not seek a remedy under the law if we were prevented from exercising the right, it would not be regarded as particularly valuable. It is therefore important that, as I alluded to earlier in my response to the convener, the bill seeks to clarify other issues, including the very important issue of remedies, which the member raised. It is important to make it clear that the remedies include the right to damages, which is an issue that has been unclear over the many decades and centuries in which we have relied on the common law third-party rights regime.

Monica Lennon: We have heard a lot in our evidence sessions about the use of third-party rights legislation in England. We have heard that lawyers in England and Wales have been slow to use the equivalent English legislation and that, as you touched on, they often use workarounds such as collateral warranties instead of third-party rights. You said in an earlier answer that, if the bill is enacted, the use of the legislation will take time. However, is there a risk that we will have the same problems as have occurred in England?

Annabelle Ewing: It is important to recall that, prior to the implementation of the Contracts (Rights of Third Parties) Act 1999 in England and Wales, there had been no possibility there of conferring a third-party right. Under English common law, the rule that applied was privity of contract, which means that a contract is absolutely between the parties to the contract and has no effect beyond that.

The 1999 act introduced for the first time in England and Wales the concept of the third-party right, so it did not simply codify a right that already existed in common law. That is perhaps why there has been a reluctance to try something new and why parties might prefer to continue to do what they know, which is to go down the collateral warranty route.

From reading the evidence about the situation in England and Wales, I understand that things may be starting to change there. As I said, given that key question marks are arising over collateral warranties, particularly with respect to their enforceability, we might see increasing recourse in England and Wales to the 1999 act.

The position in Scotland is slightly different in that, as I said, we have had a common-law regime of third-party rights for centuries but have had problems, for the reasons that have been explained, with parties having recourse to our regime. We have had third-party rights as part of our legal system for hundreds of years. By codifying our law on third-party rights, we are not introducing something new per se but simply hoping to make the law more accessible to people. We therefore start from a slightly different place from that of England and Wales.

We will have to wait and see whether the outcome in Scotland on recourse to third-party

rights legislation differs from that in England. However, we are optimistic that, by removing the obstacle to people having recourse to our third-party rights regime and with the information and awareness to which Stuart McMillan referred, we will see increasing recourse to our legislation over time. Further to the work that the committee's predecessor did on what became the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, officials conducted an anecdotal survey that suggested that that act was starting to change the previous requirements for extensive activity to get a document executed by all parties. We hope that, over time, we will also see changes from increased recourse to our third-party rights legislation.

Monica Lennon: We can tell from your evidence that you believe that the bill could provide a helpful option for people.

What could the Scottish Government do to increase the pace of change? You mentioned law conferences, and there is a job of work for the legal professions, but has the Scottish Government considered anything in particular?

Annabelle Ewing: We are happy to work collaboratively with the various professions that are most obviously involved, together with business—a point that Stuart McMillan raised—to ensure that parties and practitioners in Scotland know that a more accessible option will be available to them if the bill is passed. We are happy to consider any ideas on that.

Monica Lennon: Is the Scottish Government content for flexible approaches to remain? We took evidence from witnesses from the construction sector, who were positive but realistic about the bill. They said that the use of collateral warranties will probably continue and that, for lots of clients and investors, that would be the first point of call. Are you relaxed about that?

Annabelle Ewing: We accept that, as I said, freedom of contract is an overarching principle of contract law in Scotland. It is therefore entirely up to the parties to choose how to construct their contract in whatever field. It is not the Government's role to impose a diktat on how they do that; the Government's role is to facilitate options for them to ensure that, particularly in the commercial field, Scots law is keeping pace with other jurisdictions so that people who operate here in Scotland—not just in the commercial field, although that is what the member referred to—have that option. That is how we intend to proceed.

