



The Scottish Parliament  
Pàrlamaid na h-Alba

Passage of the

**Legal Writings  
(Counterparts and Delivery)  
(Scotland) Bill 2014**

SPPB 213

For information in languages other than English or in alternative formats (for example Braille, large print, audio tape or various computer formats), please send your enquiry to Public Information, The Scottish Parliament, Edinburgh, EH99 1SP.

You can also contact us by email [sp.info@scottish.parliament.uk](mailto:sp.info@scottish.parliament.uk)

We welcome written correspondence in any language

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website  
[www.scottish.parliament.uk](http://www.scottish.parliament.uk)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on  
the Scottish Parliament website at: [www.scottish.parliament.uk/documents](http://www.scottish.parliament.uk/documents)



The Scottish Parliament  
Pàrlamaid na h-Alba

Passage of the  
Legal Writings (Counterparts and Delivery) (Scotland)  
Bill 2014

SP Bill 50 (Session 4), subsequently 2015 asp 4

SPPB 213





## Contents

### Foreword

#### *Introduction of the Bill*

Bill (As Introduced) (SP Bill 50)	1
Explanatory Notes (and other accompanying documents) (SP Bill 50–EN)	9
Policy Memorandum (SP Bill 50–PM)	20
Delegated Powers Memorandum (SP Bill 50–DPM)	31

#### *Stage 1*

Stage 1 Report, Delegated Powers and Law Reform Committee	35
Oral evidence to Delegated Powers and Law Reform Committee (Annexe B to Stage 1 Report)	76
Written evidence to Delegated Powers and Law Reform Committee (Annexe C to Stage 1 Report)	78
Written evidence from Scottish Law Commission, 10 June 2014	205
Report on Delegated Powers, Delegated Powers and Law Reform Committee	221
Written submissions to Finance Committee	227
Scottish Government response to the Stage 1 Report, 19 November 2014	234
Extracts from the Minutes of the Parliament, 25 November 2014	236
Official Report, Meeting of the Parliament, 25 November 2015	237

#### *Stage 2*

Extract from the Minutes, Delegated Powers and Law Reform Committee, 20 January 2015	253
Official Report, Delegated Powers and Law Reform Committee, 20 January 2015	254

#### *Stage 3*

Extract from the Minutes of the Parliament, 24 February 2015	255
Official Report, Meeting of the Parliament, 24 February 2015	256



## Foreword

### *Purpose of the series*

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

### *Outline of the legislative process*

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;

- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the *Guidance on Public Bills* published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament's website ([www.scottish.parliament.uk](http://www.scottish.parliament.uk))

The series is produced by the Legislation Team within the Parliament's Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

#### *Notes on this volume*

The Bill to which this volume relates was the first Bill to be considered as a Scottish Law Commission Bill (see Rule 9.17A of the Parliament's Standing Orders) by the Delegated Powers and Law Reform Committee. More information about this type of Bill can be found at paragraphs 4 to 10 of the Stage 1 Report contained in this volume. Scottish Law Commission Bills are, however, still subject to the normal 3 stage process described above.

A piece of written evidence provided to the Delegated Powers and Law Reform Committee by the Scottish Law Commission prior to the Committee hearing oral evidence from the Commission on 17 June 2014 was not included in the Stage 1 Report as originally published, but is included in this volume (after the Stage 1 Report and the oral and written evidence listed in Annexes B and C to that Report).

No amendments were lodged at either Stage 2 or Stage 3 and so no Marshalled List or Groupings of amendments were produced. This also meant that neither an As Amended at Stage 2 print nor As Passed print of the Bill was produced. The material included in this volume for Stages 2 and 3 therefore consists solely of the relevant minute and Official Report extracts.

# Legal Writings (Counterparts and Delivery) (Scotland) Bill

[AS INTRODUCED]

---

## CONTENTS

### Section

#### *Execution of documents in counterpart*

- 1 Execution of documents in counterpart
- 2 Nomination of person to take delivery of counterparts
- 3 Use of counterparts: electronic documents

#### *Delivery of traditional documents by electronic means*

- 4 Delivery of traditional documents by electronic means

#### *Final provisions*

- 5 Ancillary provision
- 6 Commencement
- 7 Short title



## ACCOMPANYING DOCUMENTS

Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 50-EN. A Policy Memorandum is printed separately as SP Bill 50-PM.

# Legal Writings (Counterparts and Delivery) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about execution of documents in counterpart and the delivery by electronic means of traditional documents; and for connected purposes.

*Execution of documents in counterpart***1 Execution of documents in counterpart**

- 5 (1) A document may be executed in counterpart.
- (2) A document is executed in counterpart if—
- (a) it is executed in two or more duplicate, interchangeable, parts, and
  - (b) no part is subscribed by both or all parties.
- (3) On such execution, the counterparts are to be treated as a single document.
- 10 (4) That single document may be made up of—
- (a) both or all the counterparts in their entirety, or
  - (b) one of the counterparts in its entirety, collated with the page or pages on which the other counterpart has, or other counterparts have, been subscribed.
- (5) A document executed in counterpart becomes effective when—
- 15 (a) both or all the counterparts have been delivered in accordance with subsection (6) or (7), and
- (b) any other step required by an enactment or rule of law for the document to become effective has been taken.
- (6) Each counterpart is to be delivered to the party or parties who did not subscribe the counterpart in question unless it is a counterpart which falls to be delivered under subsection (7).
- 20 (7) If a party has, under section 2(1), nominated a person to take delivery of one or more counterparts, the counterpart in question is (or counterparts in question are) to be delivered to that person.
- 25 (8) Subsection (5) is subject to subsection (9).

- (9) Where a counterpart is to be held by the recipient as undelivered, the counterpart is not to be treated as delivered for the purposes of subsection (5)(a) until—
- (a) the person from whom the counterpart is received indicates to the recipient that it is to be so treated, or
  - (b) if a specified condition is to be satisfied before the counterpart may be so treated, the condition has been satisfied.

## 2 Nomination of person to take delivery of counterparts

- (1) Parties to a document executed in counterpart may nominate a person to take delivery of one or more of the counterparts.
- (2) Subsection (1) does not prevent one of the parties, or an agent of one or more of the parties, being so nominated.
- (3) A person so nominated must, after taking delivery of a counterpart by virtue of subsection (1), hold and preserve it for the benefit of the parties.
- (4) Subsection (3) does not apply in so far as the parties may agree, or be taken to have agreed, otherwise (whether before or after the document has effect).
- (5) A document's having effect is not dependent on compliance with subsection (3) or (4).

## 3 Use of counterparts: electronic documents

- (1) Sections 1 and 2 apply to traditional documents and electronic documents.
- (2) In section 1 any reference to subscription is to be read, in the case of an electronic document to which section 1(2) of the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act") applies, as a reference to authentication of the electronic document within the meaning of section 9B of the 1995 Act.
- (3) In this section—
- "electronic document" has the meaning given by section 9A of the 1995 Act,
  - "traditional document" has the meaning given by section 1A of the 1995 Act.

### *Delivery of traditional documents by electronic means*

## 4 Delivery of traditional documents by electronic means

- (1) This section applies where there is a requirement for delivery of a traditional document (whether or not a document executed in counterpart).
- (2) The requirement may be satisfied by delivery by electronic means of—
- (a) a copy of the document, or
  - (b) a part of such a copy.
- (3) But the requirement may be satisfied by delivery of a part of such a copy only if the part—
- (a) is sufficient in all the circumstances to show that it is part of the document, and
  - (b) is, or includes, the page on which the sender (or the person on whose behalf the sender has effected the delivery) has subscribed the document.



(4) Delivery under subsection (2) must be by a means (and what is delivered must be in a form) which the intended recipient has agreed to accept (the “accepted method”), unless subsection (5) applies.

(5) If—

- (a) no accepted method has been agreed,
- (b) there is uncertainty about the accepted method, or
- (c) the accepted method is impracticable,

delivery may be by such means (and in such form) as is reasonable in all the circumstances.

(6) Although delivery by electronic means constitutes effective delivery in relation to a traditional document, what is received by that means is not to be treated as being the traditional document itself.

(7) A traditional document, in relation to which delivery by electronic means has been effected, is to be held by the sender in accordance with whatever arrangements have been made by the sender and the recipient (or, if there is a number of recipients, have been made by the sender and the recipients as a group).

(8) Any reference in subsection (7) to a recipient is to be construed, in a case where a person takes delivery by virtue of section 2(1), as a reference to the parties who nominated that person.

(9) In this section, references to delivery by electronic means are to delivery—

- (a) by means of an electronic communications network (for example as an attachment to an e-mail),
- (b) by fax,
- (c) by means of a device on which the thing delivered is stored electronically (such as a disc, a memory stick or other removable or portable media), or
- (d) by other means but in a form which requires the use of electronic apparatus by the recipient to render the thing delivered intelligible.

(10) In this section—

“electronic communications network” has the meaning given by section 32 of the Communications Act 2003,

“traditional document” has the meaning given by section 1A of the 1995 Act.

### *Final provisions*

## **5 Ancillary provision**

(1) The Scottish Ministers may by order make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

(3) An order under subsection (1) is subject to the negative procedure, unless subsection (4) applies.

(4) An order under subsection (1) which adds to, replaces or omits the text of an Act is subject to the affirmative procedure.

**6 Commencement**

- (1) Section 5, this section and section 7 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
- (3) An order under subsection (2) may include transitional, transitory or saving provision.

**7 Short title**

The short title of this Act is the Legal Writings (Counterparts and Delivery) (Scotland) Act 2014.



# **Legal Writings (Counterparts and Delivery) (Scotland) Bill**

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about execution of documents in counterpart and the delivery by electronic means of traditional documents; and for connected purposes.

Introduced by: John Swinney  
On: 14 May 2014  
Bill type: Government Bill

# **LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL**

---

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Legal Writings (Counterparts and Delivery) (Scotland) Bill introduced in the Scottish Parliament on 14 May 2014:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government statement on legislative competence; and
- the Presiding Officer's statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 50–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

### **THE BILL – OVERVIEW**

3. Execution in counterpart is the process whereby each of the parties to a document signs (“executes”) a separate physical copy of it and all then exchange the resultant copies so that each ends up with a set of each of the copies signed by the other parties. The aim is to create a legally enforceable document rather than having to arrange for all parties to meet together for each to sign the same document. The Bill provides a clear framework by which a document executed in counterpart will be effective under Scots law. The Bill also creates a mechanism to enable documents created on paper (referred to in the Bill as “traditional documents”) to be regarded as delivered by electronic means for legal purposes such as concluding a contract. The Bill implements the legislative recommendations in the Scottish Law Commission (SLC) report Review of Contract Law – Report on Formation of Contract: Execution in Counterpart<sup>1</sup>, which was published in April 2013 (“the SLC Report”).
4. The Bill has 7 sections with the following key provisions:
  - execution in counterpart is confirmed as an optional process for validly signing (“executing”) documents;
  - where execution in counterpart is used, the counterparts are treated as a single document;
  - parties may either deliver their counterpart to each other party to the transaction, or nominate a person to take delivery of all counterparts but the Bill requires delivery in some form to complete the effective execution of a document in counterpart;
  - a copy of a document created on paper (whether or not executed in two or more counterparts) may be delivered for legal purposes by electronic means such as email or fax;
  - delivery by electronic means of a document created on paper need not be constituted by delivery of the whole document (including, where the document is a counterpart, delivery of the whole counterpart): part of the document may be delivered, providing this is sufficient on its own terms to show that it is part of the document and comprises at a minimum the page on which the sender has subscribed the document.

---

<sup>1</sup> [http://scotlawcom.gov.uk/index.php/download\\_file/view/1149/138/](http://scotlawcom.gov.uk/index.php/download_file/view/1149/138/)

## **THE BILL – COMMENTARY ON SECTIONS**

### **Execution of documents in counterpart**

#### *Section 1: Execution of documents in counterpart*

5. As set out in Chapter 2 of the SLC Report, it is possible to argue that Scots law already recognises the possibility of execution in counterpart. However the argument is dependent on eighteenth-century sources, and is not widely accepted within the legal profession. Subsection (1) therefore confirms the validity of executing documents in counterpart under Scots law. However, execution in counterpart is an optional process and existing methods of signing multi-party documents, such as gathering the parties together to sign a single version of the document, remain valid. Subsection (2) sets out what is meant by “execution in counterpart”. It provides that where a document is to be signed by more than one party, it will be validly executed in counterpart under Scots law if one party subscribes (i.e. signs in the appropriate place) its own copy (“counterpart”) of the document and the second party subscribes another counterpart (and so on), provided that each counterpart is a duplicate which is otherwise interchangeable with the others. Each counterpart may be signed in different locations and at different times though, in practice, counterparts are likely to be signed close in time to one another.

6. Subsection (3) provides that, once executed, the counterparts are deemed to form a single document. Subsection (4) provides that the single document may be made up of both or all the counterparts but also may be made up of a collated version of one entire counterpart together with the page or pages on which the other counterpart or counterparts have been subscribed. This has advantages for registration purposes, as explained in Chapter 3 of the SLC Report. For example, if there is a document to be executed by 5 parties, each of whom subscribe their own counterpart in self-proving form (i.e. before a witness who also signs), then that document can be registered in the Books of Council and Session as a collated version of one of the counterparts in its entirety and the subscription pages of the other 4 counterparts. Such an approach makes both registration and searching of the register more straightforward.

7. Subsection (5) specifies when a document executed in counterpart becomes effective. A document executed in counterpart becomes effective upon delivery in accordance with the delivery requirements under either subsection (6) or (7). Where the document is a traditional document, delivery by electronic means under section 4 (see paragraph 19 below) is also an option. “Delivery” is the term used in law to describe the step which the granter of a document may be required to take before he or she becomes bound by the document’s terms. In the common law this has usually been taken to mean when the granter transfers possession to the grantee with the requisite intention that the document thereby becomes binding or enforceable.

8. Subsection (5) requires delivery of both or all of the counterparts without spelling out what constitutes delivery. This is left to the existing law save insofar as modified by the Bill. The only modification in that regard is in section 4, which makes it clear that, where a traditional document is delivered by electronic means, this can be done by delivery of a part of the document (including a counterpart) by fax, email, etc. provided it satisfies section 4(3).

9. Subsection (5)(b) is a reminder that any additional requirements under the current law (whether under the common law or statute) which are needed for a particular class of document

to become effective continue to apply. For example, the law requires that a document containing a guarantee must be delivered to the beneficiary before it is effective. So, if two co-guarantors execute the guarantee in counterpart, it does not take effect until each party delivers its counterpart to the other and, in addition, the counterparts (or a single document made up of or from the counterparts, as described above at paragraph 6) are also delivered to the beneficiary.

10. Subsection (6) imposes a requirement that a counterpart must be delivered to every other party to the document whose signature is not on that counterpart. Section 2 of the Bill allows a party to nominate a person to take delivery of one or more counterparts. Where that has happened, subsection (7) requires the counterpart to be delivered to the nominee instead. In this way, execution in counterpart is subject to the existing requirement of Scots law that a written document must generally be delivered before it can become obligatory. That general requirement is not altered in any way; rather, an additional class of writing (i.e. documents executed in counterpart) is brought within its scope.

11. Subsections (8) and (9) make clear that parties may control the date and time at which their counterpart is to be treated as delivered (i.e. will become legally effective) so that this could be a later time than the point at which possession is transferred to the party or parties to whom it must be delivered. Existing Scots law permits this for documents executed in another way and that law remains unchanged. This is in keeping with the general policy in the Bill of allowing parties the greatest amount of freedom to make their own arrangements as is consistent with the minimum requirements of the law. Subsection (9) states that, where the sender of a counterpart indicates that, when received, it is to be held as undelivered, then it is not to be treated as delivered on receipt. Instead, the sender of the counterpart may specify at what future time the counterpart is to be treated as delivered, or may specify that delivery will occur when some specified condition has been fulfilled.

## *Section 2: Nomination of person to take delivery of counterparts*

12. This section makes provision for the scenario where parties wish to nominate a person to administer the execution of their document. Such a scenario is most probable where a document is to be signed by multiple parties (who would otherwise have to deliver a signed counterpart to every other party) and has been negotiated with the input of legal advisers. In this scenario, it is common for the legal adviser to one of the parties to act as administrator for the signing process. That person will send out the agreed documentation and collect back the subscribed counterparts. In order to remove any doubt as to the efficacy of such an arrangement, subsection (1) provides that parties may nominate a person to take delivery of the counterparts (or certain of the counterparts). Subsection (2) provides that that person may be a party to the document or an agent (e.g. solicitor) acting on behalf of a party to the document but this is not a requirement.

13. Subsection (3) sets out the duties of a person who is nominated to take delivery of counterparts. The nominee must hold and preserve what has been delivered, and must do so for the benefit of the parties involved. Subsection (4) provides that this is subject to any alternative arrangement made by parties. For example, parties might agree that the nominee is to advise parties of the successful delivery of all required counterparts or to forward what has been delivered to one of the parties. These provisions allow parties to make whatever arrangements they consider most suitable and ensure that, in the absence of any agreement, the delivered counterpart or counterparts will be held safely. If what is delivered contains a wet ink signature,



then there is utility in the recipient (who may not be a party to the document) being obliged to hold the counterpart pending further instruction, for example to collate the counterparts in order to produce a single document for registration purposes. If what is delivered is an electronic copy of a signed traditional document, for example in the form of a PDF file or a fax, then there may also be utility in holding that pending further instruction; for example, because the time of its delivery may determine the point at which the document becomes effective.

14. Subsection (5) clarifies that a nominee's failure to meet the obligations under subsection (3) or (4) does not alter the effectiveness of a document's execution. In other words the document has its intended legal effect, even if the nominee's non-compliance with the duty to hold and preserve the counterparts makes it more difficult to prove such things as delivery.

### *Section 3: Use of counterparts: electronic documents*

15. Section 3 provides that sections 1 and 2 apply to both traditional and electronic documents. References to execution in section 1 therefore mean execution of a traditional document or an electronic document. This means it is competent to execute an electronic document (by means of an electronic signature) in counterpart and, if desired, to nominate a person to take delivery of the counterparts. It also follows that it is competent for a document to be signed in various counterparts some by electronic signature and some in wet ink. However, given that Part 3 of the Requirements of Writing (Scotland) Act 1995 as inserted by section 97 of the Land Registration etc. (Scotland) Act 2012, provides for execution of electronic documents by electronic signature, it is unlikely that execution in counterpart will be used frequently for transactions where the parties deal entirely in electronic documents as parties can simply apply their electronic signature to the agreed electronic document wherever it is. Execution in counterpart does not provide any advantage in this scenario. However, in applying sections 1 and 2 to electronic documents, section 3 covers the mixed situation noted above where some parties execute their counterpart on paper and others apply an electronic signature to the counterpart sent to them and return that to the nominee.

16. Subsection (2) provides that where the electronic document is one that requires to be in writing under section 1(2) of the Requirements of Writing (Scotland) Act 1995 (writing required for certain contracts, obligations, trusts, conveyances) the references to subscription of the counterpart in section 1 mean that it must be subscribed according to the standards of authentication for those documents set out in section 9B of the Requirements of Writing (Scotland) Act 1995. Section 9B(2) sets out that the electronic signature must, amongst other matters, meet prescribed requirements. The Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) prescribe that it must be an advanced electronic signature.

17. For electronic documents that do not require to be in writing it remains for parties to determine what level of electronic signature should be sufficient to constitute subscription of the counterpart.

18. If parties nevertheless choose to authenticate an electronic document that does not require to be in writing in accordance with section 9C of the Requirements of Writing (Scotland) Act 1995, they will get the benefit of the document having self-proving status. However, such a standard of electronic signature is not necessary for the valid execution in counterpart of an electronic document under section 1 of this Bill.

## **Delivery of traditional documents by electronic means**

### *Section 4: Delivery of traditional documents by electronic means*

19. Section 4 establishes a new mechanism to deliver a “traditional document” (i.e. one created on paper), namely by sending a copy or a part of a copy by electronic means, for example by email or fax. As already mentioned above, delivery is the term used to describe the step which the granter of a document may be required to take in order to become bound by the document’s terms. This section adds to the existing Scots law on delivery by establishing that a traditional document may now be effectively delivered for legal purposes by sending a copy of it or a part of a copy by electronic means. The present requirement for delivery as further elaborated in section 1(5) and (6) for counterparts (see paragraph 7 above) continues to apply as well. Parties who wish for registration or other purposes to assemble a collated version of a document executed in counterpart may do so after delivery of copies of the counterparts (or part of each counterpart) by electronic means, although the person carrying out the assembly will have to gather in the pages actually signed by the parties in order to attach them to that version, as the electronically transmitted copies will be insufficient for that purpose.

20. Subsection (1) provides that this section applies to all traditional documents that require to be delivered for legal effect regardless of whether they are executed in counterpart or not. This means, for example, that missives will be capable of delivery by fax or email. Separately to this Bill, electronic documents are deliverable electronically under section 9F of the Requirements of Writing (Scotland) Act 1995 under the Land Registration etc. (Scotland) Act 2012 (Commencement No. 2 and Transitional Provisions) Order 2014 (SSI 2014/41).

21. Subsection (2) provides that the requirement for delivery of a traditional document may be satisfied by delivery by electronic means of a whole or part of a copy of the traditional document. Subsection (3) further provides that, if only part of the document is delivered electronically, there are two conditions which must be met: firstly, it must be clear from what is delivered that it is part of the document which has been subscribed and, secondly, it must contain, as a minimum, the page with the subscription. The SLC Report noted that best practice would be to use PDFs to avoid any argument that different layout or pagination through different word processing versions does not constitute a copy.

22. Subsection (4) permits parties to come to an arrangement between themselves both as to the electronic means of delivery (for example, by fax or by PDF file attached to an email) and also as to the format of the delivery, for example, whether the whole or just a part of the document is to be delivered. By subsection (5), where no such arrangement has been made, or where the arrangement is uncertain or impracticable at the time of delivery, then the means of delivery and the question of what is to be delivered will be whatever is reasonable for the recipient to receive, viewed objectively in all the circumstances. This provision is drafted from the perspective of the party about to effect delivery so what matters is what is practicable at the time of delivery, not what was practicable when an arrangement was made. An example might be where it has been agreed that delivery will be by email but the recipient is left by supervening events such as travel delay or computer system failure in a place with access to a fax but not email. In this way, priority will be given to whatever arrangements parties reach amongst themselves with the possibility of fall-back arrangements should the need arise. Subsection (6) clarifies that the status of what the recipient receives following delivery by electronic means is not the executed traditional document and so cannot, for example, be registered. For those

purposes, it will remain the case that either a fully electronic document has to be sent and received or a traditional document with wet ink signatures physically delivered.

23. Subsection (7) provides that, once a person has sent a counterpart or copy document by electronic means and therefore still retains the original traditional document, that person holds the wet ink version in accordance with whatever arrangements parties have made. For example, if the document is to be registered then it is likely that parties will agree that the version or versions with wet ink signatures are to be ingathered for that purpose. In other cases, parties may be content that the sender simply holds the wet ink version for a time and then disposes of it if no call has been made for it. The Bill is not prescriptive about this; it is up to parties to decide what is best for their needs.

24. Subsection (8) modifies subsection (7) to take account of the situation where parties have nominated a person under section 2 to take delivery of counterparts. In that case, subsection (7) is to be read as if the “recipients” were those who made the nomination.

25. Subsection (9) lists the methods of delivery which constitute delivery by “electronic means”. Paragraphs (a) to (c) list specific methods of electronic transmission and paragraph (d) provides for other cases, having the possibility of future technological developments in mind.

26. The definition in subsection (10) of “traditional document” refers to a provision of the Requirements of Writing (Scotland) Act 1995 which was inserted by paragraph 2 of schedule 3 to the Land Registration etc. (Scotland) Act 2012 on 11 May 2014: see Part 3 of the schedule to the Land Registration etc. (Scotland) Act 2012 (Commencement No. 2 and Transitional Provisions) Order 2014. This provision defines traditional documents as those “written on paper, parchment or some similar tangible surface”.

## **General**

### *Sections 5 to 7: Ancillary provision, commencement and short title*

27. Section 5 provides that the Scottish Ministers may exercise various ancillary powers by order to give full effect to the Bill.

28. Section 6 provides that sections 5 to 7 come into force the day after Royal Assent. The Scottish Ministers may make a commencement order bringing the remaining provisions of the Bill into force on a day they specify in the order. A commencement order may include transitional, transitory or savings provisions. The changes to the law are not retrospective. The Bill will not affect documents already executed or delivered before it comes into force. The current law will continue to apply to those documents, and the argument that counterpart execution was recognised from the eighteenth century on (see paragraph 5) will remain open for consideration if ever necessary.

29. Section 7 provides the short title, which is the name by which the Bill if enacted may be cited.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Financial Memorandum relates to the Legal Writings (Counterparts and Delivery) (Scotland) Bill (“the Bill”). It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Scottish Parliament’s Standing Orders. It does not form part of the Bill and it has not been endorsed by the Scottish Parliament. The Memorandum summarises the cost implications of the Bill.

2. The Scottish Government has a track record of supporting sustainable economic growth and business competitiveness. We want to ensure that Scotland is an attractive place for business. The reforms contained in the Bill will promote business and economic growth and modernise Scots law.

3. The purpose of the Bill is to provide a clear framework by which parties may “execute a document in counterpart” under Scots law and to provide a mechanism to enable documents created and signed on paper to be delivered for legal purposes by electronic means.

### **OVERVIEW OF THE BILL**

4. The following sets out the main provisions in the Bill:

- execution in counterpart is confirmed as an optional process for validly signing (“executing”) documents;
- where execution in counterpart is used, the counterparts are treated as a single document;
- parties may either deliver their counterpart to each other party to the transaction, or nominate a person to take delivery of all counterparts but the Bill requires delivery in some form to complete the effective execution of a document in counterpart;
- a copy of a document created on paper (whether or not executed in two or more counterparts) may be delivered for legal purposes by electronic means such as email or fax;
- delivery by electronic means of a document created on paper need not be constituted by delivery of the whole document (including, where the document is a counterpart, delivery of the whole counterpart): part of the document may be delivered, providing this is sufficient on its own terms to show that it is part of the document and comprises at a minimum the page on which the sender has subscribed the document.

5. There are no financial or resource implications. The Bill would enable business to be conducted more efficiently: executing a document in counterpart is likely to be cheaper and quicker than existing practices, and delivering a signed document by electronic means will also be quicker and cheaper than existing methods of delivery.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

6. The proposals are not thought to have the potential to result in any costs to the Scottish Administration other than those associated generally with the enactment of any new legislation, for example, printing and publication and these are regarded as routine running costs rather than being attributable to the Bill.

## **COSTS ON LOCAL AUTHORITIES**

7. We do not anticipate any costs related to the proposals to be borne by local authorities. The proposals update Scots law generally, and are not of particular relevance to any part of Scotland or any local authorities. However, local authorities, as with all public sector bodies, will be able to use the Bill provisions too and therefore may also benefit from the efficiencies and minor savings generated.

## **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

8. No significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. The usual costs of raising awareness may also be borne by others operating in the legal profession, for example Registers of Scotland staff. However, these types of cost result from any reform of the law. In the case of the Bill, we believe that these costs would be very small and would be more than offset by the financial benefits and furthered policy objectives which would be gained by bringing the Bill into force.

9. As an indication of the sorts of financial benefits which may be generated, we have set out below some of the financial modelling carried out by the Scottish Law Commission as part of the Business and Regulatory Impact Assessment process<sup>1</sup>.

**Table One:** Example transaction of a multi-party agreement, with 8 parties located in different offices in different cities

<b>Round Robin</b>	<b>Signing Ceremony</b>	<b>Execution in Counterpart</b>
Postage/courier costs of £150	Travel and accommodation costs £264 to £1096	£0 postage costs if delivered electronically £41.30 if posted to a nominee

10. To take the top-end estimated saving of £1096 per transaction this would translate to £19,728 per annum for a mid-sized law firm involved in the completion of 18 deals. These savings calculations do not include the costs attributable to expenses, subsistence, sundry travel, administrative costs of organising a signing ceremony or the signing parties' lost hours spent travelling.

<sup>1</sup> [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/1153/329/](http://www.scotlawcom.gov.uk/index.php/download_file/view/1153/329/)

11. Where a client's representative(s) travel to the signing ceremony, the savings would be significantly higher as the representative(s) wages and expenses would also have to be met.
12. The benefits of these savings would be keenly felt by smaller companies and sole traders because the smaller the value of the transaction, the greater the costs of a signing ceremony will be as a proportion of the overall profit of such a business.

*These documents relate to the Legal Writings (Counterparts and Delivery) (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 14 May 2014*

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

On 14 May 2014, the Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney MSP) made the following statement:

“In my view, the provisions of the Legal Writings (Counterparts and Delivery) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

---

## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

On 14 May 2014, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Legal Writings (Counterparts and Delivery) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

# **LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL**

---

## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Legal Writings (Counterparts and Delivery) (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 14 May 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 50–EN.

### **POLICY OBJECTIVES OF THE BILL**

#### **Summary**

2. There are two principal policy aims of the Bill, namely:
- (1) to provide a clear framework by which parties may “execute a document in counterpart” under Scots law; and
  - (2) to provide a mechanism to enable documents created and signed on paper (“traditional documents”) to be delivered for legal purposes by electronic means.
3. In this way the Bill implements all of the legislative recommendations contained in the Scottish Law Commission (“SLC”) Report on Formation of Contract: Execution in Counterpart (SLC No 231; April 2013)<sup>1</sup>. The Report was published as part of the SLC’s review of contract law.<sup>2</sup> Greater detail as to the legal and practical issues which informed the Bill are set out in the Report and also in the preceding SLC Discussion Paper on Formation of Contract (DP No 154; March 2012), both of which are available on the SLC’s website.<sup>3</sup>

---

<sup>1</sup> [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/1149/138/](http://www.scotlawcom.gov.uk/index.php/download_file/view/1149/138/). Those recommendations not being implemented (21 to 25) relate to Chapter 4 Electronic Document Repositories and do not require to be implemented through legislation. They will be considered by the Scottish Government in due course.

<sup>2</sup> <http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/>

<sup>3</sup> <http://www.scotlawcom.gov.uk/publications/>



## **Execution in counterpart**

4. Execution in counterpart is the process whereby parties to a document sign separate copies of it and exchange them to create a legally enforceable document rather than having to arrange for all of them to sign the same document. They do so by each signing their own copy, or counterpart, of the agreement, and then exchanging these signed copies so that each party has signed copies of all the other parties' counterparts. In the words of an international commercial law firm's website, it is "when a party signs a separate physical copy of a document to the physical copy signed by the other party (or parties) to the contract. This is in contrast to where the same physical document is signed by all parties".<sup>4</sup> Execution in counterpart is well recognised in English law as well as many other common law jurisdictions including New Zealand, Australia and the United States of America. The Bill provides for execution in counterpart of electronic as well as traditional documents but this process is far more likely to be used in relation to traditional documents, especially where the intention is to register the document. Given that Part 3 of the Requirements of Writing (Scotland) Act 1995 now allows parties to apply electronic signatures to an electronic document with legal effect for most documents, execution in counterpart will not usually be needed in purely electronic transactions.

5. As the quotation above makes clear, an alternative method of execution (or signing) is for all parties or their representatives to sign a single document (or, more typically, multiple copies of the document, each of which is signed by all parties). Under this method, parties or their representatives must either all meet up at the same time and place in order to sign the document (an event which is often called a "signing ceremony") or they may sign at different times, and probably in different geographical locations, typically sending the document from party to party until it contains all parties' signatures (the "round robin" method). By contrast, where a document is executed in counterpart there is no need for parties to meet together (thus avoiding what might be seen as the inconvenience of the signing ceremony) nor does one party have to wait for another party to deliver a partially signed document (thus avoiding the inconvenience of the round robin). In other words, signing in counterpart allows for execution of a document intended to have legal effect amongst two or more parties without the parties having to meet together to sign and without them having to collect signatures by circulating a master copy of the document. In consequence, execution in counterpart is now in common use in the commercial world.

6. There is, however, currently a great deal of uncertainty amongst Scots law practitioners as to whether a document can be validly executed in counterpart under Scots law. For example, a news item dated November 2012 on the website of the law firm Lindsays states: "*Most importantly, you should note that signing in counterpart is not a valid method of signing under Scots law. If the relevant agreement is subject to Scots law ... then all parties must sign the same copy of the agreement in order for it to be validly signed.*"<sup>5</sup>

---

<sup>4</sup> Downloadable from

[http://www.cliffordchance.com/briefings/2012/09/boilerplate\\_clausesinenglishlawcontracts.html/Boilerplate-Clauses-in-English-Law-Contracts-eng](http://www.cliffordchance.com/briefings/2012/09/boilerplate_clausesinenglishlawcontracts.html/Boilerplate-Clauses-in-English-Law-Contracts-eng)

<sup>5</sup> <http://www.lindsays.co.uk/news-and-features/bulletins/bulletin/corporate-and-technology-bulletin---november-2012/>

7. Parties to a contract are, under Article 3(1) of the Rome I Regulation,<sup>6</sup> able to exercise a choice as to the law which will govern their transaction. The convenience and efficiency of execution in counterpart has led to some Scottish practitioners opting to choose English law rather than Scots law to carry out transactions which are otherwise Scottish in nature. As a particular example of the current difficulties in this regard, Tods Murray LLP said in their response to the SLC's consultation on execution in counterpart that "*The demands of existing Scots law are cumbersome and... lead to transactions being structured around English law (sometimes even with Scots law assets being dropped from the transaction entirely).*" The effect of this is that fewer contracts are subject to Scots law and therefore fewer contracts result in litigation in the Scottish courts or arbitration under Scots law which may lead to a loss of business in Scotland.

8. It is thus clear that this is an area where reform is highly desirable. Reform will not only remove a practical barrier to the use of Scots law in commercial transactions but will also keep Scots law fit for purpose.

9. The Bill therefore establishes the validity of execution in counterpart as a method of creating legally effective documents in Scots law. It also recognises that this mode of execution requires delivery of the various counterparts between all the parties to the transaction. However, in order to prevent this requirement becoming burdensome in multi-party transactions, the Bill also permits the parties to have a nominee who is responsible for taking delivery of counterparts on behalf of all the parties, and who must hold and preserve what is received unless otherwise agreed. Appointment of such nominees (usually a professional person such as a solicitor) is common where execution in counterpart is used. The use of such a person also facilitates proof of delivery if necessary, and the parties may give the nominee other administrative functions in connection with the process if they so wish. The Bill allows but does not require the nominee to be one of the parties or an agent of one of them.

10. The provisions in the Bill that deal with execution in counterpart enable the counterparts to be treated as a single document. The single document can be made up of all of the counterparts in their entirety or one of the counterparts in its entirety with the signature pages of the other counterparts for attachment to the complete counterpart. The latter approach makes both registration and searching of the register more straightforward if the document is registered for preservation and/or execution in the Books of Council and Session. This is of importance in practice, for example where the transaction involves loans or leases of land.

### **Electronic delivery of signed document**

11. Scots law requires some documents to be "delivered" in order to take full legal effect. As already noted, once the Bill comes into force that rule will apply to all counterparts used for execution of an agreement in counterpart. There are various methods of delivery under the current law, the simplest being the handing over of the signed document by the signatory to another person with the intention that the signatory will be legally bound by the terms of the document. Another method is to record the document in a public register. But there is considerable doubt, certainly in respect of documents relating to land, as to whether a signed traditional document is "delivered" if a copy of it is transmitted to the other party or parties by

---

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>

electronic means such as fax or email. In other words, it is uncertain whether such a method of transmission will give rise to the document taking legal effect. The position is different for documents created in electronic form where Part 3 of the Requirements of Writing (Scotland) Act 1995 (“the 1995 Act”) makes provision for electronic delivery.

12. This uncertainty is hugely unsatisfactory for practitioners and others. Even if the uncertainty were to be resolved by an authoritative court decision, as is a possibility, there is no guarantee that it would be resolved in favour of permitting delivery by electronic means. The Bill therefore seeks to provide certainty, by making it clear that a signed traditional document may be effectually delivered by electronic means and by specifying certain minimum conditions which must be met for such effective delivery. What is transmitted will normally be a scanned PDF of the document, which cannot readily be altered.

13. The Bill provides that delivery must be by a means and in the form which the recipient has agreed to accept. If there is no agreement, or there is uncertainty about the agreement or if the accepted method is impracticable then delivery can be by such means as is reasonable in all the circumstances. In this way, priority will be given to whatever arrangements parties reach between themselves with the possibility of fall-back arrangements should the need arise. An example might be where it has been agreed that delivery will be by email but one of the parties is left by supervening events such as travel delay or computer system failure in a place with access to a fax but not email.

14. The policy here differs slightly from what is provided for delivery of full “electronic documents” in the 1995 Act. Section 9F of the 1995 Act provides that delivery of electronic documents is effected electronically or by such other means as are reasonably practicable. The electronic document must be in a form the recipient has agreed to accept or which it is reasonable in all the circumstances for the recipient to accept. The assessment of what is reasonable in the circumstances can therefore override the form that the recipient has agreed to accept. In contrast, the Bill expressly gives priority to any agreement which the parties have reached as to the form and means of electronic delivery of a copy of the traditional document. Only in the absence of agreement, where there is uncertainty about what was agreed or what was agreed is impracticable, is there a need to examine what is reasonable in all the circumstances. This approach was the result of extensive consultation by the SLC on a formula similar to section 9F. Practitioners were concerned that reasonableness might trump or pre-empt what the parties agree. The Bill thus takes account of the concerns expressed on this point.

15. The Bill allows a copy of part only of a document to be delivered by electronic means so long as that includes the page on which the party has signed it and there is sufficient other material – for example in page headers or footers – to show that it is indeed part of the document actually signed. This is in line with what the SLC found to be general commercial practice in those parts of the world where execution in counterpart is already used. It avoids the need to rescan as a PDF the entirety of what is often extremely bulky documentation in which the only change is the application of the relevant signature.

16. The effect of this policy is that if, for example, it was intended to register a document executed in counterpart for preservation in the Books of Council and Session, it would be enough to retain one entire counterpart along with the signature pages of the other counterparts.

However, prior to doing so the single document, comprised of an entire counterpart and the signature page of the other counterparts, must be legally effective which means each counterpart must be delivered to each party or to a nominated party. However, since, as noted above, the Bill also allows electronic transmission of a copy of part of a traditional document to constitute legally effective delivery, it is not necessary for all the counterparts to be transmitted in their entirety for this result to be achieved.

17. The Bill does not make changes to the existing law on delivery in general but rather, as outlined above, it seeks to put it beyond doubt that a requirement for delivery of a traditional document may be met by electronic means. The SLC also gave full consideration as to whether the Bill should cover proof of delivery but decided against it. The preferred approach of the SLC and the Scottish Government has been to leave as much as possible to the control of parties, who – where electronic delivery is concerned – have the technical means to record the timing of an electronic transmission precisely. We would also expect parties to continue to seek confirmation that electronic delivery has been successful which will reduce the likelihood of disputes arising about whether or not effective delivery has occurred. As previously noted, under the Bill parties may also appoint a nominee to take delivery for them all and then to hold and preserve what has been received, thus further facilitating proof of delivery.

18. In the event of a dispute, the law currently takes a principled approach to resolving it by determining objectively whether, and if so when, a document has come under the control of the intended recipient. It is worth noting that we were unable to find a record of any such dispute so far in the courts of each jurisdiction of the United Kingdom. We are clear that the Bill does not create any additional difficulties with the law as it stands. A similar approach to proof of delivery was taken in the Requirements of Writing (Scotland) Act 1995 at section 9F which provides for the delivery of “full” electronic documents but makes no provision to deal with proof of delivery. The Minister for Energy, Enterprise and Tourism wrote to the Law Society of Scotland to ask for their view and the Law Society confirmed that any legislative attempt to specify what amounted to proof of delivery could only establish a presumption and could easily become outdated due to technological developments. Therefore they are in agreement that such matters should remain to be determined by the usual rules of evidence.

19. It is important to note that the general law does not allow the attachment of signature pages to a document which, in however minor a respect, is not the document actually signed by the party. The penalty of such a practice is the ineffectiveness of the document to which the signature page has been wrongfully attached. The burden of proof is on the party claiming the signature page is genuine, unless the document appears to be self-proving. Where a document appears to be self-proving, the burden of proof is on the party claiming that the signature page is not genuine. As stated above, the Bill does not exacerbate any existing difficulties with proof of delivery or the self-proving nature of documents. The Bill also does not prevent a pre-signed signature page being attached to a different document provided that it can be shown that the party concerned clearly authorised or mandated this in advance, or subsequently ratified what had been done with full knowledge of the content of the new document. The Bill does not change the existing position in this respect.

20. In meeting the two principal aims described at paragraph 2, the Bill achieves a number of specific policy objectives.

### **Commercial expediency: savings in time and money**

21. Execution in counterpart serves to reduce unwanted burdens and costs in the process of signing documents to bring them into effect. The saved costs are typically those of travel, time, and accommodation for all the persons concerned if a signing ceremony were to be held. The process is much quicker than the alternatives, particularly in comparison with a “round robin” procedure of circulating documents for signature using the postal system or courier services. Time is often a matter of urgency or significance in commercial matters, and a signing process which is quick and straightforward will bring obvious benefits. By contrast, the current options are likely to be seen as cumbersome and prone to add delay at the critical moment when parties wish to make their agreement final.

22. Allied to this, the choice of being able to deliver a copy of a signed traditional document (whether a counterpart or another document) by electronic means creates efficiency in comparison with other methods of delivery. Given the existence of reliable electronic communications technology and its increasingly common use, offering this method of delivery brings the law into line with general expectations both in the business community and for citizens more generally.

