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Law Reform in the Scottish Parliament

*Hector MacQueen, Charles Garland and Lauren Smith**

In a previous edition of this journal, Malcolm McMillan, Chief Executive of the Scottish Law Commission, described the process which led up to the announcement of a new procedure in the Scottish Parliament for the implementation of certain Commission proposals for law reform on 28 May 2013.¹ This article follows on from Mr McMillan's piece to discuss how the first Bill under the procedure – the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 – progressed on to the statute book. While the purpose of the article is primarily descriptive, it does not shy away from comment, in particular about lessons which may be learned for the future from the initial experience, especially in comparison with the equivalent procedure at Westminster for Law Commission Bills. It is suggested that the Scottish Parliament process was not only successful but also led the Parliament as a whole to acknowledge the significance of an a- or non-political role in keeping the Scottish legal system and Scots law up-to-date and in line with developments elsewhere. In the Scottish Law Commission's fiftieth year, its role as a public but independent body charged with making recommendations for simplifying, updating and improving the law was also significantly enhanced by an increased visibility in the Scottish parliamentary and governmental processes.²

As Mr McMillan's article explains, for some time both before and after the Scottish parliamentary elections in May 2011 the Scottish Law Commission and the Scottish Government were in significant discussions about achieving better implementation rates for law reform proposals made by the Commission which fell within the legislative competence of the Scottish Parliament. The SNP Government's absolute majority in a Scottish Parliament from 2011 to 2016 allowed

* Scottish Law Commission, Edinburgh. The authors formed the Scottish Law Commission team for the Scottish Parliamentary stages of the passage of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015; and Professor MacQueen and Charles Garland were the lead Commissioner and Project Manager, respectively, for the *Report on Formation of Contract: Execution in Counterpart* (Scot Law Com No 231, April 2013). Save where the article summarises the 2015 Act or the Report, however, the views expressed should not be attributed to the Scottish Law Commission. The authors are indebted to Malcolm McMillan for much helpful comment and information. All URLs cited were last checked on 9 July 2015.

¹ Malcolm McMillan, "Law Reform in the Scottish Parliament: A New Process – A New Era?" (2014) 3 *Scottish Parliamentary Review* 95.

² The Commission operates on a statutory basis: see the Law Commissions Act 1965.

it to pursue its policies with an expectation of successful outcomes, at least at Holyrood, that it did not have in its 2007–11 incarnation as a minority government. The fact of the majority was remarkable: the electoral system for the Scottish Parliament had been designed to produce coalition governments, the politics of which make the achievement of any legislation necessarily more complex, whether or not its content is political in the sense of dividing parties one from another. The outcome of the independence referendum in September 2014 did not affect the disappointed but still majority government party, and the defection of an SNP MSP from the party the following month coupled with the fact that the Parliament's Presiding Officer was also an SNP member still left the party with 50% of the votes in the chamber.³ ~~[should the footnote be expanded to explain that the Presiding Officer has to be non-partisan and generally doesn't vote?]~~

What emerged in the discussions after May 2011, apart of course from the pursuit of the SNP's primary goal of Scottish independence, was that one of the things the SNP government did indeed wish to do was law reform: not in the general sense that any legislation reforms the law in some way, but in the very specific Law Commission sense, i.e. non-political, often technical, law reform, that nonetheless simplifies, modernises and improves the law, and enables, as it was put in a recent Report by the Commission, the social and economic 'plumbing' that is the legal system to be kept in good working order.⁴ The Scottish Law Commission itself had expressed concern that, despite legislative devolution, the rate of implementation of its Reports had been falling. There was no sense in the government funding a law reform body if that body's recommendations were not taken forward in a reasonably regular way. Fortunately, as the discussions resumed in 2011-2012, a Westminster model was already showing what could be achieved.

The Westminster procedure

³ 'Former SNP MSP John Finnie joins Greens': <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-29582862> (11 October 2014). It is to be noted that the Presiding Officer is non-partisan and generally does not vote.

⁴ Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, 2010) para 1.1. Commission Reports and other publications are available on the Commission's website, <http://www.scotlawcom.gov.uk/publications/>.

In 2009 the Westminster Parliament initiated a Special Public Bill procedure for uncontroversial Law Commission Bills.⁵ This was largely the result of pressure applied by the Scottish Law Commission's sister body, the Law Commission for England & Wales, but it can be – and has been – used to implement joint Reports of the two bodies and also Reports brought forward by one of them alone. The procedure is initiated by the introduction in the House of Lords of a government Bill, implementing a Law Commission Report. After its introduction, a Second Reading Committee then discusses the general principles of the Bill before committing it to a Special Public Bill Committee of the House via a formal Second Reading on the floor of the House. The Special Public Bill Committee, the membership of which is determined in relation to each Bill, can take evidence and submits the Bill to the usual clause-by-clause scrutiny. The special feature of the procedure – and the reason why it opens a door into Parliament that might otherwise be closed – is that in effect the Second Reading takes place in committee and in a committee room, not on the floor of the House. ~~[Doesn't the main task of scrutiny take place at the Committee stage in a committee room for nearly all bills? The difference is more the fact that the debate on the principles is also in committee and that the members of the special public bill committee have been appointed with the subject matter of the bill in mind (as the following sentence points out)]~~ Scrutiny in a Special Public Bill Committee may even be more rigorous than usual because at least some of the committee members will already have knowledge and understanding of the Bill's subject matter. The wood-panelled atmosphere of a House of Lords committee room also lends itself particularly well to seminar-style discussion of technical issues between relative experts in the subject. [The wood-panelled atmosphere of HoL committee rooms also applies to committee stage of other bills.] The Report and Third Reading stages take place on the floor of the House on separate days; the Bill then goes to the House of Commons. There too there is a Second Reading Committee preceding a formal Second Reading on the floor of the House; a

⁵ See First Report of Session 2007-08 from the Procedure Committee (HL Paper 63) <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldprohse/63/6303.htm>; Second Report of Session 2010-11 from the Procedure Committee (HL Paper) <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldprohse/30/3003.htm>; Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (2013 edn), paras 3.16, 8.43, 8.112. See further Elizabeth Cooke and Hector MacQueen, "Law Reform in a Political Environment: The Work of the Law Commissions", in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Studies in Constitutional Law, 2013), chapter 9.

Committee process of consideration then takes place before the Bill is reported and recommended for a Third Reading. This will generally be entirely formal, and the Bill will thereupon be passed and proceed to Royal Assent. The procedure is thus not in any way 'fast-track': the process takes as long as it needs to take. But the House of Commons has not tended to take very much time over the Bill once it has been scrutinised and passed by the Special Public Bill Committee in the House of Lords.

Six Law Commission Bills (just about one a year) have gone through so far, and the flavour of the kind of Bill that qualifies for the procedure can be got from this list:

- Perpetuities and Accumulations Act 2009
- *Third Parties (Rights Against Insurers) Act 2010
- *Consumer Insurance (Disclosure and Representation) Act 2012
- Trusts (Capital and Income) Act 2013
- Inheritance and Trustees' Powers Act 2014
- *Insurance Act 2015

It is to be noted that the insurance legislation (each Act asterisked above) applies throughout the United Kingdom and is the product of joint English and Scottish Law Commission Reports. The other Acts listed were all the product of English & Welsh Law Commission work. The Special Procedure is also available for purely Scottish Law Commission Bills, however, and so far one such Bill has got through: the Partnerships (Prosecution) (Scotland) Act 2013.

One of the present writers was closely involved with the insurance legislation throughout, and the progress of the 2015 Act in particular is an excellent illustration of some of the major features of the special procedure. The Bill initially presented to the Committee by the Government was not wholly un-amended from its original form as appended to the relevant Law Commissions Report. Two clauses were omitted: one on warranties (although others on the same subject were retained) and the other on damages against insurers guilty of late payment of claims. The argument against their inclusion was that both were controversial in the sense that there was no

consensus of support amongst stakeholders, i.e. the insurance industry. Although the Special Public Bills Committee showed some initial inclination to seek to include the clause on late payment damages in the Bill, in the end this did not happen. The concern about it expressed in evidence to the Committee by significant parties such as the Lloyds Market Association—namely that it would expose UK insurers to speculative litigation, especially from foreign policy-holders—was sufficient to confirm the Government’s position. The clause on warranties was eventually reinstated, however, after some redrafting by the Law Commissions was taken to have removed the controversy.⁶ This shows that a Bill can be subject to substantive amendment during its progress without thereby falling outside the scope of the special procedure. But an amendment to introduce something that had not been in the Law Commissions Report would clearly have meant the Bill being moved to ordinary legislative procedures.