There will be no requirement for parties to invoke the bill; rather, we hope that, over time, they will see the advantages of invoking it. It is fair to say that the more familiarity practitioners have with the legislation, the more likely it is that they will be open to at least suggesting that their clients may wish to consider it. I think that we have grounds for reasonable optimism that the legislation will, over time, be seen as a help in Scots law, not a hindrance.

David Torrance (Kirkcaldy) (SNP): Good morning, minister. Sections 4 to 6 of the bill include rules that prevent contracting parties from modifying or cancelling a third-party right. How will those provisions work in practice?

Annabelle Ewing: Different views have been expressed about sections 4 to 6. The general view is that they are balanced and that the objective that the insertion of the provisions is trying to secure is reasonable. The basic problem that arose with recourse to Scots common law in the area of third-party rights was irrevocability. It is important to say that, although parties will still be free to contract however they wish, the bill will be the default setting and will sit within the framework of the general law on obligations and contracts.

It was recognised that it would be helpful to strike a balance between giving the parties to the contract the right to modify or cancel the contract without, in effect, the consent of the third party on whom the right has been conferred, and limiting that when it would be manifestly unfair. One of the examples that are given in the sections is where the third party has relied on the right and that has been known to the contracting parties or where the contracting parties should have reasonably been able to foresee that, in the circumstances, the third party would rely on the right. It is felt that, in setting up the default structure, the bill should attempt to deal with such manifest unfairness, and that is what sections 4 to 6 seek to achieve.

10:30

Certain, but not all, of those who have given evidence have suggested that they might wish to see different terminology, but there seems to be no consensus among them about what that different terminology should be. In some people's view, sections 4 to 6 are unnecessarily complex. However, as we are setting out and codifying the default position in legislation, we feel that the bill has to deal with a multiplicity of facts and possible circumstances—it is not just a simple case of saying, "You have to pay me a sum of money"—that are outwith our ken when drafting. We must endeavour to anticipate those situations, which is why we have been happy to reflect the SLC's carefully thought-through approach. That is why we have set out the provisions in the way that we have, and we are comfortable with that.

David Torrance: We heard from Professor Hugh Beale that, although the equivalent English

provisions are cruder and less sophisticated than the Scottish ones, they are possibly easier to understand. A number of other witnesses have highlighted concerns about the clarity of sections 4 to 6. Are the provisions sufficiently clear for courts to follow?

Annabelle Ewing: Yes—they are clear. To go back to first principles, the bill is codifying hundreds of years of Scots law; we have had a tradition of third-party rights. We must not pretend that we are starting from scratch; we must recognise that we are codifying what has been a centuries-old element of our legal system and approach it in that way.

To make a direct comparison with the legislation in England and Wales—on any issue—is not to make the right comparison. In this case, we would be comparing an act that introduced third-party rights into a legal system for the first time with a bill that is patently not doing that. We are starting from a different place and we must reflect that in the drafting of our provisions.

I am not sure that the Scottish Government, in seeking to ensure the integrity of Scots law, would want to have, as Professor Beale said, a "cruder" version of the legislation as a first choice. Rather, we should draft the provisions in a way that we hope will achieve our aim, which is to slightly balance the fairness issue in relation to third parties. I hope that that answer is helpful to the member.

The Convener: That was a good answer—thank you.

Alison Harris (Central Scotland) (Con): The Faculty of Advocates argued in its written evidence that the drafting of section 9 of the bill could be improved. What is your view on the faculty's points and its suggestions for redrafting that section?

Annabelle Ewing: I am aware that the Faculty of Advocates has concerns about the drafting, albeit that they are not about what section 9 seeks to do, which is to allow third-party rights to be arbitrated. We feel comfortable that the drafting reflects the objective that is sought.

We are not sure whether there might be some misunderstanding, given the argumentation that the faculty put forward. However, if there is clear evidence that there is a better way to achieve the obvious objectives of section 9, we are happy to look at that. We feel that we have the drafting right on that issue.

The Convener: It would be fair to say that we have had a lot of evidence to suggest that the provision could be made clearer or more elegant. Given your previous response that you are seeking elegance, will you consider lodging an amendment or do you consider that the case has not yet been made?