### **Commercial expediency: consistency**

23. Mention was made in paragraphs 5 to 7 above about various ways of getting round the current lack of consensus amongst Scots practitioners about the competence of execution in counterpart. But such “work-arounds” are not universally available. For example, the majority of public procurement contracts in Scotland obtained through the public procurement portal are subject to Scots law. This includes, for example, the contracts for the running of the Commonwealth Games 2014 as well as civil engineering works for local authorities. Furthermore, although parties are generally free to choose the law to which they wish their transaction to be subject, as mentioned in paragraph 7 above, the choice of law provisions of the Rome I Regulations do not apply to contracts relating to rights over heritable property (land and buildings) nor tenancies of such property (other than in relation to time-share properties). So contracts and documents relating to heritage in Scotland must be made according to Scots law. As a consequence, Scots law practitioners dealing with such transactions are faced with the current uncertainty over the legal validity of execution in counterpart, and the inability to deliver a traditional document by electronic means with legal effect. These added burdens in the public procurement and heritable property sectors are contrary to the policy of allowing ease of contracting in Scots law, and are removed by the provisions in the Bill.

24. A further area in which legal certainty will be enhanced by the Bill concerns the precise time at which a document takes effect. This can, on occasion, be critical; for example a floating charge has to be registered in the Register of Charges within 21 days of its execution or it will be void (note though that this does not affect any contract or obligation for the repayment of money secured by the charge).<sup>7</sup> The procedure which is permitted under the Bill will allow parties to take full control of this aspect of the process and achieve a greater degree of certainty than at present.

---

<sup>7</sup> Companies Act 2006, s 889.

## **Promotion of Scots law**

25. It has already been noted that the absence of a clear consensus amongst Scots law practitioners as to the competence of execution in counterpart means that English law is sometimes chosen in place of Scots law to govern transactions that are otherwise Scottish in nature. All legal systems should aspire to meet the needs of those who live under them and Scots law is no different in this regard. The current uncertainty over execution in counterpart and the inability to be sure that a signed document can be delivered electronically, damage the reputation of Scots law by limiting its use. A clear, positive and readily accessible statement of the law in a short statute will improve the standing and value of Scots law domestically and internationally, given the multi-jurisdictional nature of many of the transactions in which execution in counterpart can be deployed.

## **Scottish Government National Outcomes**

26. The proposals in the Bill and Report on Formation of Contract: Execution in Counterpart (SLC No 231; April 2013) are in line with the policies underlying two of the Scottish Government's National Outcomes,<sup>8</sup> which form part of the Government's National Performance Framework.<sup>9</sup> These are:

- “We live in a Scotland that is the most attractive place for doing business in Europe”<sup>10</sup>: as outlined above the Bill will make the execution of documents subject to Scots law more compatible with documents from other jurisdictions that are to be executed in counterpart. The benefits of the Bill will be shared throughout Scotland, as the Bill offers a means of completing transactions remotely which would be of particular benefit to those in remote communities.
- “We reduce the local and global environmental impact of our consumption and productions”<sup>11</sup>: implementation of the Bill is likely to produce a reduction in the number of journeys made for the purpose of signing ceremonies and perhaps also in the volume of paper used for commercial transactions.

## **The Digital Scotland Agenda**

27. The Bill is firmly in line with Digital Scotland policy:<sup>12</sup> it will encourage the use of digital technology by permitting its use for the legally effective delivery of a copy of a signed traditional document.

## **Policy for the Global Economy**

28. The Bill will further the policy objective of efficiency of cross-border transactions, as parties in different countries will have the ability to complete Scots law transactions remotely in an efficient manner. This could reduce the incidence of the situation discussed in the response by Tods Murray LLP to the SLC Discussion Paper on Formation of Contract (DP No 154; March

---

<sup>8</sup> <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome>

<sup>9</sup> <http://www.scotland.gov.uk/About/Performance/scotPerforms/NPFChanges>

<sup>10</sup> <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/business>

<sup>11</sup> <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/envImpact>

<sup>12</sup> <http://www.scotland.gov.uk/Topics/Economy/digital>

2012), in which the Scottish aspects of a multi-jurisdiction transactions are, on occasion, excluded because of the complexities caused by the perceived lack of recognition of execution in counterpart in Scots law. One consequence of the Bill may be that Scots law aspects of transactions are retained which could provide a boost to Scotland's economy.

29. A significant number of Scottish law firms are involved with global networks of law firms, or have offices abroad, and the Bill will assist in minimising practical differences between executing documents in Scotland and other jurisdictions.

## **ALTERNATIVE APPROACHES**

30. The only alternative approach considered is to allow the status quo to continue. If this approach was taken, the policy objectives discussed above would not be realised. Some policy objectives might be achieved by the courts under the common law but this cannot be predicted or guaranteed and would take very much longer than the statutory route offered by the Bill.

31. We see no benefits in this approach. The law in Scotland on execution in counterpart would be likely to remain uncertain and would continue to constitute an unnecessary hindrance to business, perhaps even resulting in a loss of business and economic activity in Scotland. The same applies to electronic delivery of signed traditional documents for legal effect, where a failure to set out a clear framework for the use of what is now relatively common technology would lead to great inefficiency for consumers and businesses alike and to a perception that Scots law is out of date.

32. Mr Rod MacLeod of Tods Murray LLP summarised the practical difficulties associated with execution in counterparts in an article in The Firm Magazine: *"Although there are different tactics for coping with signatories executing in different locations – for example, converting the agreement into a unilateral document that takes effect by notice and acknowledgement, or having the document executed under power of attorney, or sending trainees off to far-flung corners of the world to track down the elusive signatory – these options aren't always available depending on the nature of the agreement or practical in the circumstances of the transaction."*<sup>13</sup> This situation will remain unless the Bill is passed.

## **CONSULTATION**

33. Consultation was carried out by the SLC in accordance with the SLC's established practice in conducting law reform projects. But the SLC also innovated on its usual methods of consultation, as described in paragraphs 36 to 39 below.

### **Within Government**

34. The SLC Contract Law team, accompanied by the Chief Executive of the SLC, met with Scottish Government officials and discussed refinements to the final draft of the Bill for introduction.

---

<sup>13</sup> <http://www.firmmagazine.com/if-there-is-one-thing-that-really-annoys-me/> Mr MacLeod has since confirmed to the SLC that his opinion on this topic remains the same as in 2008.



35. The SLC Contract Law team also consulted the Registers of Scotland, an Executive Agency of the Scottish Government, at various stages of the project.

### **Public consultation**

36. The SLC published a Discussion Paper on Formation of Contract (DP No 145) in March 2012 as part of the general review of contract law in the light of the Draft Common Frame of Reference (DCFR) undertaken as part of the SLC's Eighth Programme of Law Reform, which covered the topic of execution in counterpart and delivery of traditional documents by electronic means. Consultation responses were overwhelmingly in favour of statutory clarification of the validity of documents executed in counterpart in Scots law. There was also equal support for a legislative provision permitting the delivery of traditional documents by electronic means as this is an area which has caused great difficulty in recent years.

37. The SLC, in conjunction with the University of Edinburgh Centre for Private and Commercial Law, hosted a seminar on execution in counterpart on 29 November 2012,<sup>14</sup> and the SLC published a draft of the Bill for discussion on its website.<sup>15</sup> The event attracted around 60 legal practitioners and academics. Views expressed in the seminar were very much in favour of the Bill's initiatives; for example the Chair of the event, Lord Hodge, then a senior Court of Session commercial judge and now a Justice of the UK Supreme Court, stated: *"I welcome this initiative very much. Our commercial law needs modernising; our law of contract needs to be reviewed; and there are measures which will be taken which will make us more user friendly and will address the needs of business. I particularly welcome it at a time when Scots law is under pressure."* A number of written comments on the Bill were submitted to the SLC following the seminar, and these all expressed support for the Bill.

38. Following the seminar, the SLC released a revised draft of the Bill for further comments in January 2013,<sup>16</sup> which coincided with an article published in the Journal of the Law Society of Scotland written by Paul Hally of Shepherd + Wedderburn LLP.<sup>17</sup> This draft did not generate as significant a volume of comments as the previous draft, but responses again focussed on drafting issues whilst expressing support for the overall concept of the Bill.

39. At each stage of the consultation process, members of the legal profession and the public were able to comment on the proposals, and the SLC actively encouraged a number of legal practitioners to comment on the draft Bill. The SLC did not at any stage of the consultation process receive comments to the effect that statutory provision on execution in counterpart nor on delivery of traditional documents by electronic means would have adverse effects on Scots law.

### **Scottish Government input**

40. More recently the Minister for Energy, Enterprise and Tourism has written to a range of business representative bodies highlighting how the Bill will be particularly helpful in not only

---

<sup>14</sup> <http://www.scotlawcom.gov.uk/news/seminar-on-execution-in-counterpart/>

<sup>15</sup> <http://www.scotlawcom.gov.uk/news/draft-execution-in-counterpart-scotland-bill/>

<sup>16</sup> <http://www.scotlawcom.gov.uk/news/execution-in-counterpart-final-chance-to-comment/>

<sup>17</sup> <http://www.journalonline.co.uk/Magazine/58-1/1012099.aspx>



commercial legal transactions but also its wider application and potential to smooth and simplify any transactions, particularly those where a solicitor has not been instructed but which involve different parties in different places who want to record their agreement in writing but would rather not or cannot meet in person.

41. A draft Bill was published as part of the SLC Report on Formation of Contract: Execution in Counterpart No. 231. The Bill as introduced has been revised. The revisions are the result of discussions between the SLC and the Scottish Government. None of the revisions alter in any way the original policy aims of the Bill as set out in the SLC Report. Rather, the revisions are, in the main, technical and are minor in nature.

42. The Scottish Government re-ordered sections 3 and 4 of the Bill on the basis that what was section 4 of the SLC Bill related to the application of the counterpart proposals to traditional documents and electronic documents and was therefore more clearly linked to sections 1 and 2 rather than the provisions on delivery. The most substantive amendments have been made to what was section 3 of the SLC published draft (Delivery by electronic means of a traditional document) now section 4, to clarify that what is delivered by electronic means is a copy of the traditional document. Section 5 of the SLC Bill was removed as it is unnecessary to say that legislation does not have retrospective effect. The Scottish Government also included powers for Ministers to commence the legislation rather than having automatic commencement and ancillary powers in case these are necessary to give full effect to the Bill.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

43. The Bill is facilitative, offering new and additional ways of achieving certain goals but without making their use compulsory. Those who wish to continue to use existing ways of achieving the same goals are free to do so. In saying this we acknowledge that, in relation to electronic delivery of a document, it is only possible if the sender has access to an appropriate electronic machine (and is not prevented, whether by disability, a belief system, or for any other reason, from using it). We do not assume that everyone has such access. But the proportion of people in Scotland in that category is diminishing, and the Bill does not in any way prevent these people executing and delivering documents as they might do at present.

44. For these reasons we conclude that the Bill will not impact negatively on a person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity. As such, the Bill will not in any way hinder access to equal opportunities.

45. Viewed positively, the Bill would in fact further the equal opportunities agenda in relation to those affected by physical disabilities, as it would allow them to execute documents remotely and then deliver them electronically from the convenience and safety of their own homes and workplaces, and so more easily engage in commerce and further their interests, whether in business or in everyday life.

## **Human rights**

46. As the Bill simply offers an optional means of validly signing and delivering a document, we are confident that the proposals do not raise any human rights issues.

## **Island communities**

47. As businesses and individuals in remoter parts of Scotland would be able to execute and deliver documents without the need for difficult and costly travel, the Bill is considered to be beneficial for members of the island communities. No detrimental effects are anticipated.

## **Local government**

48. We do not anticipate any adverse effect on local government. The proposals update Scots law generally, and are not of particular relevance to any part of Scotland or any local authorities. Local authorities, like any other person, will be able to take advantage of the Bill's provisions.

## **Sustainable development**

49. We believe that the Bill will have a positive environmental impact. Provision that a copy of a traditional document can be delivered electronically for legal purposes may result in a reduced consumption of paper, as parties may choose to deliver bulky documents by electronic means rather than print them out in full and send them by post. Additionally, there is likely to be a reduction in rail and air travel made solely for the purposes of signing documents at a signing ceremony.

# **LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL**

---

## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Legal Writings (Counterparts and Delivery) (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **Outline of Bill provisions**

3. The Bill implements the legislative recommendations set out in the Scottish Law Commission (SLC) report *Review of Contract Law – Report on Formation of Contract: Execution in Counterpart*, which was published in April 2013 ("the SLC Report"). The Bill makes provision for a clear framework by which parties may 'execute a document in counterpart' under Scots law and a mechanism to enable documents created and signed on paper to be delivered by electronic means for legal purposes.

4. The Bill has 7 sections which make provision in particular for the following:

- Execution in counterpart is confirmed as an optional process for validly signing ("executing") documents.
- Where execution in counterpart is used, the counterparts are treated as a single document.
- Parties may either deliver their counterpart to each other party to the transaction, or nominate a person to take delivery of all counterparts but the Bill requires delivery in some form to complete the effective execution of a document in counterpart.
- A copy of a document created on paper (whether or not executed in two or more counterparts) may be delivered for legal purposes by electronic means such as email or fax.
- Delivery by electronic means of a document created on paper need not be constituted by delivery of the whole document (including, where the document is a counterpart, delivery

of the whole counterpart): part of the document may be delivered, providing this is sufficient on its own terms to show that it is part of the document and comprises at a minimum the page on which the sender has subscribed the document.

5. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 50-EN, and in the Policy Memorandum published separately as SP Bill 50-PM.

### **Rationale for subordinate legislation**

6. The Bill contains two delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament, and
- the desire to allow adjustments to the technical detail of the law relating to the execution and delivery of legal documents in Scotland without the need for further primary legislation.

### **Delegated powers**

#### **Section 5 – Ancillary Provision**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** Order

**Parliamentary procedure:** Affirmative if it amends an Act, otherwise negative

#### *Provision*

7. To provide the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Subsection (2) provides that such an order may modify any enactment, including any provision made by the Bill.

#### *Reason for taking this power*

8. To provide the flexibility to make any ancillary provision when commencing the provisions or that may arise in light of experience on the operation of the Act. The Scottish Government recognises the potentially broad application of this power, which includes the facility to modify primary legislation, and to alter the provisions in the Bill. Any supplementary use of the power would though need to be appropriate for the purposes of, in connection with or

for giving full effect to the Act. The SLC did not identify the need for any such provision and its draft Bill did not include this power. The Scottish Government has likewise not identified the need for any such provision. However in the course of developing the Bill, given the technical nature of the Bill and some of the legislation it relates to, it was considered safer to have these powers in case there is a need for any fine-tuning to ensure the workability in practice of the matters addressed in the Bill, particularly the interaction with the Land Registration etc. (Scotland) Act 2012 and related amendments to the Requirements of Writing (Scotland) Act 1995 which have not yet been fully commenced.

#### *Choice of procedure*

9. Where the power is used to modify primary legislation, it would require the level of parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure which would be the normal procedure for the exercise of these powers. These procedures are typical for ancillary powers.

### **Section 6 – Commencement**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** Laid, no procedure

#### *Provision*

10. To enable the Scottish Ministers to commence the Bill, including transitional, transitory or saving provision.

#### *Reason for taking this power*

11. The SLC report provided for the Bill to come into force 2 months after Royal Assent. The Scottish Government considered that in accordance with usual practice, the Bill should be commenced by Commencement Order to ensure that it is satisfied that those affected by the legislation have sufficient notice of the provisions of the Bill to be able to plan for them coming into effect.

#### *Choice of procedure*

12. No procedure is provided for aside from laying in Parliament in line with the Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for commencement powers. The power includes the usual ability to make transitional, transitory or saving provision in the commencement order. Whilst the Bill does not affect documents whose execution has been completed before it comes into force it is possible that the need for saving or transitional provision may be required on commencement.





The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

**65th Report, 2014 (Session 4)**

**Report on the Legal Writings  
(Counterparts and Delivery)  
(Scotland) Bill at stage 1**

**Published by the Scottish Parliament on 14 November 2014**



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

### **65th Report, 2014 (Session 4)**

#### **CONTENTS**

#### **Remit and membership**

<b>Report</b>	<b>1</b>
Summary of Conclusions and Recommendations	1
Introduction	5
Background to the Bill	5
Scottish Law Commission bills	5
Legal Writings (Counterparts and Delivery) (Scotland) Bill	6
Consultation	7
General Principles of the Bill	8
Bill provisions	8
Current system for signing contracts in Scotland	10
Potential benefits of the Bill	15
Practical challenges of the Bill	22
Delegated powers provisions	33
Financial Memorandum	34
Policy Memorandum	34
Conclusions on the General Principles of the Bill	34
<b>Annexe A – Extracts from the Minutes of the Delegated Powers and Law Reform Committee</b>	<b>35</b>
<b>Annexe B – Index of Oral Evidence</b>	<b>38</b>
<b>Annexe C – Index of Written Evidence</b>	<b>40</b>





The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (a) any—
    - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
    - (ii) [deleted]
    - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
  - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
  - (c) general questions relating to powers to make subordinate legislation;
  - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
  - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
  - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
  - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
  - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

#### **Membership:**

Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
Margaret McCulloch  
Stuart McMillan (Deputy Convener)  
John Scott  
Stewart Stevenson

**Committee Clerking Team:**

**Clerk to the Committee**

Euan Donald

**Assistant Clerk**

Elizabeth Anderson

**Support Manager**

Daren Pratt



The Scottish Parliament  
Pàrlamaid na h-Alba

## Delegated Powers and Law Reform Committee

### 65th Report, 2014 (Session 4)

#### Report on the Legal Writings (Counterparts and Delivery) (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

#### SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

##### Background to the Bill

*Consultation [paragraphs 17-24]*

1. The Committee notes the extensive consultation carried out by the Scottish Law Commission and considers that the responses received highlight widespread support amongst the legal, business and academic sectors in Scotland for the Bill's key provisions.

2. Given the extent of the Scottish Law Commission's consultation, the Committee considers it reasonable that the Scottish Government did not carry out further consultation of its own.

##### Current system for signing contracts in Scotland

*Existing practice under Scots law [paragraphs 39-51]*

3. It is apparent to the Committee that the current system for signing contracts under Scots law is unsatisfactory and that legislation clarifying the rules for agreeing written contracts is necessary to enable Scots law to work more efficiently and to effect an improvement in its reputation.

*Change of governing law [paragraphs 52-65]*

4. The Committee recognises that it could be argued that documents can already be executed in counterpart under Scots law. However, the Committee acknowledges that there appears to be a considerable level of doubt in relation to this matter and that, as a result, the process is not commonly practiced under Scots law.

5. It is apparent to the Committee that the problems associated with the current system in Scotland have, to an extent, led to a drift away from contracts being made under Scots law as parties determine that it would be easier to switch a contract to English law rather than to deal with the problems associated with signing ceremonies and round robins.

6. The Committee considers therefore that the process for concluding signed contracts in Scotland could be improved and that changes are necessary to encourage greater use of Scots law.

#### **Potential benefits of the Bill**

##### *Savings in time and money [paragraphs 66-75]*

7. The Committee considers that the Bill would appear to offer scope for savings and efficiencies. The Committee particularly notes the potential of the Bill to make the agreement of contracts under Scots law a more efficient and convenient process.

##### *Increase in Scots law contracts [paragraphs 76-93]*

8. The Committee acknowledges that the ability to use execution in counterpart or not is normally not the only factor for parties deciding which law to conduct their business under. Instead, factors such as familiarity and global reputation come into play with evidence to the Committee suggesting that in that regard the use of English and New York law is common.

9. Mindful of these factors the Committee appreciates that English and New York law will continue to be used in certain circumstances.

10. However, the Committee also heard evidence to suggest that, for some, the ability to execute in counterpart, or lack thereof, was a deciding factor in choosing the law of a contract with examples given of instances in which a contract was switched to English law at the eleventh hour when it became apparent that all parties would be unable to meet in order to sign a single hard copy document.

11. The Committee therefore considers the certainty of knowing from the outset that the contract can be conducted under Scots law and executed via the electronic delivery of a traditional document to be one of the Bill's greatest benefits.

12. It is apparent to the Committee that the Bill will put Scotland in a more equitable position with other jurisdictions by removing some of the factors which were viewed as off-putting by parties to contracts. It appears to the Committee therefore that a substantial benefit of the Bill will be its ability to stop the drift of contracts away from Scots law which would otherwise be made under Scots law.

##### *Precision of Delivery [paragraphs 94-98]*

13. The Committee considers the provision allowing parties to determine the precise time a document takes legal effect to be useful, particularly as it will allow parties a degree of flexibility which will enable them to adapt to changing circumstances and ensure that all parties are satisfied that a document is in force at the appropriate time.

##### *Statistical evidence [paragraphs 99-105]*

14. The Committee suggests that, 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.**

#### **Practical challenges of the Bill**

##### *Potential for fraud and error [paragraphs 106-129]*

**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 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.**

##### *Pre-signed signature pages [paragraphs 130-140]*

**21. The Committee notes that whilst the Bill does not specifically provide for the use of pre-signed signature pages, it does not prevent their use.**

**22. The Committee therefore notes the evidence it received on this matter and considers that while there may be misgivings about the use of pre-signed signature pages, there might be circumstances in which their use may be justified.**

#### **Related issues not provided for in the Bill**

##### *Electronic signatures [paragraphs 142-157]*

**23. The Committee supports the use of electronic signatures and considers that they can provide a secure means of agreeing contracts and help mitigate against fraud.**

24. The Committee encourages efforts to increase their use and welcomes the Law Society of Scotland's electronic Smartcard scheme which will provide all of its members with an electronic signature.

25. It is apparent from evidence to the Committee, however, that there is still a strong demand for the use of traditional signatures. The Committee considers that the Bill responds to this demand by allowing the continuation of wet ink signatures whilst bringing the additional benefits of the use of counterparts and the ability to exchange traditional documents electronically.

*Electronic Repository [paragraphs 158-174]*

26. The Committee supports the establishment of an electronic document repository maintained by the Registers of Scotland. The Committee considers that such a system would be a useful tool for conserving records of contracts.

27. The Committee is supportive of the idea of the repository being used not only for the storage of documents but also as a means of executing documents by way of electronic signature.

28. The Committee considers, however, that if a repository is to be established, sufficient safeguards should be put in place to ensure that it is secure and inspires confidence in those using it. The system should also be able to adapt to developments in technology.

29. Taking into account the reservations expressed by some of the witnesses, the Committee is of the view that, if a central repository is established, parties should not be obliged to use it.

**Conclusions on the General Principles of the Bill [paragraphs 183-187]**

30. The Committee supports the general principles of the Bill and in particular the Bill's two key provisions; that execution in counterpart should be clarified as a valid process in Scots law, and that paper legal documents should be deliverable by electronic means.

31. The Committee considers that the current system for agreeing written signed contracts under Scots law is unsatisfactory and needs to be changed. By removing some of the barriers to the efficient, straightforward agreement of contracts under Scots law, the Committee considers that the Bill will improve Scots law.

32. Whilst acknowledging that the Bill's provisions are unlikely to bring an influx of new contracts to Scotland, the Committee considers that the Bill has the potential to increase the number of contracts made under Scots law by encouraging those who would otherwise have completed a contract under Scots law to choose to do so.

33. **Whilst the Committee considers the potential for fraud and error to be a serious matter, it is not of the view that the passing of the Bill will lead to an increase of such instances.**

34. **The Committee recommends that the general principles of the Bill be agreed to.**

## INTRODUCTION

1. The Legal Writings (Counterparts and Delivery) (Scotland) Bill<sup>1</sup> was introduced in the Scottish Parliament on 14 May 2014 by the Cabinet Secretary for Finance and Sustainable Growth, John Swinney. It is the first bill to be known as a Scottish Law Commission Bill.

2. The Delegated Powers and Law Reform Committee was designated on 21 May as lead committee for Stage 1 consideration of the Bill. The Committee issued a call for written evidence on 28 May seeking views on the proposals contained in the Bill. Ten written submissions were received (listed at Annexe C).

3. The Committee took oral evidence on the Bill over five sessions between June and October. Evidence was taken from a range of law bodies, commercial law firms, business and academic representatives, as well as from Registers of Scotland, the Scottish Law Commission (SLC) and the Minister for Energy, Enterprise and Tourism.

## BACKGROUND TO THE BILL

### Scottish Law Commission bills

4. The Bill is the first Scottish Law Commission Bill (SLC Bill) to be considered by the Committee following changes to Standing Orders in June 2013 which altered the Committee's remit, allowing it to take the lead role in scrutinising certain SLC Bills.

5. The changes were put in place in order to increase the implementation rate of SLC reports. This followed recommendations made by the Standards, Procedures and Public Appointments Committee (SPPA Committee) in its report on the matter<sup>2</sup> which was published on 18 April 2013.

6. The SPPA report proposed a process for the referral of SLC Bills to the Subordinate Legislation Committee (as the Delegated Powers and Law Reform Committee was then known) and recommended certain changes to Standing Orders which would allow the procedure to be put in place.

---

<sup>1</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill, as introduced (SP Bill 50, Session 4 (2014)). Available at: [http://www.scottish.parliament.uk/S4\\_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd.pdf)

<sup>2</sup> Standards, Procedures and Public Appointments Committee, 2<sup>nd</sup> report 2013, *Implementing Scottish Law Commission reports* available here: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62339.aspx>

7. The report further recommended that the Subordinate Legislation Committee's name should be changed to the Delegated Powers and Law Reform Committee in order to reflect the changes to its remit.

8. On 28 May 2013, the Parliament agreed to implement the recommendations made in the SPPA Committee report. The relevant Standing Orders changes were then applied from 5 June 2013.

9. As a result of the changes, SLC Bills may be referred to the Committee where they meet the conditions of Standing Orders Rule 9.17A and the associated criteria as determined by the Presiding Officer. The Presiding Officer determined under Rule 9.17A.1(b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament—

(a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;

(b) which does not relate directly to criminal law reform;

(c) which does not have significant financial implications;

(d) which does not have significant European Convention on Human Rights (ECHR) implications; and

(e) where the Scottish Government is not planning wider work in that particular subject area.<sup>3</sup>

10. To ensure that those conditions are adhered to, the Scottish Government is required to write to the Parliament prior to the introduction of a SLC Bill, explaining why it considers the bill to comply with the criteria as set out by the Presiding Officer.

### **Legal Writings (Counterparts and Delivery) (Scotland) Bill**

11. In April 2013, the SLC published a *Report on Formation of Contract: Execution in Counterpart*. ("the SLC report")<sup>4</sup> The report was submitted to Scottish Ministers along with a draft bill which sought to give effect to the report's recommendations.

12. The report and draft bill proposed two main changes to Scots law and practice:

- First, it proposed clarifying the law to make it clear that legal documents governed by Scots law can be "executed in counterpart", i.e. that they can be brought into legal effect by each party signing separate identical copies of the document, (the counterparts) rather than the same physical document. The aim was to resolve the current uncertainty as to whether counterparts were a valid way of creating legally effective documents in Scots law

<sup>3</sup> Scottish Parliament *Business Bulletin*, 6 June 2013 available here;

<http://www.scottish.parliament.uk/parliamentarybusiness/BusinessBulletin/64350.aspx>

<sup>4</sup> Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), available at: [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/1151/329/](http://www.scotlawcom.gov.uk/index.php/download_file/view/1151/329/)



- Second, it proposed that it should be possible to deliver paper legal documents by electronic means. The aim was to resolve the current doubt as to whether faxing or emailing a copy of a signed paper document can make it legally effective.

13. The Scottish Government set out its legislative programme for 2013/14 in September 2013. The programme included a bill which would implement the majority of the recommendations made in the SLC report.

14. The Minister for Energy, Enterprise and Tourism (“the Minister”) subsequently wrote to the SLC on 28 February 2014 setting out why the Scottish Government considered the draft bill to comply with the criteria as set out in the Standing Orders and by the Presiding Officer. The letter (a link to which is listed at Annexe C of this report) was laid simultaneously in the Parliament.

15. The Legal Writings (Counterparts and Delivery) (Scotland) Bill (“the Bill”) was then introduced in Parliament on 14 May. Although some small changes to the final draft were agreed by the Scottish Government and the SLC, the Bill implements the vast majority of the legislative recommendations contained in the SLC report.

16. The Parliamentary Bureau then referred the Bill to the Delegated Powers and Law Reform Committee on 21 May 2014.

## **Consultation**

17. The SLC’s eighth programme of law reform, which was published in 2010, included a project on ‘Contract law in light of the Draft Common Frame of Reference’.

18. As part of that project, in March 2012 the SLC produced a discussion paper on the formation of contracts.<sup>5</sup> A large part of the paper focused on execution in counterpart and the electronic delivery of documents.

19. The discussion paper was circulated to a wide range of interested parties for consultation. In addition, the paper and accompanying response form were available on the SLC’s website. Responses were received from a variety of Scottish law firms, academics and law organisations.

20. The SLC subsequently produced two draft bills on execution in counterpart which were available for comment on its website. Additionally, the SLC held a seminar on execution in counterpart in November 2012 at which a draft bill was discussed. Following the seminar, further written views on the draft bill were received from representatives of the legal, academic and business sectors.

21. The Committee understands that throughout the SLC’s consultation period the majority of responses expressed strong support for the two key provisions which would go on to form the basis of the Bill - that execution in counterpart

---

<sup>5</sup> Scottish Law Commission Discussion Paper on formation of contract (DP 154), available here: [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/984/329/](http://www.scotlawcom.gov.uk/index.php/download_file/view/984/329/)

should be clarified as a valid process in Scots law and that paper legal documents should be deliverable by electronic means.

22. Whilst the Scottish Government did not carry out a separate consultation on the Bill, it did meet with the SLC to discuss the draft bill. The SLC also consulted with Registers of Scotland (an executive agency of the Scottish Government) at various stages prior to the introduction of the Bill.

**23. The Committee notes the extensive consultation carried out by the SLC and considers that the responses received highlight widespread support amongst the legal, business and academic sectors in Scotland for the Bill's key provisions.**

**24. Given the extent of the SLC's consultation, the Committee considers it reasonable that the Scottish Government did not carry out further consultation of its own.**

## GENERAL PRINCIPLES OF THE BILL

### Bill provisions

#### *Execution of documents in counterpart*

25. The SLC report defines execution in counterpart as 'the process by which a contract may be signed ("executed") by each party signing its own copy (counterpart) and then exchanging it with the other party for that party's signed counterpart.'<sup>6</sup>

26. The procedure is widely practised in England and Wales, in addition to many other countries such as the United States and Australia. This contrasts with the current situation in Scotland, where doubt has been expressed as to whether a document may be executed in counterpart under Scots law.<sup>7</sup>

27. The Bill seeks to remove any such doubts by clearly setting out that a document may be executed in counterpart under Scots law. However, the Bill does not *require* legal documents to be executed in counterpart. Instead it clarifies that the process may be used if the parties involved wish to do so.

28. The Bill provides that, once collated, all the counterparts are to be treated as a single document. The single document may be comprised either of each counterpart in its entirety or one counterpart in its entirety to which a signature page for each party has been attached. Therefore, if, for example, a contract is agreed between three parties, the final legally binding contract will either comprise three signed contracts in their entirety, each signed by a different party, or one contract in its entirety with signature pages for all three parties attached.

---

<sup>6</sup> Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), glossary x -xi

<sup>7</sup> Scottish Law Commission *Report on Formation of Contract: Execution in Counterpart* (SLC No 231), glossary x -xi, page 1-2, paragraph 1.3

29. The Bill further provides that a document which is executed in counterpart becomes effective when both or all of the counterparts have been delivered. Delivery is only complete when each counterpart has been delivered to every party whose signature is not on the counterpart, or to a person nominated by the parties to take delivery of the counterparts.

30. The Bill does not specify which type of delivery should be used, allowing parties the freedom to choose whichever method they wish as long as it complies with the provisions set out in the Bill and any other relevant legislation relating to the delivery of documents. The parties also have control over when a document is delivered, and therefore when it takes legal effect. For example, the parties may come to an agreement that a document is to take effect on a specific day or as a result of a certain circumstance having been met.

*Nomination of person to take delivery of counterparts*

31. The Bill provides that the parties to a contract may choose to nominate a person who will have responsibility for taking delivery of the counterparts. The nominee could be one of the parties, or an agent representing one or more of the parties. In practice, the role is most likely to be carried out by a solicitor. On taking receipt of a counterpart, the nominee is required to hold it 'and preserve it for the benefit of the parties'.<sup>8</sup>

*Use of counterparts: electronic documents*

32. The provisions in the Bill which relate to execution in counterpart apply to both traditional documents and electronic documents as set out in the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act").<sup>9</sup>

33. According to the Bill's Explanatory Notes<sup>10</sup>, however, it is unlikely that parties will choose to execute electronic documents in counterpart. This is due to modifications to the 1995 Act (as inserted by the Land Registration (Scotland) Act 2012) which provide that electronic documents may be executed by means of electronic signature. As a result, parties can simply attach their electronic signature to a document in order to execute it and therefore the process of execution in counterpart is unnecessary.

34. However, the provision could be useful when some parties to a contract are using traditional documents whilst others are using electronic delivery.

*Electronic delivery of documents*

35. The Bill establishes that a traditional legal document (one created on paper) may be delivered by electronic means (such as by email or fax). It should be noted that this provision of the Bill applies to *all* legal documents which are required to be delivered in order to take effect, and not only to those which have been executed in counterpart.

---

<sup>8</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill, section 2

<sup>9</sup> Requirements of Writing (Scotland) Act 1995, available here:

<http://www.legislation.gov.uk/ukpga/1995/7/contents>

<sup>10</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill. Explanatory Notes (SP Bill 50-EN, Session 4 (2014), paragraph 15, Available at:

[http://www.scottish.parliament.uk/S4\\_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-en.pdf)

36. The Bill provides that the requirement for delivery by electronic means is satisfied when a copy of all, or part, of the document has been delivered. However, when only part of a document is delivered it must contain the signature of the sender and it must be sufficiently clear which document the copy relates to.

37. When a contract is to be delivered electronically, the parties may agree that rather than send a signed copy of the whole contract, each party will send a signature page which is clearly distinguished as relating to the contract in hand, perhaps through the use of a unique header or footer.

38. The Bill allows parties discretion in determining how delivery is managed in practice. For example, the parties can agree what form of electronic delivery to use, or indeed whether to use it at all. When no such method has been agreed, that which is deemed reasonable for all parties constitutes delivery<sup>11</sup>.

### **Current system for signing contracts in Scotland**

#### *Existing practice under Scots law*

39. Although some witnesses were of the view that documents can already be executed in counterpart under Scots law (e.g. Dr Gillian Black of the University of Edinburgh)<sup>12</sup>, in practice it is not widely accepted as a valid process and, as a result, parties are generally reluctant to complete contracts in this way since they fear that they may not be enforceable. There would therefore seem to be uncertainty in the law.

40. Similarly, although recent legislation has provided for the electronic delivery of electronic documents, it remains unclear whether traditional documents can be delivered by electronic means. The Bill confirms that this is a valid process under Scots law.

41. Under existing practice, all parties to contracts made in Scots law must sign the same document rather than each party signing separate identical counterparts. This is usually achieved by all parties meeting at the same place at the same time in order to sign the document (a “signing ceremony”) or by the document being sent round each party sequentially until it has all of the parties’ signatures (the “round robin” process). Evidence taken by the Committee suggests that the norm now is for the round robin process to be used with documents being sent to the parties by e-mail.

42. Evidence to the Committee suggests that such methods of signing can be time-consuming and cumbersome, and can lead to delay as highlighted in Glasgow City Council’s written evidence—

“At times it can be problematic to get all parties to a transaction to sign the same principal copy of a legal document on time, especially in transactions involving multiple parties based in different geographical locations. This

---

<sup>11</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill, section 4(5)

<sup>12</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 12

causes delay, practical difficulties and, in some cases, financial loss to one or more parties.”<sup>13</sup>

43. Travelling to attend a signing ceremony can take up a large amount of time as the parties must travel to the agreed destination, in addition to the time spent at the ceremony itself. There are also financial costs associated with travel and accommodation. The SLC report expands on this—

“The traditional practice in commercial as distinct from conveyancing transactions was for the parties and/or their lawyers, acting as agents, to meet together in one place and apply their "wet ink" signatures to the transaction's documentation. For many commercial transactions involving multiple parties this could mean a gathering of a significant number of people to sign a large number of frequently bulky documents, preceded by a process of checking that the documents are in good order for the purpose. This checking process is often necessary in complex development and similar transactions because it is only upon the organising solicitor certifying that all the other contracts involved are fit for their purpose and validly executed that the project's funders will execute the funding agreements and release the necessary finance. These checks frequently reveal drafting and typographical errors needing last-minute correction. Arranging such a "signing ceremony" and carrying it through can thus be a time-consuming, expensive and complex process.”<sup>14</sup>

44. There are particular problems for multinational, multilateral contracts where those signing are in different countries or time zones. In many cases, international parties will be used to a system in which documents are agreed and executed by the electronic exchange of traditional documents. In agreeing a contract, or part of a contract, under Scots law, representatives of different organisations, and often different countries, are required to gather at a specific place and time in order to sign one single document.

45. Whilst the financial costs of the round robin process are likely to be less than those associated with a signing ceremony, parties may still have to pay for a courier or postage. In addition, the process of waiting for the single contract to be sequentially delivered to each party for signing may be extremely time-consuming, particularly when a large number of parties are involved. Such issues are of particular relevance when a contract must be agreed as a matter of urgency which can often be the case in commercial contracts. Shepherd and Wedderburn's written submission highlights some of the problems with the current system—

“The nature of modern commercial transacting means that completion “in person” is simply not a practical alternative in the majority of cases. This has resulted in the requirement either to construct elaborate, but inefficient and often time-consuming completion mechanism...”<sup>15</sup>

---

<sup>13</sup> Glasgow City Council Written Submission

<sup>14</sup> Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 231), paragraph 1.15

<sup>15</sup> Shepherd and Wedderburn written submission

46. It has been suggested that the lack of a law on counterparts can cause damage to the reputation of Scots law internationally. Tods Murray's written submission suggested that—

"The existing Scots law, particularly the lack of counterpart execution as a valid form of execution, can cause problems in terms of transaction logistics and requirements as well as giving a poor impression of Scots law and Scotland generally as a place in which to do business."<sup>16</sup>

47. Dr Hamish Patrick of Tods Murray expanded on this in oral evidence, explaining that having to explain the different system in Scotland can at times be frustrating—

"I spend quite a lot of my time apologising for the inadequacies of Scots law. For example, if you have a multijurisdictional financing transaction with assets in England and various European countries or the United States, all the parties involved will sign their documents electronically in counterpart, and they will do them in advance, with a signing date several days before the closing date. I have to tell them, "Sorry, we can't do that." I have to explain that we need separate Scottish documents that operate differently, and that we must then work out how to get our footwork right so that they work, and it is not uncommon for us to have to get signatories out again on the day of completion to sign a series of documents, in a specific order, to comply with the requirements of Scots law as to counterpart or delivery."<sup>17</sup>

48. The Committee notes that the current system of signing a single, hard copy document can be costly, both financially and in terms of time.

49. The Committee also recognises that these processes can lead to logistical problems, particularly for multiparty, multinational contracts. It also recognises that some witnesses considered that the current rules reflect negatively on the reputation of Scots law.

50. The Committee further considers that the current system lacks the flexibility and efficiency required in order for Scots law to adapt to modern advances and compete on a level playing field internationally.

**51. It is apparent therefore to the Committee that the current system for signing contracts under Scots law is unsatisfactory and that legislation clarifying the rules for agreeing written contracts is necessary to enable Scots law to work more efficiently and to effect an improvement in its reputation.**

---

<sup>16</sup> Tods Murray's written submission, paragraph 2.1

<sup>17</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 43

*Change of governing law*

52. Under EU legislation,<sup>18</sup> the parties to a contract can normally exercise a choice as to which law will govern their transaction. Evidence to the Committee suggests that commercial parties often take up this option, switching contracts to another form of law in which execution in counterpart is provided for. Normally English law will be chosen as the alternative.

53. The system for signing documents in counterpart in England was explained to the Committee by Warren Gordon, Head of Real Estate Know How at Olswang LLP, who gave evidence on behalf of the Law Society of England and Wales.

54. Under English law, parties may conclude a contract by signing copies of the final versions of written agreements and then sending the copies to each other. The documents are normally exchanged by electronic means. Mr Gordon explained that—

“Signed, separate counterparts have the same effect as if all the signatures on the counterparts had been on one document, so although the parties are physically signing separate documents, legally, you treat them together as one document. Each counterpart is an original, which can be taken to court and sued upon. All the counterparts together, similar to an original and a counterpart, constitute one document.”<sup>19</sup>

55. The practice of signing documents in counterpart is longstanding and widely-used in England, although it is not explicitly provided for in English legislation. Instead, modern usage is based on a mixture of best practice and case law. Guidance on the use of execution in counterpart, with particular reference to executing documents electronically, was drawn up by the Law Society of England and Wales in 2010 following a court case<sup>20</sup> relating to the use of execution in counterpart (“the practice note”)<sup>21</sup>.

56. The practice note outlines the three available options for completing this process. Firstly, each party may return electronically their copy of the entire document to the coordinator along with their signature page. Secondly the parties may return electronically to the coordinator their signed signature page. The third available option is to create a pre-signed signature page which can be attached by the finalised document.