It is not known, however, how far the process of updating and adjustment, whether by the Government before introduction or during a Bill’s parliamentary progress, can go before it ceases to be a Law Commission Bill and so eligible for the procedure. Certainly a Bill going through this procedure cannot be a vehicle for a piece of non-Law Commission policy. Hence, for example, although the Government’s Consumer Rights Bill 2014 implemented two sets of Law Commission recommendations, one on remedies in the supply of goods and the other on protection against unfair contract terms, it could not be a Law Commissions Bill, since it additionally provided in considerable detail for implied terms in contracts for the supply of services as well as goods, for rules on the supply of digital content, and for various other aspects of consumer protection.⁷ It also seems that where a Bill is dealing with English law alone, it must not seek to impact also upon Scots law without any prior consultation in Scotland. The Inheritance and Trustees’ Powers Bill 2013 as originally laid before Parliament contained a provision (*not* recommended by the Law Commission in the relevant Report, a fact by itself probably making the Bill unsuitable for the procedure) that would have allowed English and Welsh courts to undo the outcomes of Scottish succession law in certain circumstances, at least

⁶ For the Parliamentary debates on the passage of the Bill, see <http://services.parliament.uk/bills/2014-15/insurance/stages.html>.

⁷ For the Consumer Rights Bill 2014 in Parliament, see <http://services.parliament.uk/bills/2014-15/consumerrights.html>.

insofar as they took effect in England & Wales. The provision was withdrawn without ever reaching the Special Public Bill Committee after fierce opposition from Scottish interests.⁸

The Scottish Law Commission has engaged in discussion with Whitehall officials about other implementation possibilities in areas of law currently reserved to the Westminster Parliament, for example with regard to its Report on Unincorporated Associations,⁹ and there may be further activity in this area in future. The present debate about further powers for the Scottish Parliament could have a significant bearing upon this avenue for specifically Scottish law reform, however.

New legislative procedures for Scottish Law Commission Bills

As Malcolm McMillan has explained, the Scottish Parliament finally decided on 28 May 2013 to accept recommendations for changes to its Standing Orders to allow Scottish Law Commission Bills where the need for reform is widely agreed, but no major or contentious political or financial issues arise, to be referred for consideration to the Subordinate Legislation Committee, which was accordingly to be re-named as the Delegated Powers and Law Reform Committee (DPLRC).¹⁰ The new Standing Order provided for the development by the Presiding Officer of further criteria for the procedure and these were duly published on 6 June 2013.¹¹ They are cumulative and mostly stated in a negative way apart from a requirement that there be “a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended”. For the rest, the Bill must not relate directly to criminal law reform, or have significant financial or European Convention on Human Rights implications; while the Scottish Government must not be planning wider work in that particular subject area. This is not to be a revival in different guise of the system of

⁸ For the progress of the Inheritance and Trustees' Powers Bill 2013, see <http://services.parliament.uk/bills/2013-14/inheritanceandtrusteespowers.html>.

⁹ *Report on Unincorporated Associations* (Scot Law Com No 217, 2009).

¹⁰ See the Official Report for 28 May 2013, cols 20374–79

(<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=8934&mode=pdf>) and Standing Orders Rule 9.17A ('Scottish Law Commission Bills'). The Committee previously only reviewed draft subordinate legislation and powers to make subordinate legislation in draft primary legislation. It continues to exercise these functions in its new guise.

¹¹ <http://www.scottish.parliament.uk/parliamentarybusiness/BusinessBulletin/64350.aspx>. The text is also to be found set out in full in McMillan, 'Law Reform in the Scottish Parliament' (above note 1), 110-111. Note that the Scottish Parliament's *Guidance on Public Bills* has not yet been updated to take this change into account: meantime see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/15707.aspx>.

two Justice Committees that had operated not very successfully in the Parliament of 2003-2007.

It is further worth noting, however, that neither the Standing Orders nor the Presiding Officer's criteria require the Bill to be brought forward by the Scottish Government. It is thus possible for a Private Member, or indeed any Committee (including the DPLRC itself), to promote a Scottish Law Commission Bill using the new procedure. The Legal Writings Bill was however a Scottish Government Bill as well. A final point is that a proposed Scottish Law Commission Bill must be confirmed as such by the Parliamentary Bureau before it can be referred to the DPLRC.

As in Westminster, Bills coming under the criteria must otherwise follow the usual procedures for legislation in the Scottish Parliament. Thus the DPLRC's job at Stage 1 is to inquire into the Bill's general principles, taking evidence from interested parties on the matter, and then to report to the Parliament on whether or not it supports these principles. The Committee may reach the view in the course of its consideration of the Bill that it does not comply with the criteria determined by the Presiding Officer, and if so it must inform the Parliamentary Bureau. The Parliament may then, on a motion of the Parliamentary Bureau, designate another committee as the new lead committee to consider the general principles of the Bill afresh, although it will also be able to take into account any evidence gathered and views submitted to it by the DPLRC. Assuming that the Bill remains with the DPLRC under the Standing Orders and that the Committee then makes its report, Parliament will then consider in a Stage 1 debate whether or not it agrees with the Committee's recommendations on the matter. If the Bill's general principles are approved by Parliament (and this is not a given either), it then goes back to the DPLRC for Stage 2, where the Committee's job is to consider amendments to the Bill before finally reporting back to Parliament for a Stage 3 debate, where the full body decides whether or not to make any proposed amendments and pass the Bill.

It should thus be clear that the process is not meant to be one of rubber-stamping the Scottish Law Commission's original recommendations. The Bill brought forward need not necessarily be identical to the one appended to the Report;

the DPLRC can propose amendments, as can the Scottish Government; and the full Parliament has also an opportunity to amend. The Bill may cease to be a Scottish Law Commission Bill during its progress and revert to ordinary legislative procedures; indeed, it may fall altogether if its characterisation or general principles are not accepted by the DPLRC and the Parliament respectively. Nor is the procedure “fast-track” in any way: in the case of the Legal Writings Bill, it began its Parliamentary progress in May 2014, was passed on 24 February 2015, received Royal Assent on 1 April (possibly an unpropitious date), and came into force on 1 July 2015.

The crucial fact, however, is that the concept of a “Scottish Law Commission Bill” with associated procedures is now embodied in the Standing Orders of the Scottish Parliament. Unless and until these Standing Orders are changed, the law reform activities of the Commission are embedded in the Parliament’s constitution, and so are not merely experimental or subject to changes in the government party or parties. They tie the sponsor of such a Bill, whether the Scottish Government or otherwise, into joint working with the Commission in order to see it on to the statute book. Law reform of the kind associated with Law Commissions thus gains a new place at the legislative table.

Identifying the first ‘Scottish Law Commission Bill’

With its Chief Executive much involved in the discussions of the matter, the Scottish Law Commission as a body was of course well aware of the moves towards a new procedure leading up to the Scottish Parliament’s decision on 28 May 2013. Within the organisation it was clear that only some of its then ongoing projects would be suitable candidates to be the first to undergo the process. The two most obviously meeting the criteria were the work on judicial factors and on ‘execution in counterpart’.

The Report on the former was published on 29 August 2013.¹² A judicial factor is a person appointed by the court to gather, hold, safeguard and administer property which is not being properly managed. Judicial factors carry out their duties

¹² *Report on Judicial Factors* (Scot Law Com No 233, August 2013).

under the supervision of the court. The existing legislation on the subject dates back to the nineteenth century, and in consequence not only is its language archaic and difficult for modern readers to understand, but its substance is also no longer fit for purpose. Yet the institution has continuing practical significance, notably in the administration of partnerships, charities and farms in serious financial and managerial disarray. The Commission's Report and draft Bill were the product of wide consultation with stakeholders, notably the Law Society of Scotland as probably the most frequent user of the institution, and there appeared to be a good deal of consensus on the results. The draft Bill was however some 61 sections and three schedules long.