Annabelle Ewing: I am not convinced that the case has been made. I will bring in Jill Clark, because we feel that there has been a misunderstanding on the part of those who have a problem with the drafting—they might not have understood the way in which section 9 sits in the bill and its interrelationship with other sections, including the key definition section.

The Convener: We would be grateful to hear from Jill Clark.

Jill Clark (Scottish Government): What the minister said is exactly right. We would still like some time to work with the Scottish Law Commission and in particular with David Bartos, who helped the commission a great deal with its chapter on arbitration, to consider whether there is a real issue. We are not convinced of that but, as the minister said, if there is an issue, we will be happy to consider an amendment. However, we are not quite there yet.

The Convener: Forgive my lack of hearing, but did you say that you are in discussion with David Bartos and others?

Jill Clark: Absolutely—yes.

The Convener: Thank you. That is helpful.

We will move on to section 12(2), which protects from abolition existing third-party rights that were acquired before the legislation comes into force. Shepherd and Wedderburn argued in written evidence that the reference to "acquired" in section 12(2) means that existing conditional third-party rights might not be protected from abolition, as they will not be acquired until the condition is fulfilled, which might not happen until the legislation has come into force. What is the Scottish Government's view on that argument?

Annabelle Ewing: Shepherd and Wedderburn raised a very good point. It is certainly clear that the intention is to ensure that contingent or conditional jus quaesitum tertio, or third-party rights, that are currently in existence can be enforced at the time of crystallisation of the right and that it is absolutely not the intention of the bill to do anything that would hinder that. Therefore, it is clear that we need to reflect further on our drafting on that point, because the use of the word "acquired", although it is clear in one regard, could perhaps benefit from further clarity to ensure that there is absolutely no dubiety about the fact that contingent third-party rights that are currently in existence are absolutely not affected by the legislation. We will actively look at that.

The Convener: That would be welcome from our point of view. We would not wish to see a right

that somebody had taken away from them—we want those rights to be maintained.

We will move on to adjudication. Some witnesses said that it might be worth investigating whether the bill's rules on arbitration could be applied to the adjudication that is used in the construction sector, whereas others have suggested that that would overcomplicate and slow down the adjudication process. What is the Scottish Government's view on the concerns raised by the construction industry in relation to the arbitration section?

Annabelle Ewing: I understand that, further to the evidence that was provided, officials are currently looking at the housing grants adjudication process, specifically as regards construction, in the Housing Grants, Construction and Regeneration Act 1996. We will reflect on the specific nature of that.

On adjudication in general, Hew Dundas made the point that adding adjudication is unnecessary and could be confusing. However, as you have alluded to, others felt that the suggestion is worth looking at. In that regard, it is important to bear in mind that, as far as I understand it, adjudication is a temporary process that leads to agreement, the courts or arbitration. That was probably the starting point, or one of the points, in the consideration of the issue.

It is important to recall why it is necessary to have a specific reference to arbitration in the bill. The Arbitration (Scotland) Act 2010 expressly limits the possibility of invoking that act to those who are parties to an arbitration agreement. Therefore, in order to displace, if you like, that provision in the 2010 act as far as third-party rights are concerned, in the circumstances set forth, we had to make an express reference to that act.

We are not convinced that the procedure would be the same for other dispute resolution mechanisms, which is why there is no reference to other forms of dispute resolution in the bill. Nevertheless, we are reflecting on that point to ensure that the legislation is drafted in the best way possible so as not to inadvertently exclude those proceedings that could be included.

The Convener: Excellent. That is what we wanted to hear on that subject. It is still work in progress.

We move to the human rights element of the bill.

Alison Harris: The policy memorandum explains that the bill complies with article 6 of the European convention on human rights, on the right to a fair trial, as it gives third parties the choice of using arbitration. Can you expand on why the bill complies with the convention?