57. Mr Gordon considered that the system of executing documents in counterpart and exchanging documents electronically works well in England. He explained that the overriding benefit of such a system was the level of efficiency and speed it could bring to a transaction—

---

<sup>18</sup> Rome I Regulation (EC) No 593/2008, available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>

<sup>19</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1602

<sup>20</sup> *Mercury Tax Group and another v HMRC* [2008] EWHC 2721

<sup>21</sup> Law Society of England and Wales (2010). *Execution of documents by virtual means*. Available at: <http://www.lawsociety.org.uk/advice/practice-notes/virtual-execution-of-documents/>

“The key benefit of having the original and the counterpart separately executed by the parties is fairly obvious: if the parties execute separate identical parts, the speed of execution is much quicker, which must improve the efficiency of the transaction. If you have to get all the parties—the landlord, the tenant and a guarantor—to execute both parts of the document, that would slow up the transaction, particularly if the parties were based overseas. In that case, it might be much more difficult and time consuming to get the documents executed, especially if you were executing with a wet ink signature, as we call it.”<sup>22</sup>

58. Evidence from witnesses with experience of dealing with contracts in Scotland suggested that a switch to English law is often viewed a preferential to setting up a signing ceremony or signing on a round robin basis. Dr Ross Anderson, an advocate and honorary research fellow at the University of Glasgow, explained that—

“..when the 11th hour approaches it can become clear that some of the parties will not be available so that they can all come to one room to sign on the dotted line, so the view is taken that the easiest thing to do is simply to change the governing law clause and execute under English law.”<sup>23</sup>

59. This view was shared by Alasdair Wood of the Law Society of Scotland who explained that contracts are often switched to English law, even in cases where Scots law would otherwise be the preferable choice—

“In a number of transactions that we work on, the sole reason to change the law to English law or to that of another jurisdiction is the inconvenience of creating a valid document when people are based in different countries, different towns or even different offices in the same city or town, late at night, for instance.”<sup>24</sup>

60. Although the practice of switching contracts from Scots to English law appears to be a relatively common occurrence, the Committee notes that this option is not universally available to parties agreeing contracts in Scotland. The Policy Memorandum explains that this is the case for most public procurement contracts in Scotland and contracts relating to heritable property<sup>25</sup>. Glasgow City Council set out its position in a written submission to the Committee—

“Changing the governing law of the legal document to English law, which allows execution in counterpart, would not be a suitable option for a Scottish local authority. In addition, this option would not be applicable to Scottish property transactions, as the governing law for such transactions is

<sup>22</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1601-2

<sup>23</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 2

<sup>24</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 34

<sup>25</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill. Policy Memorandum (SP Bill 50-PM, Session 4 (2014), paragraph 23, available here: [http://www.scottish.parliament.uk/S4\\_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-pm.pdf)



*lex situs* (the law of the place where the property is situated), namely Scots law.”<sup>26</sup>

61. Parties to such contracts, therefore, have little choice but to sign in person at a signing ceremony or to sign on a round robin basis.

62. Whilst the Committee’s report goes on to note that the issue of contracts being switched to another law is a common problem and by no means exclusive to Scotland, the Committee still considers that steps must be taken to ensure that contracts which would otherwise be made under Scots law remain under Scots law.

63. **The Committee recognises that it could be argued that documents can already be executed in counterpart under Scots law. However, the Committee acknowledges that there appears to be a considerable level of doubt in relation to this matter and that, as a result, the process is not commonly practiced under Scots law.**

64. **It is apparent to the Committee that the problems associated with the current system in Scotland have, to an extent, led to a drift away from contracts being made under Scots law as parties determine that it would be easier to switch a contract to English law rather than to deal with the problems associated with signing ceremonies and round robins.**

65. **The Committee considers therefore that the process for concluding signed contracts in Scotland could be improved and that changes are necessary to encourage greater use of Scots law.**

#### **Potential benefits of the Bill**

##### *Savings in time and money*

66. By allowing for contracts to be executed in counterpart and traditional documents to be delivered electronically, the Bill removes the need for signing ceremonies and round robins.

67. The Bill, therefore, has the potential to reduce the amount of time spent by parties in order to complete a contract. For example, parties will no longer have to travel to signing ceremonies or wait for a round robin process to reach completion.

68. This was welcomed in the Weir Group’s written evidence—

“In our business environment, and given the countries in which we operate, transactions are increasingly time critical with often multiple parties involved in different locations. Therefore, both the virtual signing facilitation and clarity and certainty around the law on execution in counterpart, will allow our business to utilise Scots law more as a preferred law of choice.”<sup>27</sup>

---

<sup>26</sup> Glasgow City Council, written submission

<sup>27</sup> Weir Group, written submission

69. Colin MacNeill from Dickson Minto WS explained that the time taken up by travelling to and attending signing ceremonies was one of the main reasons for transactions being switched to English law—

“... the choice of law was changed from Scots to English, not because of a minor inconvenience or minor travelling cost for the parties to get to one place...but because we could not contemplate asking many busy people to take a day or half a day out of their lives to get to one solicitor’s office. The effect is multiplied when you deal with parties in places outside Scotland.”<sup>28</sup>

70. Overall, the weight of evidence suggests that the Bill could lead to an increase in efficiency when contracts are agreed in Scots law. This is summarised in Glasgow’s City Council’s written submission to the Committee—

“The process of the execution of legal documents in Scotland will become more efficient and less time-consuming. It will provide greater flexibility to all parties to a transaction.”<sup>29</sup>

71. The Financial Memorandum illustrates the potential financial savings created by the Bill, giving the example of a transaction between eight parties located in different offices in different cities.<sup>30</sup>

72. The Memorandum suggests that £150 per transaction could be saved if parties no longer choose the round robin process. It also outlines the potential savings of up to £1096 which could be made when travel to a signing ceremony is no longer necessary. In contrast, the Memorandum states that there are no financial costs associated with the use of execution in counterpart, although postage to a nominee may have a cost of up to £41.30.

73. The Faculty of Advocates (“the Faculty”) is sceptical, however, as to the extent to which savings will be made in reality, particularly for smaller contracts made by smaller firms. Robert Howie QC explained—

“Most of the contracts that are made under Scots law are smaller-scale contracts, which are made not in Glasgow, Edinburgh or Aberdeen but in small towns around Scotland. In such cases, we suspect that the saving of cost and the convenience that are envisaged as a result of the electronic execution and exchange of counterparts, instead of simply having people come into the office to do all that, will be limited.”<sup>31</sup>

---

<sup>28</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 42

<sup>29</sup> Glasgow City Council, written submission

<sup>30</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill. Financial Memorandum (SP Bill 50-EN, Session 4 (2014) table 1, page 9. Available at: [http://www.scottish.parliament.uk/S4\\_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-en.pdf)

<sup>31</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 22

74. In contrast, Dr Anderson of the University of Glasgow suggests that execution in counterpart could be beneficial to those in rural areas or smaller towns—

“The geography of Scotland suggests that counterpart execution may be of particular relevance to so-called small-town cases for businesses in the Highlands and Islands, the Hebrides and so on. Trying to get people on a cold November evening to take trains and ferries—even to Inverness—is not easy. One could see, in Scotland in particular, considerable benefit for small-town practices that want to avail themselves of the option. It is not an obligatory provision—it is merely facilitative”<sup>32</sup>

**75. The Committee considers that the Bill would appear to offer scope for savings and efficiencies. The Committee particularly notes the potential of the Bill to make the agreement of contracts under Scots law a more efficient and convenient process.**

*Increase in Scots law contracts*

76. The majority of the evidence received suggests that by allowing for execution in counterpart and the electronic delivery of traditional documents, some of the perceived barriers to the use of Scots law will be removed and that, as a result, more contracts will be conducted under Scots law.

77. However, whilst the Faculty accepts this premise to an extent, it is unconvinced as to the level of impact the Bill will have in this regard. Robert Howie QC suggested that the reasons parties choose to have their contracts governed by a certain law—

“...are generally substantive and relate to the transaction that they are trying to carry out and where those involved in funding and underwriting it are based.”<sup>33</sup>

78. He was therefore of the view that the ability to use execution in counterpart would not necessarily lead to an increase in contracts made under Scots law as opposed to English law, stating that—

“...people tend to have a familiarity with and a concentration on English law and use English firms, and they have merchant banks that are much more comfortable using people whom they know, recognise and have dealt with for the last 30 years.”<sup>34</sup>

79. Further evidence to the Committee suggests that, in many cases, English law is viewed as the preferable choice regardless of the circumstances. Parties may, for example, choose English law due to its good reputation throughout the world or because they are familiar with the law, having used it many times before. Professor George Gretton explained that—

---

<sup>32</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 6

<sup>33</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 24

<sup>34</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 24

“In commerce, people have a tendency to choose English law...It is so standard. Internationally, English and New York law are consistently chosen.”<sup>35</sup>

80. Professor Gretton also made clear that the popularity of English and New York law is so prevalent that every legal system in Europe is being “squeezed” in favour of them.<sup>36</sup> It would seem, therefore, that parties in Scotland choose English law for a variety of reasons and it is unlikely that all of those doing so will switch to Scots law as a result of the Bill’s provisions.

81. However, much of the evidence to the Committee suggests that, as a result of the Bill, parties who normally choose Scots law as the law of the contract, will no longer feel forced to switch to English law. This viewpoint is backed up by the evidence provided to the Committee suggesting that many contracts are switched to English law at the eleventh hour when it becomes apparent that the planned workaround is no longer appropriate.

82. This view was expressed by Dr Ross Anderson of the University of Glasgow—

“We are a small system; business from around the world will not flock to Scotland just because of how one can sign a document. What is crucial is that Scotland stops exporting transactions that are carried out by the ordinary people of Scotland and by Scottish businesses and companies, and which relates to assets in Scotland. If we cannot persuade our own citizenry to use our law, that reflects poorly on the content of our law.”<sup>37</sup>

83. Catherine Corr, of Scottish Enterprise, echoed this view—

“I do not think that the change being made in the bill will necessarily make people who are not otherwise connected to Scotland suddenly flock to Scotland to use Scots law, but it will certainly make the messaging around Scots law and the utilisation of Scots law for commerce easier.”<sup>38</sup>

84. In exploring the current system for signing contracts in Scotland (discussed in paragraphs 39-65 of the Committee’s report) the Committee heard real life examples of situations where the current system for signing contracts under Scots law has caused parties to view Scots law with a degree of negativity.

85. The Policy Memorandum explains that the Scottish Government’s intention is to set out the provisions clearly in statutory legislation with the aim of counteracting any such potential damage to the reputation of Scots law.

---

<sup>35</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 4

<sup>36</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 4

<sup>37</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 5

<sup>38</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 17-18

86. Catherine Corr considered that the Bill could be used to change the perception of Scots law internationally—

“We can do that now, and the bill will help in the process. There is a misconceived idea about Scots law being somehow very different because it is a separate system; we have to explain that, in commercial terms, the law is not very different throughout the UK. That is a dialogue that Scots lawyers in Scotland probably have with international clients every day at some point. The bill is a practical step that can help in that discussion.”<sup>39</sup>

87. It was also suggested that the fact the provisions are to be specifically set out in statute will lead to the promotion of Scots law.<sup>40</sup> The SLC, in particular, consider that, as a result of the Bill, parties will be attracted to Scots law as it will be “clean and clear cut”<sup>41</sup> whilst based on “clear legal principles.”<sup>42</sup>

88. Stephen Hart from the Braveheart Investment Group also suggested that the primary benefit of the Bill is the certainty it will bring to this matter by clearly stating that a document may be executed in counterpart under Scots law—

“For me, the benefit of the bill will be certainty. People are doing this anyway; they have been working out ways of getting around the strict requirements of Scots law, and notwithstanding the current law, we are currently undertaking transactions in counterpart with electronic delivery. I think that commercial practice is already there, and the bill is all about catching up.”<sup>43</sup>

**89. The Committee acknowledges that the ability to use execution in counterpart or not is normally not the only factor for parties deciding which law to conduct their business under. Instead, factors such as familiarity and global reputation come into play with evidence to the Committee suggesting that in that regard the use of English and New York law is common.**

**90. Mindful of these factors the Committee appreciates that English and New York law will continue to be used in certain circumstances.**

**91. However, the Committee also heard evidence to suggest that, for some, the ability to execute in counterpart, or lack thereof, was a deciding factor in choosing the law of a contract with examples given of instances in which a contract was switched to English law at the eleventh hour when it became apparent that all parties would be unable to meet in order to sign a single hard copy document.**

---

<sup>39</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 21

<sup>40</sup> This differs from the English system in which execute in counterpart is not provided for in legislation and instead has developed through practice

<sup>41</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1532

<sup>42</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1532

<sup>43</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 19

92. **The Committee therefore considers the certainty of knowing from the outset that the contract can be conducted under Scots law and executed via the electronic delivery of a traditional document to be one of the Bill's greatest benefits.**

93. **It is apparent to the Committee that the Bill will put Scotland in a more equitable position with other jurisdictions by removing some of the factors which were viewed as off-putting by parties to contracts. It appears to the Committee therefore that a substantial benefit of the Bill will be its ability to stop the drift of contracts away from Scots law which would otherwise be made under Scots law.**

*Precision of delivery*

94. Although there are exceptions, in Scots law the general rule is that a document must be delivered in order to take legal effect. In order to be delivered a document must both be physically handed over ("physical delivery") and it must be the intention of the parties that the document will be legally binding ("legal delivery").

95. The Bill will allow for parties agreeing a contract under Scots law to determine the time a document will be "delivered" and therefore at what precise time the document takes legal effect. Therefore, the parties may determine that a document will come into effect after a certain date or event has come to pass.

96. The Policy Memorandum explains that this will give parties complete control of when a document will come into force, providing a higher degree of certainty than is currently provided for.

97. Those giving evidence to the Committee supported the Bill's facilitative approach – the Bill allows parties a great deal of freedom to determine how execution in counterpart will work for them in reality. By allowing parties the ability to determine when exactly a document will come into legal force, this flexibility is further maintained.

98. **The Committee considers the provision allowing parties to determine the precise time a document takes legal effect to be useful, particularly as it will allow parties a degree of flexibility which will enable them to adapt to changing circumstances and ensure that all parties are satisfied that a document is in force at the appropriate time.**

*Statistical evidence*

99. The Policy Memorandum suggests that the Bill will lead to an increase in contracts being made under Scots law, in addition to savings in time and money. The Committee notes, however, that the Scottish Government has not provided statistical evidence to support this view.

100. During its oral evidence sessions, the Committee asked witnesses whether they were able to quantify the potential financial benefits of the Bill. However, those giving evidence generally felt unable to provide such information. For example, the Committee was unable to gain an understanding of the number of contracts which are currently being switched from Scots to English law.

101. Dr Ross Anderson of the University of Glasgow explained—

“In particular in the corporate world, if there was a real possibility that a signatory could not be present from the beginning of a transaction, that would support the choice to use English law on a matter on which English law is roughly identical anyway. One can put it no more strongly than that; it always depends on the circumstances. However, everyone who has been involved in such transactions will have had occasions when that was done, and it is not infrequent. Beyond that, I am afraid, “commonly” is a deliberately vague and general term. I do not have statistics.”<sup>44</sup>

102. Paul Hally of Shepherd and Wedderburn echoed this view—

“I am not sure that I have figures for that. In writing a contract[s] for which we know that it is highly unlikely that the parties will come together to sign, we would predominantly choose English law rather than Scots law. It is not a question of how many documents there are or whatever; it is about the fitness for purpose of Scots law against the expectation of the global community.”<sup>45</sup>

103. Whilst the Committee recognises the views expressed, it considers that statistical evidence would have proved useful in helping it reach its conclusions on the potential benefits of the Bill. It therefore raised this matter with the Minister who explained that, as the Bill is permissive and does not require parties to execute documents on counterpart, it is difficult to quantify what the potential increase in business, or savings made, will be.<sup>46</sup> He explained that—

“We are providing a useful tool. It is not really possible to state what its benefit will be; it depends on how the business world in Scotland uses it.”<sup>47</sup>

104. It is apparent from written and oral evidence that the Committee received that the Bill does have the potential to save businesses money and to increase the number of contracts conducted under Scots law. Nevertheless, the Committee considers that it would have been useful if the Government could have provided some data illustrating the number and the value of contracts that will be written under Scots law as a result of the Bill.

**105. The Committee therefore suggests that, wherever possible, statistical evidence should be provided with SLC 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 in order to provide such data to the Committee when future SLC Bills are introduced.**

---

<sup>44</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 3

<sup>45</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 44

<sup>46</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 11

<sup>47</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 12

## **Practical challenges of the Bill**

### *Potential for fraud and error*

106. The main concern raised with the Committee in relation to the Bill was that it would lead to more instances of fraud and error. This concern stems primarily from the fact that the Bill allows parties each to sign a counterpart as opposed to all parties signing one single document. The Faculty suggested that this approach could lead to different parties unknowingly signing different versions of a document either as a result of error (caused by, for example, a computer error) or fraud (such as the deliberate removal of a page from a document).

107. In particular, the Faculty expressed concern in relation to the provision in the Bill which allows parties to exchange signature pages as opposed to counterparts in their entirety. It was suggested that if parties were only exchanging signature pages it would be easier for the content of the document to be altered. Robert Howie QC explained this view—

“If one permits execution by the exchange of the back pages of a contract, each signed by a particular party, plus the front page, it is all too easy for the rogue or fraudster to amend the critical stuff in the middle of the sandwich.”<sup>48</sup>

108. It was further suggested by the Faculty that such undetected issues would lead to an increase in parties coming to court in order to resolve disagreements over the content of documents.

109. The Faculty considered that such risks could be lessened if the Bill was amended to specify that entire documents must be exchanged rather than signature pages only. Further to this, it proposed that the Bill should specify that, when only signature pages have been exchanged, the parties should subsequently exchange full versions of the document via post, allowing checks to be made for differences between the counterparts.

110. The majority of those giving evidence did not consider the Faculty’s concerns to be valid. The general view evinced was that instances of fraud and error would always occur to an extent and that the Bill was unlikely to lead to an increase in fraud or error.

111. In expressing that view, the Minister explained that fraud and error is not a problem unique to execution in counterpart—

“..the issue of fraud and error is not new. The risk of a document used at a signing ceremony being incorrect because of error or fraud exists currently. There are means to deal with that already in the civil and criminal law, and the bill does not need to add to those. There is an existing risk and, in our opinion, the bill does not alter that.”<sup>49</sup>

---

<sup>48</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 22

<sup>49</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 28 October 2014, column 13



112. Professor George Gretton from the University of Edinburgh suggested that it would be just as easy for a page to be swapped into a single hard copy document signed by all parties as it would be to add a page to a counterpart, whether in hard copy or in electronic form—

“Fraud can happen in our system now. For example, a few years ago a solicitor in Aberdeen substituted earlier unsigned pages in deeds transferring property so as to insert his own name rather than that of his client, and then registered that version. He did that more than once. There is risk in such things; I do not think that the bill will decrease risk, but I do not think that it will significantly increase risk, either.”<sup>50</sup>

113. Many of those giving evidence to the Committee referred to the fact that other countries execute documents in counterpart successfully with little to suggest that there was an increase in instances of fraud and error as a result. Professor Rennie of the Law Society of Scotland illustrated this point in his evidence to the Committee—

“I also point out that execution in counterpart is a feature of the English jurisdiction and of European and American jurisdictions. They seem to have managed to operate it without any substantial increase in fraud. I make a third point—and it is the obvious one—that people will commit fraud no matter what you do or what the process is. No bill, and no safeguard in a bill, is ever going to prevent fraud absolutely. I do not consider that the measure substantially increases the risk of fraud in commercial transactions.”<sup>51</sup>

114. Warren Gordon, who gave evidence on behalf of the Law Society of England and Wales, supported this view as he considered there was little to suggest an increase in fraud and error where documents were executed in counterpart, whether by electronic or paper means.<sup>52</sup>

115. Further to this, the majority of those giving evidence to the Committee were content that sufficient safeguards against fraud and error are already in place. Colin MacNeill of Dickson Minton WS set out the steps taken by legal practitioners when executing a document in counterpart by electronic means—

“All documents are transferred in Word format by email until they are agreed, and the final version is agreed and signed off as the final version, by both sides. That follows best practice in England: one firm will then convert the document to a PDF. At that point, if there is to be a physical completion meeting, the solicitor prints off however many copies are needed and takes them to the meeting to be signed. If completion is to be done electronically, the solicitor sends the PDF, which of course cannot be

---

<sup>50</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 6

<sup>51</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 35

<sup>52</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1615

changed, round all the parties, who agree that that is the document to be signed.”<sup>53</sup>

116. Those giving evidence saw no reason why this process would change as a result of the Bill and expressed satisfaction that the current safeguards would continue to protect against fraud and error should the Bill pass into law.

117. It is apparent from evidence to the Committee that in the majority of cases where documents are executed in counterpart, legal practitioners will carry out the process on the parties’ behalf. The Minister argued that clients held a high degree of confidence in the integrity of their lawyers and their ability to ensure a document was executed safely and securely.

118. This view was shared by Catherine Corr of Scottish Enterprise—

“Trust between clients and their lawyers is an issue. Solicitors are regulated by a host of professional duties, and there are engagement letters and so on. When a client is asked to sign a signature page, they therefore think just of the convenience and are usually happy, because they trust that the proper document will be executed.”<sup>54</sup>

119. In addition to the safeguards put in place by legal practitioners and the trust between practitioners and clients it should be noted that legal sanctions are currently in place to protect against fraud.

120. The majority of witnesses were of the view that the Faculty’s suggestion that the Bill should be amended to require that parties deliver documents in their entirety instead of just signature pages was unnecessary and impractical.

121. Dr Black of the University of Edinburgh suggested that, particularly where large documents are being executed, the exchange of entire documents could lead to practical problems—

“I also have concerns about the number of documents that would be floating about. If you have four parties to a transaction, that would involve the exchange of 12 counterparts. It is manageable and feasible to exchange 12 signature pages, but I would have thought that it would become incredibly uncommercial to exchange 12 counterparts of a 200-page contract.”<sup>55</sup>

122. Colin MacNeill of Dickson Minton WS also had doubts about the Faculty’s proposal, suggesting that the obligation to sign and deliver documents in their entirety would negatively impact on the Bill’s aims of providing a straightforward and flexible method of executing documents—

---

<sup>53</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 46

<sup>54</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 22

<sup>55</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 8

“It is a gross inconvenience to ask a company director to print off 100 pages at 2 o’clock in the morning and then rescan them all to send back, whereas printing off a single signature page to get the deal done is not an inconvenience.”<sup>56</sup>

123. Whilst the Government does not consider that the Bill should be amended to take account of the Faculty’s suggestion, the Minister assured the Committee that the Scottish Government would give full consideration to any suggestions made by the Faculty.

**124. 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.**

**125. 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.**

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

**127. 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.**

**128. 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.**

**129. 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.**

*Pre-signed signature pages*

130. Some of the discussion on the potential for fraud focused on pre-signed signature pages. These are signature pages which have been signed by a party to a contract in advance of a document being finalised. The signature page is subsequently attached to the counterpart once the final version of the document has been agreed.

131. The SLC suggested that pre-signed signature pages could be used when a party to a contract was, for example, on holiday and unable to sign a counterpart. More typically, a pre-signed signature page could be used to ratify a change made

---

<sup>56</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 50-51

after the document had already been signed, for example, if an error had come to light.<sup>57</sup>

132. Whilst the Bill does not directly provide for the use of pre-signed signature pages, the Policy Memorandum states that a pre-signed signature page may be used if it can be—

“shown that the party concerned clearly authorised or mandated this in advance, or subsequently ratified what had been done with the full knowledge of the content of the new document.”<sup>58</sup>

133. Given the concerns raised in England as regards pre-signed signature pages, the Committee wished to determine whether, by not specifically preventing the use of pre-signed pages, the Bill could precipitate an increase in instances of fraud and error.

134. The strong view put forward by witnesses was that they did not use pre-signed signature pages, nor did they recommend their use. The disinclination to use such a method was explained by Dr Patrick of Tods Murray—

“It is very unusual to use pre-signed signature pages. In practice I would be reluctant to do so, other than very exceptionally. In an advised transaction, where lawyers were involved, I would ensure that I had a clear trail of authorisations indicating approval of the document to which the page was attached. I would want the PDF to be accompanied by an email that said, “You can attach this page to this document” if I was the person who was doing the attaching. I would also want to know why we had to do it that way.”<sup>59</sup>

135. Dr Anderson of the University of Glasgow shared this view—

“As a solicitor, I would never use them. Actually, one questions what is being done here. It seems to me that the authorisation that has been given by client in that situation is essentially a power of attorney to the solicitor to sign the document, once the solicitor has seen the full document on behalf of the client. I confess that I find the use of pre-signed signature pages odd.”<sup>60</sup>

136. Further to this, although the English practice note outlines a procedure for pre-signed signature pages, Warren Gordon of the Law Society of England and Wales was of the view that their use should be avoided where possible—

---

<sup>57</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1529

<sup>58</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill. Policy Memorandum (SP Bill 50-PM, Session 4 (2014), paragraph 19

<sup>59</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 46

<sup>60</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 9

“Although option 3 caters for that scenario, I would not recommend it to people, because I think that signing a page up-front before you actually see the document itself is a very dicey form of execution.”<sup>61</sup>

137. However, whilst Stephen Hart agreed that pre-signed signature pages should be avoided if possible, he considered that they can at times be a helpful device. In such cases, a high degree of trust between a practitioner and a client is required—

“...commercial organisations can be affected by the availability of signatories or the timing of the transaction. It may be that, once the terms of a document have been negotiated and broadly agreed, the engrossment version is not quite ready yet because, for example, we are still arguing about a point or waiting to hear back from a third party or, with time progressing, my board is unavailable or will shortly become unavailable. There is an implicit trust that the document that I approve for signature will be the document that we as an organisation may wish to enter into. There are times when I may take the opportunity to benefit from that provision to obtain a pre-signed signature page.”<sup>62</sup>

138. Therefore, although the Bill tacitly allows for the use of pre-signed signature pages, it would appear from those giving evidence to the Committee that they are rarely used.

**139. The Committee notes that whilst the Bill does not specifically provide for the use of pre-signed signature pages, it does not prevent their use.**

**140. The Committee therefore notes the evidence it received on this matter and considers that while there may be misgivings about the use of pre-signed signature pages, there might be circumstances in which their use may be justified.**

#### **Additional concerns raised by witnesses**

141. A number of additional issues were raised with the Committee in the course of its consideration of the Bill. The Committee notes the responses received from the Scottish Government which can be found at Annex C.

#### **Related issues not provided for in the Bill**

##### *Electronic signatures*

142. The Bill seeks to make clear that traditional, paper documents may be delivered by electronic means and does not set up a system of electronic signatures.

143. However, it should be noted that legislation is currently in place which allows for contracts to be drawn up and agreed without the need for paper

---

<sup>61</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1619

<sup>62</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 24

documents, through the use of both simple electronic signatures such as tickbox declarations/scanned written signatures and so-called advanced electronic signatures. The SLC report analyses this legislation in more detail and defines advanced electronic signatures as—

“....a secure method of applying a signature electronically. It guarantees both the identity of the signatory and also the integrity of the data to which it is attached. In other words, it is a guarantee that a certain person applied the signature and that the document to which the signature relates has not been subsequently altered. Electronic signatures can confer probativity under the Requirements of Writing (Scotland) Act 1995 as amended by the Land Registration etc. (Scotland) Act 2012.”<sup>63</sup>

144. In addition, since the writing of the SLC report, as a result of the coming into force of parts of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”) and the Electronic Documents (Scotland) Regulations 2014 on 11 May 2014, most of the documents which require to be formally valid under the 1995 Act (i.e. in writing) can now be drawn up in electronic form.

145. Consequently, there would seem to be options available by which contracts could be signed using electronic signatures (including advanced electronic signatures).

146. As highlighted, the Bill does not mandate the use of advanced electronic signatures, and instead focuses on the electronic delivery of traditional paper documents (in practice by using scans of traditional wet ink signatures). The SLC explained to the Committee that this was in part based on the results of their consultation exercise, which highlighted that there was very little client demand for the use of electronic signatures.

147. This view was shared by Colin MacNeill of Dickson Minto WS—

“They are not used at all. Pen and paper are used the world over, whatever jurisdiction people are in. That is true for the contracts that I get involved in”<sup>64</sup>

148. The Committee understands that advanced electronic signatures are generally purported to be a very secure way of executing a document. Advanced electronic signatures validate the identity of both the signatory and the document to which the signature is attached. The Committee was therefore keen to determine the reason behind the apparent reluctance to use them.

149. The Committee heard that there is a degree of uncertainty with regard to the use of advanced electronic signatures. This is in part the result of an apparent

---

<sup>63</sup> Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 231), glossary, x

<sup>64</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 48

lack of trust in certification service providers. The SLC cited examples of European certification providers which had recently gone out of business.<sup>65</sup>

150. Many considered the use of advanced electronic signatures to be a relatively new phenomenon using technology which was continuing to develop over time. As a result, there is a lack of familiarity, and therefore a degree of reluctance to adopt the use of electronic signatures, as Professor Gretton explained—

“the technology is still a bit science-fiction for many people, including sophisticated commercial practitioners. They are familiar with paper and wet ink, and with scanning and PDFs, but they are not very familiar with the idea of pure electronic documents.”<sup>66</sup>

151. One suggestion put to the Committee was that electronic signatures were not commonly used to conclude transactions in Scotland as they are not widely available. The Committee heard that some developments have been made in that regard as the Law Society of Scotland is in the process of issuing electronic Smartcards to all of its members. The cards will provide an electronic signature for every solicitor who is registered with the Law Society.

152. In a letter to the Committee (a link to which is listed at Annexe C to this report), the Law Society of Scotland explained that the smartcards will provide solicitors with a digital signature which will allow them to securely sign documents. In addition, they will be able to take receipt of digital signatures safe in the knowledge that they are coming from ‘a trusted professional system’.<sup>67</sup>

153. The Law Society further explained—

“The Smartcard will provide Scottish solicitors with a qualified secure digital signature, the EU digital signature with the highest form of security and ‘self-proving’ in Scotland. This form of digital signature guarantees the integrity of the text, as well as the authentication.”<sup>68</sup>

154. The Committee was interested to hear of the progress being made in this area and considers that the smartcards could act as a useful tool in the undertaking secure transactions.

**155. The Committee supports the use of electronic signatures and considers that they can provide a secure means of agreeing contracts and help mitigate against fraud.**

**156. The Committee encourages efforts to increase their use and welcomes the Law Society of Scotland’s electronic Smartcard scheme which will provide all of its members with an electronic signature.**

---

<sup>65</sup> Scottish Law Commission Discussion Paper on formation of contract (DP 154), page 109, paragraph 7.37

<sup>66</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 7

<sup>67</sup> Law Society of Scotland, written submission, 31 October 2014

<sup>68</sup> Law Society of Scotland, written submission, 31 October 2014

157. It is apparent from evidence to the Committee, however, that there is still a strong demand for the use of traditional signatures. The Committee considers that the Bill responds to this demand by allowing the continuation of wet ink signatures whilst bringing the additional benefits of the use of counterparts and the ability to exchange traditional documents electronically.

*Electronic repository*

158. The SLC report recommends that the Scottish Government should consider setting up an electronic document repository which would be run by the Registers of Scotland (ROS). The repository would allow for the execution of documents by electronic signature and the secure storage of electronic documents.

159. Evidence to the SLC's consultation suggested that ROS is the obvious choice to run such a repository – already having experience in the area and technological capacity. Further to this, the organisation is known and trusted throughout the Scottish legal profession. Professor Gretton of the University of Edinburgh expressed this view—

“The fact that the repository would be run by Registers of Scotland gives it a credibility that might not exist if it was offered to the private sector.”<sup>69</sup>

160. The Bill does not take up the SLC's recommendation that a central repository should be established. However, Jill Clark from the Scottish Government explained that, although legislation is not required in order to set up an electronic repository, the Government is keen to pursue the idea—

“In line with the SLC's recommendation, we are keen to get involved, and we are certainly happy to look at the matter further. I expect that that will happen after the bill has gone through, but I cannot give you a firm timescale.”<sup>70</sup>

161. In addition, ROS expressed its willingness to being involved in the operation of an electronic repository whilst adding that no detailed discussions had taken place on the matter to date. Kenny Crawford of ROS explained that one of the main benefits of having such a repository would be the degree of trust it would be held in by its users—

“We can see the benefits of having a repository that people can use. If it were to be run by Registers of Scotland, it would be independent and held by the keeper, so it would be trusted. The resilience of Registers of Scotland is a factor, as we are not likely to go out of business. We have been doing our job for almost 400 years, so we have a track record.”<sup>71</sup>

---

<sup>69</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 10

<sup>70</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 17 June 2014, column 1514

<sup>71</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 32



162. The SLC report suggests that, should an electronic repository be set up, it could be used for both the preservation and the execution of documents. Therefore, in addition to the storing of documents, the repository could be used to agree documents and virtually sign them by means of electronic signature.

163. Whilst not dismissing the proposal, Christopher Kerr of ROS explained that in order to achieve this a change to legislation would be required—

“For an electronic repository to be used for execution as well as preservation would require an amendment to the underpinning legislation for the books of council and session. That would involve creating an electronic aspect for the books rather than simply a stand-alone electronic repository. If a repository was to be used purely for preservation, we could potentially create one without the need for underpinning legislation. We do not have a view on whether a repository would be just for Scottish parties or whether it could be more international. We would hold an entry and register it if the market, and our customers, wanted it.”<sup>72</sup>

164. Those giving evidence to the Committee were, on the whole, supportive of the idea of a central electronic repository and particularly of the idea that, should a repository be created, it would be operated by ROS.

165. The idea of maintaining a digital archive of documents was considered appealing and it was considered that if ROS ran the repository, parties would have trust that the system would be neutral and secure. Robert Howie QC explained—

“...if one were to create a repository, it would be of help if that repository were of some official variety, such as the Registers of Scotland. Some of the responses that the committee has received have clearly grasped that. One would want to be able to ensure its security and confidentiality so that it could not be a place where those of ill intent could get in and make use of things or alter things electronically.”<sup>73</sup>

166. Warren Gordon of the Law Society of England and Wales, explained that similar systems were in place for dealing with property transactions in England, considered that an electronic document repository could prove to be useful—

“Ultimately, people are seeking to improve the efficiency of property transactions in our jurisdiction—and, I am sure, in other jurisdictions—and having ease of access to all relevant electronic documents in one electronic document repository would be very helpful to all parties.”<sup>74</sup>

167. Witnesses told the Committee that, if a repository was to be used for cross-border transactions, work would need to be undertaken to determine how such a

---

<sup>72</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 32

<sup>73</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 30

<sup>74</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 19 August 2014, column 1619

repository would work and what the role of ROS would be. Catherine Corr considered that—

“Registers of Scotland is primarily a land register that is linked to Scotland. If we were looking to create a repository for international contracts, for example, we would need to work out how that fits with Registers of Scotland’s role and remit as a Scottish registry for property transactions and how that would morph into a wider role if it were to take on that responsibility. Such questions would need to be answered, but I can see the merit in the concept.”<sup>75</sup>

168. Others echoed the view that in order to work on an international basis, there would have to be an agreement between all parties that the repository would be used. This could prove difficult if each country or each organisation had its own repository. It would have to be agreed that a central repository was to be used and all parties would have to have trust in ROS to operate the repository. Paul Hally of Shepherd and Wedderburn LLP told the Committee—

“Because we often transact cross border, any form of depository would need to gain a degree of universal acceptance. Registers of Scotland, or someone else, may be able to provide that—I do not know. It might be possible for such a register to become universally accepted, which would be very helpful—the situation is similar to that of CHAPS [*Clearing House Automated Payment System*], which has been discussed.”<sup>76</sup>

169. Whilst acknowledging the potential benefits of an electronic repository as opposed to a paper repository, witnesses considered that an electronic repository must be secure and able to adapt to changes in technology.

170. As discussed, the Books of Council and Session have been maintained for hundreds of years. Witnesses were of the view that any electronic repository must have built-in safeguards which ensure that the documents it holds will continue to be accessible and readable despite any changes to technology. Professor Rennie of the Law Society of Scotland explained—

“The problem with repositories is that IT systems change and are updated from time to time. .... we would want to be sure that whatever system was used was never going to be completely outdated, meaning that we could not access what was there.”<sup>77</sup>

**171. The Committee supports the establishment of an electronic document repository maintained by ROS. The Committee considers that such a system would be a useful tool for conserving records of contracts.**

---

<sup>75</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 7 October 2014, column 25

<sup>76</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 49

<sup>77</sup> Scottish Parliament Delegated Powers and Law Reform Committee. *Official Report*, 30 September 2014, column 37

172. The Committee is supportive of the idea of the repository being used not only for the storage of documents but also as a means of executing documents by way of electronic signature.

173. The Committee considers, however, that if a repository is to be established, sufficient safeguards should be put in place to ensure that it is secure and inspires confidence in those using it. The system should also be able to adapt to developments in technology.

174. Taking into account the reservations expressed by some of the witnesses, the Committee is of the view that, if a central repository is established, parties should not be obliged to use it.

### **Delegated powers provisions**

175. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. The Committee may also consider and report on any provision in such a Bill conferring other delegated powers.

176. The Committee published its report on the Delegated Powers provisions in the Bill at stage 1 on 6 August 2014.<sup>78</sup>

177. There are two provisions in the Bill which will confer delegated powers to make orders. Section 5 makes the usual ancillary provision generally found in Government bills. It provides the Scottish Ministers with the power to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Such an order may modify any enactment, including any provision made by the Bill.

178. Sections 5, 6 and 7 of the Bill will come into force on the day after Royal Assent. Section 6(2) provides that the Scottish Ministers may, by order, appoint days on which the other provisions of the Bill come into force. Subsection (3) provides that a commencement order may include transitional, transitory or saving provision.

179. The Committee reported that it does not need to draw the attention of the Parliament to the delegated powers provisions in the Bill at Stage 1 and that it is content with the Parliamentary procedure to which they are subject.

---

<sup>78</sup> Scottish Parliament Delegated Powers and Law Reform Committee, 46<sup>th</sup> Report, 2014 (Session 4), *Delegated Powers in the Legal Writings (Counterparts and Delivery) (Scotland) Bill*, (SP paper 575) available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/79946.aspx>

## **Financial Memorandum**

180. The Finance Committee received four responses to its call for evidence and shared the written responses with the Committee.

181. The Committee has discussed the estimated costs and savings arising from the Bill elsewhere throughout the report.

## **Policy Memorandum**

182. The Committee is content with the Policy Memorandum provided in support of the Bill.

### **CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL**

183. **The Committee supports the general principles of the Bill and in particular the Bill's two key provisions; that execution in counterpart should be clarified as a valid process in Scots law, and that paper legal documents should be deliverable by electronic means.**

184. **The Committee considers that the current system for agreeing written signed contracts under Scots law is unsatisfactory and needs to be changed. By removing some of the barriers to the efficient, straightforward agreement of contracts under Scots law, the Committee considers that the Bill will improve Scots law.**

185. **Whilst acknowledging that the Bill's provisions are unlikely to bring an influx of new contracts to Scotland, the Committee considers that the Bill has the potential to increase the number of contracts made under Scots law by encouraging those who would otherwise have completed a contract under Scots law to choose to do so.**

186. **Whilst the Committee considers the potential for fraud and error to be a serious matter, it is not of the view that the passing of the Bill will lead to an increase of such instances.**

187. **The Committee recommends that the general principles of the Bill be agreed to.**

**ANNEXE A – EXTRACTS FROM MINUTES OF THE DELEGATED POWERS  
AND LAW REFORM COMMITTEE**

**18th Meeting, 2014 (Session 4) Tuesday 27 May 2014**

**Decision on taking business in private:** The Committee agreed to take items 5 and 6 in private.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

**21st Meeting, 2014 (Session 4) Tuesday 17 June 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Jill Clark, Team Leader, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government;

and then from—

Lord Pentland, Chairman; Hector MacQueen, Commissioner; Malcolm McMillan, Chief Executive; Stephen Bailey, Legal Assistant; Charles Garland, Government Legal Service for Scotland, Scottish Law Commission.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.

**23rd Meeting, 2014 (Session 4) Tuesday 05 August 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee considered the delegated powers provisions in this Bill at Stage 1.

**25th Meeting, 2014 (Session 4) Tuesday 19 August 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 via video conference from—

Warren Gordon, Member of the Law Society of England and Wales Conveyancing and Law Committee, Head of Real Estate Know How, Olswang LLP

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee considered the written evidence received in relation to the Bill and agreed a future programme of oral evidence.

**27th Meeting, 2014 (Session 4) Tuesday 30 September 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Robert Howie, QC, Faculty of Advocates;

and then from—

Professor Robert Rennie, Chair of Conveyancing, University of Glasgow, and Alasdair Wood, Member of Law Society of Scotland Obligations Law Committee, Law Society of Scotland;

and then from—

Paul Hally, Partner, Finance and Restructuring, Shepherd and Wedderburn LLP; Colin MacNeill, Corporate Partner, Dickson Minto W.S; Dr Hamish Patrick, Partner, Banking and Finance Team, Tods Murray LLP.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee agreed to defer consideration of the evidence it heard to a later meeting.

**28th Meeting, 2014 (Session 4) Tuesday 07 October 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Professor George Gretton, Lord President Reid Professor of Law, and Dr Gillian Black, Senior Lecturer in Law, University of Edinburgh; Dr Ross Anderson, Junior Counsel, Ampersand Advocates and Honorary Research Fellow, University of Glasgow;

and then from—

Stephen Hart, Legal Counsel, Braveheart Investment Group plc; Catherine Corr, Principal Solicitor, Scottish Enterprise;

and then from—

Christopher Kerr, Head of Legislation and Legal Policy, and Kenny Crawford, Commercial Services Director, Registers of Scotland.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee considered the evidence it heard over the course of the last two meetings.

**29th Meeting, 2014 (Session 4) Tuesday 28 October 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism; Jill Clark, Team Leader, Civil Law Reform Unit; Ria Phillips, Civil Law Policy Manager, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government.

**30th Meeting, 2014 (Session 4) Tuesday 04 November 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee considered the evidence it has received on the Bill.

**31st Meeting, 2014 (Session 4) Tuesday 11 November 2014**

**Legal Writings (Counterparts and Delivery) (Scotland) Bill (in private):** The Committee agreed its Stage 1 report.

**ANNEXE B: INDEX OF ORAL EVIDENCE**

**21st Meeting, 2014 (Session 4) Tuesday 17 June 2014**

Jill Clark, Team Leader, Civil Law Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government;

Lord Pentland, Chairman; Hector MacQueen, Commissioner; Malcolm McMillan, Chief Executive; Stephen Bailey, Legal Assistant; Charles Garland, Government Legal Service for Scotland, Scottish Law Commission.

**25th Meeting, 2014 (Session 4) Tuesday 19 August 2014**

Warren Gordon, Member of the Law Society of England and Wales Conveyancing and Law Committee, Head of Real Estate Know How, Olswang LLP

**27th Meeting, 2014 (Session 4) Tuesday 30 September 2014**

Robert Howie, QC, Faculty of Advocates;

Professor Robert Rennie, Chair of Conveyancing, University of Glasgow, and Alasdair Wood, Member of Law Society of Scotland Obligations Law Committee, Law Society of Scotland;

Paul Hally, Partner, Finance and Restructuring, Shepherd and Wedderburn LLP; Colin MacNeill, Corporate Partner, Dickson Minto W.S; Dr Hamish Patrick, Partner, Banking and Finance Team, Tods Murray LLP.