By contrast the draft Bill appended to the Report on Execution in Counterpart, published a few months earlier on 25 April 2013, had just seven sections.¹³ In brief, execution in counterpart is a process by which parties to a formal document intended to have some legal effect (e.g. as a contract) may each in different places and quite possibly at different times be able to apply their respective signatures (execution) to their own copy of the same text (counterpart), and then deliver that copy to a nominee to hold in accordance with their instructions to bring the text into existence as a mutually binding document. In 2013 it was widely thought in the legal profession that such a process was not allowed in Scots law, despite its widespread use in other jurisdictions throughout the English-speaking world. Numerous commercial law practitioners in Scotland had pressed the matter upon the Commission for its consideration. The difficulties which its lack caused in relation to the completion of high-value commercial contracts were such that it was common practice to shift the law of the contract from Scots to English law, in order to take advantage of its better solutions to the problems. The Commission team working on the Report had consulted widely in the legal profession, in particular on a series of draft Bills, and had also made a number of presentations to practitioners around the country as it developed its thinking from 2010 on. It was therefore confident that the recommendations in the Report did indeed enjoy widespread support, in particular amongst the commercial law firms who were the "key stakeholders" in this area. The

¹³ *Report on Execution in Counterpart* (Scot Law Com No 231, April 2013).

team was also sure from these stakeholders, and also from its own consultations with business groups, that wider business interests would support the Bill as well.

Both the Reports just mentioned had been accompanied by Business and Regulatory Impact Assessments (BRIAs), a relative novelty for the Scottish Law Commission (although the first such BRIA had been published alongside a May 2012 Report on prescription and title to moveable property).¹⁴ The aim of these documents is to assess the costs and benefits (monetised where possible) of proposals for government action, including legislation.¹⁵ Of particular relevance are the creation of additional costs or the removal of costs for business, the third sector and the public sector itself; the range of options for action (including taking no action); and the justification for the choice of option in the light of the cost-benefit analysis. While to some extent such matters had of course been considered by the Commission in the preparation of its Reports, the need to put figures on the assessment did sharpen the inquiry and carry it beyond ordinary legal and general policy research. The Commission team working on execution in counterpart certainly had difficulty getting stakeholders to put their difficulties in the quantitative terms required by the BRIA; but on the other hand it was useful to be forced by standard BRIA questions to think of the possible benefits which the proposed reform would have outside the commercial law practices: for example, for rural and island communities, and for the disabled, both of which considerations actually reinforced the case for allowing counterpart execution.¹⁶

The Commission began to put forward its candidates for the new Bill procedure before that procedure was finally agreed and promulgated. In early November 2012 the matter was discussed at a meeting with the Commission's sponsor in the Scottish Government to review work in progress prior to a handover to a new sponsor.¹⁷ But only once the procedure was in place the following summer

¹⁴ *Report on Prescription and Title to Moveable Property* (Scot Law Com No 228, May 2012). Commission BRIAs are only published on its website: see e.g. for this Report http://www.scotlawcom.gov.uk/files/6913/3648/2478/rep228_impact.pdf.

¹⁵ On BRIAs, which must be produced for all proposed Bills, see the Scottish Government guidance at <http://www.gov.scot/Topics/Business-Industry/support/better-regulation/guidance/Guidance>.

¹⁶ The BRIA for the *Report on Execution in Counterpart* is available at http://www.scotlawcom.gov.uk/files/3213/6687/7699/EinC_BRIA.pdf.

¹⁷ The sponsor is the civil servant appointed on the Scottish Government side to manage its relationship with the Scottish Law Commission as a non-governmental public body.

did it become clear that the first Bill with which it would be piloted was the one entitled the Execution in Counterpart etc (Scotland) Bill in the Commission Report. In August 2013 the Commission was apprised that, although nothing should be taken for granted until the speech was delivered, the First Minister's Programme for Government 2013/2014, to be announced in the Scottish Parliament on 3 September, would very likely include a 'Conclusion of Contracts etc (Scotland) Bill'. It appeared that the title of the Commission's draft Bill had caused difficulties in those parts of the Scottish Government dealing with the Programme for Government. The Commission registered its difficulties in turn with the suggested new title, given that the Bill dealt with how to make documents legally effective and not just contracts; but this was left over for further discussion later. The First Minister duly announced a Conclusion of Contracts etc (Scotland) Bill in the Programme for Government and indicated that it would be put forward as a candidate for enactment using the Scottish Law Commission Bill procedure.

Preparing the Bill for the Scottish Parliament

As already noted,¹⁸ the essential novelty of the situation was the commitment of the Commission arising from the Scottish Parliament's Standing Orders to work jointly with the Scottish Government (as the Bill sponsor) in preparing the Bill before its introduction into the Scottish Parliament and to continue doing so as the Bill progressed thereafter. The actual work to be done was not otherwise much different in kind from what it would have been with any Bill. In February 2014 the Commission team began a series of meetings with a Scottish Government Bill team, consisting of policy officials from the Civil Law branch of the Justice Directorate, solicitors from the Legal Directorate, and two draftsmen from the Office of Scottish Parliamentary Counsel (OSPC; since re-named as the Parliamentary Counsel Office [PCO]). Fergus Ewing MSP, Minister for Enterprise, Energy and Tourism, was appointed to lead on the Bill in Parliament, however, rather than the Cabinet Secretary for Justice or his deputy, the Minister for Community Safety and Legal Affairs. It was therefore Mr Ewing who, in a letter dated 28 February 2014 addressed to the Commission's then newly-appointed Chairman, Lord Pentland, and also laid in the Scottish Parliament, formally set out the Scottish Government's view

¹⁸ See above, 000.

that the Bill was suitable for the new Scottish Law Commission Bill procedure, while further declaring Government support of the Bill's policy aims and endorsement of the approach that the Commission had taken to the matter.¹⁹

The first significant step for the Bill and the Commission teams had begun a little earlier, in a meeting held on 11 February to lay plans with the Scottish Government's Legislation team as to how the Bill and its associated paperwork would proceed.²⁰ Timelines were set out provisionally at first, to be firmed up later as other pieces of the Parliamentary jigsaw fell into place. Further, all Bills have to be accompanied into Parliament by a host of other documents, as follows:²¹

- *Policy Memorandum*: setting out the policy objectives, the alternative approaches considered and set aside, the extent of public consultation, and the effect on equal opportunities,²² human rights, island communities, local government and sustainable development;
- *Explanatory Notes*: a section-by-section commentary on the Bill;
- *Financial Memorandum*: a summary of the costs of the Bill for the Scottish Administration, local authorities, other bodies, individuals and businesses;
- *Legislative Competence Statements* by the Scottish Government and by the Presiding Officer;
- *Delegated Powers Memorandum*: since it was eventually decided that the Bill should create powers to make subordinate legislation, this had to be justified and explained.

¹⁹ See http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2014-02-28_Minister_for_Energy_Enterprise_and_Tourism.pdf.

²⁰ The detailed procedures to be followed are set out in The Scottish Government, *Bill Handbook: a Guide to Bill Procedure for Scottish Parliament Bills* (Version 13, March 2011, accessible only on the Scottish Government's Saltire intranet at - <http://intranet/InExec/AboutUs/PermSec/GovernmentPublicAdmin/DevolvedAdministrations/Bill-handbook>). Like the Scottish Parliament's *Guidance on Public Bills* (above note 11), this document has yet to be updated to take account of Scottish Law Commission Bills.

²¹ For all the documents see the Bill website, now at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76414.aspx>. Note that the Financial Memorandum and the Legislative Competence Statements are published in a single document together with the Explanatory Notes.

²² In addition the Scottish Government must prepare and publish an Equality Impact Assessment (EQIA), the preparation of which informs the equal opportunities part of the Policy Memorandum. The Commission team took part in a meeting of the Bill team with representatives of the Scottish Government's Analytical Services at which this was discussed. The resultant EQIA for the Legal Writings Bill is accessible at <http://sh45inta/Topics/Justice/law/damages/contract/Legal-Writings-EQIA-Results>.

In the light of the extensive recent consultation carried out by the Commission, it was decided that no further formal consultation by the Scottish Government need take place before the introduction of the Bill. The documents also played a significant role in the Parliamentary Bureau's decision to refer the Bill to the DPLRC as a Scottish Law Commission Bill: while that was the anticipated result throughout, the decision could not be taken for granted simply because this was the Government and the Commission view.

While much of the meat for these various documents could be extracted from the Commission Report and its accompanying BRIA as well as the explanatory notes to its draft Bill, each of the documents had to be independently drafted within the Bill team, and a substantial part of the Commission team's contribution was to provide commentary on initial drafts and suggestions for revisions which did not simply go back to the wording in the Commission's own documents. This tended to involve a number of iterations in each case, with members of the Bill team also providing their own further responses, comments and suggestions along the way. The finalisation of the formal documents in particular became something of a race against the clock set by an increasingly definite timetable for the submission of the Bill to the Parliamentary Bureau and its introduction in Parliament.