Annabelle Ewing: The Presiding Officer has ruled that the bill is within scope and I would not want to second guess the Presiding Officer. I think that the point that is being raised is the issue of whether someone can be forced to give up their recourse to the courts.

Going back to the first principles of conferring a third-party right, the arbitration provisions make it clear that, in conferring a right, the bill cannot impose a requirement for a party to proceed with arbitration; it can simply facilitate that. It will be up to the party to choose to proceed with arbitration or not—to choose whether to waive their right to go the courts. Because there is no compulsion, there is no breach of the article 6 right.

The Convener: That is very welcome. I want you to be absolutely clear about that, because where the Parliament has tripped up over the past number of years is—as you well know—the removal of the element of choice. That is where we have fallen foul. As long as we are not removing choice—

Annabelle Ewing: We are simply stating that there is an opportunity to use arbitration. Going back to first principles, the conferring of a third-party right is simply that—you cannot impose an obligation on the third party in your contract. It is up to the third party to accept the right or not; the third party does not need to accept the right. However, in terms of the first element of the arbitration provision, it could be part of the package conferring the right that the matter will, in the event of dispute, be subject to arbitration, and, in accepting the right, the third party is accepting the package. That is the key issue.

The Convener: Okay. Thank you very much.

Stuart McMillan: When you spoke about third-party rights and the length of time for which they have been in operation in Scotland, you said that they go back hundreds of years. I am not going to argue with you on that particular point. However, some of the evidence that we have received has highlighted that there has been an issue with third-party rights in Scotland since the second world war. Is there an argument that the pace of law reform in the area has been too slow?

Annabelle Ewing: In an ideal world, one would like to see a lot of activity on a lot of fronts. However, we need to be realistic and take into account the complexity of this area of the law in particular. We want to get it right and have discussion, which is what the SLC has done with regard to this complex area of law. It has proceeded with extensive consultation and has carefully considered the responses that have been received. It has then proceeded with a draft and has had further discussions on particular issues.

Now we are at the point of the stage 1 evidence session with the minister.

We would all like to see things happen more quickly in life, but, realistically—and particularly in complex areas of civil law—there is a process to be followed, and the point of that process is to ensure that we get the best piece of legislation that our collective endeavours can possibly arrive at. The prize is therefore worth a wee bit more delay.

I understand that Scotland is not unique in that regard. I think that there was a reference in one of the evidence sessions to the English and Welsh legislation of 1999 and to the first mooting of doing something there being before the second world war. Things tend not to move as quickly as maybe the general public would like. In the interests of getting it right, it is important to proceed without undue haste but, of course, we can always strive to do things better.

Stuart McMillan: Thank you. An issue that arose in some of the evidence sessions was the black hole of non-liability. We understand that the SLC is considering the issue separately, but its activity seems to have focused on individual areas of law. In terms of the process, is there an argument that law reform could be speeded up if further law reform bills were to incorporate more than just one specific area of the law?

Annabelle Ewing: That is an interesting question. I guess that that is a possible approach. We have seen both at Westminster, when it still legislated exclusively in the area of Scots civil law, and in some Scottish Parliament bills that once we have an omni-bill, things can get a bit rushed and difficult. Instead of there being a clear, straightforward focus on the matter in hand, bits are added, there are unintended consequences, or something needs to be added at the last minute to deal with something else that we included earlier on—it can become a bit of a hotchpotch. We need to balance proceeding in an orderly fashion with respecting the interests of the public by ensuring that we maintain our legal system to be effective and accessible for the benefit of all our citizens.

It is an interesting question and one that I can perhaps pursue further in my next meeting with Lord Pentland, but we should bear in mind that, if a bill has a wide reach and brings within its scope a series of issues that are not necessarily interlocked, issues can arise with regard to how it will end up further to its parliamentary handling. There is no ideal solution, but we are certainly encouraged to note that the SLC is proceeding with its next programme of reform, which I think it is about to announce.