**28th Meeting, 2014 (Session 4) Tuesday 07 October 2014**

Professor George Gretton, Lord President Reid Professor of Law, and Dr Gillian Black, Senior Lecturer in Law, University of Edinburgh; Dr Ross Anderson, Junior Counsel, Ampersand Advocates and Honorary Research Fellow, University of Glasgow;

Stephen Hart, Legal Counsel, Braveheart Investment Group plc; Catherine Corr, Principal Solicitor, Scottish Enterprise;

Christopher Kerr, Head of Legislation and Legal Policy, and Kenny Crawford, Commercial Services Director, Registers of Scotland.

**29th Meeting, 2014 (Session 4) Tuesday 28 October 2014**

Fergus Ewing, Minister for Energy, Enterprise and Tourism; Jill Clark, Team Leader, Civil Law Reform Unit; Ria Phillips, Civil Law Policy Manager, Civil Law



*Delegated Powers and Law Reform Committee, 65th Report, 2014 (Session 4) –  
Annexe B*

Reform Unit; Alison Coull, Deputy Director, Scottish Government Legal Directorate, Scottish Government.

## **ANNEXE C: INDEX OF WRITTEN EVIDENCE**

### **Correspondence from Minister for Energy, Enterprise and Tourism**

[Letter from Minister for Energy, Enterprise and Tourism to Scottish Law Commission \(laid before Parliament on 28 February 2014\)\(1.21MB pdf\)](#)

### **Submissions received on the Legal Writings (Counterparts and Delivery) (Scotland) Bill**

Responses to the Committee's call for evidence—

[Dickson Minto W.S \(25KB pdf\)](#)

[Faculty of Advocates \(71KB pdf\)](#)

[Freshfields Bruckhaus Deringer \(90KB pdf\)](#)

[Glasgow City Council \(11KB pdf\)](#)

[Law Society of Scotland \(69KB pdf\)](#)

[Maclay Murray and Spens LLP \(36KB pdf\)](#)

[Registers of Scotland \(76KB pdf\)](#)

[Shepherd and Wedderburn LLP \(68KB pdf\)](#)

[Tods Murray LLP \(70KB pdf\)](#)

[Weir Group plc \(68KB pdf\)](#)

Additional correspondence and submissions—

[Paper provided by the Scottish Law Commission on Signatures in Scots Law dated 19 August 2014\(256KB pdf\)](#)

[Correspondence from Professor George Gretton, University of Edinburgh dated 8 October 2014\(69KBpdf\)](#)

[Scottish Government and Scottish Law Commission response to issues raised in written and oral evidence dated 23 October 2014\(144KB pdf\)](#)

[Correspondence from the Law Society of Scotland on Smartcard scheme dated 31 October 2014 \(81KB\)](#)

## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 17 June 2014*

[The Convener opened the meeting at 10:00]

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

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

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

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

Ministers have carried out further focused and specific consultation and some changes, which

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

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

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

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

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

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

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

**John Scott:** Thanks very much.

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

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

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

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

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

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

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

**Jill Clark:** Absolutely.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I want to explore the subject of electronic signatures through some research that I have done. First, I looked at the Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83), which, essentially, say that an advanced

electronic signature needs to be used. Those regulations make reference to the Electronic Signatures Regulations 2002 (SI 2002/318), which are United Kingdom regulations. They say that, with an advanced electronic signature, there needs to be a certification service provider, and they go on to establish a register of such service providers. I sought to find that register, which proved to be formidably difficult. I eventually found paper URN 09/642 from the Department for Business, Enterprise and Regulatory Reform. Although that paper does not say anything about the register, when I printed it out, I realised that the register was present on the very back page, despite that not being mentioned anywhere in the document. There is a single name on the register, and that is the point to which I am navigating.

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

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

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

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

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

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

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

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

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

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

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

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

10:15

**Stewart Stevenson:** I could go on at some length, but I have one fundamental final question. Given that the electronic character of the document—and of the signature, for that matter—is not protected, in a technical rather than a legal

sense, is it likely that people will wish to use the process? There is no provision for advanced electronic signatures that provide technical protection for the content of the document and the inscription of the signature.

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

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

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

**Stewart Stevenson:** That is a helpful comment to hear.

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

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

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

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

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

**Richard Baker (North East Scotland) (Lab):**

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

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

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

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

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

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

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

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

**Alison Coull:** Yes, exactly.

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

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

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

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

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

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

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

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

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

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

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

**Stuart McMillan:** Thank you.

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

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

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

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

10:28

*Meeting suspended.*

10:31

*On resuming—*

**The Convener:** We shall resume. I have huge pleasure in welcoming to the meeting representatives from the Scottish Law

Commission: Lord Pentland, chairman; Hector MacQueen, commissioner; Malcolm McMillan, chief executive; Stephen Bailey, legal assistant; and Charles Garland from the Government legal service for Scotland.

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

**Lord Pentland (Scottish Law Commission):** It is.

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

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

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

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

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

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

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

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

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

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

**John Scott:** Thank you very much, convener.

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

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

**Lord Pentland:** Perhaps Hector MacQueen can address those points.

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

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

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

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

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



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

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

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

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

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

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

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

Commission programme might go on to consider the law on delivery over the next few years.

10:45

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

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

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

**The Convener:** Indeed.

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

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

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

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

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

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

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

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

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

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

Those are the sorts of things that happen and they hold up transactions. It is important information—it is important that it is correct—so the solicitor then has to go back to the beginning.

They have to get a fresh mandate to apply that advanced electronic signature to the document again as it is now a new document. It was said in discussion that that would be much too cumbersome. Doing it to the paper document, which is provided for in the Requirements of Writing (Scotland) Act 1995, is slightly easier. It is not exactly easy but it is a lot easier. It is basically the famous process of putting your initials in the margin at the place where the document has been manually corrected.

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

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

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

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

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

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

**Hector MacQueen:** That is certainly true.

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

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

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

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

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

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

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

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

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

electronic signature, for which there is a legal framework already?

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

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

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

11:00

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

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

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

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

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

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

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

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

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

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

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

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

However, we are certain that there is no need to change the law to enable an electronic document

repository to be set up. Registers of Scotland has the power to do that under the 2012 act, and there is nothing in that act or the amendments that it makes to the Requirements of Writing (Scotland) Act 1995 to stop people using electronic documents and applying electronic signatures of the appropriate standard.

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

**Margaret McCulloch:** Excellent. Thank you for that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Richard Baker:** Thank you.

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

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

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

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

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

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

**Hector MacQueen:** There are examples of that.

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

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

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

11:15

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

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

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

We think that there is a possibility that Scotland could have a competitive advantage—“edge” is perhaps the right word to use. People may be

attracted by the fact that, under the bill, the Scottish procedure is clean and clear cut, which might—along with the fact that it is based on clear legal principles—lead them to execute their documents under that system. In a sense, it will be for our lawyers to rise to the challenge that will be presented. They are certainly hungry enough to make that happen.

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

Charles—did we identify something similar in Spain?

**Charles Garland (Scottish Law Commission):**

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

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

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

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

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

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

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

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

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

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

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

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

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

10:01

**The Convener:** Today's session on the bill allows us to take evidence from the Law Society of England and Wales, which, along with the City of London Law Society, is responsible for the practice note outlining the modern English law on execution in counterpart, which informed the bill.

Joining us via videoconference is Warren Gordon, member of the conveyancing and land law committee at the Law Society of England and Wales and head of real estate know how at Olswang LLP. I welcome Mr Gordon and invite him to make an opening statement.

**Warren Gordon (Law Society of England and Wales):** Thank you. Olswang LLP is a law firm in London and we have other offices in England and around the world. As the convener said, I am also a member of the Law Society of England and Wales's conveyancing and land law committee and will become chair of that committee from September. As a member of the conveyancing committee, I had some involvement in the production of the Law Society's practice note in February 2010, "Execution of documents by virtual means".

My specialism is in real estate, and my experience of execution of documents, virtual signings and counterparts is in that context. However, I am happy to comment on its application in other areas.

I thank the committee for the opportunity to provide some information about our experience in England, which I hope will be of use to the committee as it formulates the legislation. Without further ado, I am happy to take questions.

**The Convener:** Thank you for that introduction. We will go slightly slowly because our cameras need to be able to move.

**Margaret McCulloch (Central Scotland) (Lab):** Good morning, Mr Gordon. My question is on the background to the English law of counterparts. Will you explain the extent to which counterparts are used in commercial settings in England and the role that law firms play in the process?

**Warren Gordon:** The doctrine of counterparts in English law has a couple of meanings, which I will explain. The first relates to deeds. In our interpretation, counterparts are deeds executed as duplicates or identical documents. When a deed is executed in duplicate, there might be separate parts, but all of them are regarded as one deed.



Each part is equally effective. I am talking about written documents as opposed to virtual electronically signed documents, which I will talk about shortly.

The concept of the original deed and the duplicate counterpart constituting one deed, and each part being equally effective, is at the heart of the English law of counterparts in relation to written documents. That is certainly the case in a real estate property context, which is the one with which I am most familiar. The biggest example of that would be something like a lease, where the two parts of the lease—the part executed by the landlord and the part executed by the tenant—are identical. The part that the landlord executes is called the original or the principal deed, and the part executed by the tenant and any guarantor is called the counterpart. The counterpart does not have to be signed by all the parties to be valid. It has to be signed by only the tenant and any guarantor to the tenant. The landlord signs a separate part, or the original.

The original deed is usually the part executed by the party doing the disposition. I guess that it would be similar in the corporate context. The party who is selling or letting the property—the one who is carrying out what we call in legal terms the disposition—will always execute the original document. That is the document that is sent to and registered at the Land Registry.

The Land Registry does not need to see the counterpart, which is in effect evidence that the tenant executed the document. The landlord could use that counterpart if it wanted to sue the tenant. Indeed, the landlord would need to have that document in order to go to court and bring proceedings.

The counterpart has a role but, ultimately, the original prevails over the counterpart if they are not identical. Clearly, they should be identical but, for example, sometimes the word processing systems do not work properly and they are slightly different. In that scenario, the part executed by the landlord would prevail as the original over the counterpart. However, if, for example, you had the unlikely scenario in which the original was unavailable, the counterpart would still have a role to play in the situation, because it could be used as evidence that the document existed.

The committee asked what the advantage is of having an original and a counterpart. I will speak later about the separate concept of counterparts generally in commercial agreements, which has similar advantages.

The key benefit of having the original and the counterpart separately executed by the parties is fairly obvious: if the parties execute separate identical parts, the speed of execution is much

quicker, which must improve the efficiency of the transaction. If you have to get all the parties—the landlord, the tenant and a guarantor—to execute both parts of the document, that would slow up the transaction, particularly if the parties were based overseas. In that case, it might be much more difficult and time consuming to get the documents executed, especially if you were executing with a wet ink signature, as we call it. In a real estate context relating to deeds, having an original and a counterpart is a much more effective way of executing documents.

It must be said that people sometimes like all the parties to execute each part, just to make them feel more comfortable, but in a property context that does not usually happen.

That is the position in relation to property. I will broaden out to the concept of counterparts that is more applicable to virtual signing and to the bill: commercial agreements.

In commercial agreements there are often counterpart provisions: a clause in the document relating to counterparts. It is similar to what I have just been talking about, but slightly different, as you will see. We do not have a concept of an original and a counterpart in that context; rather, we have the concept of counterparts that are identical parts of the document. They are exactly the same, but each one is signed by a different party; you do not have all the parties signing one document.

Signed, separate counterparts have the same effect as if all the signatures on the counterparts had been on one document, so although the parties are physically signing separate documents, legally, you treat them together as one document. Each counterpart is an original, which can be taken to court and sued upon. All the counterparts together, similar to an original and a counterpart, constitute one document.

That is particularly relevant to the concept of virtual signings as dealt with in the Law Society practice note and also in relation to your bill. It highlights the efficiency of each party being able to do their own electronic and virtual signing. Ultimately, once that has been done, all the counterparts together constitute one document. Each party being able to sign by themselves, without everyone having to sign one document, provides much greater flexibility, which can be utilised in an electronic virtual signing context.

Those are the benefits. Does anyone have any questions on what I have said so far? My next comments relate to question 2.

**The Convener:** Stewart Stevenson had an observation.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** Thank you very much, convener. I have listened carefully to what has been said and I hope that I have understood it. I am looking at a submission from the Faculty of Advocates. It may be that there is a difference between English and Scots law that accounts for my not hearing you say anything about the delivery of documents, which is part of the bill.

You seemed to suggest that, particularly in relation to property, there is not necessarily a delivery to the primary signer—that is my term. You clearly differentiated between the status of the version of a document that is signed in counterpart and that of the other version. Is the junior document—that is my phrase—delivered, so that the two versions can be compared and so that it can be confirmed that they are identical? You mentioned difficulties that would arise if the versions differed. Does what you do include a delivery process?

**Warren Gordon:** There is a concept of delivery, but I understand—although I am not an expert on Scots law—that one form of delivery in Scots law is physically delivering the document. Is that right? That concept is not a necessary corollary of what we do. In practice, one firm of solicitors produces both documents and gets the parties to execute. Ultimately, one party ends up with each part of the document. As for comparison, the solicitors will check that the documents are the same, but the physical delivery is not integral to the legal effect.

In English law, the concept of delivery—as I will come on to with virtual signings—is that, if a party signs a document, our interpretation is that they are legally bound at that point by virtue of having signed the document, unless the parties agree otherwise. Normally, we agree otherwise and we do not want a party to be bound merely at the point of execution. We say that they will be bound only when the document is dated. The dating takes place after the respective parties have executed.

The concept of physical delivery binding the parties is not relevant in English law, but we have a concept of delivery whereby, if a party signs, they will be bound unless the solicitors and the parties agree otherwise, when they will normally be bound when the document is dated.

**Stewart Stevenson:** Forgive me—I want to be as clear as a layperson can be. The concept of dating is that the legal effect of the two signed copies starts only when the documents are dated. Will you describe how dating happens? Who is party to it? Have there been cases in which the absence of dating or a question about dating has led to difficulties in how you do things in your jurisdiction?

**Warren Gordon:** The parties execute the documents and do not want to be legally bound until the documents are dated, so the documents are undated. My experience of transactions is that, normally, the respective solicitors speak on the phone and agree on a specific time in the day and a date when the document will be dated. From that date and time, the parties are legally bound.

Contracts, which are not under deed, are executed. As there is no concept of delivery in the concept of non-deeds, the parties are not necessarily bound when they sign. The documents go to the solicitors, who use a Law Society formula to exchange the contracts, and that has various elements. The parties are bound from when the document is specifically dated.

The comparison is with a deed, which—as I said—involves the danger that a party can be bound merely by virtue of signing the document, even if it has not been dated at that point. That could create quite a lot of uncertainty, so any well drafted document—although I am not saying that every document is written in this way—will have a statement that specifically says that delivery, as we understand it, is to take place on the date of the deed. That means that the fact that the parties have signed the document does not mean that they are bound. Sometimes, a party signs something and then has second thoughts and decides not to proceed, or a party might sign something but have a three-month gap until completion.

Parties sign the documents but are not legally bound until they are dated. All that that means is that there is a gap on the front page for the date to be put in. The solicitors agree on the date when they will complete—that is the word that we use—the deed. The parties are legally bound from the moment that it is dated.

10:15

**Stewart Stevenson:** So there is a contract, either implicit or explicit, between the signatories and the lawyer acting on their behalf, because the lawyer is giving effect to the dating.

**Warren Gordon:** That is correct. The lawyer is, in effect, acting as the agent of the client to bring effect to the legal completion and the dating.

**Stewart Stevenson:** I am sorry to be so picknickety—I am kind of known for it—but if I have understood you correctly, we are talking about a third lawyer who has a responsibility to both sets of parties to the contract. Is that correct?

**Warren Gordon:** No. Some parties will not even be represented by a lawyer, in which case we would advise them to seek independent legal advice. In commercial transactions, each party has

its own lawyer—there is no third lawyer involved—and between them they work out the arrangements for exchange in the case of contracts or completion in the case of deeds and how and when those matters will be dated.

**Stewart Stevenson:** Thank you.

**Margaret McCulloch:** I can see the advantage to businesses in different parts of the country or internationally of being able to sign the documents in this way. Does going down this route have any other advantages?

**Warren Gordon:** At the moment, people are a little bit cautious about it and are reluctant to go down the electronic route. I will come to the Land Registry's change of practice, which might mean completing deeds through virtual signings, but I think that people still feel slightly uncomfortable with virtual transactions. Indeed, the advantage that I have highlighted is one of the main advantages—indeed, the only advantage—that I can think of at the moment with regard to virtual signings.

As for different parties executing different parts of the document, we who practise English law have been familiar with that concept for decades if not for hundreds of years, so we do not really think of it as an advantage. However, in practice, it is a bit of hassle if you cannot take advantage of the counterpart arrangement and if, as sometimes happens with our large commercial transactions, you have to get five or six parties to execute the same document. It is a total nightmare; people are not around when you need them to be and, given how the typical commercial transaction goes, everything needs to be done yesterday.

Not being able to use the counterpart arrangement is a real disadvantage—and I stress that that, for me, is the main advantage of separate execution by counterpart and original. I cannot think of any other particularly obvious advantage, but that one advantage is well merited and I hope that its benefit will be seen in virtual signings.

**Margaret McCulloch:** Are there any practical difficulties with the English law of counterparts, and have you identified any areas where improvements could be made?

**Warren Gordon:** The main disadvantage is, I would argue, a corollary of the main benefit. Because each party executes its own part of the document, if a part were to be lost—these things happen; documents get lost—problems could arise if that part had to be used, for example, to bring proceedings in court. If all parties had executed each part of the lease, that would not be a problem, because you could get a certified copy of the document that showed that both parties had executed it for the other party. That said, it is quite

rare for parties to lose their documents. It happens, but the rarity of such an occurrence does not make it a significant enough disadvantage to outweigh the benefits of the efficiencies of having separate execution.

Another disadvantage, which we have already mentioned, might arise if the documents are not in identical form. I have to say that one might have seen that as more of a disadvantage in the olden days—before my time—when people used to scribe these documents together. What with modern technology and information technology processing, it would be pretty negligent for a solicitor producing the counterpart and original or the counterpart documents not to put different copies of the documents into identical form. One might argue that it only stands to reason that if you were getting three parties to execute each part of an agreement in counterparts you would have three documents because you would want each party to have a copy. In that case, what if, when it came to the IT processing, the three parts were not identical? Even if all the parties execute each part, there is always a danger that, if there is more than one copy of a document, the various copies could differ.

I put forward the concern about documents not being identical simply because you asked me about the disadvantages. In practice, using information technology, that should not be an issue because one would literally push the print button and say, "I'll have two copies of that, please," rather than having to go through a different process to create the second copy. If one is concerned about that, one would be concerned about knocking out more than one copy of any document when one pushes the print button.

As I said, those are disadvantages, but they are very minor and are outweighed by the greater efficiencies that we gain by executing separately.

**The Convener:** That takes us back to Stewart Stevenson, who has a point on the subject before he moves on.

**Stewart Stevenson:** Yes. I just wanted to ask whether consideration had been given to the use of electronic signatures that relate to the document—in other words, electronic signatures that validate that the document is a particular version. That would allow a quick comparison of electronic signatures rather than someone having to compare the detail dot by dot and crossed t by crossed t.

**Warren Gordon:** I am not aware of that, certainly in a real estate context; personally, I think that it is probably unnecessary. A lot of the documents are negotiated online and there are different versions. When a version is agreed and we are ready to push the button to engross the

document, the solicitors for each party should look at the final version. The final version of the document should be circulated to the respective solicitors, and they can then come back and say that they are happy with it.

One of the lawyers will produce the final version of the document and email it to the other side. Any lawyer who is doing their job properly will then check the document. I use a tool in the office called PDF comparison, which is a technical device that shows any differences between two versions of a document.

I agree that, in this context, locking down the agreement with an electronic signature—we will come to the issue again in later questions—would probably be more effective. However, I am guessing that it would probably involve more administration and would probably cost more. The solicitors would have to liaise on whether there was any incompatibility in their technology.

In answer to your question, I note that the technology that we have at present gives sufficient protection to solicitors and their clients, bearing in mind the cost pressures on transactions; what clients are prepared to pay in the real world; and what firms are prepared to spend and can afford to spend. Firms will do the things that they need to do, and if the technology is sufficient to protect them to a reasonable degree, I think that people will perceive that to be enough.

**Stewart Stevenson:** Right. I am available on consultancy at about £1,000 a day, so there we are.

I move on to the case of Mercury Tax Group v HM Revenue and Customs, and the Law Society's practice note, which you indicated in your introductory remarks that you were party to.

To what extent are you satisfied that the practice note addressed the issues that were raised by that case?

**Warren Gordon:** The case, of which I am sure the committee is aware, is from 2008. As often happens with such cases, it is very specific to its particular facts. In that sense, one could say that it is therefore not that significant. However, the case is important because it highlighted areas that the profession had perhaps not focused on closely enough, with regard to pre-signed signature pages and the practice of exchanging signature pages for contracts by email.

In the commercial context in particular, and in the residential context to a degree, there are increasing numbers of overseas purchasers. We act for a lot of people who are abroad, and it is too fiddly to send an overnighter to somebody to get a document signed with wet ink and then have them send it back.

Lawyers have always attempted to come up with their own solutions for how they can go about effecting an exchange legally that would properly bind the parties. There has been great uncertainty about how they could go about doing that, and whether the clients would be properly protected in such situations.

The Mercury case was not of great relevance to what practitioners do, but it highlighted an issue that the Law Society needed to address in its guidance. As you mentioned, that involved not only the Law Society but the City of London Law Society, which was arguably more involved because a lot of its transactions involved clients overseas.

We have the guidance, which was in the practice note. My particular interest was in relation to real estate documents and deeds. The Law Society came up with three options. Is the committee fully au fait with the contents of the practice note, or should I reiterate the key points on the three options?

**Stewart Stevenson:** I suspect that we may know as much as we need to, but if you can briefly make a few bullet points I would be better informed.

**Warren Gordon:** Okay. I will make a couple of introductory points. Virtual signings mainly occur in a property context in relation to real estate contracts. In English law we usually have a contract, which is the agreement to sell the land. At a subsequent point there will usually be the disposition: the actual transfer of the legal interest.

In a real estate context, virtual signings normally occur in relation to the contracts to sell. It is at that point that the parties are initially bound to transfer the property at a later date. The urgency usually arises when the clients want to get the contractual commitment. The legal transfer itself will happen later, but the urgency is to get the contractual commitment, which is why they need to do an electronic signing. This is normally for property sale contracts.

Until recently, we would never do a disposition—the transfer of the legal interest—by virtual signings. The key reason for that was that dispositions had to be registered at the English Land Registry. Until about two months ago, the English Land Registry required wet-ink signatures: it would not have been happy with a PDF copy. However, the Land Registry changed its practice from 30 June and it no longer wants to see original documents, unless it is a first registration situation. For the vast majority of property transfers the Land Registry does not need to see the original document.

I do not know what the Scottish land registry's practice is, but that is quite an interesting practice.

What is very interesting about it is that it opens up virtual signings to a much wider group of documents, which now includes not only contracts but transfers, leases and any other disposals. That is relevant to the options because it means that they can be much more widely used. The guidance is very helpful to practitioners.

There are three options. The strictest option—option 1—relates to deeds, because in England deeds have the greatest technical requirements under the Law of Property (Miscellaneous Provisions) Act 1989, and to real estate contracts, which also have technical requirements. Documents such as guarantees and simple contracts have less strict requirements, and options 2 and 3 deal with them. I will come to those options shortly.

Each option contains a series of steps that need to be taken by the clients—the parties—and their solicitors. The committee will be delighted to know that I will not go through all the steps for all three options, but I will go through the main steps for option 1, then highlight the two or three small changes for options 2 and 3.

I remind you that option 1 is for deeds and real estate contracts. I think that most of the documents that you are talking about in your context are deeds. The parties' solicitors have to agree the arrangements for the virtual signing, which you would expect. The document is then agreed and finalised between the parties. One person will be in control of the production of documents, in the same way as if it were a paper completion—as I mentioned, for paper completions the solicitor will physically produce the paper document. In this scenario, the solicitor will email to the parties overseas the final version of the document—which, as we discussed, will not be under public key infrastructure or digital signature protection, but it will still be the final version of the document that the parties have agreed—and, separately, a signature page. Those are emailed to parties who are overseas or who are unable to give a wet-ink signature.

I will explain why we have a separate signature page. Let us say that a client is lying on the beach in the south of France and we have a 500-page document and a one-page signature page. In theory you might think that the person would need a good printer to print out his 500-page document and signature page, and that he would need to sign it all, then scan it all and send it back. In practice we think that quite often clients are not going to want to print out lengthy documents. All that we are requiring them to do is print out the signature page and sign it with a wet-ink signature. They then need to have a handy scanner somewhere near them so that they can scan the

signature page, which they email back to the solicitor with the final version of the document.

10:30

Immediately, you can see a slight wart in that because it is dependent on a client attaching the right document. Let us say, for example, that the client manages to scan the signed page correctly but then goes to the wrong email and attaches the previous version of the document. The solicitor controlling the whole arrangement would receive back from one party the scanned version of the signature but version 4 of the document. If the other party has done it correctly and sent back the scanned signature and version 5, we have a problem because if we have documents in a different form we will not have a contract—we will not have a legally binding document. Therefore, somebody somewhere has to make sure that those documents match.

That comes back to the question about the extent to which we could have some kind of certification to make the process more foolproof. The danger is that we are depending on a layperson client to get it right—doing what they have to do, printing out the page, signing it, scanning it and returning it together with the document that they were sent by the solicitor. That is not difficult from a technical perspective even for people who are not into IT, but you can still see a potential issue: if they mess it up and send the wrong version of the document back with the scanned signature page, there could be a problem with achieving legal effect, unless it is picked up by one of the solicitors.

**Stewart Stevenson:** Let me develop a little point from that. You are clearly discussing the legal link between the signed page—pre-signed, in some cases—and the document. How is that legal link created? It sounded to a layperson a little haphazard, potentially. Has it been tested by any case law thus far?

**Warren Gordon:** Following the Mercury case, we had to produce some guidance. We were concerned about whether the legal links that you mention stack up under English law.

I am not aware of there being any recent cases testing whether a virtually signed document in that format works as a matter of English law. Whenever we—the Law Society and the City of London Law Society—have an extremely difficult legal point that is fairly novel, we go to senior counsel. We went to a chap called Mark Hapgood, who gave a big opinion on it. Through the City of London Law Society real estate committee, we were concerned about the specific technical issues for real estate documents and deeds, so we went to a couple of our own senior counsel—

one of whom I think co-wrote the Land Registration Act 2002, so he is fairly knowledgeable—and got from them about 80 pages of opinion on whether or not it works.

We wanted those counsel to tell us whether the way in which documents are executed by the email arrangement was consistent with the legislation for the execution of documents in the manual context. They had to examine the legislation and determine whether it could be interpreted as encompassing executions by virtual signings. The clear response that we got from our real estate counsel and also from Mark Hapgood QC was that, yes, a virtual signing using the steps set out in the Law Society formula would equate to a manual signature in accordance with the legislation.

As I say, as far as I am aware, that has not been tested in the English courts so I cannot give you a definitive answer that it absolutely 100 per cent works but, because we knew that the profession wanted guidance on the matter, we were very careful to get some very detailed opinions. That gave us the assurance to put out the guidance note, which we felt would at least give practitioners and their clients greater comfort that doing virtual signings had some legal basis, although there was no case law that said 100 per cent that worked.

**Stewart Stevenson:** Forgive me for asking this question—I may regret asking it. We are talking about the communication method being electronic. When it was all paper and wet ink, how was it possible to know that the page that held the signature, which was part of the contract, related to the contract if, for the sake of argument, it was sitting in a looseleaf binder out of which I could take an individual page and into which I could put another one? When everything was on paper, was there no process of initialling all the pages that were being authorised by the full signature page, so that there would be that link? Is there an issue there?

**Warren Gordon:** That is an excellent point. You might call me and most of my fellow practitioners naive, but I think that we assumed that, once a document had been physically bound with a binder on the side—we call it engrossed—one must never unbind it. I always knew that and was brought up in practice in that way. That probably gave the reassurance. The solicitor would physically engross the document and send it to the other party's solicitor, who would check it and send it to their client. It would all be bound, with the signature paper bound in at the end. The client would physically sign that and return the bound document to their solicitor. It is possible that the client could have unbound the document, taken out a few pages, put a few more in and messed it around, but it did not tend to happen that way.

Generally, law-abiding citizens would probably not go into that and they would have no reason to start interfering with the document. The client relies on the solicitor to have got the document right.

My point is that that scenario was probably a little more foolproof. I realise that the potential issues that I raised were not necessarily brought out in the Law Society practice note, but they occurred to me as we were speaking. That approach is perhaps a bit more foolproof than a virtual signing scenario, where there is a danger. A client might be asked to send back the right part, but if he has a number of emails in his system, he might accidentally attach the wrong document. That is more likely to be an issue than somebody unbinding a physical document. With a bound physical document, we know that it is the same document.

**Stewart Stevenson:** In moving to the electronic world, we are seeking to replicate that physical relationship that requires a positive action to disrupt it, as was the case prior to the electronic world. As yet, there has been no legal challenge on that.

We have probably done that issue to death, and I know that my colleagues have other questions.

**John Scott (Ayr) (Con):** What are the Law Society's views on the likely impact of the bill on businesses that are operating in Scotland and the competitive position of Scottish law firms?

**Warren Gordon:** Unfortunately, I am not an expert in Scots law and I do not have the arrogance to think that I could tell you about that. However, it is worth pointing out an analogy with the English law context and the virtual signing scenarios that I talked about. With option 1, which we have just discussed, the view that we have from counsel and the position that we adopt is that, if someone sends to the solicitor a page that has been signed by the client together with the document, that counts as a legally effective and binding virtual signature. As I discussed in relation to delivery, unless it is made clear that delivery takes place at a date other than the date of signature, it will take place on the date on which the signature page and document are emailed to the solicitor. Therefore, in our context, with delivery, it needs to be made clear that, even though a virtual signature has been sent, the document does not have legal effect until the date that is on it.

The analogy with the bill is that it talks about a copy of a signed traditional document being transmitted by electronic means, such as email. From what I have seen, that is the heart of the bill and it seems quite similar to our option 1, which is when the client has signed the page and sends it and the document by email. We have counsel's

opinions and we have produced a note that says that, if the relevant option steps are followed, the party is legally bound by the virtual signature unless, as I say, delivery is to be on the date of the document. For your purposes, however, the client will be legally bound by that virtual signature.

To me, that is analogous with the bill's proposal, whereby a copy of a signed traditional document would be transmitted by email and would have binding legal effect. As I said, I cannot comment on the Scots law element because I am not a Scottish lawyer and I am sure that I would say the wrong thing. However, in the context of English law, I see an analogy between the heart of the proposal and what we have in option 1.

**John Scott:** Do you envisage that any competitive advantage will accrue to Scottish law firms as a result of the bill? I understand that Scottish legal firms think that that will happen. I would be interested to hear your opinion.

**Warren Gordon:** If the consequence of the bill is that Scottish law firms do a lot more virtual signings, firms might perceive that their executions are more efficient. If they are doing more of those executions than English firms are doing virtual signings, they might perceive there to be a competitive advantage.

However, as I said, given the way in which things are going, with the Land Registry saying that it does not require wet-ink signatures and with so many transactions being cosmopolitan and based overseas, there is a great chance that there will be a lot more virtual signings in the English jurisdiction. If there is an advantage in that there are more virtual signings in Scotland than in England, I think that, ultimately, the situation will balance itself out.

**John Scott:** Does the Law Society of England and Wales have comments to make on the bill's not requiring parties to include an express counterpart clause, in contrast with the normal practice in England?

**Warren Gordon:** In my experience, we do not have counterpart provisions in our real estate documents. We simply say that the part that was executed by the landlord is the original and the part that was executed by the tenant is the counterpart. We do not need a four or five-line clause in the document that says that it is a counterpart—it is just called a counterpart.

Usually, in commercial agreements there is a four or five-line counterpart provision, which basically says that each part counts as the original, and the documents are in identical form. However, as I understand it, in English law we do not need to have a counterpart clause in a commercial agreement provided that the documents are in identical form.

**John Scott:** Thank you. That is clear.

Does the Law Society have any other comments to make on relevant differences between the English law on counterparts and the approach that is envisaged in the bill?

**Warren Gordon:** I have no comments to make about that. My great interest is in the concept of giving a document legal effect merely by physically delivering it, which is a concept that we do not really have in English law. That highlights the great and interesting differences between our jurisdictions. I have nothing further to add on your question.

**Margaret McCulloch:** Warren Gordon said that the signature page can be sent electronically to all parties for them to sign, print, scan and send back. Does that page have a header or footer that ties the page to the document to which the parties are agreeing, or is it a blank page?

**Warren Gordon:** It will not be a blank page. I cannot confirm that every document that I have seen has had page numbers—some do not—but it is usually the case that, if the final page of the main document is page 56, the signature page will be page 57. The footer will be the document number, which I suppose also ties the page into the rest of the document. There will be no header; there will simply be the execution clause—the wording, which might say, “Signed as a deed by X in the presence of Y”—to enable the client to sign in the relevant place. The only things that tie the signature page into the rest of the document are the page number and the document number.

That is probably not as crystal clear as you might want it to be. It would be clearer if there were a heading that identified the page as the signature page for the document to which it related, but I suspect that our current approach is not as clear as that.

**Margaret McCulloch:** Is there any reason why that has not been done? Would such an approach make the document more secure, by tying the signature to a particular document so that it could not be used for anything else?

**Warren Gordon:** I think that it has not been done because people do not perceive that to be a concern. If people have lawyers who are acting for them, they trust their lawyers to get it right. Clearly if there is a fraud going on, that is a different scenario, but that rarely happens. In most normal scenarios, the party would have their solicitor acting for them and they would trust their solicitor to get it right.

10:45

In answer to your question, I believe that having the words at the top would probably make the

document more secure. What situations are we concerned about? One of the key concerns with virtual signing that we have not really touched on is the possibility that it makes fraud more likely. If fraud is going to be perpetrated, the fact that there are two lines at the top of the page saying, "This is the document to which this relates" will not necessarily prevent a fraud from being perpetrated. People can just manipulate the legislation to suit their own nefarious purposes.

I think that people trust the system. I am not sure that the suggestion about having the lines at the top of the page would take off in our jurisdiction, as people would just think that it was fiddly. It is the first time that I have heard that suggestion made; I have not heard it made in the English jurisdiction. From your perspective, starting afresh and looking at things anew, why not try it? It is a good idea. It would not stop a fraud, but it would tie the signature page in better with the rest of the document, so it is a good suggestion.

**Margaret McCulloch:** Thank you very much.

**Stuart McMillan (West Scotland) (SNP):** Good morning, Mr Gordon. My question follows on from the comments that you made a moment ago. How prevalent has fraud been with this particular practice in England and Wales?

**Warren Gordon:** I have not been provided with any statistics by the Law Society or anybody else to show the regularity of fraud. It is a new practice. The problem is that, if frauds were taking place, one would not necessarily get to hear of that publicly. Although we have had these types of signature for some time, it is probably too early doors to say how prevalent fraud is. It has not been highlighted in the press as an issue, although it is a concern. It is a concern because, as we see in the press every day, with anything that is done electronically there is a greater chance of hacking or of fraud. Call me a Luddite, but, when I have physical documents such as the land certificates that we used to have, I feel that I have more security than I would have if I relied on someone amending the register, for example, with nothing to prove it. I still believe that physical documents give a greater degree of security. In that sense, there is a greater chance of fraud, but I do not have the statistics to show that fraud is happening more often in relation to virtual signings than in relation to manual signings.

**Stuart McMillan:** Have there been many reports of fraud cases in the media?

**Warren Gordon:** I have not heard of any in relation to virtual signings in this area. That does not mean that there have not been any, but none has been reported. I presume that, if there was such a scenario, the police would be involved and

such cases might not even be made public for a time because of the investigations that would be going on.

The practice note has been out for some time and the Land Registry will now accept certified copy documents. You must remember that virtual signings are probably less of an issue in relation to sale contracts than they are in relation to the actual transfers of the properties—that is where the fraudsters would really be interested. It is only since 30 June that the Land Registry has said that we can have certified copy signatures, which lays open the possibility of having virtually signed leases or transfers being sent to the Land Registry. The process went live only seven weeks ago, so it is probably too early to judge whether a fraud will happen. However, over the next year or so, it will be interesting to see whether we get more such cases coming out in the press. That will really highlight whether there are serious pitfalls with the virtual signing process, particularly when it relates to dispositions of land.

**The Convener:** Stewart Stevenson has questions on the particular issue of electronic signatures.

**Stewart Stevenson:** I have just been reminded of a gentleman called George Scovell, who, 200 years ago, broke Napoleon's grand chiffre and thus laid the groundwork for his ultimate defeat at Waterloo. Maybe the lawyers are correct to stay away from anything electronic that requires encryption and encoding.

**Warren Gordon:** We just need caution.

**Stewart Stevenson:** Indeed. What worked 200 years ago might still be a danger today.

I am really interested to know about other work that the Law Society or other people in the English legal system have planned or are undertaking to promote the use of electronic signatures and create an infrastructure to allow the system to be more easily and cheaply introduced.

**Warren Gordon:** As far as I am aware, the Law Society is not actually involved in the promotion of true digital signatures. We have looked at the issue at length over the years, and many firms have written about it.

To my mind, the best iteration of digital signatures came from the Land Registry's earlier iterations of e-conveyancing. I was actually doing a bit of research on the matter last night, because I thought that the question might come up, and I found an interesting *ComputerWeekly* article from 2008 that examined the role of public key infrastructure—PKI—systems in guaranteeing the authenticity of property transaction documents. If you look online, you will find it.



I also noticed some Land Registry documents from the same time setting out some of the technical parameters for PKI. In a nutshell, if the Land Registry's proposals had gone ahead—which, ultimately, they did not—authorised parties would have been able to exchange information quickly between each other and the Land Registry; the documents would have been encrypted and signed with a digital certificate. I think that that is perhaps the sort of thing that you have in mind. To get into and read those documents, people would have needed a secure token, a username and a password. Under the Land Registry's original plans, up to 300,000 documents a day would have been affected, and up to half a million security certificates would have been supported. In the arrangement, the Land Registry would have managed a central authority issuing the certificates to enable parties to sign electronically documents such as transfers and mortgages, and law firms would have appointed administrators to ensure that the people at their end were acting securely and properly utilising the certificates, with security to enable access.

The system never saw the light of day in an e-conveyancing context, but the committee might find it worth its while to speak to the Land Registry for England and Wales about its experiences, if it has not done so already. If you do not want to do that, you will find, if you do an online search for "PKI" and "Land Registry", a 10-page document that might be of interest explaining some of the project's technical aspects.

As far as English legislation is concerned, there is the Electronic Communications Act 2000, which makes quite wide-ranging provision with regard to electronic signatures. For example, it makes all electronic signatures, no matter whether they are simple or advanced—I will explain the difference in a moment—admissible in UK legal proceedings. However, the evidential weight of the signature depends on whether it is simple or advanced. A simple electronic signature is, for example, a typed signature at the end of an email; frankly, that sort of signature does not carry much evidential weight because it is not very secure. The more advanced signatures are those certified by some kind of certification authority and are more akin to the Land Registry PKI-protected signatures that I have just mentioned.

The other problem with electronic signatures is that, although the 2000 act is an umbrella piece of legislation, it is not entirely clear whether every other bit of English legislation enables that act to be used to effect electronic signatures in that context. In relation to property legislation, we specifically went to counsel to get a view on virtual signings. The point is that one cannot definitively say whether every bit of English legislation allows for the application of PKI or its equivalent to

electronic signatures, perhaps because of the incomplete incorporation of the 2000 act into other pieces of legislation.

**Stewart Stevenson:** That was very interesting and helpful. I close with the simple observation that the banks in the clearing house automated payment system—or CHAPS—have been using this technology since 1982, so there is a bit of evidence that it actually works. I know a bit about that, because I happened to be the project manager of that particular project.

**The Convener:** It occurs to me that there might be a need for an internationally agreed protocol, given that the route that we are going down does not seem to be reversible. From where you are sitting, is there any indication of that sort of thing happening?

**Warren Gordon:** From where I am sitting in a real estate context, the answer is no. Of course, that does not mean that it will not happen in future, particularly with the transatlantic and cosmopolitan nature of transactions. Such a development would not surprise me, but I have not been involved in such work and I am not aware that the Law Society has discussed the matter with law societies in other jurisdictions. I agree with you, though, that that would be an important step.

**The Convener:** Thank you very much. We will now return to Stuart McMillan, who has a question about electronic document repositories.

**Stuart McMillan:** What benefits could a dedicated electronic document repository bring to the system envisaged in the SLC report?

**Warren Gordon:** Can you clarify what you mean by "electronic document repository"?

**Stuart McMillan:** The SLC recommends such a repository on page 63 of its report, but the issue has not been dealt with in the bill. I suppose that it means a facility where all the electronic documents could be collected.

**Warren Gordon:** The nearest things that we have to that in the property context are extranets, which are usually for completed documents. I would therefore define an extranet as an electronic document repository, because it allows us to have all our electronic documents in one place so that clients can access them and so that they can be used for transactions. After all, as we move further into the virtual world, we will not want to send the other parties in transactions a tonne of paper documents.

As for any wider application, there have been discussions—they might even have involved the Land Registry; I am not sure how far they have progressed—about the extent to which the Land Registry could hold a series of different documents in context. Ultimately, people are seeking to

improve the efficiency of property transactions in our jurisdiction—and, I am sure, in other jurisdictions—and having ease of access to all relevant electronic documents in one electronic document repository would be very helpful to all parties. I do not think that the issue has been progressed at all in a public sector context with the various agencies but, as I have said, we use it in a private context in our transactions and as a means of holding documents. Indeed, it is a big issue for law firms, particularly the larger ones, which deal with big properties and therefore lots of documents that they will want to make it as easy as possible for people to access.