A further complication was the revision of the Bill itself. As a Government Bill the text presented to Parliament was the responsibility of the drafting team in the OSPC. Quite apart from the issue of the title, OSPC was not entirely content with the draft presented in the Commission Report. This led to useful discussions which eventually produced the final title for the Bill as well as some re-ordering of provisions, textual revisions, and dropping of sections in the final version. The Commission's principal concerns in this process were to ensure that its recommendations received their intended effect and that the final Bill remained recognisable as the one on which there had been widespread consultation with the legal profession in 2012-2013. But the whole discussion further clarified the technical details of the Bill and helped to inform the work on the formal documentation going on at the same time.

During the months preceding the formal introduction of the Bill on 14 May 2014,²³ the Commission team inter-acted informally and at meetings with the clerk to the DPLRC and his staff. It also made presentations of the Bill at an informal breakfast meeting with the DPLRC members on 11 March and at a meeting with the Minister, Mr Ewing, on 26 March. The presentations sought to explain the problem and the proposed solution in short and non-technical form, using a Powerpoint presentation with not many slides, and each relying more on diagrams than words. On both occasions it was clear that the essence was swiftly grasped; questions were asked and as far as possible answered. Concerns were expressed on both occasions about the possibilities for fraud inherent in the Bill's provision allowing the electronic submission of completed signature pages alone to constitute delivery of counterparts; this was to become a running theme in the subsequent progress of the Bill. Although the Commission team was clear that the Bill and the surrounding general law did offer safeguards against fraudulent mis-use of signature pages, the Minister, wary of potential trip wires later on, asked the Bill team officials to engage in some further informal consultations on the matter with bodies such as the Law Society of Scotland. This was done, and the Minister duly satisfied on the point. The Powerpoint presentations, along with the development of a response to the questions on fraud, were the beginnings of what the Commission would submit as its written evidence in response to the DPLRC's call for such material issued on 15 May after it had received the Bill.²⁴ A final piece of work on which the Commission team's assistance was sought and given was the preparation of a 'Briefing' on the Bill produced by the Scottish Parliamentary Information Centre (SPICe), although this was published only some little time after the Bill had been introduced.²⁵

The next stage in the work of the Commission team was to assist with the preparations for Stage 1 before the DPLRC, in particular encouraging stakeholders

²³ The introduction was carried by John Swinney MSP, then Cabinet Secretary for Finance and Sustainable Growth. But this was purely a formality; Mr Swinney played no further role in relation to the progress of the Bill beyond voting in the full Parliament at the end of the Stage 1 and Stage 3 debates.

²⁴ The Finance Committee had also formally to consider the Bill [and issue a call for evidence] on 28 May.

²⁵ See SPICe Briefing 14/64, The Legal Writings (Counterparts and Delivery) (Scotland) Bill, accessible at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-64.pdf and dated 25 September 2014.

to submit written evidence (ten submissions were eventually made²⁶) and also beginning to suggest to the Committee, in both specific and general terms, who might usefully be called to give oral evidence. It was of course the Committee itself which decided who should be called. The Commission decided itself to submit written evidence in which it would set out its understanding of the legal and practical difficulties to which the existing uncertainty about the law gave rise, and how it had reached its proposed solutions. The earlier Powerpoint presentations had convinced the Commission team of the value of visual representations of the problem, but where before clip art images had been used, on this occasion the artistic talents of a team member's young daughter were brought into play instead. This approach was the subject of some debate within the Commission but in the end it was agreed that the drawings usefully supported the text. Vindication of that view came later from Nigel Don, Convener of the DPLRC, who remarked during the Stage 1 debate on the Bill on 25 November 2014:

[T]he Scottish Law Commission ... gave us a remarkably precise and careful description of what was involved, complete with drawings, which I still remember. That seemed to be exactly the way to describe law.²⁷

The Commission team also asked some commercial law firms to help with illustrative examples of situations in which counterpart execution was used or where its lack in Scots law had presented problems. A number of these quickly emerged, based on actual experiences, and they were eventually included as an appendix to the Commission's submission to which cross-reference could be usefully made in the text prepared by the Commission team itself.²⁸

Progress through Parliament

²⁶ See <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/78719.aspx>. The submissions included five from commercial law firms (one London rather than Scotland-based), one from a corporate body (the Weir Group), and one from Glasgow City Council. The others came from the legal profession's governing bodies (the Law Society of Scotland and the Faculty of Advocates) and Registers of Scotland.

²⁷ Official Report, 25 November 2014, col 48 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9649&mode=pdf>).

²⁸ For the Commission's written submission, see – http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/20140617Papers-WEB.pdf.

The first oral evidence session before the DPLRC was held on 17 June 2014 with the witnesses being the Bill team followed by the Commission team and Chairman Lord Pentland.²⁹ The questioning from the Committee was friendly but intense, pressing various issues, notably those of fraudulent mis-use of signature pages and the possibilities of technological solutions through the use of advanced electronic signatures in digital document repositories (a matter discussed in the Commission Report without any legislative recommendation following because it was thought no change in the law was needed before it could happen³⁰). The Commission witnesses expressed willingness to provide supplementary written evidence on the capacity of the existing law to provide safeguards against fraud and forgery of documents, and this was taken up by the Committee. Since however it would not meet again to consider the Bill until near the end of the summer, there was time for the Commission team to carry out further research and provide a quite detailed technical paper (without drawings) which was submitted to the DPLRC on 19 August.³¹

The oral evidence sessions before the DPLRC resumed on the same date in August. Warren Gordon, an English solicitor representing the Law Society of England & Wales as a member of the conveyancing and land law committee, and also head of real estate know how at the City of London and international law firm Olswang LLP, was interviewed by video link on practice south of the border and how pitfalls, notably fraud and error, were avoided.³² Mr Gordon had much relevant experience and knowledge of execution in counterpart thanks to his involvement with the preparation of the Law Society's practice note in February 2010, "Execution of documents by virtual means".³³ This was and is the "bible" for English practice in the

²⁹ Official Report, 17 June 2014, cols 1509-1533 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9259&mode=pdf>).

³⁰ *Report on Execution in Counterpart*, chapter 4.

³¹ See http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2014-08-19_Scottish_Law_Commission.pdf.

³² Official Report, DPLRC, 19 August 2014, cols 1600-1620 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9494&mode=pdf>). The DPLRC also discussed the Bill's delegated powers provisions and indicated its contentment therewith on 5 August 2014 (Official Report, DPLRC, col 1572 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9436&mode=pdf>)). The Finance Committee completed its scrutiny of the Bill on 28 May 2014: see http://www.scottish.parliament.uk/S4_FinanceCommittee/Minutes/Minutes_17th_Meeting.pdf.

³³ For this document, see now <https://www.lawsociety.org.uk/support-services/advice/practice-notes/virtual-execution-of-documents/>.

area of counterpart execution, and had been much referred to in the Scottish Law Commission Report and its antecedent Discussion Paper.³⁴

Following this meeting of the DPLRC, there was then something of a hiatus: the Scottish Parliament did not sit from 23 August to 21 September as a result of the Independence Referendum campaign and the Referendum itself (which took place on 18 September).³⁵ This provided an opportunity for the Bill and Commission teams to draw breath and reflect on progress to date, culminating in a meeting held at St Andrew's House on 24 September. In particular, possible responses to the relatively few criticisms of the Bill made in the written submissions to the DPLRC (most of them on technical drafting issues) could begin to be developed for transmission to the Committee.³⁶ One written submission went beyond merely drafting points, however. The Faculty of Advocates was anxious about the lack of safeguards in the Bill against fraud and error,³⁷ and its representative was due to appear before the Committee on 30 September.

The Faculty's position was eventually presented by Robert Howie QC who gave eloquent expression to his and the Faculty's concerns before the Committee.³⁸ He was particularly worried by the problems that the procedure could create for solicitors practising outside the country's major commercial centres and with little experience of using it. This led to one of the few lighter moments during the oral sessions, an exchange between Mr Howie and DPLRC member Stewart Stevenson MSP, recorded thus in the Official Report:

Robert Howie QC: 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

³⁴ *Report on Execution in Counterpart*, paras 1.18-1.28; note also *Discussion Paper No 154 on Formation of Contract* (March 2012), paras 6.10-6.20.

³⁵ See http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Recess_Dissolution_Parliamentary_Years.pdf.

³⁶ See <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/78719.aspx>.