Jill Clark: It will launch that tomorrow. The bill and the Legal Writings (Counterparts and Delivery) (Scotland) Bill are good examples of things from a big contract framework that the SLC is looking at. If we waited until it had concluded all of that, we would be waiting even longer for law reform to happen. The fact that it is breaking it down into these bite-sized chunks at least means that something is happening and improvements are being made. Otherwise, we would just wait longer, I think. Its 10th programme of law reform launches tomorrow.

Stuart McMillan: I was on the committee that considered the Legal Writings (Counterparts and Delivery) (Scotland) Bill, and I think that your point about bite-sized chunks is well made. Maybe there is potential in future, without having overarching bills, to address two or three bite-sized chunks that are compatible with one another. That might be worth considering, in comparison with looking at individual bite-sized chunks.

Annabelle Ewing: Exactly. Each instance will depend, I suppose, on the facts and circumstances of what we are seeking to do and which things could be combined. I am certainly happy to raise the issue in my next meeting with Lord Pentland. I do not know when that is set for, but I am sure that it is soon.

Stuart McMillan: Thank you.

The Convener: As no one has any further questions for the minister, it just remains for me to thank her very much, and Jill Clark and Catriona Marshall, who have accompanied her today, for giving us their evidence so elegantly. We will reflect on what they have said and we look forward to the stage 1 process continuing.

10:49

Meeting suspended.

10:50

On resuming—

Instruments subject to Affirmative Procedure

Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101)

10:51

The Convener: The purpose of the regulations is to update and replace the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (SSI 2000/320) in order to implement directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment.

The committee notes that the meaning of regulation 30(1)(c) could be clearer if the provision referred to the "consultation bodies", as defined in regulation 2(1), rather than "those authorities", as drafted. That is particularly the case as no authorities appear to be referred to in regulation 30(1)(c). Accordingly, do we agree to draw the instrument to the attention of the Parliament on ground (h), as the meaning of regulation 30(1)(c) could be clearer?

Members *indicated agreement.*

The Convener: The committee also notes that there are errors in regulations 13(5)(b), 18(1), 29(3) and 34 that are all similar in nature. Those provisions all fail to properly cross-reference other provisions in the same instrument or in other regulations, which the Scottish Government has acknowledged.

On that basis, do we also agree to draw the instrument to the attention of the Parliament on the general ground, as the regulations contain the following minor drafting errors related to cross-referencing: regulation 13(5)(b) refers to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 (SSI 2004/520) but was intended to refer to regulation 11(2) of those regulations; regulation 18(1) refers to a notice published under regulation 21(1) but was intended to refer only to regulation 14(2)(c); regulation 29(3) refers to particulars in paragraph (2)(c) but was intended to refer to paragraph (2)(a); and regulation 34 refers to regulations 30 to 32 but was intended to refer to regulations 31 to 33, on electronic communications?

Members *indicated agreement.*

The Convener: The committee notes that the Scottish Government intends to bring forward an amending instrument to rectify the errors identified in the regulations. Do we agree to welcome the Scottish Government's commitment to bring forward an amending instrument?

Members *indicated agreement.*

Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102)

The Convener: The purpose of the regulations is to update and replace the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139) to implement certain provisions of directive 2014/52/EU. As with the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101), the committee notes that the regulations raise a matter of drafting clarity. Specifically, with regard to regulation 42(1)(c), it would be clearer if the provision referred to the "consultation bodies" as defined in regulation 2(1) rather than "those authorities", as drafted. Accordingly, does the committee agree to draw the regulations to the Parliament's attention on ground (h), as the meaning of regulation 42(1)(c) could be clearer?

Members *indicated agreement.*

The Convener: The committee also notes that the instrument contains some minor drafting errors that have been acknowledged by the Scottish Government. I therefore seek the committee's agreement to draw the regulations to the Parliament's attention on the general reporting ground in the light of the following minor drafting errors. First, regulation 19(6)(b) refers to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 (SSI 2004/520) although it was intended to refer to regulation 11(2) of those regulations. Secondly, there is an error in schedule 6, which relates to revocations, in that it cites

"the Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2016"

instead of the 2015 regulations.