**Stuart McMillan:** I note that, only two or three years ago, the Scottish Parliament passed the Land Registration etc (Scotland) Act 2012 to improve the efficiency of Registers of Scotland and bring it more into the electronic age, and the SLC's proposal is for that organisation to be the main body for collecting these documents.

**Warren Gordon:** Has that system gone live?

**Stuart McMillan:** Yes.

**Warren Gordon:** I am sure that if the Land Registry of England and Wales chose to go down the same route, there would be some very interesting conversations to be had.

**The Convener:** I am grateful to you for your responses, Mr Gordon. I think that that concludes our questions, but do you think that we have missed anything? I know that that seems unlikely, given that we have been at this for an hour now, but was there anything that you expected to come up that we have inadvertently missed?

**Warren Gordon:** The only point that we did not cover was options 2 and 3 on the Law Society practice note with regard to documents that are not real estate contracts or deeds. Those options take a more adventurous approach to the execution of documents with, in option 3, the use of a pre-signed signature page. What happens is that you get a client to sign a separate page, let the parties go away and agree the document and then attach the page to the finished version of the document. Speaking as a real estate lawyer, I have to say that such an approach does not fill me with great comfort—and if I were a client, I would not be filled with great comfort either, because I like to look at what I am being asked to sign. Although option 3 caters for that scenario, I would not recommend it to people, because I think that signing a page up-front before you actually see the document itself is a very dicey form of execution. I am not sure how many members of the committee would be happy doing that, but I certainly would not be.

Apart from that, convener, I think that we have covered all the points.

**The Convener:** What you have outlined seems to be where the law of agency and the law of trust bump into each other, and I would suggest that it is commercial nonsense.

Stewart Stevenson has another question.

11:00

**Stewart Stevenson:** Is there a defined process for attaching the pre-signed signature page that involves the person in question, who might have provided the signature many months earlier?

**Warren Gordon:** Solicitors would be authorised to attach the page to the document. I might have overstated the adventurousness of the process that is set out in option 3—although I still think that it is adventurous—but what would happen is that, once the final document was agreed, it would be transmitted electronically to the party who signed it at the beginning. They would be able to look at the final version and they would then email back to say, "I'm happy for the signature page to be attached."

That party would physically sign the page at the beginning of the process, but the final document would still be sent to them. The sending of the document and their approval would constitute the legal affixing or attachment of the original pre-signed page. However, the more the signature and the signed page are physically and electronically separated from the actual document, the more the risk or the possibility of fraud enters the scenario and the more I get hesitant about the process.

**Stewart Stevenson:** So we come back to the need for a legally identifiable process that connects the signature page to the document. I see Mr Gordon nodding, so I have clearly understood him correctly.

**The Convener:** That brings us to the end of this evidence-taking session, which has taken more than an hour, as I have said. We very much appreciate your evidence, Mr Gordon. Every word that you have said will be found in the *Official Report*, and we will ensure that we send you a copy of it.

**Warren Gordon:** Thank you for the opportunity to speak to the committee.

11:02

*Meeting suspended.*

11:08

*On resuming—*

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

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

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

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

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

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

The faculty's main concern is the risk that the proposed form of execution in counterpart, as opposed to a situation in which everyone executes the same document, can lead to opportunities for fraud and, more probably, given how much more common they are, downright error and mistakes. If enough people sign enough different copies, the copies might not be identical and someone might think that some of the contract either is in or has been deleted. A computer glitch might lead someone to think that something is there, while

the other side thinks that it is not there. Only later, when the matter comes before the courts—which is where we tend to see these things—will it be discovered that people did not sign up to the same things or others maintain that they did not sign up to the same things.

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

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

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

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

11:15

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

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

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

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

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

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

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

might be covered by the contracts that we are thinking about in relation to the bill.

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

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

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

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

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

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

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

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

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

**Margaret McCulloch:** Okay. Thank you.

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

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

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

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

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

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

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

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

11:30

**Mike MacKenzie:** Or perhaps the first.

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

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

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

On such occasions, I tend to use the example of Banff. If a contract is made in Banff, what will happen, given that that is not where we will get large contracts that have a big technological background or which involve large-scale

organisations? Perhaps that is unfair on Banff; I should indicate that I make no particular accusation against Banff but simply take it as an example of a small Scottish town that nonetheless will have some degree of contractual work in it.

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

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

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

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

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

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

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

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

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

The faculty suggests that it is distinctly sceptical about the idea that there is a considerable financial benefit to altering the law relating to the execution or delivery of deeds. That is highly unlikely to bring work in or to dissuade work from being done here. However, I read what has been

said by others who deal in big-value transactions, because they will have more up-to-date knowledge of them and more direct involvement with them. Our overall view is that we are inclined to be sceptical that there is much of a financial benefit to this at all.

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

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

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

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

“have been subscribed by the parties.”

The last sentence says:

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

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

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

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

**The Convener:** Indeed.

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

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

**The Convener:** Yes.

**Robert Howie:** Section 1(2) says:

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

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

11:45

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

“A document may be executed in counterpart”—

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

“no part is subscribed by both or all parties.”

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

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

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

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

“executed in counterpart”, rather than “executed in contract”?

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

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

**Robert Howie:** Certainly.

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

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

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

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

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

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

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



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

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

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

**The Convener:** Thank you.

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

11:50

*Meeting suspended.*

11:53

*On resuming—*

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

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

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

**Margaret McCulloch:** Can you tell me how you disagree?

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

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

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

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

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

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

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

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

12:00

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

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

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

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

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

**Alasdair Wood:** That is correct. For company transactions where a single purpose vehicle may

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Professor Rennie:** Yes.

**Alasdair Wood:** I agree.

**Stewart Stevenson:** That is concise and unambiguous.

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

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

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

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

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

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

**Professor Rennie:** Yes, I do.

**Richard Baker:** That answers my question very succinctly.

**The Convener:** Thank you for that succinct answer.

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

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

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

12:15

**The Convener:** That is very helpful—thank you.

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

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

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

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

**Professor Rennie:** That is so.

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

**Professor Rennie:** Absolutely.

**The Convener:** That makes perfectly good sense.

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

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

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

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

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

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

**Professor Rennie:** Yes.

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

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

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

“Parties to a document executed in counterpart may nominate a person”.

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

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

**Professor Rennie:** Yes.

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

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

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

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

12:19

*Meeting suspended.*

12:21

*On resuming—*

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

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

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

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

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

There has been a lot of talk about whether the change will bring work into Scotland. The evidence that was given earlier by the Law Society about the way in which contracts are now conducted is pertinent. Colin, Hamish and I have all sat round

boardroom tables for the last 20 to 25 years, and the nearer to today that has happened, the more disparate have been the parties to contracts. If a person is selling a Scottish company, the law that logically should govern that contract is Scots law. However, time and again firms change that to English law because there are four or five parties, and the director may be on holiday—he may be sunshining in the Cayman Islands—and the last thing he wants to do is turn up in a wet, dreich Glasgow to sign the contract, despite the fact that it is selling his company for millions of pounds.

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

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

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

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

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

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

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

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

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

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

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

12:30

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

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

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

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

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

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

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

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

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

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

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

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

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

**The Convener:** Richard Baker wants to ask about fraud.

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

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

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

**Colin MacNeill:** I foresee no material difference.

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

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

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

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

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

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

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

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

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

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

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

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

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

**Paul Hally:** No.

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

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

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

**Stewart Stevenson:** That is fine. I did not want to make a meal of it. By the way, I hope that you

are not relying solely on PDFs, but are using secure PDFs. I have software that enables me to edit PDFs, which I do for my own reasons.

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

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

**Paul Hally:** Yes.

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

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

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

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

**The Convener:** Would John Scott like to come in?

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

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

“There are no disadvantages to the approach taken in the Bill”

and

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

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



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

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

12:45

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

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

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

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

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

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

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

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

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

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

**John Scott:** Others will speak for themselves, doubtless.

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

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

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

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

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

**John Scott:** Thank you. That is clear cut.

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

12:52

*Meeting suspended.*

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

10:04

**The Convener:** Item 2 is the Legal Writings (Counterparts and Delivery) (Scotland) Bill. We are in a position to take further oral evidence on the bill, and today we hear from representatives from the academic and business sectors, as well as from Registers of Scotland. I welcome our first panel. Professor George Gretton is the Lord President Reid professor of law at the University of Edinburgh; Dr Gillian Black is a senior lecturer in law, also from the University of Edinburgh, and Dr Ross Anderson is an advocate and honorary research fellow at the University of Glasgow. Good morning, one and all, and thank you for coming along.

I open our questioning by asking you for examples of the practical difficulties of the inability to sign contracts in counterpart, at the moment.

**Dr Gillian Black (University of Edinburgh):** I can speak only from my experience in practice, which was 10 years ago, when I spent three and a half years in commercial practice. I would repeat the evidence that you have already heard from people such as Paul Hally from Shepherd and Wedderburn. I can confirm that there have been occasions on which contracts that had been progressing under Scots law have been changed at the 11th hour to English law to enable execution in counterpart. Whether that is strictly legal or not, it happens, and I have experience of it.

**Dr Ross Anderson (University of Glasgow):** That reflects my experience and it is commonly done, particularly in relation to areas of law in which the substance of the law is essentially the same in the two jurisdictions. In the case of a share purchase agreement, company law is essentially the same in Scotland and England and there is UK companies legislation, but the governing law has to be either that of Scotland or of England.

If all the parties are Scottish, if the company is Scottish and if everything to do with the transaction is Scottish, the parties may want to execute under Scots law. However, as Gillian Black has said, when the 11th hour approaches it can become clear that some of the parties will not be available so that they can all come to one room to sign on the dotted line, so the view is taken that the easiest thing to do is simply to change the governing law clause and execute under English law.

There is an issue about whether that is already competent in common law in Scotland, but the law

is not clear. The view is taken that it gives more certainty to change the governing law clause and to execute under English law. It is a real issue.

**The Convener:** We understand that giving certainty is precisely what the bill is about.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I want to pick up on what Dr Anderson said precisely. He said, “it is commonly done”. Can you give the committee a sense of how frequently it happens? We may have individual views on what the word “commonly” might mean, but I want to test what you meant.

**Dr Anderson:** That is a good question and one that is difficult to answer. The phrase that I have used is, to some extent, deliberately vague. Let me explain what I mean by that. In my daily practice as an advocate, I am not involved in any concluding transactions, at all. My experience is from when I was a solicitor. In particular in the corporate world, if there was a real possibility that a signatory could not be present from the beginning of a transaction, that would support the choice to use English law on a matter on which English law is roughly identical anyway. One can put it no more strongly than that; it always depends on the circumstances. However, everyone who has been involved in such transactions will have had occasions when that was done, and it is not infrequent. Beyond that, I am afraid, “commonly” is a deliberately vague and general term. I do not have statistics.

**Stewart Stevenson:** I accept that. However, you have now brought into play another question by making reference to such a change happening at the outset of a transaction, whereas Dr Black referred to her experience of changes at the 11th hour. I wonder whether concerns at the outset account for the greater part of such occurrences, or whether it is those that arise at the 11th hour. Although I am addressing my questions to you, Dr Anderson, it may be that the experience of other witnesses should be brought to bear.

**Dr Anderson:** To answer that point briefly, I say that it always depends on the facts. We may know from the outset that parties are based in Vancouver, Berlin and Capetown—they may all be Scots who just happen to be living there—or it may come to light only at the 11th hour.

**Stewart Stevenson:** I am content with that answer.

**The Convener:** Does Margaret McCulloch want to come in?

**Margaret McCulloch (Central Scotland) (Lab):** No. Stewart Stevenson has asked my question.

**The Convener:** Could you also comment on the suggestion that we heard last week, which was

that parties will choose a legal system because of the characteristics of that legal system? I must confess that my perception is that Scots law and English law are essentially the same in many commercial areas, for reasons that we are aware of. To what extent does the choice of law affect how things operate?

**Professor George Gretton (University of Edinburgh):** In commerce, people have a tendency to choose English law. To some extent, it is a matter of prejudice. It is so standard. Internationally, English law and New York law are constantly chosen. I sometimes think that, even if the law of Scotland were dictated to us by God himself, and was therefore the perfect legal system, people would continue to choose English law regardless, because of tradition and prejudice. People do what they are used to doing.

If the reform were made, it would not suddenly make a huge change, but it would cause some change. Obviously, there are some cases in which a situation such as we are discussing is the particular factor that makes people opt for English law. There are other situations that might cause that. The reform would be a useful step. It will not absolutely transform the situation, but it seems to me to be sensible.

**Stuart McMillan (West Scotland) (SNP):** I was struck by your use of the word, “prejudice”. Why did you choose that word?

**Professor Gretton:** People tend to assume that English law is good law or the best law, without really examining other legal systems. Scots law is not the only legal system that gets squeezed in this way in favour of English law and, on a global scale, New York law. Every legal system in Europe is getting squeezed.

In a sense, there are transaction costs involved in people finding out about different legal systems. They know about English law and New York law, but it takes time and trouble to find out about Dutch law, Scots law or whatever. To that extent, their behaviour is rational. Beyond that, however, there is a certain irrationality involved. People tend to think that English law is good law when—in my view, and subject to qualifications—on the whole, Scots law is better.

**Stewart Stevenson:** I would like to test that, if I may. As a lay person, it seems to me that Scots law has two parts to it. There is what is defined as being the law, but there is also the process that is associated with it. When you make your remark, are you perhaps pointing to superior process and, perhaps, the quality of the practitioners in Scotland, rather than what is actually on the page as law, which is, as was acknowledged earlier, essentially the same as English law—in effect, if not in words?

**Professor Gretton:** I would be reluctant to comment on the comparative abilities of leading practitioners in Scotland and England. All I can say is that, in my lifetime's experience, I have come across many superb practitioners in Edinburgh and Glasgow—there are others, no doubt, elsewhere in Scotland—and have been really impressed by them. I have come across numerous practitioners in London and elsewhere, and I do not think that they are any better. However, I am an academic, so I am not sure that I can give a full answer to that question.

**The Convener:** We will leave that discussion there, if we may. I will move us hastily on to John Scott.

**John Scott (Ayr) (Con):** What might the practical and economic benefits of a new system be for businesses in Scotland? If I understood him correctly, Professor Gretton suggested that the change would not necessarily be transformative in terms of a sudden rush of business to Scotland. Do all our witnesses share that view?

**Dr Anderson:** In general terms, I share that view. We are a small system; business from around the world will not flock to Scotland just because of how one can sign a document. What is crucial is that Scotland stops exporting transactions that are carried out by the ordinary people of Scotland and by Scottish businesses and companies, and which relate to assets in Scotland. If we cannot persuade our own citizenry to use our law, that reflects poorly on the content of our law.

As Professor Gretton has already touched upon, to some extent the practice in that area of law is not entirely rational; in 100 years sociologists may wonder what we were doing by scanning pages. However, that is what the market is comfortable with and the empirical evidence suggests that without the bill, many contracts that would otherwise be governed by Scots law will be governed by English law, although there is no great connection with England.

10:15

**Professor Gretton:** I agree with that.

**Dr Black:** I do not know whether the change will attract business to Scotland, but I hope that it will prevent some contracts being governed by English law where the only reason for that choice is the execution and counterpart advantage.

**John Scott:** Would you like to talk about the risks that are attached to the proposal, in terms of small towns and smaller legal practices? I presume that small local businesses are confined to Scots law. Do you see benefits for them?

**Dr Anderson:** Yes, is the short answer. The geography of Scotland suggests that counterpart execution may be of particular relevance to so-called small-town cases for businesses in the Highlands and Islands, the Hebrides and so on. Trying to get people on a cold November evening to take trains and ferries—even to Inverness—is not easy. One could see, in Scotland in particular, considerable benefit for small-town practices that want to avail themselves of the option. It is not an obligatory provision—it is merely facilitative.

**John Scott:** Previous panels have suggested that the new law could be of use beyond large commercial contracts because it would allow businesses to set up new ways of signing electronically, hence stimulating innovation. As academics, do you see an opportunity for new and innovative ways of signing being developed on the back of the legislation?

**Professor Gretton:** I am sorry, but I do not have any comment to make on that, although my colleagues might have.

**Dr Anderson:** No.

**Dr Black:** No.

**John Scott:** Thank you. You have answered all my questions.

**Margaret McCulloch:** We have heard evidence from various groups of people about the possible increase of fraud or error that could happen with the introduction of electronic signatures. Are you aware of any examples of fraud or error that have occurred under the English system?

**Professor Gretton:** I am not aware of such occurrences in England, although no doubt they happen. Fraud can happen in our system now. For example, a few years ago a solicitor in Aberdeen substituted earlier unsigned pages in deeds transferring property so as to insert his own name rather than that of his client, and then registered that version. He did that more than once. There is risk in such things; I do not think that the bill will decrease risk, but I do not think that it will significantly increase risk, either.

**Dr Black:** I have read the evidence from other witnesses and I agree that if people are interested in committing fraud or are out to do so, there is already potential for them to do that now. I agree that the bill will not necessarily increase the risk, even if it does not head it off at the pass.

**Dr Anderson:** I agree with that. I do not agree with the view that there is a danger of fraud lurking in the bill. That danger is inherent in our present hard-copy, wet-ink system: as George Gretton mentioned, if one has a pile of paper and only the last page is signed, another 250 pages can be swapped at will.

We are talking about a document that is generated as a PDF as the master copy, and there is no doubt that it may be possible to interfere with the copy in some way. However, it is now a little more difficult to do so, and there would, one hopes, be some sort of digital trail for litigators such as me to follow up if there was a dispute.

**The Convener:** I wonder whether I can bring in Stewart Stevenson, because this might be a good point at which to discuss electronic signatures.

**Stewart Stevenson:** Indeed. I just make the observation that I have software—which I use for quite legitimate purposes—that enables me to edit PDFs as a matter of normal practice. There is no fee for that advice; I am merely saying that you should not rely for security on the fact that you have stuffed something in a PDF.

I will move to a matter of more substance and weight. Given that the whole point of an electronic signature is that the technology preserves the unique single possible source of the signature, which is similar to a written signature—with all the caveats that one might attribute to either of those statements—and ensures that the signature reflects the totality of the document's content, why has there been substantial reluctance thus far to adopt electronic signatures? Furthermore, why has there been a reluctance to adopt the ability to sign at a distance, which is part of the issue?

**Professor Gretton:** That is an excellent question.

**Stewart Stevenson:** Which means that it is not an easy question to answer—is that correct?

**Professor Gretton:** Exactly. When a student asks me a question that I cannot answer, I always say, "That's a very good question."

The possibility of completely electronic documents that are electronically signed with an advance signature finally arrived earlier this year—in May, I think. Those documents are sometimes called pure electronic documents with pure electronic signatures. Your question is why that system has not—or not significantly—been adopted. Harking back to when I said that it is a good question, I do not know the answer.

One issue is availability: advance electronic signatures are not sufficiently widely available. Another issue is that the technology is still a bit science-fiction for many people, including sophisticated commercial practitioners. They are familiar with paper and wet ink, and with scanning and PDFs, but they are not very familiar with the idea of pure electronic documents. Perhaps that will be different—and the bill will look pretty old-fashioned—in 10 years' time. Things will move on, and we may be in a pure electronic world. Pure electronic documents are more secure—or at least

so the techies tell me—so why are they not used more widely?

Those are the two reasons: the questions around the wider availability of advance electronic signatures and the fact that people are simply not used to the idea yet, as it is too advanced for them. However, I am just guessing. I am an academic and I do not know, as I have not been out there and asked people, "Why aren't you doing that?"

The technology is very new, because it came in only in May and these things take time. To some extent, it is a generational issue.

**Stewart Stevenson:** I make the observation that Mary Queen of Scots was born in 1542, and she used the process of having single keys that no one shared in order to correspond with her lovers. It is exactly that process that we are looking at here, albeit that the key is electronic. In fact, the concepts involved in this technology are at least 450 years old. In the electronic world, electronic signatures have been in legally enforceable use for more than 30 years.

That advice is also free.

**Professor Gretton:** Maybe the committee should amend in the word "lovers" to the bill. It would certainly have a bigger impact.

**Stewart Stevenson:** I feel the convener's discomfort at where we are going with this.

**The Convener:** Perhaps I could drag us back to the bill with questions from Margaret McCulloch.

**Margaret McCulloch:** What are your views on the suggestion from the Faculty of Advocates in its oral evidence on 30 September that risk could be reduced if the parties are required to deliver an entire document in counterpart and not just the signature pages? Would that suggestion be commercially realistic?

**Dr Black:** We have discussed the current potential for fraud. If you have a hard-copy document, it is easy enough to sub in new pages, whether it is the whole document or particular pages. That would remain even if you deliver the entire document that has been signed.

I also have concerns about the number of documents that would be floating about. If you have four parties to a transaction, that would involve the exchange of 12 counterparts. It is manageable and feasible to exchange 12 signature pages, but I would have thought that it would become incredibly uncommercial to exchange 12 counterparts of a 200-page contract.

**Dr Anderson:** When I first looked at this area of the law a number of years ago, it was as a result of receiving emails, as the junior lawyer, of signed signature pages, and questioning what we were

doing. At the time, I shared to some extent the concern about whether that was really enough. My views on that have changed, because the essence of counterpart execution is to avoid the delivery, whether in hard copy or electronic form, of the whole document. If the committee was minded to recommend that the whole document should be transmitted, one might as well put a line through the first section of the bill.

Gillian Black gave a good example, which one can multiply easily. I was trying to do such a sum last night. If one has a fairly short form share purchase agreement that is 100 pages long—to which, conceivably, there could be 50 signatories, if there are 50 shareholders—that would be a document of 149 pages. If one started thinking that every party must send the whole document, one would be in the situation of requiring about 7,500 pages to be exchanged for just one document.

Many transactions will have literally hundreds of documents. It is pertinent to ask, “Why just the signature pages?”, but that goes to the very heart of what counterpart execution is. If the committee is satisfied with the policy or idea of counterpart execution, as done in England and much of the world, adding the additional requirement of delivering whole copies of the document would not take us much further on from where we already are.

**Professor Gretton:** I agree.

**Richard Baker (North East Scotland) (Lab):** My question is on pre-signed signature pages. The policy memorandum states that those may be used if

“the party concerned clearly authorised or mandated this in advance, or subsequently ratified what had been done with full knowledge of the content of the new document.”

First, do you think that that offers sufficient protection? Secondly, to what extent is it an issue anyway? The law firms that gave evidence on 30 September said that they do not use pre-signed signature pages. It would be helpful to know whether you have experience of how widely they are used.

**Dr Anderson:** As a solicitor, I would never use them. Actually, one questions what is being done here. It seems to me that the authorisation that has been given by client in that situation is essentially a power of attorney to the solicitor to sign the document, once the solicitor has seen the full document on behalf of the client. I confess that I find the use of pre-signed signature pages odd.

The basic principle that is contained in the policy memorandum is probably right when it says that it might be competent if one had authorisation. From my point of view, I do not think that many solicitors would be willing to risk it.

**Richard Baker:** Why do you think that it is in the bill then? Is it because it is expected that pre-signed pages will be used more in future, or is it a guarantee that all bases are covered in legislation? Why is it there?

**Dr Anderson:** It is a good question. It may be simply to reflect some of the practices that are going on in England and, again, to be facilitative for cases that may arise.

**Richard Baker:** But, at this point, you do not see what cases would arise.

**Dr Anderson:** One of the difficulties with transactional practice lies in trying to see the future for every factual eventuality. One needs an element of flexibility with that.

**Dr Black:** I agree. If the client wishes to give authority to the solicitor to sign on their behalf, the existing doctrine of agency would allow the client to do that and the solicitor to sign on their behalf. I therefore do not know that the provisions add anything: there is existing provision for someone to appoint an agent to sign on their behalf if they wish to do so.

10:30

**Stuart McMillan:** What are your views on the likely benefits for business of the setting up of an electronic document repository maintained by the Registers of Scotland?

**Professor Gretton:** That is not in the bill, of course, because the view has been taken that those arrangements do not need legislation. It seems to me to be a good idea. I would imagine that it would not be too difficult to set up.

The fact that the repository would be run by Registers of Scotland gives it a credibility that might not exist if it was offered to the private sector. I imagine that that will go ahead when Registers of Scotland has the capacity. At the moment, it is doing the transition to the new provisions of the Land Registration etc (Scotland) Act 2012, and I imagine that it is all hands on deck for that. Once that act comes into force—on 8 December, I think—and once things have settled down, I imagine that Registers of Scotland will turn its attention to the repository.

Your question was about business benefits. I am an academic, and I am entirely reluctant to comment on that, but I would imagine that there is very strong potential.

**Dr Anderson:** It is always difficult to know what the future holds. Mention was made earlier of technology in the 16th century. Paper and ink has been around for a long time and has generally proved itself to be a pretty useful, durable technology. At the moment, we have a register

called the books of council and session, which has kept original documents for literally hundreds of years. The idea behind the repository, which I certainly support in general terms, is to have some digital archive with state backing, which would ensure that electronic documents are archived in such a way that they will continue to be accessible.

I am not a technical person, but I speak from my experience of trying to open up old documents—sometimes they will not open. One difficulty with software is that it moves on, and there is a real issue of retaining, for example, an old Betamax machine to watch Betamax tapes.

I can certainly see that there may be some major benefits to having an archive that keeps electronic documents in such a form that they will still be readable in 100 years' time.

**John Scott:** Would you make that point to Registers of Scotland? Surely it would keep all its documents in an accessible form, rather than allowing them to become redundant because of technology to access them no longer existing. It would have to update them as time went on.

**Dr Anderson:** I fear that we are straying into an area where I lack the technical knowledge to comment further. I merely highlight the issue; others might have more to say.

**Professor Gretton:** To some extent, Registers of Scotland is already doing that: pure electronic documents are already registrable in the land register of Scotland and in the books of council and session. I believe that the resident techies at Registers of Scotland have addressed the issue so that material can remain accessible even as the technology moves on. I do not know how they do that—I am a cybermoron—but I think that they have tackled the issue and that we are already there. There are already purely electronic documents registered. Those who apply for official copies can get them. Apparently, it will be a stable situation—so I am told.

**Stewart Stevenson:** I am not a cybermoron, for a variety of reasons. I thought that it would be useful to put it on record that an essential feature of any electronic repository of information of any kind that is going to endure is that the full details of how the data is organised, and the algorithms that are used to access it, must also be stored in perpetuity and must be publicly available, free from any commercial restrictions.

If those tests are met, electronic repositories that endure for the long term are sustainable. For example, PDFs are a commercial product, which can be changed by the manufacturer over time. We need to exercise care. Without getting involved in the technology itself, we should be clear that, if we end up using electronic

repositories, we must also deposit the means by which the material can be accessed in perpetuity—not the programmes, because the platforms that the programmes run on will quickly become obsolete, but the algorithms. It is useful to express that point for the record.

**The Convener:** We are now in Mike MacKenzie's hands.

**Mike MacKenzie (Highlands and Islands (SNP):** Thank you, convener.

Are there any other comments on the bill and—possibly the most difficult question of the lot—is there anything that should be in the bill but is missing?

**Dr Black:** I agree with Ross Anderson that it is unclear in Scots law as to whether the bill is needed. My view is that it is not required as it is already open to parties to execute documents in the way provided if they wish to do so. I accept that there is a lot of commercial concern about that approach, so the certainty that the bill provides is welcome. However, as I think that the bill is not, strictly speaking, essential to allow the parties to execute documents in such a way, I also think that it is important that it has a light touch.

I have two queries about the bill as drafted. First, what is the position when a contract does not need to be executed in this way? Most commercial contracts do not need to be executed formally in writing at all, let alone executed in counterpart. If the parties choose to use this method but fail to comply with the provisions of the act—so they opt to use the scheme available in the act but then fail to do so for some reason—does that mean that the contract is not properly concluded or enforceable, even though there is no need for them to opt in? If they choose to opt in, what is the position if they then fail to comply? I would welcome some clarity on that.

My other concern is with section 1(3), which states:

“On such execution, the counterparts are to be treated as a single document.”

My interpretation would be that it creates a legal fiction that two or three documents become one—the holy trinity of contract law, perhaps. Instead of saying that two or three documents become one document, it would be adequate and create less of a fiction to say that, regardless of how many parts a document is executed in, it is still a valid contract. Instead of deeming several parts to be one, we should accept that it does not invalidate a contract to be executed in multiple parts. Those are my two observations on the bill.

**Professor Gretton:** I have one or two points on the delivery of traditional documents via electronic means, rather than on the counterpart issue,



which I should probably put in writing for clarity's sake. The provisions in section 4 are drafted with contracts in mind, and that makes sense, but the wording covers documents other than contractual documents. I will try to be brief.

I will begin with section 4(6), which states:

"Although delivery by electronic means constitutes effective delivery in relation to a traditional document, what is received by that means is not to be treated as being the traditional document itself."

It is not immediately obvious what that means—it certainly was not obvious to me. I looked back at the Scottish Law Commission report and saw that one thing that it is supposed to mean is that a document as an electronic deliverable—a PDF—is not itself to be registrable in, for example, the land register or books of council and session.

As a drafting point, I thought that that section could be amended to make the point quite clear. It was not clear to me reading the bill cold; I am a pretty good reader of statutes with a good background knowledge of the law, but it did not come home to me. It would be good if subsection (6) could be amended to make the point that such documents are not registrable.

I have another point to make. If we turn away from contractual documents and look instead at, say, a conveyance of land, we see that it is on two pages. I have an example of a conveyance of land with me today and, as you can see, there are signatures on page 2. Section 4 says that a document can be delivered if just part of it is delivered, so if one page was faxed it would constitute delivery of the disposition, but that would be no use to a buyer because most of the deed is not there, and even if they got the whole deed they still could not register it because of section 4(6).

The project is being driven by contracts, and I fully understand that. As I have said, I support the bill, but I think that an amendment would be appropriate to cover the point that I have made. I can put that in writing for you.

**The Convener:** That would be extremely helpful.

**Professor Gretton:** I will fax it to you in portable document format.

**The Convener:** Indeed. It would be helpful to get a response on that point from the Law Commission, which has probably thought about that at some stage, although I do not remember everything that it wrote down.

Thank you for those interesting observations. Dr Anderson, do you want to add anything?

**Dr Anderson:** My observations are linked to both of the prior observations. We should try to

keep in view some of the different subjects that the bill will deal with. George Gretton has given the example of a unilateral deed that may have to be registered and therefore has to be delivered in order to be effectual in terms of section 4. Section 1 of the bill is directed, as has been discussed, mainly at commercial contracts, and that takes us to the issue that Gillian Black has raised—what if a mistake is made and the contract is not executed in accordance with the bill? There are a couple of observations to be made about that.

First, most commercial contracts do not have to be in writing at all. It would be perfectly competent for the parties just to meet over a cup of tea or a strong drink to work out what they want to agree and for money to change hands on that basis. Of course, if the parties have gone to the trouble of spending money on their lawyers to negotiate detailed terms for many months, they will want to ensure that they do not have issues about those terms forming part of their contract. That is why they then seek to execute the document in such a way as to benefit from the presumptions that the Requirements of Writing (Scotland) Act 1995 will confer upon them—namely that, if it has been signed at the end of the last page, it is presumed to have been signed by the granter, and that all the terms are so incorporated.

If a contract is not required to be in writing, however, a mere failure in that procedure, or any other procedure under the 1995 act, does not necessarily invalidate the contract. It just means that one will have greater difficulties in proving either whether the contract was concluded at all or, if so, what the terms of that contract are.

That is a simple point to make, but when I listened to some of the other evidence I was not sure whether that point always came out. The bill must always be looked at in the context of the Requirements of Writing (Scotland) Act 1995, and the document that George Gretton referred to is one that must be in writing and is normally unilateral and therefore requires delivery. That is a slightly different situation from the commercial contracts, and it is why, for contracts that do not need to be in writing, delivery of the signature pages alone is usually sufficient, because there is a master copy of the document somewhere else and it is not going to be registered anywhere.

There are different issues relating to different documents, and I am not sure that that has always been made fully clear.

**Mike MacKenzie:** That takes me on to my next question. Do you agree with the general approach of the bill being facilitative rather than prescriptive?

**Dr Black:** Absolutely.

**Professor Gretton:** Yes.

**Dr Anderson:** Yes.

**Mike MacKenzie:** Those are succinct and useful answers. Thank you.

**The Convener:** That brings us—all of a sudden, it seems—to the end of our questions. If the witnesses would like to add any further thoughts in writing, that would be appreciated, and I recognise that people sometimes prefer to put them in writing so that they can make their thinking clear on a complicated subject.

Thank you for your evidence.

10:44

*Meeting suspended.*

10:49

*On resuming—*

**The Convener:** I welcome to the meeting Stephen Hart, legal counsel, Braveheart Investment Group plc, and Catherine Corr, principal solicitor, Scottish Enterprise. We are just going to run through the same script, as the questions are relatively obvious and we would like some consistency in what we are hearing.

Are there any difficulties with the current state of Scots law? Answers on a postcard, please.

**Catherine Corr (Scottish Enterprise):** Yes, absolutely.

**Stephen Hart (Braveheart Investment Group):** I agree. There are a number of practical difficulties, and I also see a number of legal or situational difficulties arising.

On the practical side, the committee has heard a weight of evidence suggesting that transactions sometimes outrun the lawyers who are managing them and that consideration of the location and availability of signatories can change as the transaction progresses. In some deals, people consider at the outset which law needs to be applied, while in others, there is a last-minute decision based on availability.

The number of parties can present a great difficulty. Dr Anderson referred to share-purchase agreements, in which I have great experience in relation to corporate and investment agreements. In such agreements, there are many parties, some of whom are only subsidiary actors—that is, if they are actors at all; they are just shareholders of the company. That situation creates delays and great uncertainty in the transaction process.

Other legal difficulties or situational conflicts can arise. People become wary of being bound to a contract before they want to be. Theoretically, if all

parties sign a round-robin document rather than hold a completion meeting, the document becomes binding when the last person signs it, but the parties might not intend for that to be the case, as the document might be interconditional with other documents.

Interconditionality raises a number of issues in larger corporate transactions, and having documents seemingly become effective at different times, with different signatures, can raise issues. I have seen people use probative signatures under the Requirements of Writing (Scotland) Act 1995, but, bizarrely, leave them undated because it was, say, 7 October and they knew that the document had to go around the parties and that the deal itself would not be done until 10 October. Such practical and legal uncertainties can arise.

**The Convener:** I suspect that most of us have signed something without dating it. After all, that is the average way to buy a house.

**John Scott:** Given Scottish Enterprise's knowledge of big deals, Ms Corr, do you have any practical examples of the current law's impact?

**Catherine Corr:** I would echo the evidence that you have already heard. The lack of clarity on counterpart execution poses a practical difficulty for Scots lawyers with regard to not only large commercial firms and contracts but smaller firms.

One example that recently came across my desk related to a licence agreement with a US company. The US is one of our biggest export markets. A lot of business is done there not only by Scottish Enterprise but by Scottish businesses, and we want to encourage that. In that case, we had to make the usual apology for Scots law to the US company and say, "I'm really sorry, but you'll have to print out the document there. We can't sign it in counterpart and take the deal as done. You'll need to courier it back from the US to Glasgow and we'll need to have it signed." That is a practical example of what is happening every day in Scotland, and I am sure that Stephen Hart has had experience of similar conversations. The bill aims to address that in a positive way.

**The Convener:** Do you have any comments on the previous evidence that we have heard that the choice of law has something to do with its nature and content, or do you agree with the earlier comment that people are perhaps more familiar with English law, know what it means and go with what they are used to?

**Stephen Hart:** I would say, primarily from my experience of private practice, that choice of law can be a very early consideration with regard to the document. We look at choice of law in a positive way. A number of things might affect that decision, an obvious one being the location of the

counterparty or counterparties. To be perfectly honest, I think that, if the counterparties are English or if there are multiple counterparties, there is a draw towards English law as a common standard, so to speak.

Commercial practice dictates that a number of types of contract—for example, international shipping contracts and such things—are more prone to being governed by English law, which reflects its international standing. However, in other situations—where, say, the convenience of execution plays a part in the choice of law—Scots law is the natural forum. That could be determined at the outset, or it could be a late call.

Aside from the absurdity of having Scottish parties executing under English law a document in relation to Scottish assets so that they do not have to meet up, complications arise if there is a late switch from a Scots law to an English law document. Scottish lawyers, particularly company lawyers, are relatively adept at using English law.

It was pointed out in earlier evidence that it is easier and more pragmatic for a Scots lawyer to draft an English law document than it is to ask an English company to instruct Scots solicitors. The latter course might increase risks or the likelihood of error. Obviously, there are differences in terminology, one of which relates to joint and several liability and several liability, and sometimes oddities emerge when you change the choice of law but keep the jurisdiction of the courts the same, so you have Scottish courts opining on English law. It is, in general, messy.

**Margaret McCulloch:** I have a question for Catherine Corr from Scottish Enterprise. Scottish Enterprise is a big company that deals with organisations nationwide and throughout the world. Is English law its first option because of the ease of getting signatories on the final document?

**Catherine Corr:** I should clarify a couple of things. Scottish Enterprise might enter into a lot of contracts but it does not transact in the same way as a commercial business; we do not trade as such. We always use Scots law because we are a non-departmental public body and take great pride in the Scottish legal system, and we always seek to promote it in the business that we do.

With regard to Margaret McCulloch's question and indeed Mr Don's question about whether the decision that people make is dictated by the substantive content of the law or whether it is just habit, I would say from my experience that English law is more universally recognised because of habit and perception. It is a bit more practical, and because of its historic legacy it has tended to be used as the law of commerce. I do not think that the change being made in the bill will necessarily make people who are not otherwise connected to

Scotland suddenly flock to Scotland to use Scots law, but it will certainly make the messaging around Scots law and the utilisation of Scots law for commerce easier.

11:00

At the moment, a Scottish Enterprise workstream is seeking to promote the Scots legal profession abroad. One of the UK's key strengths is professional services, and there is an appetite at the UK and Scottish Government level to promote professional and legal services. A good message in that promotion is that arrangements are practical and workable for business, which makes Scotland a good jurisdiction to do business in.

**The Convener:** That answer brings us comfortably to where John Scott was going to go.

**John Scott:** Indeed, convener. At the risk of asking the witnesses to say the same thing twice, I think that opinions seem to vary on the benefits of the proposals for Scottish legal practitioners. Last week, corporate lawyers told us, "This is great. Bring it on." Most recently—today, in fact—others have said that the provisions would not be transformative with regard to the business that they would bring to Scotland. What are your views on the likely economic benefits of the proposed legislation?

**Catherine Corr:** It is difficult to crystal-ball-gaze with any certainty, but I think that the bill will stop the drift of contractual business from Scotland. It is fairly common for parties, either at the outset of a transaction or at the 11th hour, to seek to utilise the practicalities of English law around execution.

That is what I guess we are focusing on at the moment: the practicalities of execution in relation to the bill. What I have referred to is a very real occurrence and, if we can stop that drift, it will benefit the profession with regard to the work that is done in Scotland and give Scottish businesses a level playing field in relation to businesses from England and worldwide. They will be able to put a better message across to their customers and assure them that they can operate in a practical way and accommodate their customers' needs. I hesitate to say that the bill will suddenly bring a lot of business to Scotland, as I am not sure that it actually will, but it will certainly stop the movement of business from Scotland in relation to legal commercial contracts.

**Stephen Hart:** I will deal first with the issue of attracting business and the economic benefit before I turn to some of the bill's more generic benefits. I echo the view that the bill will not make Scots law the top choice for international parties to transact under. However, the bill clearly stops exporting, which is a refrain that you have heard

from many witnesses, and it will allow the most appropriate forum to apply to contracts.

Looking ahead, I guess that possibilities will arise as, with the move towards internet-based transactions, we start to consider more novel ways of entering into agreements or purchasing goods. In that respect, I should also mention the conclusion of click-through agreements and giving consent through electronic media.

I will be honest: I have not read—and I never intend to read—the user agreements that people always have to agree to before they can buy things online. I hope that Scottish companies that are selling businesses online use Scots law for their online transactions, because it would be a bit daft to get all the way to the bottom of an online agreement, only to find that it said that English law applied, just because the companies involved were not sure. Bringing things home is the fundamental question.

For me, the benefit of the bill will be certainty. People are doing this anyway; they have been working out ways of getting around the strict requirements of Scots law, and notwithstanding the current law, we are currently undertaking transactions in counterpart with electronic delivery. I think that commercial practice is already there, and the bill is all about catching up.

**John Scott:** So you think that the law is just catching up with what is already happening. That is an interesting observation.

A moment ago, you suggested that there might be opportunities to use the forthcoming legislation in an innovative way. Last week, it was suggested that, beyond large commercial contracts, the bill would allow businesses to set up new ways of signing electronically. However, you seem to be saying that they are already doing that.

**Stephen Hart:** I am not necessarily advocating the view that the bill will allow Scottish companies to become world leaders in a new way of transacting documents. In much of our content, we have been moving from wet ink to a PDF copy of that wet-ink document to electronic signatures. The more our agreements are made online, the more the issue becomes about having a law that allows those contracts to be concluded online with certainty. It is not necessarily a question of technological innovation.

**John Scott:** Does Scottish Enterprise see any opportunities for innovation under the bill?

**Catherine Corr:** I do not feel particularly qualified to comment on that. As such a change beds in, businesses will inevitably work out that things move on and evolve. Indeed, we are seeing that in the approach that Stephen Hart has referred to of having an entirely electronic

document that has been signed electronically and which exists in a virtual space. That sort of innovation is happening all the time, and I think that businesses will develop innovative solutions. However, I cannot presume to predict what they might be.

**John Scott:** I might have asked you this question already, but can you confirm that you do not think that the bill is likely to attract business to Scotland that does not otherwise have a connection with Scotland? The same view was expressed last week. If you think that it will attract business to Scotland, we would like to know, because we would be happier if it did. Even if you think that, in the real world, it will not, we would still prefer to know.