³⁷ See http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/The_Faculty_of_Advocates.pdf.

³⁸ Official Report, DPLRC, 30 September 2014, cols 21-33 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9560&mode=pdf>).

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 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 QC: As someone who does shipping cases, I know what you mean.³⁹

Later witnesses in the same session represented the Law Society of Scotland (Professor Robert Rennie and Alasdair Wood) and three major commercial law firms (Colin MacNeill of Dickson Minto, Paul Hally of Shepherd & Wedderburn and Dr Hamish Patrick, then of Tods Murray⁴⁰) and, having heard Mr Howie from the public benches in the Committee room, they all took pains to refute the Faculty's fears about fraud and error. Committee members continued to be interested in the technological possibilities for electronic signing of electronic documents, and the witnesses explained the continuing value placed on paper and "wet ink" signatures

³⁹ Ibid, col 28. Mr Stevenson provided much of the light relief during the Bill's progress, e.g. the following contributions to the Stage 1 debate on 25 November 2014 (above, note 27) at cols 49 and 51 respectively:

"Only this morning, we had a piece of secondary legislation on food, and the table in the schedule to that instrument told me that corned beef must have 120 per cent meat in it. ... The figure was correct, as it turned out. I would never have known that had I not been on the Delegated Powers and Law Reform Committee. ...

As a mathematician, I find prime numbers particularly interesting. They come up time and again. Some of this technology has been described in "The Simpsons". Most of the team that writes "The Simpsons" are mathematicians, which might surprise members. Eighteen years ago, Homer Simpson referred to Belphegor's prime. Belphegor is one of the seven princes of hell in John Milton's "Paradise Lost" and was charged with helping people to make ingenious inventions and discoveries. Belphegor's prime number is 31 digits long: it is 1 followed by 13 zeroes, followed by 666—which is why it is Belphegor's prime—followed by 13 zeroes, followed by 1. Of course, it is also symmetric: it is the same read either way around. Prime numbers are exciting and interesting, ..."

It should be added that as the Bill progressed Mr Stevenson also offered a number of other cogent points on the use and potential of digital technology in modern contracting practice.

⁴⁰ Now of Shepherd & Wedderburn.

by clients as well as by solicitors. The Law Society undertook to provide written evidence on the “Smartcard” which it would shortly start to issue to its members; amongst other things, this would enable solicitors to place advanced electronic signatures on electronic documents.⁴¹

The last substantive oral session with external witnesses took place a week later, on 7 October.⁴² It was a busy occasion, with three groups of witnesses. First came three academic lawyers whose submissions to the Scottish Law Commission were quoted in its Report and all of whom had backgrounds including practical experience in commercial law, with one also a practising advocate. They were Dr Ross Anderson of Glasgow University, advocate; Dr Gillian Black; and Professor George Gretton (both of Edinburgh University). Each spoke to perceptions of the existing law and the need for the proposed legislation. Professor Gretton raised some drafting points on which he subsequently sent a letter to the Committee.⁴³ The Committee next turned to Stephen Hart, in-house counsel at Braveheart Investment Group plc (a Scottish-based fund manager and business lender), and Catherine Corr, principal solicitor of Scottish Enterprise (Scotland's main economic, enterprise, innovation and investment agency). Their evidence spoke to the value of counterpart execution for Scottish businesses, especially those dealing outside the jurisdiction. The final pair of witnesses were from Registers of Scotland: Christopher Kerr, head of legislation and legal policy; and Kenny Crawford, the commercial services director. They spoke relatively briefly to their organisation's willingness to develop an electronic repository which might be a place of safe-keeping for electronic documents and even one where the parties could negotiate their way through a drafting process.

Over the following fortnight the Commission team assisted the Bill team in putting together a written response to all the evidence, oral and written, that had been provided for the Committee to that point. This document was submitted to the

⁴¹ The letter was provided to the DPLRC at the end of October 2015: see http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2014-10-31_Correspondence_from_Law_Society_of_Scotland.pdf.

⁴² Official Report, DPLRC, 7 October 2014, cols 2-33 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9576&mode=pdf>).

⁴³ See http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2014-10-08_Professor_George_Gretton.pdf.

DPLRC by the Bill team on 23 October, and argued that none of the evidence, including that on drafting points, required amendment to the Bill.⁴⁴ This was also important preparation for another meeting of the Bill and Commission teams with Mr Ewing, the responsible Minister, which took place at Atlantic Quay in Glasgow on 21 October. The purpose of this meeting was to brief the Minister ahead of his oral evidence session with the DPLRC, which had been set down for 28 October. This was the occasion at which the Minister was to advise the Committee of the Scottish Government's view of the Bill in the light of the previous evidence, and was the final opportunity to try and influence the position to be taken by the Committee on the Bill's general principles and the lack of any need to amend the Bill in the light of the evidence received. The session subsequently went forward without any hitches from the viewpoints of the Minister, the Committee and the Bill and Commission teams.⁴⁵

The DPLRC published its Stage 1 Report on the Bill on 14 November 2014.⁴⁶ The conclusion was a recommendation that the general principles of the Bill should be agreed. Consisting of some 187 paragraphs, the Report reviewed very thoroughly the evidence heard by the Committee. It dealt with the main controversial issue thrown up by the evidence (the concern that the procedure opened new windows to the possibilities of fraud and error) as follows:

15. The Committee is not persuaded that the Bill will lead to an increase in instances of fraud and error where legal documents are signed under Scots law.

16. Whilst acknowledging that instances of fraud and error may still occur when parties use execution in counterpart, the Committee notes that the existing safeguards in the general law will remain.

17. In reaching this view, the Committee notes the apparent lack of evidence pointing to problems of fraud and error in other countries in which execution in

⁴⁴ See http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/2-2014-10-23_Scottish_Government_and_Scottish_Law_Commission.pdf.

⁴⁵ Official Report, DPLRC, 28 October 2014, cols 6-18 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9593&mode=pdf>).

⁴⁶ Delegated Powers and Law Reform Committee, 65th Report 2014 (Session 4), Report on Legal Writings (Counterparts and Delivery) (Scotland) Bill at stage 1, accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/83660.aspx>.

counterpart and the electronic delivery of documents is already commonly practised.

18. The Committee does not agree with the Faculty of Advocates suggestion that the Bill should be amended to provide that entire documents should be delivered in counterpart not just signature pages. The Committee considers that such an arrangement could be impractical, and is not persuaded that it would lead to a decrease in instances of fraud and error.

19. However, the Committee welcomes the Scottish Government's commitment to take account of any further suggestions made by the Faculty of Advocates on how it considers the risk of fraud and error can be reduced.

20. The Committee encourages the Scottish Government to ensure the potential for fraud and error is accounted for and to consider how such risks could be reduced further.⁴⁷

The recommendation of the Committee Report was considered by the full Scottish Parliament in a Stage 1 debate held on 25 November 2014. Most of the contributors to the quite lively debate, which lasted some two hours, were members of the DPLRC, and many of them commended the work which the Scottish Law Commission had done in gathering its evidence on the case for reform and in making its recommendations. Perhaps the most significant such statement came from Richard Baker MSP:

I reflect on the fact that dealing with bills introduced by the Scottish Law Commission will be beneficial generally to legislative reform in the Parliament. ... Too many bills on important issues, which could have been equally as beneficial as the one that we are considering, were not progressed, so it is good that with our committee's parliamentary consideration, we can look forward to more progress with such legislation. ... In this process, the committee's work will be beneficial not just to Parliament but to the quality of law. ...⁴⁸

⁴⁷ The quotation is from the Report's executive summary. The detailed discussion is at paras 106-129 of the Report.

⁴⁸ Official Report, 25 November 2014, cols 52-3 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9649&mode=pdf>).