Again, the committee notes that the Scottish Government has confirmed that it intends to bring forward an amending instrument to make the necessary changes to regulations 19(6)(b) and 42(1)(c). Does the committee agree to recommend that the planned amendment should also correct the error in schedule 6?

Members *indicated agreement.*

Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Amendment Regulations 2017 (SSI 2017/112)

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

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Fatal Accident Inquiry Rules) 2017 (SSI 2017/103)

10:58

The Convener: Agenda item 6 is consideration of an instrument not subject to parliamentary procedure. The purpose of the instrument is to set the procedural rules that apply in the sheriff court in relation to fatal accident inquiries, and it follows the enactment by the Scottish Parliament last year of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

The committee notes that rules 1.2(1) and 3.5 and paragraph 19 of schedule 4, as currently drafted, appear to be defective. Accordingly, I seek the committee's agreement to draw the instrument to the Parliament's attention on ground (i) in respect of the following instances of defective drafting.

First, the definition of "apply" and related expressions in rule 1.2(1), which means to apply in accordance with schedule 1, does not provide for an exception where the context requires otherwise. That is despite the instrument containing a number of references to "apply" and related expressions that are not intended to engage the procedure in schedule 1. In addition, the procedure in schedule 1 incorrectly applies in relation to rule 3.5 in connection with a person who is not given notice of an inquiry under section 17(1) of the 2016 act but who wishes to apply. Moreover, paragraph 19 of schedule 4 incorrectly includes in the definition of "legal representative" a person having a right to conduct litigation or a right of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Does the committee agree to report that to Parliament?

Members *indicated agreement.*

11:00

The Convener: In addition, our legal advisers have raised a number of minor drafting errors. I therefore seek the committee's agreement to draw the instrument to the Parliament's attention on the general ground, as the instrument contains the following minor drafting errors.

First, rule 4.8(4) refers to the fees payable under paragraph (2), but it was intended to refer to paragraph (3). Secondly, form 3.1 in schedule 3 does not reflect rule 3.1(2)(f) in so far as it does not provide for the first notice to set out, in the case of a discretionary inquiry under section 6 of the 2016 act, which condition in section 6(3)(a) of that act is met. Thirdly, the signing block in form S4.7 in schedule 3 is missing. Fourthly, the heading of form S5.5C in schedule 3 does not reflect the fact that the form can be completed by the participant who obtained an order for recovery of documents in terms of paragraph 5(3)(b) of schedule 5. Finally, paragraph 5(1)(b) of schedule 5 refers to a participant executing commission and diligence under paragraph 4, but it was intended to refer to paragraph 6. Do we agree to report those errors to Parliament?

Members *indicated agreement.*

The Convener: Members will be pleased to note that the Lord President's private office has undertaken to rectify all the errors identified at the next available opportunity, which will be considered in the light of the meeting timetable of the Scottish Civil Justice Council. Does the committee agree to welcome the undertaking by the Lord President's private office to keep the committee informed in that respect?

Members *indicated agreement.*

The Convener: In addition, with a view to clarifying the correspondence with the Lord President's private office, does the committee agree to recommend that the proposed amendments also include inserting a signing block in form S4.7 in schedule 3?

Members *indicated agreement.*

Domestic Abuse (Scotland) Bill: Stage 1

11:03

The Convener: Agenda item 7 is consideration of the committee's approach to the delegated powers provisions in the Domestic Abuse (Scotland) Bill. As the powers are limited to ancillary and commencement powers, it is suggested that the committee be content with them. Is the committee content with the powers in the bill and does it agree to prepare a stage 1 report in that regard?

Members *indicated agreement.*

11:04

Meeting continued in private until 11:49.

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