**Catherine Corr:** As I have said, I do not think that the legislation will necessarily attract businesses to Scotland that would not otherwise have an interest in doing business in Scotland or have some connection with Scotland. I think, however, that it will stop the drift of business from Scotland and will make parties who already have that connection or the desire to do business in Scotland feel more comfortable about the idea of Scots law.

In my former life as a private practice lawyer and since moving in-house with Scottish Enterprise, I have come across the general perception that there is something a bit different about Scots law—that it is a bit archaic and cumbersome. Even though people do not really know the detail of it, they are somehow put off. I have come across that pervading attitude before, and it is just a matter of pointing out that the Companies Acts are UK-wide and that there is very little difference in the commercial sphere. Enacting the bill would remove one of the more practical differences that exists with the lack of counterpart execution certainty, and that positive message will make people feel more comfortable around Scots law. However, I do not think that it will suddenly make Scotland a key jurisdiction over any other place.

**John Scott:** Are you happy with that response, Mr Hart?

**Stephen Hart:** Yes.

**Margaret McCulloch:** Are you aware of countries that use English law because of the ease of getting signatories?

**Stephen Hart:** If you mean countries that choose to use English law purely because of counterpart execution, no. Different parties in different jurisdictions choose English law for reasons that we have touched on; counterpart execution is not necessarily one of those reasons. The issue is most acute between Scotland and

England because the same law applies to the rest of the transaction.

**Stuart McMillan:** From what we have heard from this panel and the previous one, it sounds as though there is a reputational issue that the bill seeks to address. It will stop the drift towards businesses using English law, and by doing so it presents an opportunity to enhance and promote Scots law for transactions further down the line. There could be a positive outcome in five or 10 years' time for the promotion of Scots law and its reputation.

**Catherine Corr:** Certainly. We would argue that Scots law already has a superb reputation and that we should be doing more to promote it, because it has many strengths.

Our lawyers have exposure to many areas and transactions in which they develop expertise that is exportable. For example, lawyers in our oil and gas industry in Aberdeen are getting experiences that many lawyers across the world do not get—everything is on their doorstep—and the renewables projects that are springing up all over Scotland mean that our lawyers are sometimes among the first to encounter and overcome particular issues. Skills, experience and knowledge are already present in the profession and we must do more to enhance them. Practical steps such as the bill can only enhance that message and promote Scots law.

**Stuart McMillan:** Forgive me, but only a few moments ago you used the word “archaic” in the context of Scots law. That is why I asked about reputation.

**Catherine Corr:** Yes. The answer that I just gave you was about changing such perceptions. We can do that now, and the bill will help in the process. There is a misconceived idea about Scots law being somehow very different because it is a separate system; we have to explain that, in commercial terms, the law is not very different throughout the UK. That is a dialogue that Scots lawyers in Scotland probably have with international clients every day at some point. The bill is a practical step that can help in that discussion.

**Stephen Hart:** A variety of factors contribute to the perception of a legal system as strong and positive, or weak, or archaic. The institutions, the effectiveness of the judges and the courts, and the rule of law are all great factors that contribute to people relying on Scots law as a forum in which to get decisions. The decision-making process is a solid foundation on which they can conduct their commercial activities.

11:15

Other things contribute to a feeling that Scots law might be a bit behind the times. Execution in counterpart might be one small part of that. Other aspects might be the way in which we plead our litigation hearings, where Latin is used, and the way in which some property transactions have historically been done. It is not too long since property lawyers abandoned travelling drafts with coloured ink, which I am sure could still be found in various places. The bill deals with one small part of how the legal system is presented.

**The Convener:** We will move on to fraud and error.

**Margaret McCulloch:** You said that you use the proposed system with some clients. How do they feel initially when asked to sign a sheet and trust the lawyers to ensure that all the other pages—there could be 100 or 150 pages—are accurate? I have asked witnesses about fraud, but do businesspeople happily sign the sheet of paper and feel confident that what they are signing is what they will get?

**Stephen Hart:** There is a question about trust in lawyers and a client's trust in their own lawyers.

**Margaret McCulloch:** My question is also about accuracy. Clients trust that the paperwork is correct, but human error is a possibility.

**Stephen Hart:** Error and human error exist and will continue to exist. Throughout a paper document, it is still probable that manuscript amendments will be found, with little initials by them. We already produce paper documents that have in them typographical errors or address changes. I would like to think that an employer should be able to take confidence in its in-house counsel to put on the table the bits of paper that reflect the institution's will.

**Margaret McCulloch:** What about fraud? Have you come across or heard of examples of fraud?

**Catherine Corr:** I have not. I echo the evidence that the committee has already heard. The potential for fraud and error exists at the moment; the bill will not eliminate that or open the door further to it. If people wish to be fraudulent, they will find ways to do that.

The English system has operated on the proposed basis for a number of years and I am not aware of any particular problems there. Trust between clients and their lawyers is an issue. Solicitors are regulated by a host of professional duties, and there are engagement letters and so on. When a client is asked to sign a signature page, they therefore think just of the convenience and are usually happy, because they trust that the proper document will be executed.

**Margaret McCulloch:** I asked earlier whether risk could be reduced if the parties were required to deliver the entire document in counterpart, not just the signature pages. What are your views on that from a practical, commercial point of view?

**Stephen Hart:** As Catherine Corr said, a number of things can mitigate risk. Professional advisers, ethics codes, technology and good practice that the Law Society of Scotland may promote can all reduce fraud.

On the suggestion by the Faculty of Advocates that principal copies of documents should be delivered by one party to the other, it is no longer as common to find a bound engrossment as it was a number of years ago, because the first thing that we do is take off the binding and put the document through the scanning machine. Documents are primarily circulated unbound.

As earlier evidence indicated, if dozens of parties to a transaction each send 100 pages to each other, and the nominee—as the bill suggests—can collate all the signature pages and put 99 pages into the shredder, that would seem to be a bit of an environmental waste and a practical inconvenience.

**Catherine Corr:** I echo that. If we are looking to enhance the practical application of the law, in terms of the conclusion of contracts and the ease with which that is done, it would not make sense to say that someone has to send back an entire document.

Following the Mercury case, the Law Society of England and Wales suggests that an option—which is not obligatory—is that a solicitor could send a PDF of the final document along with a separate PDF of the signature page. The recipient would only have to print and sign the signature page. When they returned the signature page, they would just ping it back in an email with the PDF of the final document that was attached to the email that was sent to them that included the signature page. The Law Society of England and Wales suggests that way of matching up the signature page with the final document. I do not think that that is particularly convenient for clients and I think that it strays from what we are trying to do with this bill, which is to enhance the speed and ease with which contracts can be concluded.

**Stephen Hart:** Earlier, I alluded to the fact that parties already use English law mechanisms to transact under Scots law. The Mercury format of replying to an email and including the execution form of the document—the signature page—and the document to which it relates has become more commonplace.

**Richard Baker:** The bill has provision for pre-signed signature pages, but they seem not to be very widely used, from what we can gather. Do

you have any views on their use and on whether provision for them in the bill is appropriate? Mr Hart, that question might best be directed to you.

**Stephen Hart:** What you have commonly heard, which is that the use of pre-signed signature pages is best avoided, is probably the default scenario. I do not want to obtain pre-signed signature pages way in advance of a transaction.

However, commercial organisations can be affected by the availability of signatories or the timing of the transaction. It may be that, once the terms of a document have been negotiated and broadly agreed, the engrossment version is not quite ready yet because, for example, we are still arguing about a point or waiting to hear back from a third party or, with time progressing, my board is unavailable or will shortly become unavailable. There is an implicit trust that the document that I approve for signature will be the document that we as an organisation may wish to enter into. There are times when I may take the opportunity to benefit from that provision to obtain a pre-signed signature page.

**The Convener:** It is worth making the point that the bill does not specifically allow that; nonetheless, it is effectively allowed in law if it becomes the practice. That is why we were discussing the issue.

**Catherine Corr:** I do not think that that practice is widely used in Scotland. I do not use it; indeed, it is certainly not something that I feel comfortable with. The view that it is somewhere that we do not go is probably prevalent across the profession, because it is one step too far in terms of flexibility.

**The Convener:** We have probably covered that issue, so we will move on to Stuart McMillan.

**Stuart McMillan:** What are the likely benefits for business of the setting up of an electronic document repository maintained by Registers of Scotland?

**Catherine Corr:** I can see the attractiveness of that suggestion, because having a central documents repository would give a sense of security to the parties in a situation where charging one solicitor or the other in a particular transaction to retain documents might not give that same level of security to the other party. There are also questions of practicalities for individual solicitors firms in terms of the size of the storage required and the length of time for which the documents would have to be retained.

I can see the merit in the suggestion, but questions would need to be answered about the independence, the funding and the staffing of the repository and about who would be responsible for it. Some of the commentary suggests that Registers of Scotland could take that on. That

could be explored. Registers of Scotland is primarily a land register that is linked to Scotland. If we were looking to create a repository for international contracts, for example, we would need to work out how that fits with Registers of Scotland's role and remit as a Scottish registry for property transactions and how that would morph into a wider role if it were to take on that responsibility. Such questions would need to be answered, but I can see the merit in the concept.

**Stephen Hart:** I see a superficial attraction to setting up such a depository, but it is a potentially expensive technological solution to a problem that does not really exist.

**Stuart McMillan:** Are there any major examples of a legal firm misusing legal documentation that it had saved and stored? There is a suggestion that an independent organisation should act as the repository. Stephen Hart said that the idea had a superficial attraction, but are there any examples of the misappropriation or misuse of documents under the current system?

11:30

**Catherine Corr:** I am not aware of any. In previous evidence to the committee, the key point was made that the bill refers to the parties instructing a nominated person to retain the relevant document. Even if party A instructed party A's solicitor to destroy a document or to do something with the document, the solicitor could not do that, because he has been charged by both parties to retain it for their benefit and on their behalf. The bill anticipates that issue and seeks to head it off. In reality, it is something that I have never come across.

**Stuart McMillan:** What about Mr Hart?

**Stephen Hart:** No. I am not aware of any such situation.

**Margaret McCulloch:** What if the legal firm goes out of business?

**Stephen Hart:** That is a shocking suggestion.

**Margaret McCulloch:** Yes, but these things happen. What would happen if a firm that held all these documents electronically went out of business? How could people access the documents at a later date? Could they get hard copies?

**Stephen Hart:** The answer is that I do not know. I would have to defer to the Law Society.

**Margaret McCulloch:** Could having a central point where the electronic documents are stored independently therefore be an option?

**Catherine Corr:** I can see some merit in the suggestion. However, quite a lot of issues would

have to be worked through in relation to funding for the body, its staffing and responsibility for it. Another issue is the need to update the documents. If someone registers a document in 2010 or whenever and in 2018 the parties change it, how would the process whereby the copy is updated be managed? That would be quite labour intensive and so on. All those issues would have to be worked through, but I can certainly see merit in the idea, for the reasons that you have touched on.

**The Convener:** I thank Margaret McCulloch for introducing that idea. The committee perhaps ought to take the advice of the Law Society about how the situation that she envisages would be handled.

**Stuart McMillan:** I have a follow-up question. If a small firm that was tasked with storing the records decided to stop trading—as opposed to going into receivership—because the people who ran it wanted to retire, what would happen to the documents?

**The Convener:** I will stop you there, because I think that we will take some specific advice on that. To be honest, I do not think that it is fair to ask this panel that question, unless either of the panel members has a particular comment to make, which I do not think they do.

I will pursue something about which I have no idea. For how long does the contract for the average commercial transaction need to be held on to? To put my question in context, it is clear that if somebody buys some land, they hold it for ever until ownership changes. One can see that as being open-ended. However, does the average commercial contract or even the long commercial contract ever extend beyond 50 years, or even beyond 20 or perhaps 25 years?

**Catherine Corr:** It depends.

**The Convener:** Is there a real need for the document to be around for a very long time?

**Stephen Hart:** I think that Mr Stevenson might want to comment.

**The Convener:** I ask the witnesses to comment first.

**Stephen Hart:** It would clearly depend on the type of transaction. For example, a drug patent licence will exist for the duration of the patent. In an investment agreement, the principal terms of the investment will be concluded straight away, but the way in which the shareholders' arrangements are governed will continue until the shareholders change.

**The Convener:** So there are genuine contracts other than those for the purchase of land that could be seen as going on for a very long time,

which means that holding on to the original document might be fair in some cases in which people do not want to change it.

**Catherine Corr:** Yes.

**Stephen Hart:** Correct. One of the issues is whether an electronic repository and the digitisation of the document would allow for the destruction of the original, because otherwise we would be doing two things: we would be holding an original in a safe for 25 years and keeping an electronic version.

**The Convener:** So duplication is an issue. We have a panel from Registers of Scotland to come, so some of these matters can be dealt with then. Stewart, do you still want to comment?

**Stewart Stevenson:** I will just make the rather obvious point, which is topical in light of what the Parliament will be debating this afternoon, that if the documents that related to the insurance of various properties were not available in perpetuity, the position would be difficult in relation to claims that are now being made for mesothelioma.

Many commercial operations, in particular the railways, depend on legislation and contracts that, in the oldest cases, are approaching 200 years old, so I think that it is beyond peradventure that we need to keep such documents for ever.

**The Convener:** I think that makes the point.

We will move on to electronic signatures. Stewart, is there anything that you want to say on that subject?

**Stewart Stevenson:** I will just make the observation that I pay Mr Google £1.68 a month for my 100 gigabytes in the cloud—all my documents live there and the electronic keys will be available to people after I am dead, so it can be done for £1.68 a month. We will see where we get to with that.

On electronic signatures, does the bill that is before us—and the form that it is likely to have at the end of our deliberations—help or hinder the adoption of electronic signatures instead of paper and ink?

**Stephen Hart:** My view is that the initial impact of the bill will be reflective of current practice—the wet-ink signature of a paper document, which is then scanned and used to conclude the transaction. Like Mr Stevenson, I have experimented with digital certificates on PDFs. Currently, the greatest barrier is common adoption or the fact that you can lead as much as you want, but if nobody else is using a key, it becomes relatively pointless.

The other thing about electronic signatures is whether we are talking about the conducting practitioner who is overseeing the transaction or

each individual signatory to a document. In company law terms, it is a question of whether each director and the company secretary are all using their different keys.

**The Convener:** I do not think that we need to push on this issue too far.

**Stewart Stevenson:** I will push on it, because the whole business of a key involves a key pair—a public key that anyone can use to verify the signature and the private key, which is available only to the person who signed the document. In that context, would it be useful if the public key, which is available to everyone to verify, were to be part of what is held in an electronic repository such as might be provided by ROS? That way, although the ability to sign anew might be lost if the private key was mislaid, at least the public key would be available enduringly to verify the electronic signatures—that would be protected.

**Stephen Hart:** I cannot comment on that.

**The Convener:** We have probably gone as far as we are going to with that.

**Mike MacKenzie:** Do the witnesses have any other comments on the bill? Do you feel that anything has been missed out of the scope of the bill that could usefully be included?

**Catherine Corr:** I do not think so, at this stage. The aims of the bill are admirable in the sense that they are trying to address a specific problem and to achieve a specific outcome within a relatively short time. That is an admirable ambition.

In due course, other areas of Scots law might be looked at—that was referred to in earlier evidence to the committee in relation to electronic signatures, delivery and those sorts of concepts. There is nothing missing from the bill, which seeks to achieve a practical and useful outcome. To contemplate bringing in anything else would overcomplicate it at this stage.

**Stephen Hart:** I have three points to make in relation to the bill and possible omissions.

First, the bill allows for counterpart documents to be held undelivered until the parties agree that they be delivered. It would be helpful if traditional documents, signed by all the parties, could be held undelivered until it is agreed by the parties that they be delivered. It would seem a little odd that if Catherine Corr and I have signed counterparts of documents, we can agree to postpone delivery, but if we sign the same document, it is deemed to be delivered at the time.

Secondly, although I applaud the use of the nominee structure, the more implicit it is, the better. If parties adopt formal appointment-of-a-nominee letters, it is just another piece of paper and another formality, which is perhaps



unwelcome. Whether law firms would introduce them into standard terms and conditions is a separate question, but when agreeing to that nominee, a relatively informal appointment should suffice—indeed, lawyers acting on behalf of parties might be deemed to be nominees.

My third point relates to a completed counterpart. Once a counterpart has been executed and exchanged and the transaction has been concluded, there is sometimes a natural abhorrence of empty spaces on the page. Under English law and practice, it might not be uncommon for the recipient to complete the counterpart. They might do that for a couple of reasons—so that they had one whole copy of the document or so that, if they needed to adduce it in evidence in court, they would at least have a copy that signified that they were bound to the document.

On the use of probative signatures, a counterpart, by definition in the bill, is not executed by all the parties, so the process would presumably assume that the counterparties sign. They may sign in a probative manner: “I have signed this on 7 October. We intend it to be delivered on 10 October. We exchange.” Catherine Corr may arrange for SE to put its signature on things so that it has its own version; that might be done on 17 October. Although the transaction date would already be past, I suppose that I would find it important to assume that the counterpart was effective at the time that it was delivered and that the recipient putting a signature to it did not somehow not make it a counterpart.

**The Convener:** Thank you for those detailed observations, which I am sure that others will address.

**Mike MacKenzie:** The general approach of the bill is to be facilitative rather than prescriptive. Do you agree with that general approach?

**Stephen Hart:** I do.

**Catherine Corr:** Yes.

**The Convener:** We have heard some interesting, detailed suggestions this morning, which we will have to get other people to consider. I am looking at my colleagues, who seem to be finished—[*Interruption.*] Sorry, John.

**John Scott:** As I am sure the convener meant to say—I am not suggesting that he should have—if you have any further observations, or if you want to outline your proposals as just expressed, it would be helpful to do that in writing.

**The Convener:** Thank you very much for your evidence to us.

11:45

*Meeting suspended.*

11:50

*On resuming—*

**The Convener:** It is now my pleasure to welcome two witnesses from Registers of Scotland: Christopher Kerr, who is the head of legislation and legal policy; and Kenny Crawford, who is the commercial services director. Thank you for waiting, gentlemen. The fact that you heard much of the previous evidence will probably help the process that follows.

**Mike MacKenzie:** My question is probably best answered by Mr Crawford. Could you outline how the books of council and session operate in practice, what benefit the register offers to commercial parties and what type of documents are commonly registered?

**Kenny Crawford (Registers of Scotland):** I think that it would be best if I handed that question straight to Chris Kerr, who is our legal expert.

**Christopher Kerr (Registers of Scotland):** At the moment, the books of council and session are a paper-based register. You can record in that register all sorts of deeds: minutes of agreement, which normally relate to family law matters; leases; standard securities, which are also recorded in the property registers; and all manner of other deeds. The reasons for recording such deeds in the books of council and session are twofold. The first is the preservation of the deed—it is, simply, a safe repository from which you can achieve an extract that has the evidential status of the original. The second is execution. That means that, where the deed includes some sort of obligation—typically a monetary obligation—an extract from the books of council and session has the effect of a court decree, and it allows you to do summary diligence based on the deed without having to go to court.

**Mike MacKenzie:** Section 1(3) of the bill allows counterparts to be treated as a single document. Counterparts can be signed in probative form and, if necessary, the document can then be registered in the books of council and session as a collated version of one counterpart, plus the various signature pages. In her written submission in response to the call for evidence, the keeper indicates that dealing with those new collated documents would involve only a small amount of staff retraining. Could you confirm that that would be the only requirement on Registers of Scotland?

**Christopher Kerr:** Yes, I think that that is right. The books of council and session are a fairly straightforward register to run. They are not like

the property register or the land register in particular, where the keeper has to take some sort of view on the effect of the documents. All that the keeper, or her staff, would typically check would be whether the document has been executed in an appropriate manner. There would, therefore, be some retraining to ensure that staff understood the new rules of execution or that this was a valid way of executing a probative writ, and then they would record it in the usual manner.

**Stuart McMillan:** With regard to the electronic document repository, in her written submission, the keeper states:

"I understand that the Scottish Government intend to turn to this aspect of the Scottish Law Commission's Report in due course. I will be happy to come back to the Committee with further detail on what RoS may provide once we have looked at the detail of any system and sought further views from colleagues in Scottish Government and our customers".

Can you give us any further detail on that comment? Can you expand on the current state of play with the electronic document repository?

**Kenny Crawford:** Our focus has very much been on getting our systems ready to implement the Land Registration etc (Scotland) Act 2012. The designated date is 8 December, so we have spent most of our time on information technology development for that. The next phase, beyond that date, will involve looking at our digital strategy, which will include replacing our systems with new ones to improve the conveyancing process. Our intention is to look at the systems that we have and consider what we might be able to introduce.

**Stuart McMillan:** Mr Kerr, do you have anything to add to that?

**Christopher Kerr:** Not really, other than to say that we have had no more detailed discussions with colleagues in the Scottish Government, as the witnesses on the previous panel demonstrated. There is not a clear view among the profession on whether such a system would be useful and, if so, whether Registers of Scotland would be the appropriate body to run it. At present, we have no clarity on that.

**Stuart McMillan:** Would there be any benefits from setting up an electronic repository for legal documents rather than using the current paper-based system?

**Kenny Crawford:** The only real evidence that we have for that is based on the automated registration of title to land system that we currently use. It is an electronic system that allows simple transactions to be made online using a digital signature. Although the uptake has not been as high as we anticipated, the system has dealt with more than 90,000 transactions securely, so we

see some evidence that there is a desire to move in that direction.

Conversations are going on with the Law Society of Scotland on the use of smartcards in conveyancing in the future. We can see the benefits of having a repository that people can use. If it were to be run by Registers of Scotland, it would be independent and held by the keeper, so it would be trusted. The resilience of Registers of Scotland is a factor, as we are not likely to go out of business. We have been doing our job for almost 400 years, so we have a track record.

**Stuart McMillan:** Some of the evidence that we have received raised the issue of the scope of any type of repository. In particular, the Scottish Law Commission suggested in its report that a repository could be used for the negotiation and the registration of legal documents, not just for preservation but for execution. It also suggested that such a system could potentially be used globally by non-Scottish parties. Do you have any thoughts on what the likely scope of a repository could or should be?

**Christopher Kerr:** For an electronic repository to be used for execution as well as preservation would require an amendment to the underpinning legislation for the books of council and session. That would involve creating an electronic aspect for the books rather than simply a stand-alone electronic repository. If a repository was to be used purely for preservation, we could potentially create one without the need for underpinning legislation. We do not have a view on whether a repository would be just for Scottish parties or whether it could be more international. We would hold an entry and register it if the market, and our customers, wanted it.

**Stuart McMillan:** The issue of specifications for a repository has also been considered, and we heard from witnesses on the previous panels about some of the issues. The Scottish Law Commission report indicated that any repository

"must be (i) completely confidential, (ii) secure, (iii) designed in such a way that all documents relating to a ... transaction are clearly linked and marked, and (iv) durable for the long term".

In other words, a repository must be future proofed, including the software. Do you have any comments on those points?

**Kenny Crawford:** It is not something that we have explored yet. The 17 registers that the keeper currently holds are open registers, so that would be a departure for us. We would have to do a lot of research to understand what people were looking for and what would be required to put that together. So far, we have not investigated that.

12:00

**Stuart McMillan:** I am not a technical boffin by any manner of means, but I am quite sure that the software issue will be sorted out—the software is already out there—and the repository will be future proofed so that any documents can be examined in 50 or 60 years' time.

**Kenny Crawford:** We are aware that there are exchange repositories available at the moment, which are confidential. I agree that that is something that technology can already provide.

**Stewart Stevenson:** Is Registers of Scotland working with the National Library of Scotland, which seems to be a little bit ahead in terms of electronic storage and long-term preservation of documents? Superficially, there might be overlap at technical and practical levels, albeit that the jobs that you do are quite different. Are you collaborating with the NLS?

**Kenny Crawford:** Not that I am aware. We work with the National Records Office and, as I said earlier, we are exploring the digitisation of the end-to-end conveyancing process. That is something that we would like to explore in the future.

**Stuart McMillan:** Another issue that was raised in evidence and by the SLC is the fees and charging structure for a repository. The SLC suggests that if a repository were to be set up, it should not be set up to make a profit and that the charging structure should cover only the costs of setting up and running the facility. The SLC also suggests that charges should be based on a fixed fee per document and not, for example, on the value of the documents. Do you have any thoughts on the SLC's suggestions and on any evidence that you have heard and read?

**Kenny Crawford:** As I said earlier, we have not explored that. ROS is a trading fund and is funded through the fees that we charge for the various services that we provide. We would have to consider the various business models. We provide statutory and semi-statutory products that recover the costs of what we do. We would need to consider that in coming up with a pricing model.

**The Convener:** We have dealt with that aspect relatively swiftly. Thank you for attending the committee and for the evidence that you have been able to provide for us. Clearly, this is an issue for future consideration and, as we are all aware, not imminent in the bill.

12:03

*Meeting suspended.*

12:17

*Meeting continued in public.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

which

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

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

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

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

I hand over to Margaret McCulloch.

**Margaret McCulloch (Central Scotland)**

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

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

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

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

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

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

**Alison Coull (Scottish Government):** That is correct.

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

12:30

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



12:45

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

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

**John Scott:** Thank you. That was very helpful.

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

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

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

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

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

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

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

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

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

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

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

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

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

**Alison Coull:** That is our view.

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

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

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

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

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

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

**The Convener:** I am grateful for that clarification.

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

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

I thank everybody for attending.

*Meeting closed at 12:51.*

The Hon. Lord Pentland  
Chairman  
Scottish Law Commission  
140 Causewayside  
EDINBURGH  
EH9 1PR



28th February 2014

*Dear Lord Pentland,*

#### REPORT ON FORMATION OF CONTRACT: EXECUTION IN COUNTERPART

I am writing to express my thanks for the Scottish Law Commission's Report on Formation of Contract: Execution in Counterpart, presented to Ministers in April 2013 and to advise you of my plans to take this issue forward.

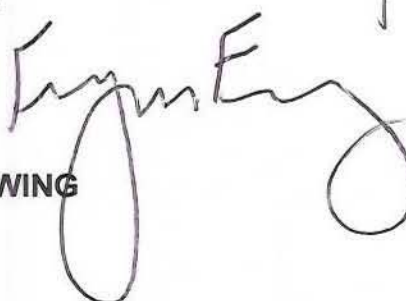
I very much welcome the thorough and considered Report. I also appreciate the way in which the SLC has responded to the significant support for execution in counterpart expressed by respondents to your earlier Discussion Paper and for further reforming the law by including provision for counterparts and other documents to be exchanged electronically.

We wholeheartedly support the recommendations in the Report and agree that adopting these provisions would place Scots law in this area on a much stronger footing. By giving certainty to Scots law practitioners it will in turn be particularly helpful to commerce and business in Scotland. That is why the First Minister announced the Conclusion of Contracts etc. (Scotland) Bill as part of the Scottish Government's legislative programme in his Programme for Government statement in September last year.

You will of course be aware that the Parliament decided in May last year to accept recommendations for changes to the Standing Orders to allow certain SLC Bills to be referred to the Subordinate Legislation Committee; and to re-name the Committee the Delegated Powers and Law Reform Committee. This move recognises the valuable role of the SLC in reforming the law of Scotland and is intended to go some way towards improving the implementation rate of SLC reports.

In order to qualify for the new SLC process, the Bill must meet a number of criteria determined by the Presiding Officer. My officials have given this joint consideration with the SLC team responsible for the Bill and have come to the shared conclusion that this Bill fulfils the criteria and the Annex to this letter provides the necessary detail. I will therefore arrange to have this letter laid formally in the Scottish Parliament.

Please accept my thanks to you and the Commissioners and staff at the SLC for the progress on this issue. I look forward to working with the SLC during the parliamentary stages of the Bill.

Yours sincerely  


**FERGUS EWING**



## ASSESSMENT OF THE BILL AGAINST THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A 'SCOTTISH LAW COMMISSION BILL'.

**The Bill must implement all or part of a report of the Scottish Law Commission.**

The Bill will implement recommendations 1- 20 of the Report entitled *Review of Contract Law – Report on Formation of Contract: Execution in Counterpart*<sup>1</sup>, which was published on 9 April 2013 as part of the Scottish Law Commission's Eighth Programme of Law Reform. Specifically it will make provision for a clear framework by which parties may "execute a document in counterpart" under Scots law; and provide a new method for the delivery of a signed document, namely by electronic means. The remaining five recommendations are termed "non-legislative recommendations" (in paragraph 4.1 of the Report) and the draft Bill appended to the Report does not contain any provisions in respect of them.

**Where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.**

The SLC has carried out extensive and comprehensive consultation in accordance with the SLC's established practice in conducting law reform projects and we share the conclusion of the SLC that "there is a widespread and well-established support, especially amongst Scots lawyers for a clear, concise and certain means of executing documents in counterpart" (in paragraph 1.37 of the Report).

The SLC published a *Discussion Paper on Formation of Contract*<sup>2</sup> in March 2012 as part of the general review of contract law; Part 3 was devoted to the topic of execution in counterpart. Consultation responses were overwhelmingly in favour of statutory clarification of the validity of documents executed in counterpart in Scots law.

The SLC, in conjunction with the University of Edinburgh's Centres for Private and Commercial Law, hosted a seminar on execution in counterpart on 29 November 2012,<sup>3</sup> and the SLC published a draft of the Bill for discussion on its website.<sup>4</sup> The event attracted around 60 legal practitioners and academics. Views expressed in the seminar were very much in favour of the Bill's initiatives; for example the Chair of the event, Lord Hodge, then a senior Court of Session commercial judge and now a Justice of the UK Supreme Court, stated: "*I welcome this initiative very much. Our commercial law needs modernising; our law of contract needs to be reviewed; and there are measures which will be taken which will make us more user friendly and will address the needs of business. I particularly welcome it at a time when Scots law is under pressure.*" A number of written comments on the Bill were submitted to the SLC following the seminar, and these all expressed support for the Bill.

Following the seminar, the SLC released a revised draft of the Bill for further comments in January 2013,<sup>5</sup> which coincided with an article published in the Journal of the Law Society of Scotland written by Paul Hally of Shepherd + Wedderburn LLP.<sup>6</sup> This draft did not generate

<sup>1</sup> SLC No 231.

<sup>2</sup> DP No 154.

<sup>3</sup> <http://www.scotlawcom.gov.uk/news/seminar-on-execution-in-counterpart/>

<sup>4</sup> <http://www.scotlawcom.gov.uk/news/draft-execution-in-counterpart-scotland-bill/>

<sup>5</sup> <http://www.scotlawcom.gov.uk/news/execution-in-counterpart-final-chance-to-comment/>

<sup>6</sup> <http://www.journalonline.co.uk/Magazine/58-1/1012099.aspx>



as significant a volume of comments as the previous draft, but responses again focussed on drafting issues whilst expressing support for the overall concept of the Bill.

The final draft of the Bill is the product of the consultation process described above. At each stage of this process, members of the legal profession and the public were able to comment on the proposals, and a number of legal practitioners were actively encouraged to comment on the draft Bill, either by telephone or email or by way of a bespoke meeting with the SLC team. At no stage of the consultation process have comments been received to the effect that statutory provision on execution in counterpart would have an adverse effects on Scots law.

#### **Which does not relate directly to criminal law reform**

The Bill relates to civil law reform and does not relate in any way to criminal law reform.

#### **Which does not have significant financial implications.**

The legislation would enable business to be conducted more efficiently: executing a document in counterpart is likely to be cheaper and quicker than existing practices, and delivering a signed document by electronic means will also be quicker and cheaper than existing methods of delivery. Therefore no significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will borne by law firms in making their staff aware of the changes to the law affected by the Bill. This will also be required of others operating in the legal profession, for example Registers of Scotland staff. However, these types of cost result from any reform of the law. We believe that these costs would be very small and in any event that they will be significantly offset by the financial benefits gained by bringing the Bill's measures into force. We also note that the scheme for the signing of documents created by the Bill is entirely "opt-in". Accordingly, present practices for the signing of documents will remain valid and practitioners will not require to bear any costs of training and raising awareness of the Bill's provisions unless they wish to do so. So far as registration income for Registers of Scotland is concerned, we do not anticipate any significant change in the number of deeds to be registered and therefore in the level of income.

#### **Which does not have significant European Convention on Human Rights (ECHR) implications.**

The Bill offers an optional means of validly signing and delivering a document. We consider that the proposals do not have any ECHR implications. The provisions of the Bill are not retrospective, so there is no danger of established rights being affected.

#### **Where the Scottish Government is not planning wider work in that particular subject area.**

The SLC are undertaking a significant long term project on contract law in light of the Draft Common Frame of Reference (DCFR). The project is being tackled on a topic by topic basis and Discussion Papers on other contract law topics are likely to be produced over the course of the next few years, together with one or more corresponding Reports. In effect, though, the particular legislative proposals in this Bill form a stand-alone topic and the Scottish Government is not planning wider work in the area of execution in counterpart.

## Other

The Bill is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revisions Bill.

### Submission from Dickson Minto WS

1. *What are the advantages and disadvantages of the approach taken in the Bill? Are there any provisions not included in the Bill which you considered should be?*

- We strongly agree with and support the Bill. This is a much needed change to the law in Scotland.
- There are no disadvantages to the approach taken in the Bill.
- The Bill is comprehensive and we do not believe that there are any missing provisions.
- If the Bill becomes law the main advantage will be that the governing law of legal documents will no longer need to be changed from Scots law to English law where clients and counterparties are unable to attend face-to-face completion meetings. Frequently, clients or counterparties in commercial transactions are unable to attend completion meetings and wish instead to be able to sign counterpart documents. The only options available in these situations are either to change the law governing the contractual arrangements between the parties to English law, where for many years execution of documents in counterpart has been common and well accepted practice, or to use powers of attorney which can cause delay and other practical issues. Note that in relation to Scottish property transactions changing the choice of law is not an option so completion is often delayed. If the Bill becomes law this problem will be eradicated. It is unfortunate that Scots law currently makes otherwise perfectly legitimate business dealings more difficult than necessary.
- The advantages of the Bill are best illustrated by way of practical examples. In this regard, please see Part A of the Appendix to the SLC's evidence to the DPLR Committee in which Scottish law firms, including ours, provided various examples demonstrating how the law currently works and how the Bill would dramatically improve the position.

2. *How will the Bill improve the process of the execution of legal documents in Scotland?*

These days business transactions are usually completed remotely yet there is no mechanism under Scots law that allows us to do that. The Bill becoming law would represent an immeasurable improvement to the process of the execution of documents in Scotland. The Bill will provide greater flexibility to businesses and improve the speed at which transactions are completed.



3. *Do you consider that the Bill will precipitate an increase in the use of Scots Law to govern transactions?*

Yes.

4. *What are the financial implications of the Bill?*

The financial impact is difficult to quantify but we could possibly envisage cost savings to businesses as a result of the practical flexibility that the Bill would introduce (as detailed above). If the Bill becomes law it will also mean that more contracts are governed by Scots law. This will be helpful to the Scottish legal profession by virtue of the increase in litigation going through the Scottish courts.

5. *Are there any equality issues arising from the Bill?*

No.

6. *What is your view of the potential environmental impact of the Bill?*

The environmental impact would be minimal. However, fewer documents will need to be posted or couriered etc., which would possibly have a positive environmental impact.

## Submission from the Faculty of Advocates

### Introduction

1. The Faculty of Advocates is grateful for an opportunity to offer evidence in relation to this Bill. The nature of the Bill is such that it is of direct interest to lawyers involved in transactional work. It is accordingly primarily for solicitors, who are more likely to be involved in transactional work, to comment on the policy need for the Bill. The Faculty notes the justification advanced in the Policy Memorandum for this reform and, for its part, does not regard the policy aims of the Bill as controversial.

### Response to Questions in the Call for Evidence

Q1. There are two issues addressed in the Bill. It is convenient to address each in turn.

#### (i) *The advantages and disadvantages of the approach taken to allow execution in counterpart*

The approach taken has the advantage that it will allow parties separated by distance to execute documents conveniently and perhaps save some expense. It will allow parties to some circumstances a degree of precision as to when a multi-party document becomes effective.

The Faculty has identified some potential disadvantages. In particular, the proposal to allow execution by counterpart admits of the possibility that parties may execute different versions of the document, which they wrongly believe to be the same document, whether due to error or fraud. If this were to happen the discrepancy may often be discovered on delivery of the counterparts, although it may also be possible that the discrepancy would not be discovered where delivery is effected of only part of the document by electronic means. However, the Faculty is unable to quantify the potential effects of this apparent disadvantage; and recognizes that execution in counterpart appears to be used in England and Wales without widely reported material concerns.

The Faculty has two technical observations:

(a) The requirement that no part of the document can be subscribed by all the parties may limit the use of execution of counterpart (and potentially cause other difficulties) in certain contractual situations. Some contracts (e.g. construction contracts) commonly seek to incorporate a variety of documents, some of which may have been subscribed by the parties. This would mean that the contract could not be executed in contract.

(b) Section 2(3) imposes on a person nominated to take delivery of one or more of the counterparts to hold and preserve it for the benefit of the parties. It is not clear why this is necessary standing section 2(5). Nor is it clear how long this duty persists or what remedy there may be for its breach.

#### (ii) *The advantages and disadvantages of the approach taken to allow delivery of traditional documents*

Subject to appropriate safeguards, the proposed approach will permit delivery to be effected in a convenient and speedy manner. This would clearly be advantageous.

The Faculty has some technical observations:

- (a) The phrase “requirement for delivery” in section 4(1) may be ambiguous. It is not clear, for example, whether it is confined to situations in which delivery is required as a precondition of a document becoming legally effective.
- (b) The Faculty has reservations about the provision that delivery may be effected by electronic transmission of part only of a document. The person to whom it is delivered may not be aware of the full contents. It is not obvious, in the context of electronic transmission, why the full document should not be transmitted.
- (c) Section 4(3) is liable to give rise to disputes as to what is sufficient to show that what has been delivered is part of the document. It would be more straightforward to require transmission of the full document.
- (d) Section 4(5) is also liable to give rise to disputes about whether a particular method of transmission is “reasonable in all the circumstances”.

Q2. The Bill will improve the execution of legal documents in Scotland by:-

- (i) permitting execution in counterpart; and
- (ii) permitting delivery of traditional documents by electronic means.

These improvements are subject to the technical comment which we make above.

Q3. The Faculty would be sceptical of the suggestion that the change to the means of execution will, of itself, attract business into Scotland which does not otherwise have a connection with Scotland. However, the evidence gathered by the Scottish Law Commission suggests that, without these innovations, business otherwise connected with Scotland would be lost to the Scottish legal system and that is a good reason for making reform in this area.

Q4. The parties involved in the execution of documents may make some modest savings in expense. The uncertainties identified above may increase litigation costs in some cases.

Other than when an arm of government is a party to such a contract, the public purse is unlikely to be affected.

Q5. The Faculty can see no equality issues arising.

Q6. The Faculty can see no material environmental impact.

## Submission from Freshfields Bruckhaus Deringer LLP

### ***Execution of Documents in Counterparts***

This note sets out some general comments and suggestions in respect of the Legal Writings (Counterparts and Delivery) (Scotland) Bill (the **Bill**). Please note we have not sought to comment on any amendments to existing Scottish or other law that may be required as a result of the Bill.

References in this note are references to sections of the Bill. New wording proposed to be inserted in the Bill is underlined.

Key comments and suggestions:

1. **Ability to execute documents in counterpart (s.1(1)):** We note that the Bill does not refer to counterparts clauses. We therefore assume the intention is that no express provisions as to the ability to execute documents in counterpart are required to be included in Scottish law governed agreements.
2. **Definition of execution in counterpart (s.1(2)):** The reference to “two or more duplicate, interchangeable, parts” could be amended to clarify that a counterpart is an exact copy of a document. We would suggest that either “two or more duplicate copies” or “two or more duplicate versions” would be clearer formulations.
3. **Effectiveness of documents executed in counterpart (s.1(5)):** Limb (b) of s.1(5) appears very wide. It would seem that this could result in a Scottish law governed document not becoming legally effective due to the existence of an enactment or rule of law (which, we assume, could be a foreign enactment or rule of law) which states that a particular agreement or arrangement is not permitted unless a particular formality is complied with or some other action is taken. By way of illustration, the law of another jurisdiction may state that a particular type of asset (e.g. real estate located in that jurisdiction) can only be legally transferred following some particular process or action (e.g. the granting of consent by a certain body in that jurisdiction). In such a case, it could be argued that a Scottish law governed agreement which sought to transfer title to that asset would not be deemed to be legally effective under Scottish law because a rule of law required some other step to be taken before such a transfer (and therefore arguably the document itself) could “become effective”. In light of this, we would suggest that the reference to “become effective” be amended to refer to “be validly executed” or wording to that effect. This should clarify that s.1(5)(b) is seeking to cover only enactments or rules of law which relate to formalities which are required to be complied with in order for a document to be validly entered into (i.e. parties should be capable of entering into a legally binding Scottish law governed agreement which is technically in breach of the laws of another jurisdiction).
4. **Deemed delivery (s.1(9)):** We would suggest that the words “the person from whom the counterpart is received indicates that” be inserted at the start of

s.1(9)(b) (or alternatively, be inserted at the end of the preamble in s.1(9) and removed from the start of sub-clause (a)). This would appear to accord with the explanatory notes to the Bill (see the last sentence of paragraph 11 of the explanatory notes).