John Mason MSP, not at that stage a DPLRC member although he was shortly to become one, added another general observation:

As a non-lawyer, I have to ask where Scotland is positioning herself in the global market. The legal system is not just another product such as whisky or cheese. It is much more than a product, but it is a product nonetheless. If Scotland is to compete on quality with the best food and drink, top-of-the-range engineering and one of the cleanest environments in the world, similarly we want one of the best legal systems in the world. From that perspective, I do not see today's debate as being of narrow interest only to the legal profession. It has a much wider economic impact. If this Parliament cannot fight the corner of Scots law, I do not know who can.⁴⁹

Closing the debate for the Labour Party, Jenny Marra MSP also showed that the issue had not just come before the DPLRC but that, quite outside the Committee, she had nonetheless –

... been lobbied on electronic signatures by constituents who think that the proposed amendment to Scots law is central to their businesses and will make it easier and less costly for them to conclude contracts. They think that it will make it easier for them to get more clients and more business, thereby contributing to Scotland's economy. My having been lobbied on the issue during my short time in the Parliament shows that the bill is important for our business community and our economy. Only a couple of weeks ago I spoke to a lawyer who told me that despite having struck a deal three weeks earlier he was still waiting for the contract to be delivered from one solicitor's office to the next and so on, to ensure that all parties to the contract had signed up appropriately before the deal could be set in motion.⁵⁰

Although lively, the debate did not produce any great differences of view about the DPLRC recommendation: indeed, closing for the Scottish Government, Fergus Ewing MSP remarked that "In 15 years in the Parliament, ... I cannot recall

⁴⁹ Ibid, col 56.

⁵⁰ Ibid, col 59.

there having been a debate in which there has been such a marked absence of any significant controversy.” He went on to note, “[h]owever, that is perhaps a reflection of the fact that the Scottish Law Commission, headed up by Paul Cullen—Lord Pentland—and his staff, did an excellent job prior to the legislation being submitted to the Parliament.”⁵¹ Complying with the specific recommendation on the matter in the DPLRC Report, the Minister undertook to consult further with the Faculty of Advocates on the question of fraud and error. At Decision Time, the Parliament unanimously adopted the recommendation of the Report, and sent the Bill on its way to Stage 2 before the DPLRC.

There was then something of a hiatus before on 20 January 2015 the DPLRC re-assembled for Stage 2.⁵² The Scottish Government, represented again by the Minister and the Bill team, with the Commission team also present, had no amendments to propose to the Bill, nor did the Committee or any of its members. (The Faculty of Advocates had not responded to the Minister’s letter following the Stage 1 debate.) Each of the Bill’s seven sections was then approved by the Committee along, finally, with its long title. There had been talk pre-meeting of breaking what was said by officials to be the record for the shortest Stage 2 proceedings ever – one minute 18 seconds – but the Official Record shows that this one began at 10.32 and concluded at 10.34.

It was a further month before the Stage 3 debate on the Bill took place in the chamber of the Scottish Parliament on 24 February 2015.⁵³ There were no amendments to discuss, and the debate largely consisted of speeches from the Minister and the spokespersons for the various parties, along with contributions from DPLRC members. These included a number of general statements about the significance of the Scottish Law Commission Bill procedure. Opening the agenda item, the Presiding Officer, Tricia Marwick, declared: “I put on record my gratitude to the committee for the work that it has carried out on the bill and for its contribution to improving the Parliament’s capacity to legislate. I expect further Law Commission

⁵¹ Ibid, cols 60-1.

⁵² Official Record, DPLRC, 20 January 2015, col 2 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9734&mode=pdf>).

⁵³ Official Record, 24 February 2015, cols 8-28 (accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9794&mode=pdf>).

bills to be considered in this way.”⁵⁴ This was picked up straightaway by Fergus Ewing in his opening statement:

[I]t is an important new development of our parliamentary procedure, and I am extremely grateful to the Scottish Law Commission for its work in providing us with the legislation. ... I hope and expect that the new process, which we see coming to its conclusion in respect of the first bill today, will go some way towards increasing the implementation rate of commission reports. ... I was particularly impressed with the way in which the committee took on its new role, so I look forward to successive commission bills being considered in this way. To use a non-parliamentary expression, bring them on.⁵⁵

Opening for Labour, Lewis MacDonald MSP noted a devolved Scottish Parliament provided greater opportunities for keeping Scots law up to date than had been available at Westminster pre-devolution:

It is fair to say that this devolved Parliament has taken a little time to work out the best way to deliver that objective, but there is no need to apologise for that. This is, after all, a maturing institution. ... However, we are now moving on to a new phase, and I think that the committee’s focus on law reform will prove useful to both the Parliament and the legal profession, while the whole Parliament remains responsible—as it is today—for the final outcome.

The bill is useful, not because it will bring businesses flocking to these shores, but because it will ensure that Scotland and Scots law do not get left behind. The process of law reform as it is exemplified by today’s debate does not give Scotland a novel competitive advantage, but ensures that we are not at a disadvantage and that our Parliament delivers on one of the purposes of devolution. ... The bill can help to ensure that we also have a legal system that is modern, up to date and fit for purpose ...⁵⁶

⁵⁴ Ibid, col 8.

⁵⁵ Ibid, col 8.

⁵⁶ Ibid, cols 12-13.

For the Conservatives, Annabel Goldie associated herself with the tributes to the work of the Scottish Law Commission and the DPLRC, and their “important functions”.⁵⁷ In her closing speech she again added her acknowledgement of “the need to adapt and change our centuries-old legal system to meet the exigencies of the modern age.”⁵⁸ There was also an interesting exchange between Graham Pearson, closing for Labour, and DPLRC Convener Nigel Don:

Graeme Pearson: ... although the issue that we are dealing with is in truth not the most pressing issue for the Scottish public, the details of what we discuss in relation to the bill will be critical to members of the public at key times in their lives.

Nigel Don (*interrupting*): The member has made the most important point, which is that this is all about how the legal system works. The public do not care about or want to know how the system works, but they want a system that works. Our job is to ensure that that system is good and effective. ...

Graeme Pearson: The Delegated Powers and Law Reform Committee has provided a valuable service. It has modernised Scots law to some extent and has made it more relevant. We should acknowledge the Scottish Law Commission’s role in producing legislation whose time has obviously come, in that it has passed so easily through the Parliament, with due scrutiny and examination.⁵⁹

The significance of this and the other contributions quoted lies, as it seems to us, in the acceptance that the Scottish Parliament’s function in passing legislation is not only to deal with political issues but also to engage with the care and maintenance of the law and the legal system of Scotland to ensure that as far as possible it keeps pace with the basic requirements of contemporary life, including those of legal and business practice. In his own speech, Nigel Don laid especial emphasis upon this aspect of the significance of the Law Commission Bill procedure as a response to changing socio-economic conditions:

⁵⁷ Ibid, col 13.

⁵⁸ Ibid, col 22.

⁵⁹ Ibid, cols 24, 25.

Parliament has historically never found enough time for the repair and maintenance of Scottish law. We now have the opportunity to do that. ... I suggest that we will need to do more of the kind of thing that we have done. ... I therefore suggest to you, Presiding Officer, and the chamber that we need to start thinking about whether there should be a wider remit for my committee or any other; I would not want to say what the process should be. We need to ensure that we can look after the repair and maintenance of Scots law—in particular, perhaps, private law ...⁶⁰

Fergus Ewing picked this up in his closing statement: “I can say that the Scottish Government echoes the sentiment that he expressed and which I think underlay his criticism, which is that we require to have a process for the repair and maintenance of Scots law. That was a prudent comment and one on which it may be sensible to ponder further.”⁶¹

The Bill did not pass without further reference being made to the dangers of fraud and error in counterpart execution of documents. It was a particularly strong theme of both Annabel Goldie’s contributions to the debate. She wound up with this:

I ... urge the Parliament to seriously consider post-legislative scrutiny of the bill at some appropriate point in the future to ensure that, if any loopholes have emerged, we can deal with them. I also reiterate that the Law Society of Scotland should issue to practitioners practice guidance notes to ensure that signatories know what they are signing and that the agreed signed version or a copy is retained in a physical form, whether that is a PDF file or a paper copy.⁶²

Despite these anxieties, the Bill passed *nem con* at Decision Time, received Royal Assent on the possibly inauspicious date of 1 April 2015, and came into force on 1 July 2015. A process which had formally begun nearly 18 months before had finally achieved its objective.

⁶⁰ Ibid, cols 20-22.

⁶¹ Ibid, col 26.

⁶² Ibid, col 23.

What next?

The agreement by which the Scottish Parliament's Law Commission Bill procedure was set up provides for a review after either two Bills had gone through it or, in any event, two years. The question of which is to be the second Bill has now been answered. The Succession (Scotland) Bill, introduced to the Parliament on 16 June 2015, has been referred to the DPLRC. Meantime the Scottish Parliament's Standards, Procedures and Public Appointments Committee (SPPAC) began its review of the procedure in August 2015 in accordance with the two-year provision made at the time of its introduction.⁶³

The Succession Bill implements some of the more technical aspects of the Report on Succession published by the Scottish Law Commission in April 2009.⁶⁴ The Committee begins its Stage 1 processes in September 2015.⁶⁵ Given that a Scottish Parliamentary election is to take place in May 2016, meaning that the Parliament will rise sometime in March that year, the Committee will clearly be working to a rather tighter timetable than prevailed with the Legal Writings Bill. This may put to the test an observation about the process made by DPLRC member Stuart MacMillan MSP during the Stage 1 debate on the Legal Writings Bill:

There have not been many time constraints placed on it, which is probably of great benefit in this instance. I am sure that when more bills from the Scottish Law Commission go through the Delegated Powers and Law Reform Committee, the timescales will reduce slightly—or greatly.⁶⁶

The Succession Bill presents a number of other important differences from the Legal Writings Bill, and not just in its subject matter. First, where the latter Bill implemented a Report made the year before it was introduced, it is already more than six years since the Scottish Law Commission reported on succession. Indeed, on the matters covered by the Bill, the 2009 Report generally carried forward

⁶³ See the Committee's website: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29890.aspx.

⁶⁴ *Report on Succession* (Scot Law Com No 215, April 2009).

⁶⁵ See the Bill's website: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/90123.aspx>.

⁶⁶ Official Report, 25 November 2014 (above note 27), col 44.

recommendations made in a previous Report published in 1990.⁶⁷ This explains why on this occasion there was a Scottish Government consultation, published in August 2014, in addition to the Commission's own, much earlier, consultation processes.⁶⁸ That consultation had also shown that one of the topics which might have been included in the Bill (abolition of executors' bonds of caution, but with a discretion given to the court confirming an executor to require caution to be taken out in appropriate cases) was indeed in some respects too complex—or, at least, not yet sufficiently thought through—to be included in a DPLRC Bill. While there was widespread support for abolition of the requirement, there was no consensus on the scope and costs of the judicial discretion.⁶⁹ So in the Bill as published in June 2015 there was nothing on the matter at all.

Second, whereas the Legal Writings Bill was only seven sections long, the Succession Bill has 27 sections and also covers a fairly wide and rather miscellaneous range of matters. It thus lacks the overall coherence and narrow focus which characterised the Legal Writings Bill, and made its objectives fairly easy to grasp. In dealing with the Succession Bill, therefore, the DPLRC will have a more difficult task in working out what are to be its angles of approach to the different elements involved. But the Bill affects potentially everyone living in Scotland, and not just the business and legal profession communities. It is about wills, survivorship of potential heirs, forfeiture for parricide, gifts made in contemplation of death, and mourning expenses; so it has plenty of human interest to put alongside the more technical issues also covered, such as estate administration, liferents and destinations giving rise to conditional institutes. The Bill will thus provide a helpful test of the Committee's capacity to deal, not only with a longer Bill, but also one touching on diverse matters. Successful completion by the Committee would encourage the bringing forward of further more substantial Bills in future. With regard to the 61-section draft Bill attached to the Commission's Report on Judicial Factors, for example, its still greater length by comparison with the Succession Bill

⁶⁷ *Report on Succession* (Scot Law Com No 124, January 1990).

⁶⁸ See <http://www.scotland.gov.uk/Publications/2014/08/1185>.

⁶⁹ For analysis of the consultation responses and the Scottish Government's decision not to include provision on this subject in this Bill, see <http://www.gov.scot/Publications/2015/06/1124/2>.

might prove capable of being balanced by its more specific focus on a single topic and its largely procedural substance.⁷⁰

Finally, one of the criteria which a Scottish Law Commission Bill has to meet to go to the DPLRC is that the Scottish Government must not be planning wider work in that particular subject area. But it is already clear that the Scottish Government is planning further legislation on succession in implementation of those parts of the Commission's 2009 Report not covered by the Succession Bill. A consultation indicating the Government's intention so to legislate was published on 26 June 2015.⁷¹ It covers intestate succession (including the abolition of the distinction between heritable and moveable property in that context), the scope for disinheritance (to be less restricted than in the present law, especially in relation to children), and the protection of cohabitants. This can be read as broadly covering succession where there is no will, and the extent of a testator's power to over-ride these rules in a will, whereas the Succession Bill is primarily about cases where there is a will and about the system by which a deceased person's executor is authorised to administer the estate. So there is a distinction to be drawn, even if the overall substance of the two pieces of prospective legislation comes from a single Scottish Law Commission Report. The relevant criterion has been read as narrowly as possible. The development suggests that this particular restriction is a candidate for removal or rewriting in the SPPAC review already mentioned. Either it poses an un-necessary difficulty for implementation of uncontroversial elements in an overall scheme which also has controversial ones, and so should go; or the criterion might be cast in less absolute terms than at present, perhaps by inserting a word such as "normally" as a qualifier to the negative proposition. [Not sure whether saying that the criterion should be altered – is a narrow reading not in the Commission's interests?]

Most of the other criteria seem likely to survive this initial review. A question may be raised about whether criminal law reform should be excluded, given that at Westminster the Partnerships (Prosecution) (Scotland) Act 2013 has been put

⁷⁰ *Report on Judicial Factors* (Scot Law Com No 233, August 2013).

⁷¹ Scottish Government, Consultation on the Law of Succession (26 June 2015), accessible at <http://www.gov.scot/Publications/2015/06/7518>.

through the equivalent process. But that Act is the only criminal law statute to go through the Westminster process so far; all the other Acts under it have related to non-criminal law. The 2013 Act was not entirely uncontroversial, however; it went through despite the expression of some difficulties with it by the Law Society of Scotland. But the experience of the Legal Writings Bill, and in particular its criticism before the DPLRC by the Faculty of Advocates, also shows that the Holyrood criterion of “a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended” does not mean that the consensus must be total, either before or during the legislative process. What matters is that the criticism can be either answered convincingly – as it was in the case of the Legal Writings Bill – or that the Bill can be amended after Stage 1 to meet the criticism while retaining the character of a Scottish Law Commission Bill. The latter would clearly not have been possible had the DPLRC been persuaded that the Faculty’s criticism had substance. That would not necessarily have killed the Bill, since it could still have gone forward under ordinary legislative procedures; but the chances of that being accommodated within the parliamentary programme would have been extremely slight.

It is also worth noting that members of the DPLRC did suggest that they would not object to a more active role in developing Bills brought before them under the procedure. Thus Committee convener Nigel Don MSP remarked early on in the progress of the Legal Writings Bill: “I suspect that there are few bills before the Parliament that have been consulted on quite so much and have been so consensually put together.”⁷² At Stage 3, knowing that the Succession Bill might be next in line for his Committee, he observed: “[H]aving read the consultation on how we might amend succession law, I have to say that finding things that are non-contentious will be rather more difficult than it has been with this bill, without it having to go through the Justice Committee ...”.⁷³ Now that the Committee has the Bill, it may be put to the test. Stewart Stevenson even expressed a modicum of concern during the Stage 3 debate: “[T]he danger with the process that the Law Commission undertakes—it involves a rigorous examination before fully developed proposals are brought to Parliament, which is extremely helpful—is that all the contentious and

⁷² Official Report, DPLRC, 17 June 2014, col 1510 (above note 29).

⁷³ Official Report, 24 February 2015, col 22 (above note 52).

difficult bits have been removed from the proposals, so we end up with something that is the lowest common denominator, to some extent.”⁷⁴ It was certainly true that a great deal of effort went into the preparation of the Legal Writings Bill as the pilot for the new procedure; but the effort on the part of the Scottish Law Commission at least would have been no less, since at the time of most of its substantive work on counterpart execution, the new procedure was by no means certain to come about. Nor was there an absence of contentious or difficult elements, as the evidence of the Faculty of Advocates undoubtedly brought out. So the Commission at least should not be deterred by contention or difficulty in bringing forward its recommendations; and the result put before the DPLRC should not be the minimum that all stakeholders involved are prepared to accept. We suspect that with future Bills under the procedure there will be opportunities for the DPLRC to play a more creative role, while remembering that from the perspective of those bringing legislative proposals forward, Bills are made to pass as razors are to sell.⁷⁵

The second Succession Bill is however unlikely to be put to the DPLRC, even if (improbably) the Scottish Government’s consultation shows a wide degree of consensus as to how the law should be reformed. Given that everyone dies but only a minority make wills, the social significance of the distribution of estates on intestacy, the extent to which the family of the deceased should be protected against disinheritance, and the mutual claims of cohabitants, means that these are bound to be matters on which the Scottish Parliament will need to have a detailed public debate of a kind making it unsuitable for the relatively low-key DPLRC procedure. There are other topics on the current Scottish Law Commission agenda likely also to be of this nature for different reasons, notably defamation (which probably anyway falls into the exclusionary criterion of having significant European Convention on Human Rights implications, i.e. in relation to freedom of expression).⁷⁶

In its Stage 1 Report, the DPLRC noted:

⁷⁴ Ibid, col 17.