5. **Obligations of nominated person (s.2(3)):** As drafted, there is no requirement for the nominated person to consent to being a nominated person and to accepting delivery of counterparts. This seems unsatisfactory in light of the obligations imposed on nominated persons under s.2(3). In addition, there is no method specified by which a nominated person can return documents delivered to him so as to relieve himself of such obligations. We would therefore suggest that s.2(3) be amended to allow a nominated person the option of returning a counterpart to either the sender or in to court (in addition, consent wording could be added to s.2(1)). We would also suggest that s.2(3) be amended to read “hold and preserve it for the benefit of the parties who nominated it”, so as to clarify that a nominated person is not required to hold a counterpart on behalf of all the parties (but rather, only those parties who nominated it).
6. **Agreement between parties regarding obligations of nominated person (s.2(4)):** We suggest that s.2(4) be amended to read “does not apply in so far as the parties and the nominated person may agree” as it would seem reasonable that the nominated person should be involved in any agreement which varies his statutory obligations in s.2(3).
7. **Delivery of traditional documents by electronic means (s.4(2)):** This section relates only to delivery by electronic means. As a consequence, the Bill does not appear to allow parties to deliver counterparts of “traditional documents” in any other method, e.g. by post. Whilst practice seems to favour email and other electronic methods of delivery, a party may, conceivably, wish to delivery wet ink hard copy counterparts to the person coordinating the process by some other method. For example, it may be convenient for a party to post a number of wet ink hard copy counterparts (either the whole document, or where this is cumbersome, just the signature pages) to the coordinating solicitor if that solicitor will be responsible for filing those wet ink originals e.g. with HMRC, the Land Registry etc. We would therefore suggest that s.4 be extended to cover delivery of counterparts by non-electronic means.
8. **General:** A few observations and additional points are set out below:
  - a. It may be helpful to clarify that: (i) although documents may be executed in counterpart, a signatory’s signature cannot be witnessed in counterpart, i.e. a witness must sign the same hard copy version as the signatory whose signature he is witnessing; and (ii) where two signatories are signing on behalf of a single party (e.g. a director and a company secretary signing on behalf of an English company), those two signatures can be in counterpart, i.e. the director and the company secretary may sign different hard copy versions of the document.

- b. We note that the Bill does not refer to dating of documents. We assume that the Bill does not seek to amend the current Scottish law on this point and that the current Scottish law related to when a document is deemed to have been dated will not be affected by the Bill.
- c. We assume that there are no categories of document which, under Scottish law, should be executed in counterpart in a different way to that described in the Bill. For example, under English law, different rules apply to the execution of deeds and real estate contracts by electronic means (see the Law Society's practice note, *Execution of documents by virtual means*).

## Submission from Glasgow City Council

*1. What are the advantages and disadvantages of the approach taken in the Bill? Are there any provisions not included in the Bill which you considered should be?*

The Council support the Bill.

At times it can be problematic to get all parties to a transaction to sign the same principal copy of a legal document on time, especially in transactions involving multiple parties based in different geographical locations. This causes delay, practical difficulties and, in some cases, financial loss to one or more parties.

Changing the governing law of the legal document to English law, which allows execution in counterpart, would not be a suitable option for a Scottish local authority. In addition, this option would not be applicable to Scottish property transactions, as the governing law for such transactions is *lex situs* (the law of the place where the property is situated), namely Scots law.

Providing an optional method by which parties may execute a legal document in counterpart under Scots law and, in addition, allowing documents created and signed on paper to be delivered for legal purposes by electronic means, will significantly expedite matters and will afford greater flexibility to all parties to a transaction.

In the opinion of the Council, there are no disadvantages to the approach taken in the Bill.

The Council do not believe that there are any further provisions that require to be added to the Bill.

*2. How will the Bill improve the process of the execution of legal documents in Scotland?*

The process of the execution of legal documents in Scotland will become more efficient and less time-consuming. It will provide greater flexibility to all parties to a transaction.

*3. Do you consider that the Bill will precipitate an increase in the use of Scots Law to govern transactions?*

Yes.

*4. What are the financial implications of the Bill?*

Having reviewed the Bill and its accompanying documents, the Council believe that there will be minimal financial or resource implications, such as the costs associated with making legal and administrative staff aware of the changes to the law affected by the Bill.

Referring to the Financial Memorandum prepared by the Scottish Government, the Council note that the Government do not anticipate any costs related to the proposals to be borne by local authorities. The Council agree that local authorities and other public sector bodies will be able to benefit from the efficiencies and savings if the Bill becomes law.

*5. Are there any equality issues arising from the Bill?*

The Council are not aware of any equality issues arising from the Bill.

*6. What is your view of the potential environmental impact of the Bill?*

The need for parties travelling by various modes of transport to sign legal documents will be greatly reduced, thereby making a positive impact on the environment.



## **Submission from the Law Society of Scotland**

### **Introduction**

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Obligations Sub-Committee of the Law Society of Scotland, welcomes the opportunity to consider and respond to the Delegated Powers and Law Reform Committee's call for written evidence on the Legal Writings (Counterparts and Delivery) (Scotland) Bill.

### **General comments**

We note that the bill is the first to be considered under the new legislative process for Law Commission Bills, and we welcome this process which gives recognition to the importance and valuable role that the Scottish Law Commission plays in reviewing, evaluating and reforming the law in Scotland.

We are fully supportive of the policy intent and objectives of the bill, which is to modernise the law relating to legal documents, speeding up transactions and allowing traditional documents to be delivered by electronic means. We responded to the Scottish Law Commissions Discussion Paper on Formation of Contract (paper 154)<sup>1</sup> in 20012.

The Society believes there are significant benefits for consumers of legal services, Scottish businesses, and the Scottish Legal sector in allowing execution of

---

<sup>1</sup> [http://www.lawscot.org.uk/media/511503/obl\\_slc\\_discussion\\_paper\\_154-formation\\_of\\_contract-law\\_society\\_of\\_scotland\\_response.pdf](http://www.lawscot.org.uk/media/511503/obl_slc_discussion_paper_154-formation_of_contract-law_society_of_scotland_response.pdf)

documents in counterpart and for this to include electronic documents. To help realise the benefits for these groups quickly and efficiently the Society is currently issuing qualified secure digital signature to all Scottish practicing solicitors. More detail of the project can be found at [www.lawscot.org.uk/smartcard](http://www.lawscot.org.uk/smartcard)

## **Question responses**

### **2. How will the Bill improve the process of the execution of legal documents in Scotland?**

We believe that enabling execution in counterpart will bring Scots Law into line with many of the other international jurisdictions, including England and New York, both of which are often considered to be two of the world's key legal centres. We believe that the bill will enable a more efficient process for execution where parties are based in different locations.

### **3. Do you consider that the Bill will precipitate an increase in the use of Scots Law to govern transactions?**

Yes, and in our view this is to be welcomed. As we understand, in the experience of many commercial practitioners the primary reason for a change in choice of Scots Law in commercial transactions involving parties in multiple locations and/or jurisdictions is the requirement that a single agreement is executed. In the experience of the Committee members, international parties will often choose English law for commercial transactions as this offers the option of counterparts.

### **6. What is your view of the potential environmental impact of the Bill?**

Although we are not in a position to comment fully on the potential environmental impact of the Bill, we do believe that the ability to effect remote execution and delivery of agreements will most likely reduce travel requirements for contract parties and advisors.

### Submission from Maclay Murray and Spens LLP

1. *What are the advantages and disadvantages of the approach taken in the bill? Are there are provisions not included in the bill which you considered should be?*
  - We strongly support the Bill and do not believe that there are any particular disadvantages nor further provisions that need to be included. We see the fundamental purpose of the Bill as to remedy a perceived "defect" in current Scots law for the benefit of clients and the legal profession.
  - Although there is some case law to the effect that execution in counterpart has always been possible under Scots law, there has been sufficient doubt that such execution has in practice virtually never been used. The consequence is that parties must all sign the same single document. This can cause logistical difficulties, particularly in the case of major high value commercial transactions involving a number of parties, not all of whom may be in the same country let alone the same city.
  - Pragmatic as ever, Scots lawyers have therefore resorted to circulating a single document by various means, but even this causes delay and practical difficulties. Equally pragmatic, but undesirable, a solution has been to change the governing law of the documents to that of English law in order that execution in counterpart would be possible. This is undesirable generally from the point of view of Scots law, including the fact that one thereby loses the opportunity to litigate any matters arising under Scots law or have Scotland as the seat of any arbitration under the document. Further, and in any event, the latter solution does not work in relation to property documents, as the governing law is that of the *lex loci* i.e. Scotland.
2. *How will the Bill improve the process of the execution of legal documents in Scotland?*
  - We have answered this above.
3. *Do you consider that the Bill will precipitate an increase in the use of Scots Law to govern transactions?*
  - Yes for the reasons stated in response to Question 1 above.
4. *What the financial implications of the Bill?*
  - This is not a question to which we can give a particularly full answer. We would note, however, that there will be costs savings for parties

if the mode of execution of documents is simplified. On the other side of the financial equation, allowing issues arising from the document to be litigated/arbitrated in Scotland will increase the flow of legal work to this jurisdiction.

5. *Are there any equality issues arising from the Bill?*

- We are not aware of any equality issues that do, or could, arise from the Bill.

6. *What is your view of the potential environmental impact of the Bill?*

- To the extent that there is an environmental impact, it arises from issues flowing from our answer to Question 1 above, namely the need to avoid parties travelling, whether by plane or otherwise, in order to execute the documents in order to consummate legal transactions in Scotland.

## **Submission from the Registers of Scotland**

Thank you for the opportunity to respond to the call for evidence as part of the Committee's Stage 1 consideration of the Bill.

My role as Keeper of the Registers of Scotland will only be impacted minimally by the provisions in the Bill. I would anticipate that many of the documents executed in this way will not require to be registered or recorded in any of the legal registers for which I am responsible. Where such registration or recording does occur, there will be a small amount of retraining required for my staff, but I do not anticipate that this will go beyond the regular development training that we undertake.

To the extent that the Bill provides greater flexibility in relation to execution of legal documents, as with the amendments made to the Requirements of Writing (Scotland) Act 1995 by the Land Registration etc. (Scotland) Act 2012, I consider that will provide useful options for those engaged in negotiation and execution of such documents.

I note that in the Committee's evidence session of 17 June, the issue of an electronic document repository, possibly run by Registers of Scotland, was brought up. I wanted to take this opportunity to confirm that Register of Scotland is open to the idea of operating such a depository subject. I understand that the Scottish Government intend to turn to this aspect of the Scottish Law Commission's Report in due course. I will be happy to come back to the Committee with further detail on what RoS may provide once we have looked at the detail of any system and sought further views from colleagues in Scottish Government and our customers.

### **Submission from Shepherd and Wedderburn LLP**

Shepherd and Wedderburn strongly supports the introduction of the Legal Writings (Counterpart and Delivery) Bill, which will significantly facilitate the swift completion of commercial and domestic transactions under Scots law.

#### **Counterpart signing**

The completion of many commercial transactions in Scotland involves numerous parties, multiple documents requiring all-party execution, and frequently, the parties are based in two or more separate legal jurisdictions. The inability, under the law of Scotland as it stands at present, for those parties to complete the multiplicity of documents simultaneously in any way other than gathering in person, causes considerable practical problems.

The nature of modern commercial transacting means that completion “in person” is simply not a practical alternative in the majority of cases. This has resulted in the requirement either to construct elaborate, but inefficient and often time-consuming completion mechanisms, or where these will not deliver the required legal effect, resort often has to be had to the law of another jurisdiction, usually English law, where counterpart execution is permitted, as the only way to achieve the required result and effect completion. Where the transaction requires, for proper legal effect, to be subject to Scots law, this option is simply not available.

Increasing complexity in modern commercial transaction means that the shortcomings in the Scottish system are more difficult to surmount. The introduction of a system of execution in counterpart has the potential to transform the delivery of commercial and business transactions in Scotland, even where there are multi-jurisdictional aspects.

By designing a workable and comparatively simple counterpart signing structure in this Bill, it is possible for Scotland to create an efficient and enviable approach to commercial completion. By including electronic as well as traditional documents, Scotland will bring itself to the leading edge of practice in this area, and anticipate and facilitate developments in electronic transacting that are emerging. Doing business in Scotland becomes easier. We commend the structure for counterpart signing contained in the Bill, which provides a clear and simple to follow procedure for ensuring effective simultaneous execution and completion.

#### **Delivery of documents**

Delivery of traditional documents in Scotland poses problems of a different type, in the modern commercial and domestic arena. For written contracts to be legally binding in Scotland, physical delivery must take place. For property transactions in particular, that has meant that, to ensure the creation of a legally binding contract (“missives” consisting of an exchange of letters between solicitors acting for the parties) by same day delivery, resort has to be had to using couriers at what can often be considerable expense. Some alternatives which involve complicated workarounds, where the solicitors are located in different towns or cities, are time consuming and sometimes simply not available.

The vast majority of communication and correspondence among solicitors and between solicitors and their clients takes place via email and the invariable practice is to attach documents, either in Word or other suitable format, or pdf, to emails for speed and immediate delivery. This does not however create the legally binding requirement for contract, which needs physical delivery. The practice has evolved for contracts consisting of traditional documents with a “wet” signature to be converted to pdf and then attached to, and sent via an email. As delivery does not take place until the principal document arrives with the recipient (or in the case of letters concluding the contract, when they are put in the post) the sending solicitor provides an irrevocable undertaking to hold the document to the order of the receiving party until it is sent, and to send it in the next available post. This is characterised as “constructive delivery”. The procedure has not, to our knowledge, been tested in the courts, but there is doubt about whether such undertakings could, under the law of Scotland as it stands at the moment, actually override the requirement for physical delivery. Many contracts have had to rely on this legally fragile arrangement.

Accordingly the proposal in the Bill, to make electronic delivery of such traditional contractual and other documents legally binding, is an innovative and ground-breaking proposal which will, at a stroke, dispense with an antiquated procedure, and modernise and make more effective Scottish practice. Both commercial and residential conveyancing practice, in particular, will see enormous benefits, and not only is this new enablement consistent with the Scottish Government’s digital strategy, it will also provide greater clarity and certainty for parties transacting in Scotland, and fills the gap in procedure, that was not addressed by Part 10 of the Land Registration etc. (Scotland) Act 2012, which enables electronic delivery of *electronic* documents but not traditional ones. The vast majority of legal documents are still created in traditional format, and executed traditionally. The Bill will bring these types of documents on a par with their electronic equivalents, and bring significant efficiencies and cost savings to current commercial and domestic legal practice in Scotland.

## **Submission from Tods Murray LLP**

### **1 Introduction**

- 1.1 Tods Murray is a leading independent Scottish law firm, dedicated to providing first rate, innovative and commercially aware specialist advice to companies, institutions and organisations, within both the private and public sectors, and to families, individuals and charities.
- 1.2 Our Banking and Finance team is one of the largest in Scotland. We provide a full range of services to a client base which includes UK and overseas banks and other financial institutions as well as borrowers operating in a variety of sectors. We are focussed on understanding and delivering our clients requirements and assisting them in meeting their commercial objectives. We have particular experience of cross-border transactions and a clear understanding of the issues involved when dealing with multiple jurisdictions.

### **2 Analysis**

- 2.1 Our submission is made largely in the context of banking and finance transactions, particularly multi-jurisdictional transactions where Scots law forms just one (and usually a minority) part of a larger transaction. The existing Scots law, particularly the lack of counterpart execution as a valid form of execution, can cause problems in terms of transaction logistics and requirements as well as giving a poor impression of Scots law and Scotland generally as a place in which to do business. The lack of execution in counterpart under Scots law is, however, an issue that goes wider than just banking & finance transactions. Members of our Corporate, Projects and Real Estate departments also encounter difficulties on a regular basis and have also had input into this response.
- 2.2 We are aware that some “work-around” methods are used in transactions to circumvent the lack of availability of execution in



counterpart under Scots law. These include the use of powers of attorney and undertakings (whereby the solicitors agree to accept executed counterparts in order to allow a transaction to complete, but undertake to each other to deliver a fully, validly executed document at a later date). These are, however, to differing degrees unsatisfactory and uncertain and Scots law should not have to rely upon work-around methods for something as fundamental as the execution and validity of documents.

Not infrequently if a multi-jurisdiction transaction is facing execution difficulties because of Scots law requirements, then we will see the document being written under English law to avoid these challenges. Where this cannot be done great care has to be taken in explaining to the parties how the document must be signed in accordance with Scots law. However where this is within a large multi-jurisdiction transaction this can cause frustrations for the signatories and give a regressive impression of Scots law. We have also very occasionally seen the Scottish aspects of a transaction dropped completely from the wider transaction because of the difficulties and complexities that Scots law poses. This is obviously unsatisfactory and indeed commercially detrimental to Scotland.

- 2.3 In our view the Legal Writings (Counterparts and Delivery) (Scotland) Bill (the “**Bill**”) is in a format which would be of great utility to Scots law. We provided detailed comments to the Scottish Law Commission on the draft Bill as it progressed through their review and drafting processes and the final Bill reflects these comments in various respects. Our comments here are accordingly of a more general nature.

### **3 Summary**

Our view is that in general the Bill is to be greatly commended and would offer a welcome innovation which would benefit all aspects of Scots commercial law. The Scots law formalities on execution can – to the wider commercial world – seem antiquated and give a negative impression of Scots law as a modern, dynamic legal system and indeed Scotland itself as a place to do business. The enactment of the Bill would bring Scots law requirements on execution of documents into line with many other worldwide jurisdictions and, more importantly, would promote Scotland as a business-friendly legal jurisdiction.

### **4 Costs & Impact**

It is difficult to quantify the value and cost benefit that the Bill would bring. We see the issues with the existing Scots law as being less cost-related and more about making sure that Scots law is business-friendly (which in terms of execution formalities it currently is not) and promoting Scots law as a legal system which can facilitate commercial transactions. The demands of the existing law are cumbersome and can – as stated above – lead to transactions being structured under English law (sometimes even with Scots law assets being dropped from the transaction entirely). Making Scots law certain but more attractive to business are the principles which we consider should underpin the Bill and the law reform project more generally.

### Submission from Weir Group plc

The Weir Group ("Weir") is a global engineering solutions provider, headquartered and registered in Scotland. Our business is focused on designing, manufacturing and supplying innovative products and expert engineering solutions. The Group has more than 15,000 employees operating in 70 countries through more than 200 manufacturing and service facilities. Activities are divided into three divisions:

- Minerals - designs, manufactures and supports products used in mining, oil & gas and general industrial markets
- Oil & Gas - designs, manufactures and supports products used in upstream pressure-pumping, pressure control and downstream refining operations
- Power & Industrial - designs, manufactures and supports valves, pumps and turbines for the power, industrial and oil and gas markets.

Having reviewed the Bill and related documentation, Weir consider the proposed Bill as a positive development of Scots law. In our business environment, and given the countries in which we operate, transactions are increasingly time critical with often multiple parties involved in different locations. Therefore, both the virtual signing facilitation and clarity and certainty around the law on execution in counterpart, will allow our business to utilise Scots law more as a preferred law of choice.

We have noticed a tendency with the parties we generally contract with, to move away from Scots law and to select other legal systems in contracts, (such as English law). This is possibly as a result of the inflexibility regarding the execution of documents. It has been difficult to counter this approach in our own contractual negotiations.

Weir consider it helpful, through the Committee's endeavours and through this legislative change, that a contract execution by counterpart can satisfy the requirement of the formal validity and probativity under Scots law. Most commercial transactions we are involved in require flexibility, and as stated above, we often have had to select English law instead of Scots law in order to facilitate this counterpart signing aspect. In addition, it is advantageous to form a valid and probative contract by exchanging an electronic version of the original. In our experience, over 90% of our contracts involve multiple parties, located across the world and the certainty with electronic exchange will expedite matters greatly when Scots law has been contractually agreed.

A possible future addition to the Bill could involve an electronic contract repository (in a similar way to the Land Register or Books of Council & Session). This could allow parties to lodge significant electronically agreed contracts, to ensure that a formal record of a contract is recorded. Whilst we have not encountered this in other jurisdictions, there may be a good case in the Scottish legal environment to provide further contractual certainty between contracting parties. There would clearly need to be some consideration to contract confidentiality in such a repository.

Our view with regards to any financial implications of the Bill will principally be evidenced in reduced costs, both direct and indirect to our business and to those we transact with. We can only see positive financial implications with the Bill.

Similarly in the context of environmental implications, the electronic exchange facility will certainly reduce travel needs of those involved.

Weir has no observations in relation to equality issues arising from the Bill.

We trust the Committee find our observations of use in the progression and consultative process of the Bill. We feel that the Bill will potentially increase the selection of Scots law as a jurisdiction of choice in contracts as well as provide legal certainty in some of the areas where currently contract law remains unclear.

## Submission from Scottish Law Commission

### Signatures in Scots Law: Form, Effect, and Proof

*This research paper seeks to state the law as of August 2014. Unlike Scottish Law Commission documents such as our Discussion Papers and Reports, we have not had the benefit in preparing this paper of consultation with others with relevant knowledge and practical experience such as solicitors and financial service providers, and have relied upon our own resources entirely. We have however made every effort within the limits of the time available to ensure the accuracy and comprehensiveness of our analysis.*

#### Form

##### *Paper (traditional) documents*

1.1 What constitutes signature in Scots law in the context of traditional paper documents? Although “signature” derives from the Latin *signum*, meaning “sign, mark or seal”, today it usually involves the application of some version of a party’s name to the document by that party.<sup>1</sup> In general, signature is a voluntary act of a party in relation to a document by which it becomes an expression of that party’s wishes and intentions. Signatures are of course used in contexts where their legal effect is at best evidential: e.g. to make a claim of ownership of a book on its flyleaf; or to declare one’s presence at a particular place, as in a visitor’s book; or to take responsibility for the contents of a manuscript, as in an examination script book; or to send personal greetings to another elsewhere, as in birthday, Christmas, retirement or get well cards. But they can have a greater legal effect where the intention is to create legally enforceable rights and duties (whether immediately or in the future) through the document being signed, as for example in a contract, a will or a disposition of heritable property.<sup>2</sup> It is with the effectiveness of signatures in this sort of documentary context that this paper is concerned. It should be noted, however, that signature is not necessarily enough by itself to make a document legally effective: in a multi-party document it may not come into effect before all parties have signed, while a unilateral document may require delivery to its beneficiary and/or an equivalent, such as registration in a public register, to become effective.

1.2 The requirement of voluntariness mentioned above implies the absence of external controls on the signatory’s signing mechanism. So it has been held that there was no

---

<sup>1</sup> Advanced electronic signatures (for which see below, para 1.17) involve the application to an electronic document, not of a name, but of a unique electronic identifier of the owner of the signature.

<sup>2</sup> Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (2008), para 2.09; John M Halliday and Iain J S Talman, *Conveyancing Law and Practice* (2<sup>nd</sup> edn, 1996), para 3.08.

signature when an illiterate person simply copied his name over lines made on the paper with a pin by another.<sup>3</sup> Taking account of technological developments in the ways in which documents may be created and by which people may indicate on documents the “authenticating intention” which they believed to be the defining characteristic of a signature for the purposes of the law, however, the Law Commission for England & Wales suggested in 2001 that “what is required therefore is something which is not purely oral and which evidences that authenticating intention.”<sup>4</sup>

1.3 An account of the present Scots law on signatures may begin (but not end) with the Requirements of Writing (Scotland) Act 1995 (RoWSA). This has two main aspects in the present context. The first is to require the use of a certain form of writing in a limited number of transactions (including contracts for the sale of land, and wills), with the main feature being a subscription or subscriptions (that is, a signature by the party or parties to be bound by the document applied at the foot of the document’s final page (excluding annexes and the like) and, if necessary, in further subsequent “signature pages”).<sup>5</sup> The second is to provide an optional facility whereby a subscription to any document may be made probative, or self-proving, by having certain characteristics (see below para 1.38-1.39), and being made before or acknowledged to, a witness who also signs the document in that capacity.<sup>6</sup>

1.4 Commonly in the highly formal documents which are made probative the text will design the parties by their full names (e.g. Thomas Broun Smith). But for that party’s subscription to be probative it need only include the signer’s forename and/or initial followed by surname (e.g. Thomas B Smith), while an abbreviated or familiar form of a forename may be used as part of this (e.g. Tom Smith).<sup>7</sup> It is thought by some that the signature must also be legible, since probativity requires that the document “bears” to have been subscribed by

---

<sup>3</sup> *Crosbie and Pickens v Pickens* (1749) Mor 16814. It is however no objection to a signature that the signatory has gone over his or her original signature and reinforced it because it was too faint: *Stirling Stuart v Stirling Crawford’s Trustees* (1885) 12 R 610.

<sup>4</sup> Law Commission, *Electronic Commerce: Formal Requirements in Electronic Transactions: Advice from the Law Commission* (December 2001), para 3.28. Note also the very wide definition of document in Civil Evidence (Scotland) Act 1988, s 9.

<sup>5</sup> Superscription is possible only for the monarch, who does not have time to read the documents she signs.

<sup>6</sup> The significance of probativity will be explored further below in the section on Proof. For wills of more than one page to be probative every sheet must be signed by the testator (but this need not be by way of subscription): RoWSA s 3(2).

<sup>7</sup> Section 7(2). This is however without prejudice to any other rule of law relating to the subscription or signing of documents by members of the Royal Family, by peers or by the wives or the eldest sons of peers (s 7(6)). See further George L Gretton and Kenneth G C Reid, *Conveyancing* (4th ed, 2011), para 17.04 (p 296).

the granter.<sup>8</sup> On the other hand, if the witness is to be taken as either seeing the signature being applied, or receiving the signatory's acknowledgement of the signature, it may be that his or her attestation on the document can overcome any illegibility of the main subscription.<sup>9</sup> It is not required that the subscription be the signer's usual signature. It is however not allowed to sign by reversing the usual order of forename followed by surname, or to sign with a name not one's own, whether in whole or in part.<sup>10</sup> It would definitely not do to subscribe in a name which bore no relation to that set out in the document: for example, "Flora MacDonald" when the document text spoke of "Charles Edward Stuart". While persons of full capacity are free to call themselves what they wish in Scots law, "provided that any change is made with publicity, good faith, and the absence of any improper object",<sup>11</sup> that freedom does not extend to a freedom of signature in formal documents in the sense of allowing absolute inconsistency between text and subscription.

1.5 The 1995 Act is more liberal in allowing the following also to be a valid subscription where only formal validity is necessary:

- a name which is not the signatory's full name (e.g. the forename Tom standing without a surname; a stand-alone surname would not however be enough,<sup>12</sup> nor would a name which was not that of the signatory as designed in the document),
- a description (e.g. Mum),<sup>13</sup>
- an initial (e.g. TBS),<sup>14</sup> or
- a mark (e.g. X).<sup>15</sup>

---

<sup>8</sup> Gretton and Reid, *Conveyancing*, para 17.04 (p 297); Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.09. Cf Halliday and Talman, *Conveyancing*, vol 1, paras 3.07, 3.104.

<sup>9</sup> For what is required of the witness as such, see RoWSA s 3(7).

<sup>10</sup> Gretton and Reid, *Conveyancing*, para 17.04 (pp 296-7).

<sup>11</sup> Thomas Innes, Advocate, "Name and Change of Name", *Encyclopaedia of the Laws of Scotland*, vol 10 (1930), paras 289, 290 and 305; Stair Memorial Encyclopaedia, Child and Family Law Reissue, para 222 (focused on parents' freedom of choice in naming child). For changes of names in the Registers of Births Deaths and Marriages see Stair Memorial Encyclopaedia, Registration of Births, Deaths, Marriages, etc Reissue, paras 36-39.

<sup>12</sup> Cf the pre-1995 Act case of *American Express Europe Ltd v Royal Bank of Scotland plc (No 2)* 1989 SLT 650, OH, where signing with a surname only was held to be enough under the then law.

<sup>13</sup> See *Rhodes v Peterson* 1971 SC 56. Note also *Draper v Thomason* 1954 SC 136 ("Connie" enough).

<sup>14</sup> In the law as it stood before RoWSA came into force (1 August 1995) there were special rules for what were known as writs *in re mercatoria*. While the rules on this subject had become very unclear in their effect by 1995, leading to their abolition by the 1995 Act, a governing principle was that the requirements of formality were relaxed for documents being deployed in business transactions. Thus where subscription might have been required under the previous law, a party's initials, if proved or admitted to be genuine and the person's accustomed mode of signing, would suffice to make a writ *in re mercatoria* binding. See Halliday and Talman, *Conveyancing Law and Practice*, vol 1, paras 3.73-3.77. The 1995 Act does not limit this relaxation of formality to business documents, however.

<sup>15</sup> See *Crosbie v Wilson* (1865) 3 M 870 (where it was held that a will which was attested but at the end bore only the testator's name with, in words only, the statement "her mark" was ineffective); *Donald v McGregor* 1926 SLT 103, OH (in which the ill testator was too weak to sign her dictated will in full, and so signed only "Mary T McG" and added her cross as her mark; held the will was invalid).

But these must each be the person's usual method of signing, whether generally or only for documents of the kind in question, or if the person intended it to be a subscription of the document.<sup>16</sup> Since the document so signed is not probative, the party's usual method of signing or the intention to subscribe may have to be proved before it can take effect. Legibility does not seem to be even implicitly required, however.

1.6 The 1995 Act does not expressly limit a signature for any of the above purposes to the application of pen and ink to paper by the hand of the signatory. So can it be in pencil, for example? There may be a question whether a pencilled and so relatively easily erased signature can really manifest the signatory's final commitment to the document; but the answer may be that it is for the other party to show that lack of final intention, not for the signatory to prove its existence.<sup>17</sup> In *Jollie v Lennie* (2014) the dispute was over a purported will handwritten and subscribed on each side of a single sheet of A5 paper by the testator before a witness who also signed, all in pencil. The will was held to be effective but the fact that it was written in pencil throughout was not a point put in issue against this conclusion at any stage of the proceedings.<sup>18</sup>

1.7 Under the pre-1995 law it was held that the application of an embossed stamp bearing a facsimile of a party's signature and of a cyclostyled print of a party's signature could not be subscriptions to formal deeds.<sup>19</sup> The modern courts have however held that faxes of subscribed missives are by themselves insufficient to meet the requirements of the 1995 Act, although there has been uncertainty as to whether such a fax might be sufficient communication that a subscribed acceptance missive existed, so concluding a contract.<sup>20</sup>

---

<sup>16</sup> RoWSA s 7(2)(c).

<sup>17</sup> The position would be different, however, if the issue was whether or not a party's pencilled subscription had subsequently been erased so that as it stood the document appeared to be unsubscribed. On its face the document could not then be probative in relation to that party even if attested.

<sup>18</sup> *Jollie v Lennie* [2014] CSOH 45. The rule requiring all sheets of a will to be signed to make it probative (above note 1) was met because there was only one sheet of paper, albeit written on both sides thereof; but it was not probative because the document does not seem to have borne the name and address of the witness apart from her signature, nor a testing clause or equivalent.

<sup>19</sup> *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610 (embossed stamp); *Whyte v Watt* (1893) 21 R 165 (cyclostyle). Halliday and Talman, *Conveyancing Law and Practice*, vol 1, paras 3.08, 3.105, regard these cases as still authoritative in relation to the 1995 Act but they are not cited in this context by Gretton and Reid, *Conveyancing*, or Rennie and Brymer, *Conveyancing in the Electronic Age*, or David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7<sup>th</sup> edn, 2004).

<sup>20</sup> See *EAE (RT) Ltd v EAE Property Ltd* 1994 SLT 627; *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 444; *Merrick Homes v Duff* 1996 SC 497; *McIntosh v Alam* 1997 SCLR 1171, 1998 SLT (Sh Ct) 19; *Park Petitioner (No 2)* 2009 SLT 871 (OH).



1.8 Where probativity is not sought or formal validity not required for a document, all the forms of signature recognised in the 1995 Act must nonetheless also be valid in relation to that document, and the question is whether there are other forms that might be valid as well. So for example need a signature be a subscription (i.e. appear at the end of the document) to be binding? What if it appears at the top or in the middle of the document, or along the margin of a page, or on the backing? In pre-1995 Act cases about wills, however, it was held that such signatures were ineffective to make a valid testamentary document,<sup>21</sup> and that would still clearly be the result in that particular case today, since the 1995 Act requires wills to be subscribed. But wills may be a special case in which it is essential to be as certain as possible that the testator intended the whole of the document to have legal effect. It is not uncommon, however, to find in contexts other than wills the use of pre-printed documents with marked places for the application of signatures which are not at the foot of the page, and it may be that since these are places clearly intended for effective signings the result is indeed to bind the signatory to whatever the legal effect of the document may be. Again, suppose a handwritten document in which the writer begins “I, AB, hereby contract to supply goods to CD”; can AB be taken to have “signed” this document if it bears no subscription?

1.9 In an informal document intended to have binding effect only upon signature by the party to be bound, that party typing his or her name at the end of a writing might, it is thought, be capable of being a signature if it was so intended by the typist. This could be shown, for example, by a statement to that effect in the body of the text, or perhaps by a word or phrase immediately before the alleged signature, such as “Signature” or “Signed”, whether or not also placed there by the signatory. Another possibility might be a statement from the party to whom the typist was to be liable under the document that a typed signature was acceptable.

1.10 Do the nineteenth-century cases holding that the use of an embossed stamp or a cyclostyle did not constitute signature for formal deeds<sup>22</sup> also govern the twenty-first century possibility of inserting into a word-processed informal document a file containing a scanned hand-written signature in a similar context, with a result which can then be printed out, whether by the creator of the document or another person?<sup>23</sup> Might a PDF and a fax

---

<sup>21</sup> See *McLay v Farrell* 1950 SC 149 (mid-document); *Robbie v Carr* 1959 SLT (Notes) 16 (margin); *Boyd v Buchanan* 1964 SLT (Notes) 108 (backing).

<sup>22</sup> Above, para 1.7; *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610 (embossed stamp); *Whyte v Watt* (1893) 21 R 165 (cyclostyle).

<sup>23</sup> See Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.09: “A signature must be in handwriting and not printed, typed or otherwise artificially created.” This may however apply only to formal documents.

including a facsimile of a handwritten signature applied to a writing by the signatory also be treated as signed so as to confirm the signatory's intention to be bound by the writing?

1.11 *Whyte v Watt*, the case about cyclostyled signatures, is of considerable interest in regard to this question, because the decision was actually about whether a notice of objection to the retention of another person's name on the Register of Voters under section 4 of the Burgh Voters Act 1856 had been "signed by the person objecting" as the section required.<sup>24</sup> The method by which the cyclostyled signature was produced is set out in some detail in the report of the case:

Hugh Watt did, with a certain instrument called a stencil-pen, perforate the letters forming his signature upon a prepared waxed skin stretched on a frame. He then placed the notice under the waxed skin, and passed an inked roller over the said waxed skin perforated as aforesaid, and the ink from the roller passing through the perforations in the waxed skin produced the signature on the notice. The signature was formed entirely by Hugh Watt; no other person was employed in the operation, and no use was made by Hugh Watt of any stamp, die, or engraved plate in forming his signature.<sup>25</sup>

His reason for performing this complicated process is also explained:

When letters or words have been formed on the said waxed skin by the stencil-pen, sheets of paper to the number of 100 or more can be placed successively under the waxed skin, and upon the inked roller being passed over the waxed skin the letters or words are produced on the sheet of paper immediately under the waxed skin.<sup>26</sup>

He could thus be spared the effort of physically writing his signature for as long as the cyclostyle continued to work. The sheriff's decision that Mr Watt had indeed signed the notice was upheld by an unanimous Division of the Court of Session, the opinion of which was delivered by Lord Kinnear:

The word "signed" is not a technical word but a word of ordinary language. Subscription is a method of signing. It is not the only method. We are therefore to consider whether the method of authentication described in the case can properly be called "signing." Now, upon that question, we have the advantage of a decision of the Court of Common Pleas, in the construction of a similar provision in the 6th of the Queen, chapter 18, which requires that a "notice of objection shall be signed by the objector." In *Bennett v. Brumfitt*, L. R., 3 C. P. 28, the Court held that this requirement was satisfied although the objector had not subscribed the notice but had affixed his name to it by means of a stamp on which was engraved a facsimile of his ordinary signature. I cannot suppose that when the Legislature has employed the same language in a Scots Act as in a previous English Act, it intended to prescribe one

---

<sup>24</sup> *Whyte v Watt* (1893) 21 R 165.

<sup>25</sup> *Ibid*, 165-6.

<sup>26</sup> *Ibid*, 166.

method of authentication in England and another in Scotland, and I should be very slow to differ from the learned Judges in England as to the meaning of an ordinary word in the English language.

I see no reason why the word "signed," in this statute we are considering, should be construed differently from the same word in England, and I am therefore of opinion that the mode of authentication described in the special case is a sufficient compliance with the statute.<sup>27</sup>

Elsewhere in his opinion Lord Kinnear expressed the view for which the case is commonly cited, i.e. that this mode of signature would not do for a formal subscription;<sup>28</sup> but the judgement is actually a strong authority for a wider approach to the concept of signature where formal documents are not involved.

1.12 The matter of facsimile signatures produced by scanning methods has also been addressed thus in an English case by Laddie J:

"[I]t is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been 'signed' by the author."<sup>29</sup>

What is crucial to the judge's conclusion here, however, is that the application of the copy of the signature to the document is by its author. The same conclusion would presumably be reached if the copy signature was applied by an appropriately authorised person, or if an unauthorised application was subsequently ratified by the author; but not otherwise. We deal below with the possibility that the situation described by Laddie J gives rise to an electronic signature where the document completed on computer or on-line is in fact never printed and has only an electronic existence. But, given the approach to be found in *Whyte v Watt*, we think that in hard copy form the signature produced by means of a scanning and a printing process could be valid in relation to a document not requiring formality for its legal effectiveness to be achieved.

### *Electronic signatures*

1.13 In our Discussion Paper on Formation of Contract we reviewed the law on electronic signatures.<sup>30</sup> These are legally defined in the Electronic Communications Act 2000 as:

---

<sup>27</sup> Ibid, 166-7.

<sup>28</sup> Ibid, 166.

<sup>29</sup> *Inland Revenue Commissioners v Conbeer* [1996] BCC 189, 194.

<sup>30</sup> Review of Contract Law: Formation of Contract (Discussion Paper No 154, 2012), paras 7.30-7.37.

“... so much of anything in electronic form as

(a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and

(b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.”<sup>31</sup>

1.14 This makes it clear that only an electronic document can have an electronic signature. The signature indicates that the document comes from a particular person and is to be treated as a whole. We noted further that under the 2000 Act there are essentially two levels of electronic signature, the first designated as “*simple*”, the second as “*advanced*”. The former merely meets the definition just given. It is therefore satisfied by the typing of a name into an email or a document created on a computer, or by the insertion into such a document of an electronic facsimile of a “wet ink” signature which is then transmitted electronically by way of faxes or scanned versions in PDFs attached to emails.<sup>32</sup> But it has been held (correctly, we think) that an email address including the sender’s name automatically inserted by the internet service provider upon transmission of an email is not an electronic signature when that name does not appear in the body of the email.<sup>33</sup>

1.15 In 2001 the Law Commission for England & Wales suggested that clicking a website icon may amount to a signature in appropriate circumstances.<sup>34</sup> This view has since been borne out in the first-instance decision of *Bassano v Toft* (2014).<sup>35</sup> In that case it was held that the requirement in section 61 of the Consumer Credit Act 1974 that a consumer credit agreement had to be signed “in the prescribed form” was satisfied by the consumer clicking an “I Accept” button on a defined part of the computer screen upon which the loan agreement was also presented. The form was prescribed in The Consumer Credit (Agreements) Regulations 2010, which lays down that the consumer’s signature must be in a space indicated in the document for the purpose and dated, and also recognises that the agreement may be concluded electronically and that the document may contain “information about the process or means of providing, communicating or verifying the signature to be

---

<sup>31</sup> Electronic Communications Act 2000, s 7(2) (implementing Directive on a Community framework for electronic signatures [1999] OJ L 013/12).

<sup>32</sup> *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978, para 32. For cases of contracts being concluded by simple electronic signatures on emails see *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95; *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552; *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch).

<sup>33</sup> *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543.

<sup>34</sup> Law Commission, *Electronic Commerce: Formal Requirements in Electronic Transactions*, paras 3.36-3.38.

<sup>35</sup> *Bassano v Toft* [2014] EWHC 377 (QB). See especially paras 39-46.

made by [the consumer]”. Mr Justice Popplewell commented that he could “see no reasons of policy why a signature should not be capable of being affixed and communicated electronically to an agreement regulated by the Act, just as it can for other documents which are required to be signed.”<sup>36</sup> The signature in this case is a simple electronic one.

1.16 There also arose in *Bassano v Toft* another aspect of the question raised earlier about places marked for signature in a document.<sup>37</sup> Mr Justice Popplewell summarised the issue and his decision upon it thus:

“There arises a further question whether the location of such signature is in the form prescribed by Regulation 4(3)(a) which requires it to be in “the space in the document indicated for the purpose”. The words “I accept” appear in such a space, but Mrs Bassano’s name appears on the previous page. In my view the statutory regulation is fulfilled. A signature need not consist of a name, but may be of a letter by way of mark, even where the party executing the mark can write ... The signature may consist of a description of the signatory if sufficiently unambiguous, such as “Your loving mother” or “Servant to Mr Sperling” ... In the Borro Loan Agreement, the signature is made by the electronic communication of the words “I Accept” which are in the space designated for a signature. They constitute a good signature because the word “I” can be treated as being the mark which is unambiguously that of Mrs Bassano affixed for the purposes of authenticating and agreeing to be bound by the terms of the document. The signature is therefore in the designated space by reason of the words “I Accept” being in that space. The name on page one is of relevance because it is evidence that “I” is Mrs Bassano’s mark, if any were needed in addition to the evidence that it was she who clicked the button; but it is the words “I Accept” which constitute the signature, not the name on the previous page.”<sup>38</sup>

1.17 The *advanced electronic signature* is differentiated from the simple one just discussed by a process of external certification making the signature one that is uniquely linked to and capable of identifying the signatory, using means which can be maintained under the signatory’s sole control and linked to the data into which it is incorporated or otherwise logically associated in such a way that any subsequent change in that data is detectable.<sup>39</sup> The process of certification involves satisfying the certificate provider of one’s identity and receiving thereafter the electronic signature which is uniquely linked with that person. It takes the form of a “pair of keys”, one “private”, the other “public”. Each of these is a unique string of prime numbers expressed in binary digits and paired with each other. The signatory applies the private key to the document it wishes to sign, which thereafter can only be opened and read by another party who has been issued with and applies to the

---

<sup>36</sup> Para 43.

<sup>37</sup> See above para 1.8.

<sup>38</sup> *Bassano v Toft*, para 45 (references omitted).

<sup>39</sup> Electronic Communications Act 2000, s 7(3).

document the public key. The advanced electronic signature is thus a strong confirmation of both the authenticity and integrity of the document, in that it is possible to be reasonably certain of who produced the document and that it is the document produced by that person.