⁷⁵ The famous aphorism attributed to the great Parliamentary Counsel of the Victorian era, Sir Henry Thring; found quoted in Lord Rodger of Earlsferry, “The Form and Language of Legislation”, in David Feldman (ed), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013) 65-83 at 80.

⁷⁶ See the Ninth Programme for defamation as an agenda item accessible at <http://www.scotlawcom.gov.uk/law-reform/ninth-programme-of-law-reform/>.

Wherever possible, statistical evidence should be provided with Scottish Law Commission Bills in order to aid the Committee's assessment of the likely impact of the Bill. The Committee therefore recommends that the Scottish Government takes steps in order to ensure appropriate research has been undertaken to provide such data to the Committee when future Scottish Law Commission Bills are introduced.⁷⁷

The Committee was undoubtedly concerned that no-one amongst the witnesses, not even those directly involved with counterpart execution as part of their day-to-day practice, could say in how many transactions the process was used or in which of them the governing law was switched from Scots to English law in order to take advantage of the latter's more accommodating system. But the difficulty is that there has been no business reason for the law firms concerned to quantify the problem in this way; what matters much more to them is the value of the transactions, the billable hours involved in carrying out the work, and the flow of fee income. The question of which law applies to the transaction in the end is of relatively small importance from the business point of view. So gathering statistical evidence that would certainly be relevant to a proposed reform is not an easy process. But that said, it may also be in the longer-term interests of practising lawyers and others wanting to see particular reforms to begin to think about ways of gathering material that will be useful in persuading government and legislature that these reforms should be carried out. Basically anecdotal evidence may not be enough, any more than purely doctrinal legal arguments.

An initial comparative impression of the Holyrood and Westminster processes suggests that each has its advantages and disadvantages. The House of Lords Special Public Bill Committee for the Insurance Bill 2014 appeared to be pulled together at the last minute, making even attendance at meetings by its members uncertain and also meaning that the members without previous experience of such a committee had to have the special procedure explained to them at the start. Such members may not fully grasp what this entails until quite far down the line: so, for example, it took some time to persuade Committee members not to insist on an

⁷⁷ Above, note 45, Summary of Conclusions and Recommendations, no 14.

amendment to bring in damages for late payment of insurance claims.⁷⁸ By contrast, the DPLRC as a standing committee on law reform Bills may develop a certain expertise in the procedure, and the process of law reform by Law Commissions, if its membership remains reasonably steady throughout a parliamentary session. On the other hand a House of Lords committee may bring genuine subject expertise to bear from the beginning, enabling it to mount effective challenges to the proposed legislation. The committee also engages in line-by-line scrutiny of the Bill even in its unamended form, whereas in the absence of amendments to the Legal Writings Bill at Stage 2 the DPLRC did not consider, or indeed ask its witnesses at Stage 1, whether the specific wording did actually give effect to the policies and principles being put to them by the Government and the Scottish Law Commission.

The existence of the process is also affecting the way in which we in the Scottish Law Commission are thinking about our law reform projects for the future. While traditionally we have gone for large and substantial projects, the future may see a lessening of that in favour of smaller reforms that have a chance of getting through the DPLRC, given that it has other business to which it must attend. This is why the question of the scale of the Bills with which the Committee can deal is so important. Another example of a big and important Bill besides Judicial Factors can be found in the 2014 Report on Trust Law, in which the draft Bill has 82 sections and two (short) schedules.⁷⁹ Seemingly broadly supported within the legal and financial sectors in Scotland, it would be a pity if its implementation had to wait for a suitable slot in the ordinary parliamentary timetable simply because it was too large to be dealt with in the DPLRC procedure. It would also be unfortunate if the Commission were to be deterred from taking on systematic overhauls of the law such as have in the past been successfully carried through, like the reform of land law and land registration. Some of these issues might be resolved if Nigel Don's attractive idea of the Committee having responsibility for private law in general were to be taken further; but this may be too like reverting to the structure of two Justice Committees that prevailed between 2003 and 2007 to have much appeal for the Parliamentary authorities.

⁷⁸ See above, text accompanying note 6.

⁷⁹ *Report on Trust Law*, Scot Law Com No 239, 2014.

With the Legal Writings Bill, the Commission has also found itself more in the business of “selling” its recommendations both before and now after passage of the Bill. Aware of the need to ensure at least majority stakeholder consensus, the Commission team gave numerous presentations on the proposed Bill at professional CPD and other events in the run-up to, and course of, the parliamentary stages. Since the passage of the Bill, the Commission has also engaged with a reaction triggered by Annabel Goldie’s remark in the Stage 3 debate already quoted, to the effect that practice guidance notes on the Act would be necessary to ensure that practitioners did not go wrong in applying it.⁸⁰ The comment, made in the context of Ms Goldie’s concern about the likelihood of fraud and error, has been taken up by a group of the commercial law firms who will be amongst the most regular users of execution in counterpart. The group has put together a mutually agreed protocol on how to apply the Act in the execution of documents, and sought the Commission’s (readily given) advice in its discussions.⁸¹ The Commission team has also prepared articles and comments for professional journals with the aim of helping practitioners in general to understand the Act and the steps needed to make proper use of it.⁸² The hope is to help develop a professional consensus as to how the Act works and indeed should work. That should at least reduce the possibility of error, even if it will not stop those determined to commit fraud. A measure of the success of these efforts will be the number – or rather lack – of cases about the Act coming into court.

Opening the Stage 3 debate on the Legal Writings Bill, Fergus Ewing MSP, the responsible Minister, opined that “we are creating a piece of history today, albeit one that I suspect will appear in the minor footnotes rather than the front pages or forewords”.⁸³ While in general that is probably a fair assessment, the new procedure has created interest abroad, as could be seen at the conference of the Commonwealth Association of Law Reform Agencies (CALRAs) held in Edinburgh in

⁸⁰ See above, text accompanying note 61.

⁸¹ See Ann Stewart, ‘Are You Ready for Counterpart Signing?’ (2015) 60(7) *Journal of the Law Society of Scotland* 33 (accessible at www.journalonline.co.uk/Magazine/60-7/1020522.aspx). In August 2015 the Law Society of Scotland also prepared a practice note update on the application of the Act to conveyancing missives, accessible only online: see www.lawscot.org.uk/members/member-services/professional-practice/professional-practice-updates/#Electronic.

⁸² Scottish Law Commission, ‘Writings Redefined’ (2015) 60(3) *Journal of the Law Society of Scotland* 4, published in full online only at www.journalonline.co.uk/Magazine/60-3/1019015.aspx); Hector MacQueen, Charles Garland and Lauren Smith, ‘The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015’, 2015 SLT (News) 111.

⁸³ Official Report, 24 February 2015, col 8 (above note 52).

April 2015, and again at the conference marking the fiftieth anniversary of the Law Commissions held at the UK Supreme Court in London in July the same year.⁸⁴ The first steps under the new Scottish Law Commission Bill procedure have certainly shown that it has at least some wider significance for the Scottish Parliament and legal system. The Parliament has manifested cross-party acceptance of the significance of its non-political role as the principal guardian of the well-being of the legal system. Scotland is a small legal system. Despite the strength of its common law, or precedent-based, dimensions, it simply does not generate enough cases to permit judicial development of the law to meet changing social and economic conditions, even if the judges felt inclined to try and do so. Legislation therefore provides the likeliest way forward. But it is critical that the legislation is as well prepared as it possibly can be; otherwise the cure may be worse than the disease. It is thus also significant that perceptions of the value of the Scottish Law Commission have been further enhanced by a legislative procedure bringing its nature to the attention of a widening group of MSPs and others. The possibilities, if daunting in a time of ever-dwindling resources, are also exciting.

⁸⁴ For the CALRAs conference, see <http://www.scotlawcom.gov.uk/calras-conference-on-law-reform/>; for the London conference (the proceedings of which will be published by Hart Publishing in due course), see <http://www.kcl.ac.uk/law/newsevents/eventrecords/Fifty-Years-of-the-Law-Commissions-the-Dynamics-of-Law-Reform-Now,-Then-and-Next.aspx>.