1.18 The “smart card” which the Law Society of Scotland is now producing for its members will be capable of applying an advanced electronic signature to electronic documents produced by them. In particular this will enable solicitors to make use of electronic documents throughout the entirety of conveyancing transactions, from the completion of missives through the preparation of dispositions and on to the registration of title. The Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) state that an advanced electronic signature is required for both the formal validity and probativity of an electronic document, with additional requirements for probativity being issue of the signature under a qualified certificate by a qualified certification provider as defined under the Electronic Signatures Regulations 2002 (SI 2002/318). The 2014 Regulations thus match the 1995 Act in imposing higher requirements of formality for probative documents than for those for which formal validity only is required. We believe that the Law Society “smart card” will enable solicitors to meet the requirements for probativity, and it will therefore also be capable of use when only formal validity is needed. Simple electronic signatures, however, cannot be even formally valid subscriptions of electronic documents.

1.19 The 1995 Act as amended makes clear that for an electronic document to be formally valid the advanced electronic signature must be applied by the granter of the document (a matter which may need to be proved if challenged), while to make the document probative it must “bear” to have been authenticated by the granter.<sup>40</sup>

### **Effect**

1.20 While there are some exceptions in e.g. the Requirements of Writing (Scotland) Act 1995 as amended and a number of consumer protection statutes such as the Consumer Credit Act, the law does not impose any requirement of signature to make a document provable, binding on the parties to it, and enforceable. It may become binding if, for example, the parties manifest an intention to be bound by it by appropriate reference to it at the relevant time (e.g. when forming a contract), or simply through a regular course of

---

<sup>40</sup> RoWSA ss 9B and 9C.

dealing between them.<sup>41</sup> But subscribing a document which on its face is intended to have legal effect, for example as a contract, a will, a form of payment such as a cheque, a transfer of property such as a disposition of a home, a receipt of goods delivered, or an admission of liability such as an IOU, is generally well understood as committing the signer to whatever the legal effects of the document may be. This is so whether or not the document has been read or understood by the signer.<sup>42</sup> “The fiction is that if a party signs at the foot of a page that party must have read everything above the signature.”<sup>43</sup> The inherent individual distinctiveness of a hand-written (or holograph) signature is important here as a strong manifestation of a particular person’s intention to be bound by the document.

### *When signing doesn’t bind*

1.21 There are some important qualifications to the generalisation that to sign is to become bound by a document.<sup>44</sup> For example, it is accepted that a party who signs a document is not bound by it if that party can prove (on the balance of probabilities) that the document signed was completely different from that which the party thought he or she was signing. Examples include the party signing the document thought to be an administrative act in the winding up of an estate but which was actually a discharge of the party’s rights in that estate, signing a disposition of land thinking that it was only a will, or the rather improbable case of a party signing a cheque believing it to be a visitors’ book.<sup>45</sup> Actual cases where such a plea has been successful are however extremely rare unless the error was induced by representations of the other party to the document.<sup>46</sup> So where a party signed a contract without reading it over but then discovered that a material alteration had been made to it compared with the previous draft, about which he had not been told, it was

---

<sup>41</sup> See generally W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> edn, 2007), chapter 7.

<sup>42</sup> Leading Scottish cases on this are *Young v Clydesdale Bank Ltd* (1889) 17 R 231; *Laing v Provincial Homes Investment Co* 1909 SC 812. Note also *McCutcheon v MacBrayne* 1964 SC (HL) 28.

<sup>43</sup> Rennie and Brymer, *Conveyancing in the Electronic Age*, para 2.08

<sup>44</sup> A unilateral document will also need delivery to its beneficiary before it becomes binding on the grantor.

<sup>45</sup> *Hannah v Hannah* (1869) 6 SLR 329, 330 (discharge of rights in estate thought by signatory to be merely an administrative step in winding up estate in effective); McBryde, *Contract*, para 15.18; *Ellis v Lochgelly Iron and Coal Co Ltd* 1909 SC 1278, 1282 (discharge of claims signed in belief it was receipt for past payments of compensation held ineffective). In *Gillespie v City of Glasgow Bank* (1879) 6 R 813 G had without his knowledge been assumed as a trustee, with one consequence being that his name was registered as a shareholder in a bank for shares held by the trust. The only proof that G had agreed to this was his signature on a mandate to pay dividends to law agents. By a majority the court accepted G’s evidence that he had signed the mandate in the belief that it referred to another trust of which he was a trustee and held that he had never agreed to become a shareholder and was therefore not liable as a contributory in the bank’s liquidation. A contrasting case arising from the same bank failure is *Roberts v City of Glasgow Bank* (1879) 6 R 805.

<sup>46</sup> *Fletcher v Lord Advocate* 1923 SC 27 (document represented to be agreement to arbitrate on all points in issue between shipbuilders and government in fact excluded certain elements). For unsuccessful cases see McBryde, *Contract*, paras 15.40-15.42.

held nonetheless binding upon him.<sup>47</sup> A party is of course not bound by a document signed as the result of fraud, force and fear or undue influence by the other party;<sup>48</sup> or indeed where the force is exerted by a third party, as in the cases where under improper pressure from husbands seeking loans from banks in respect of their business indebtedness wives signed guarantees and securities in favour of the banks.<sup>49</sup> If the hand of the writer is guided by another person, the signature is invalid.<sup>50</sup>

### *Signing by way of a third party*

1.22 A third party's signature may be treated as equivalent to a person's signature to make the document so signed binding on the latter person in certain circumstances. This is an example of the general law whereby one person may represent and bind another in the latter's legal affairs if appropriately authorised to do so. For example, a person may grant a power of attorney authorising a third person to sign a document on the former's behalf.<sup>51</sup> But, while a power of attorney is itself a document requiring signature by the authorising party to make it effective, there is nothing in the law that requires such writing to authorise a third person to sign on one's behalf. An oral mandate may be enough, as may be holding out by conduct.<sup>52</sup> The third party actually signing should however ensure that the signature is indeed clearly given as another's agent or representative, for example by a statement in the text of the document or immediately before the signature that it is given "for and on behalf of" or "*per procurationem*" [p.p.] that other person.<sup>53</sup> Otherwise there is a substantial risk that the third party will be found to have undertaken personal responsibility under the

---

<sup>47</sup> *Selkirk v Ferguson* 1908 SC 26.

<sup>48</sup> See e.g. *Earl of Orkney v Vinfra* (1606) Mor 16481 (party signed after being threatened with a "whinger" [sword]); *Hogg v Campbell* (1864) 2 M 848 (fraudulent representations about document's contents); *Gray v Binny* (1879) 7 R 332 (son's document consenting to disentail because of undue influence upon him of mother and her solicitor).

<sup>49</sup> *Trustee Savings Bank v Balloch* 1983 SLT 240. In the line of cases beginning with *Smith v Bank of Scotland* 1997 SC (HL) 111 the ground of challenge to the guarantee or security is the bank's failure to take steps to have the wife independently advised, which is contrary to good faith where the bank has reason to think that her consent may have been vitiated by the husband's misrepresentation, undue influence or other wrongful act. Third party fraud also generally does not constitute a ground of avoidance but there are exceptions: McBryde, *Contract*, para 14.44.

<sup>50</sup> *Moncrieff v Monypenny* (1710) Mor 15936; *Clark's Executor v Cameron* 1982 SLT 68. It is permissible to have the hand supported by the wrist: *Noble v Noble* (1875) 3 R 74.

<sup>51</sup> Gretton and Reid, *Conveyancing*, para 17.14. Powers of attorney may also be used in other contexts involving the handling of another person's affairs (e.g. if a person is absent or incapable of acting).

<sup>52</sup> On "apparent authority" arising from the principal's conduct see Reid and Blackie, *Personal Bar*, ch 13(I); Laura J Macgregor, *The Law of Agency in Scotland* (2013), chapter 11(I). For an example of a person being authorised to sign using the name of the authoriser see *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

<sup>53</sup> See for an example *Digby Brown & Co v Lyaill* 1995 SLT 932.



document.<sup>54</sup> Merely adding after the signature a designation showing a representative capacity (e.g. Director, Partner, Secretary, Agent, Trustee) will not generally be enough.<sup>55</sup>

1.23 Section 9 of the Requirements of Writing (Scotland) Act 1995 makes provision for subscriptions by authorised third parties of paper documents (including wills) on behalf of granters who are blind or unable to write, although nothing in this prevents a blind person subscribing or signing the document him- or herself.<sup>56</sup> The inability to write may arise from physical disability as well as illiteracy, so section 9 would today provide the solution for persons whose illness made it difficult for them to sign documents.<sup>57</sup> It is thought that the person who is unable to write as a result of illiteracy may also subscribe a document so as to make it formally valid by making a mark upon it at the appropriate place provided that the mark is that person's usual method of signing or the mark is intended to be the person's signature.<sup>58</sup>

1.24 If a person can be authorised to sign in his or her own name so as to bind another person to a document, there seems no reason in principle why a person cannot be authorised to attach a signature page pre-signed by another person to a document so as to bind the latter to that document. The authority to do so will have to be capable of proof, so should ideally be in writing; and its scope should be clear. But the legitimacy of providing such authority seems indisputable.

### *Forgery*

1.25 A forged signature, i.e. a third person purporting to provide another's actual signature, is generally ineffective for the purpose of making the document so signed effective in law against the party whose signature has been forged.<sup>59</sup> The general rule is probably most amply illustrated in the context of unilateral documentation such as negotiable instruments (bills of exchange, cheques and promissory notes).<sup>60</sup> In *MacLeod v Kerr* (1965), for example, a rogue Galloway had possession of a chequebook which had been stolen from

---

<sup>54</sup> See Macgregor, *Agency*, paras 12.06-12.07; forthcoming Report on Trust Law (Scot Law Com No 239, 2014), para 13.2.

<sup>55</sup> Macgregor, *Agency*, para 12.07.

<sup>56</sup> RoWSA s 9.

<sup>57</sup> As in *Stirling Stuart v Stirling Crawford's Trustees* (1885) 12 R 610 (where the party used a stamp embossed with a facsimile of his signature because he suffered from scrivener's palsy) and *Donald v McGregor* 1926 SLT 103, OH, (where the dying testator dictated her will to a third party but was too weak to complete her subscription in full and concluded it by making a cross as her mark).

<sup>58</sup> See RoWSA s 7(2)(c). See further para 1.5 above.

<sup>59</sup> See e.g. Bills of Exchange Act 1882, s 24; Partnership Act 1890, s 6.

<sup>60</sup> See e.g. Gloag & Henderson, *The Law of Scotland* (13<sup>th</sup> edn, 2012), paras 19.34, 46.18.

the account-holder Craig. In buying a car from Kerr, Galloway paid with a cheque from the stolen chequebook, signing the cheque in the name of Craig. The bank holding Craig's account was not liable to pay Kerr.<sup>61</sup> But the principle is found in operation in other kinds of unilateral document: in *Muir's Executors v Craig's Trustees* (1913), for instance, a forged signature on a heritable security was held to be ineffective and not binding on the estate of the now deceased victim of the forgery.<sup>62</sup> More recently, in *McLeod v Cedar Holdings Ltd* (1989), a husband forged his wife's signature on documents purporting to grant a standard security by them over their jointly owned matrimonial home. The security was held to be subject to partial reduction in so far as it purported to affect the wife's one half *pro indiviso* share in the home.<sup>63</sup>

1.26 The courts are also quick to prevent even innocent third parties benefiting from another's fraud such as forgery of a signature. In *Clydesdale Bank v Paul* a stockbroker's clerk entered into a transaction in the stockbroker's name without the latter's knowledge. In order to meet a balance due, the clerk forged a cheque in the stockbroker's name (along with another's – the Dixon Brothers who were the Clydesdale's customer) which was cashed. The bank thereafter sought to recover the amount from the stockbroker as the clerk could not be found. The court held that the stockbroker was bound to repay the amount to the bank as it had been obtained by the fraud of his representative and the stockbroker was benefited by the fraud to the amount of the balance that had been met by way of the forged cheque.<sup>64</sup>

### Alterations

1.27 If an initially genuinely signed document is fraudulently altered in some way by a rogue, the document in its altered form does not bind the party liable on it as a result of its signature. So in *Royal Bank of Scotland v Watt* (1991) a cheque drawn on the bank by a law firm for £631 was fraudulently altered by the payee to one for £18,631. It was held that the bank, having paid out £18,631 in cash to an innocent third party who had acquired the

---

<sup>61</sup> *MacLeod v Kerr* 1965 SC 253. The issue in the case was the ownership of the car: did that remain with Kerr or had it passed to Gibson, a good faith sub-buyer for value from Galloway? The court held for Gibson.

<sup>62</sup> *Muir's Executors v Craig's Trustees* 1913 SC 349. For other more recent examples of forged documents which had been registered see *Santander plc v The Keeper* [2013] CSOH 24 and *McVicar v GED and Ors* [2014] CSOH 61 (but nothing turned on the forgery in either case, it being accepted that the forged deed was a nullity).

<sup>63</sup> *McLeod v Cedar Holdings Ltd* 1989 SLT 620. The security thus continued to affect the husband's one-half *pro indiviso* share of the house but the court was satisfied that this would not in fact prejudice the wife's position.

<sup>64</sup> *Clydesdale Bank v Paul* (1877) 4 R 626. See also *McVicar v GED and Ors* [2014] CSOH 61.

cheque from the payee for its apparent face value, could not debit the law firm's account with that amount and had its remedy only against the third party.<sup>65</sup>

1.28 What if the alteration to the document is not fraudulent but simply a correction of a mistake in its text such as the mis-spelling of a name, a wrong date or a grammatical error? The 1995 Act contains rules about the steps that need to be taken to make valid alterations to traditional documents that are to be subscribed for the purposes of formal validity or probativity.<sup>66</sup> A document may be altered *before* any subscriptions have been applied, in which case the alteration is part of the document as subscribed.<sup>67</sup> Or the document may be altered *after* subscription, in which case the alteration must be separately signed by the party to be binding upon him or her. In the case of formally valid documents, the party's initials or mark at the relevant point will suffice; but if an alteration is to be probative it must be signed with the party's name and attested, with the alterations also being described in a testing clause. It may be a matter for proof whether an alteration was made before or after subscription of the document.<sup>68</sup>

1.29 The rules just stated would be those which would apply in any Scottish equivalent to the important English case of *Koenigsblatt v Sweet* (1923). That was a case about a sale of land by S to K and his wife where after S had signed the contract, K only signed on his side and S's solicitor then without S's authority deleted all references to K's wife in the contract. The contract was held binding on S by the English Court of Appeal because it found that he had ratified his solicitor's action before later attempting to withdraw.<sup>69</sup> In current Scots law, S would have to have signed all the alterations for them to be effective. Homologation (or ratification) is no longer allowed to make good defects of formality in contracts where, as in the sale of land, that is required under the 1995 Act.<sup>70</sup> Instead the statutory personal bar would have to be applicable, i.e. K, as the party seeking to enforce the contract, would have to show that he had acted or refrained from acting in reliance on the contract with the

---

<sup>65</sup> *Royal Bank of Scotland v Watt* 1991 SC 48.

<sup>66</sup> RoWSA s 5 and Sch 1. Section 9E of the Act enables The Scottish Ministers to make regulations as to the effectiveness or formal validity of or presumptions to be made with regard to alterations made to electronic documents whether before or after authentication; but no such regulations have yet been made. It is to be recalled that if an advanced electronic signature is applied to an electronic document one effect is that any subsequent change to that document will become automatically apparent (see above, para 1.17).

<sup>67</sup> Whether or not the subscriber realises that there has been an alteration: see *Selkirk v Ferguson* 1908 SC 26.

<sup>68</sup> Note that there are special rules about the alteration of wills, under which the testator may revoke the will in part by deletion or erasure without authentication. The testator can also revoke the whole will in various informal ways. See further Gloag & Henderson, paras 39.09-39.11.

<sup>69</sup> *Koenigsblatt v Sweet* [1923] 2 Ch 314 (CA).

<sup>70</sup> RoWSA s 1(5). See further below, paras 1.32-1.36.

knowledge and acquiescence of S, *and* that he, K, had been affected to a material extent by so acting and would also be adversely affected to a material extent if S was allowed to withdraw.<sup>71</sup>

1.30 There are no statutory rules for the alteration of informal traditional documents, but where these are, or are to be, subscribed it will help to make the position clear if the techniques given by the 1995 Act are used. It will otherwise be a matter for evidence if necessary to show, on the balance of probabilities, whether or not any alterations were made pre- or post-subscription, or, in the latter case, whether or not the alterations were authorised in advance or subsequently ratified by the party subscribing. We discuss subsequent ratification further below (paras 1.32-1.36).

1.31 Where a document has more than one page, it is factually possible to substitute a page or pages in the document, and since normally only the last page is subscribed it will not be immediately apparent that there has been any change to the document post-subscription. The document shown to have been so amended will not bind the subscriber unless he or she has either authorised or ratified the change.<sup>72</sup> Such authorisation or ratification might be shown by use of the techniques described above in relation to the substitute page.

#### *Homologation, ratification and adoption*

1.32 Homologation occurs when a party has expressly or impliedly by conduct recognised the validity of an obligation which that party has the right to challenge. Its effect is to prevent the party exercising that right of challenge. “The law of homologation proceeds on the principle of presumed consent by the party who does the acts to pass from grounds of challenge known to him and *sciens et prudens* [with knowledge and understanding] to adopt the challengeable deed as his own.” It is retrospective in effect and fully validates the obligation in question.<sup>73</sup> It is not however to be inferred from the mere silence or inactivity of a party.<sup>74</sup>

---

<sup>71</sup> RoWSA s 1(3), (4).

<sup>72</sup> For judicial disapproval of an unauthorised and unratified “slipping” of pages in a previously subscribed document see *Hawthornes v Anderson* [2014] CSOH 65 paras 86-87 (Lord Woolman). For authorisation see above paras 1.22-1.24; for ratification see below paras 1.32-1.36.

<sup>73</sup> On homologation in general see Gloag, *Contract*, 544-6; Gloag & Henderson, para 7.07; Reid and Blackie, *Personal Bar*, paras 1.11-1.15, 7.01-7.03; Macgregor, *Agency*, ch 11(II).

<sup>74</sup> See *British Linen Co v Cowan* (1906) 13 SLT 941.

1.33 The doctrine has had three major areas of application. The first was in relation to documents defective in their required form but this has now been abolished by the 1995 Act, as already noted above. The two other major areas remain part of the law, however. The first of these relates to voidable transactions, that is, transactions which can be challenged because they were brought about by wrongful acts of another party such as fraud, facility and circumvention, undue influence, or misrepresentation. If the victim homologates the transaction despite the possibility of challenge, then it remains binding. The last major area is in the law of agency, where a party (A) acts on behalf of another (P) without having P's authority to do so. P may however homologate (or ratify, as it is more usually put in this branch of the law) so that the transaction entered by A becomes binding on P.

1.34 Ratification has even been said to be applicable in the case of forgery, in a House of Lords case about a bill of exchange bearing to have been accepted by Mackenzie whose signature had however been forged by Fraser. Lord Blackburn said in the course of his speech finding (with the rest of the court) that Mackenzie was not liable on the bill:

[I]t would still be enough to make Mackenzie liable if, knowing that his name had been signed without his authority, he ratified the unauthorised act. Then the maxim *omnis ratihabitio retrotrahitur et mandato priori equiparatur* would apply.<sup>75</sup>

Lord Blackburn continued:

I wish to guard against being supposed to say that, if a document with an unauthorised signature was uttered in such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act even though known to be a crime he makes himself civilly responsible just as if he had originally authorised it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.<sup>76</sup>

1.35 It has however been argued since that "ratification" is an inapt term when what the actor has done is a complete nullity, as in the case of a forged signature and, perhaps, the unauthorised act of an agent. The word "adoption" is to be preferred in such cases: "a man may adopt an obligation on which he had originally no liability, and in certain cases adoption may be inferred without any express contract to that effect."<sup>77</sup> It may be that adoption is not

---

<sup>75</sup> *Mackenzie v British Linen Co* (1881) 8 R (HL) 8, 14, per Lord Blackburn.

<sup>76</sup> *Ibid.* In the context of bills of exchange statutory provision under which certain parties to a bill are "precluded" from challenging forged signatures upon it in certain circumstances should also be noted (Bills of Exchange Act 1882, ss 24, 54, 55). See further Gloag & Henderson, para 19.34; Reid and Blackie, *Personal Bar*, paras 17.01-17.12. For an example see *Alexander Beith Ltd v Allan* 1961 SLT (Notes) 80.

<sup>77</sup> Gloag, *Contract*, 546. See further Gloag & Henderson, paras 7.07-7.08; Reid and Blackie, *Personal Bar*, paras 1.30-1.32; Macgregor, *Agency*, para 11.33 (pp 296-7); and *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

generally retrospective in effect, unlike homologation; that is, the adopter's liability exists only from the time of adoption.<sup>78</sup> But the other conditions for homologation, particularly that of the adopter's knowledge and understanding of the step being taken, seem applicable also in adoption cases.<sup>79</sup>

1.36 Outside the areas where formal documents are required, therefore, it would seem perfectly consistent with the principles just outlined to say that a party may homologate, ratify or adopt a document to which the party's genuine signature has been attached without prior authority or which has been altered in some way since the signature was initially applied, again without prior authority, always provided that the homologating, ratifying or adopting party knew and understood what had happened in the sense of being aware that a possible right of challenge was being given up.

## Proof

1.37 It is worth beginning this section with the concept of the burden of proof.<sup>80</sup> A party who has the burden of proof of any issue of fact but does not lead any evidence, or the evidence led leaves the matter still in doubt, fails on that issue. In general the burden of proof falls on the person who initiates the proceedings, but the fact or facts initially in issue may be admitted by the opponent, who then has the burden of proving any substantive line of defence (for example, admitting a signature on a document but then seeking to prove that it was procured by the other party's misrepresentation). That defence evidence may in turn be countered by contradictory evidence from the other side, sometimes termed the shifting of the burden of proof during the case; but "[n]ow the preferred description for the process whereby one party may be expected to dispel any adverse inferences raised by the other party's evidence is 'provisional' or 'tactical' burden."<sup>81</sup> Overall -

---

<sup>78</sup> Gloag, *Contract*, 546.

<sup>79</sup> In the forged signature case of *Muir's Executors v Craig's Trustees* 1913 SC 349 it was held that constructive knowledge, arising because the victim's agent knew of the forgery (but did not tell his principal about it), was insufficient for a finding that the document (a heritable security) had been adopted by the victim. In *Dodd v Southern Pacific Personal Loans Ltd* [2007] CSOH 93 para 100 it is suggested, applying dicta by Lord Blackburn in *Mackenzie v British Linen Co* (1881) 8 R (HL) 8, 14, that a party can authorise in advance the application to a document of an imitation of his or her signature by another party. This however raises difficult questions of principle, in our view. Note also Financial Ombudsman Service, *Ombudsman News* (July 2005), Case Studies 47/1.

<sup>80</sup> See generally Margaret L Ross and James Chalmers, *Walker and Walker The Law of Evidence in Scotland* (3<sup>rd</sup> edn, 2009), chapter 2.

<sup>81</sup> Ross and Chalmers, *Evidence*, para 2.1.2.

[t]he burden of proof rests on the party who alleges the affirmative. The maxim is *ei qui affirmat, non ei qui negat, incumbit probatio* (on he who asserts, not he who denies, is the obligation to prove).<sup>82</sup>

1.38 The question of proving that a signature is genuine can best be understood by first considering the concept of the probative, or self-proving, subscription as set out in the Requirements of Writing (Scotland) Act 1995.<sup>83</sup> The basic point is that a subscription in the correct form will be *presumed* to be that of the party whose subscription it purports to be, and to have been applied on the date and at the place stated in the document (if there is any such statement). The signature of the witness to the subscription, coupled with the inclusion in the document of a testing clause or equivalent stating the name and address of the witness and also (optionally) the date and place of subscription, provides the proof of the subscription. The reduction of the requirement of two witnesses to one by the 1995 Act reflected the abolition of corroboration in civil cases in 1988.<sup>84</sup> The 1995 Act of course recognises that the genuineness of the subscription may be challenged, as also the validity of the attestation process; but the burden of proof is on the person making that challenge.

1.39 With non-probative subscriptions and signatures, on the other hand, the authenticity of the writing as that of the signatory has to be established by appropriate proof before the document can be treated as a basis for any legal rights or duties that party may have under it. Thus in *South of Scotland Electricity Board v Robertson* (1968), for example, an action for payment for the supply of electricity failed because no evidence was led that the signature to a form applying for the electrical supply was the defender's.<sup>85</sup>

1.40 Authorisation, homologation, ratification and adoption would also be matters for proof by the party claiming that one or the other had occurred. Since they may all be made by way of express oral or written statement, or arise from a party's conduct, any form of evidence may be led in relation to these matters.

1.41 The proof has to be to the civil standard of balance of probabilities, which "applies to every substantive issue which is necessary to prove the case".<sup>86</sup> Even although the conduct in question may also give rise to criminal charges, the evidence has to be assessed on the

---

<sup>82</sup> Ross and Chalmers, *Evidence*, para 2.2.4.

<sup>83</sup> RoWSA ss 3, 4 and 7.

<sup>84</sup> Civil Evidence (Scotland) Act 1988, s 1.

<sup>85</sup> *South of Scotland Electricity Board v Robertson* 1968 SLT (Sh Ct) 3.

<sup>86</sup> Ross and Chalmers, *Evidence*, para 4.2.1.

balance of probabilities rather than as putting a question beyond reasonable doubt. But “the court has acknowledged that the more serious or unusual the allegation made in civil proceedings the more cogent, clear, or careful and precise will be the evidence needed to satisfy the civil standard.”<sup>87</sup>

1.42 The limits of what may be led as evidence depend on relevancy (connection to the case subject-matter) and admissibility (rules, generally exclusionary in nature, imposed to constrain what may be taken as evidence, usually for policy reasons).<sup>88</sup> The position with regard to proof of documents has been summarised thus by Professor Fiona Raitt:

“A document which is not self-proving ... may be proved to be authentic by means of any competent evidence available and acceptable to the court. Such evidence may well be that of the person who made the document or someone who saw it being compiled. Equally a document that is not self-proving may be challenged as to its authenticity by any admissible means available to the party challenging it ...”<sup>89</sup>

1.43 In litigation, of course, there may be no issue over whether the party actually signed, and no need to prove it because it is an admitted fact. The question in the case may rather be of the kind described earlier in this note, e.g. that the signature was procured by improper pressure from the other party, or that the signatory thought that that the document being signed was something completely different from what it actually was. But in contexts other than litigation there may also be a need to prove that a signature is what it purports to be even although there is no challenger. So wills that are simply subscribed and not attested must be “set up”, that is, proved to be what they appear to be, before they can be used to found the process of confirmation (appointment) of executors in the sheriff court. The process involves a summary application to the sheriff with evidence that the will was indeed subscribed by the testator. But if the subscription is attested so that it is self-proving, an application for confirmation as executor can proceed straightaway.<sup>90</sup>

1.44 The courts have to deal with questions about the genuineness of signatures and documents not infrequently. The judges scrutinise documents with a sceptical eye, especially where what they purport to be cuts across other credible evidence in the case. Thus for example in a recent case Lord Tyre refused to accept the evidence of a note of a meeting made in a party’s diary when there was other evidence that the matters noted had

---

<sup>87</sup> Ross and Chalmers, *Evidence*, para 4.3.1.

<sup>88</sup> Ross and Chalmers, *Evidence*, chapter 1.

<sup>89</sup> Fiona Raitt, *Evidence* (3<sup>rd</sup> edn, 2001), p 196.

<sup>90</sup> Gloag & Henderson, para 39.06.



not been discussed at the meeting held on the date in question: “I do not require to go so far as to find that the pursuer’s purpose in writing the calculation in his diary was to fabricate evidence to support his case at proof; it is enough for me to say that, having regard to the whole circumstances, I am satisfied that this part of the diary entry was not made during a meeting with Mr MacDonald on or about 18 May 2006, and that the pursuer’s evidence that it was so made was not true.”<sup>91</sup> In another case Lord Hodge declined to accept a document listing properties belonging to a group of brothers as evidence that they had formed a partnership with regard to the development of some of these properties; it was later in date than the alleged formation of the partnership by five or six years, and included properties acquired after that date; and the compiler and purpose of the document remained unknown.<sup>92</sup> In *Jollie v Lennie* (2014), on the other hand, where the dispute was over a purported will handwritten and subscribed on each side of a single sheet of A5 paper by the testator before a witness who also signed, all in pencil, the document was held to be an effective will, but only after the most minute analysis by the judge of its physical condition, its content, and its consistency with the evidence of witnesses about its writing.<sup>93</sup>

1.45 Expert evidence is often used in the context of allegations of forgery in civil cases. In *Young v Archibald* (1999), for example, there were allegations that the pursuer’s signature on a disposition of a property he had co-owned with the defender had been forged and was thus not binding upon him. After hearing from two concurring handwriting expert witnesses led by the defender without reply from the pursuer, the court decided on the balance of probabilities that the signature had not been forged.<sup>94</sup> In *Dodd v Southern Pacific Insurance Co Ltd* (2007), on the other hand, the pursuer claimed that his apparent signatures on various loan and related documents and on an application for internet banking facilities with the first defender had been forged by the second defender (his estranged wife). A handwriting expert gave evidence that such forgery was highly probable and was not contradicted by any evidence led for the defenders. The judge accepted that the signatures were not those of the pursuer. He noted also that there was evidence that the second defender had perhaps signed in the pursuer’s name other documents not directly in issue in the case.<sup>95</sup> The case may illustrate the delicacy with which judges approach the balance of

---

<sup>91</sup> *Sutherland v Bank of Scotland plc* [2014] CSOH 113.

<sup>92</sup> *Gillespie v Gillespies* [2011] CSOH 188;

<sup>93</sup> *Jollie v Lennie* [2014] CSOH 45. All this was despite the virtually probative form of the document (above, para 1.6 and note 18).

<sup>94</sup> *Young v Archibald* 1999 GWD 4-205; accessible in full text at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=899987a6-8980-69d2-b500-ff0000d74aa7>. For another case involving an allegation of a forged signature on a disposition, although being decided on other legal issues, see *Kaur v Singh* 1999 SC 180.

<sup>95</sup> *Dodd v Southern Pacific Insurance Co Ltd* [2007] CSOH 93 (Lord Bracadale).

probability of allegations of forgery in civil cases: had the second defender been subject to a criminal charge, stronger evidence might have been needed to find that she was guilty beyond a reasonable doubt, but it was enough for the decision of the case in hand to conclude that the pursuer was not the signatory.

## Conclusion

1.46 It has been observed that the law stated in the Requirements of Writing (Scotland) Act 1995 does leave open opportunities for fraud:

For a person determined on fraud, the rules in the 1995 Act do not form much of an obstacle. The possibilities here are numerous. The granter's signature could be forged. Or the granter could be persuaded to sign by misrepresentation, or by force and fear, or by the application of undue influence. Another approach would be to allow the granter to sign normally, but then to alter what has been signed. Since the granter only signs at the end (except in the case of probative wills), it would be possible to substitute some of the earlier pages. If the document is too short to have earlier pages, it would still be possible to add text into the space reserved for the testing clause, or to make alterations elsewhere in the deed which are then declared in the testing clause (falsely) to have been added before subscription.<sup>96</sup>

One could now add electronic documents to the possibilities: the forging of a simple electronic signature, for example, or the application of any electronic signature, simple or advanced, by somebody other than the person who is entitled to use it.

1.47 Safeguards against such fraud exist although they are limited. With probative subscriptions, the signing witness must "know" the granter.<sup>97</sup> In practice this often means that an introduction between the persons involved took place, with the granter perhaps providing proof of identity such as a passport or driving licence, just before the granter subscribed the document;<sup>98</sup> and it can also be the case that the witness is told by the granter that the subscription already on the document is indeed his or hers before the former adds his or her signature.<sup>99</sup> Transactions where formally valid documents are required are usually handled by solicitors "who are in general trustworthy and can be relied on not to tamper".<sup>100</sup> Finally there are the rules about proof which can be applied when it is sought to enforce an apparently obligatory document by way of court action. Probative documents apart, it will be

---

<sup>96</sup> Gretton and Reid, *Conveyancing*, para 17.25.

<sup>97</sup> RoWSA s 3(4)(c)(i).

<sup>98</sup> Gretton and Reid, *Conveyancing*, para 17.05.

<sup>99</sup> RoWSA s 3(7).

<sup>100</sup> Gretton and Reid, *Conveyancing*, para 17.25. See also George L Gretton and Andrew J M Steven, *Property, Trusts and Succession* (2<sup>nd</sup> edn, 2013), para 30.11: "The Scottish rules about execution of deeds are undemanding; some would say not demanding enough."

for the party who maintains that a document is genuine to prove it, which will still leave the other party free to prove its defences against the claim, all questions being determined on the balance of probabilities rather than the criminal standard of beyond reasonable doubt.

1.48 Further safeguards are conceivable:

In many countries, deeds of a certain class require to be executed in front of a notary, who is regarded as a state official. In Scotland deeds have always been executed privately. ... [But a] system which depends on execution in front of notaries is likely to be slow and expensive. The Scottish system is fast and cheap. These are important advantages, particularly in the commercial world. Whether these advantages outweigh the drawbacks is a matter on which opinions may differ.<sup>101</sup>

One could add that the adoption of a notarial or other “public” system would necessarily entail the creation of safeguards against fraudulent notaries and/or public officials. For the moment, however, the position in Scotland is settled and, while it may well be that the incidence of fraud is growing, the civil as well as the criminal law do provide means for proving it and stopping it having adverse effects upon the victims where detected.

1.49 A final observation is that forgery is perhaps more likely in unilateral documents such as cheques and wills than in the multi-lateral documents which will be the typical examples in which counterpart execution is used and in which the parties will be represented by solicitors whose duty it is under money-laundering regulations to check the identity of their clients.

1.50 This paper has been written in support of the recognition of the use of signature pages and digital communications technology as significant elements in the process of executing documents in counterpart under the Legal Writings (Counterparts and Delivery) (Scotland) Bill. While that Bill does not in and of itself reduce the risk of fraud, or seek to deter fraudsters, it does not make the risk of fraud any greater than it already is. Safeguards against the effectiveness of fraud (in particular forgery and the mis-use of genuine signatures) already exist in the civil law, not least in the requirement that a document must be proved to be genuine by any party making a claim under its provisions; while deterrence is primarily the task of the criminal rather than the civil law.

---

<sup>101</sup> Gretton and Reid, *Conveyancing*, para 17.25.

## **Correspondence from Professor George Gretton, University of Edinburgh**

### **First drafting issue**

Section 4(6) says:

Although delivery by electronic means constitutes effective delivery in relation to a 10 traditional document, what is received by that means is not to be treated as being the traditional document itself.

When I first read that, I was not sure what its meaning and effect were. I then went back to the SLC Report. At p 72 is this statement:

Subsection (6) is included to remove any doubt as to the status of what the recipient receives following electronic delivery. In implementation of recommendation 19, the provision makes clear that what is received (eg a fax or a PDF file) is not the executed document and so cannot, for example, be recorded or registered.

Perhaps I am guilty of being slow on the uptake (which would not be for the first time...) but for me that meaning did not emerge clearly out of subsection (6). The Committee might wish to consider whether the subsection might perhaps be amended so as to ensure that slow-witted readers (such as myself) understand subsection (6) as meaning what it was intended to mean.

### **Second drafting issue**

My other concern is with s 4(2). This reads:

The requirement [for delivery of a traditional document] may be satisfied by delivery by electronic means of (a) a copy of the document, or (b) a part of such a copy.

This does, I think, work for contractual documents. But I am worried that it may cause problems for certain other types of document. For example, Jack owns a house and is selling it to Jill. They enter into a contract (“missives”). This contract will say that Jack must deliver to Jill a “disposition” (= a valid and registrable deed of transfer), plus the keys, while she must pay him the price. If Jack can simply send her a fax of the deed, or a scan of it, he has satisfied his contractual obligation. But that’s no good to Jill, because she can’t register a faxed or scanned deed. (See above.)

(There is also the worry that sending a faxed or scanned version of just the last page of such a deed would suffice for delivery.)

It is true that s 4(5) says that if not otherwise agreed etc then “delivery may be by such means (and in such form) as is reasonable in all the circumstances.” But as I read it, that is about which type of electronic delivery is to be used (flash key, email etc), and not about the more basic issue of electronic delivery as such.

I don't think that the provision, if left unamended, would be likely to cause major problems in practice. No doubt common sense would prevail. Still, some amendment would, in my view, be desirable.

## Scottish Government and Scottish Law Commission written submission

	Summary of Issue Raised	Response
1	<p><u>Faculty of Advocates</u>: (See Faculty's general comment at 1(i) and related point at 1(ii)(b) in written evidence) Execution in counterpart may give rise to fraud or error.</p> <p>Concern, in particular, about provision allowing electronic delivery of only part of a traditional document (see section 4(2)(b) and (3) of the Bill).</p>	<ul style="list-style-type: none"> <li>Where solicitors or other professional advisors are involved in preparation of the document there can be a reasonable reliance on their professional integrity to guard against fraud and an expectation that they will exercise due care against error. However, the risk of fraud or error cannot be entirely eliminated.</li> <li>The problem is not unique to execution in counterpart: the risk of the document used at a signing ceremony being incorrect (either because of error – perhaps because an earlier draft is mistakenly printed for signing – or fraud) is also present. In addition, it is common at a signing ceremony for there to be multiple copies of the document executed, so that each party keeps a version signed by all parties; this necessitates the production of the required number of “counterparts” (with the concomitant risk of error or fraud). In relation to a contract, fraud is normally a civil wrong, but it can also be a crime. The Faculty does not specify which is meant. There is, in any case, an inherent risk of fraud in execution: see the SLC's paper on signatures, especially at paragraph 1.27 and its discussion of fraudulent alteration of a signed document. There are, however, well-recognised sanctions for fraud, especially where lawyers or other professionals are involved. For example, see the recent Inner House decision in which a solicitor's firm was held liable for losses caused by the agent not disclosing promptly his client's fraudulent activity (<a href="#">Frank Houlgate Investment Co Ltd v Biggart Baillie</a> [2014] CSIH 79). Note also the obligations on solicitors and others to file Suspicious Activity Reports under the money laundering regime, failure to do so being a criminal offence. See Paterson and Ritchie, <i>Law, Practice &amp; Conduct for Solicitors</i> (2<sup>nd</sup> ed, 2014), para 9.37 for a discussion of SARs and also the disciplinary proceedings related to the <i>Houlgate</i> decision.</li> <li>On error, if for example parties inadvertently sign different versions of a document they will not have validly executed in counterpart in terms of the Bill which provides that a document is executed in counterpart if “it is executed in two or more duplicate, interchangeable, parts” (section 1(2)(a)). The effect on the transaction will be determined under existing law and much will depend on the particular facts and circumstances – e.g. whether the transaction is one which must by law be in writing or, where parties seek to contract and there is no requirement for writing, there is nevertheless sufficient agreement</li> </ul>

		<p>between them to constitute their contract. In practice, if a document is transmitted to parties for signature, for example in the form of a PDF, that will limit the risk of parties signing different documents.</p> <ul style="list-style-type: none"> <li>• Fraud would require an enquiry into the perpetrator and motive; but it must be unlikely that there will be a valid contract where one or more counterparts have been fraudulently manipulated before signing. See the Scottish Law Commission's paper "Signatures in Scots Law: Form, Effect, and Proof", especially at paras 1.21, 1.25-1.27, 1.31, 1.34-1.36, 1.38 to the end, but especially 1.44-1.45, 1.46-1.50.</li> <li>• On electronic delivery of only part (eg signature pages) of a traditional document, see generally the Scottish Law Commission "Report on Formation of Contract: Execution in Counterpart", paras 2.72 to 2.86. See particularly para 2.79 re protection against fraud. As other witnesses have identified, to require delivery of the complete document or documents (as there could be many which are needed for a transaction) would significantly undermine a key aim of the Bill – ie to ensure that the law is not putting undue burdens on commercial transactions.</li> </ul>
<u>2</u>	<p><u>Faculty of Advocates: (See comment 1(i)(a) in Faculty's written response)</u></p> <p>Section 1(2)(b) of the Bill (document executed in counterpart – no part of document may be subscribed by both or all parties) doesn't seem to allow for other documents to be incorporated into a document executed in counterpart if those other documents have been subscribed by the parties.</p>	<ul style="list-style-type: none"> <li>• There is no obstacle to a document being executed in counterpart incorporating other documents which have already been signed by all parties (or are to be so signed) by appropriate reference within the principal document. In other words, the effect of section 1(2)(b) sounds only at the level of the document in question and not at the level of any annex or schedule to it. See the evidence of Professor Rennie on 30 Sept 2014 at cols 39-40, and also McBryde, <i>The Law of Contract in Scotland</i> (3<sup>rd</sup> ed, 2007), paras 7.02-7.03 (and especially this sentence in para 7.03: "If it is sought to incorporate a document into a contract, it must be reasonable to expect the document to have a contractual effect.").</li> </ul>
<u>3</u>	<p><u>Faculty of Advocates: (See comment 1(i)(b) in Faculty's written response)</u></p> <p>Why does section 2(3) of</p>	<ul style="list-style-type: none"> <li>• At a general level, the provisions in section 2 of the Bill in relation to the use and role of a nominee are really to indicate to parties what they can, if they want, do and so the provisions take a fairly minimalist approach, leaving pretty much everything to parties to agree. The purpose of the provisions is to provide a signpost to parties that these are</li> </ul>

	<p>the Bill place a duty on a nominated person to hold and preserve a counterpart given that section 2(5) provides that failure to comply with section 2(3) does not impact on the effect of the document?</p> <p>-----</p> <p>How long does the section 2(3) duty to hold and preserve subsist?</p> <p>-----</p> <p>The Bill is silent on the</p>	<p>matters upon which agreement is necessary. It has seemed better to us to leave matters to the parties rather than to lay down even a default solution, given the variety of contexts in which these rules will operate.</p> <ul style="list-style-type: none"> <li>• The reason section 2(3) is included when the document's effect is not dependent on compliance is because a nominee holding and preserving will be helpful in evidencing completion of the deliveries of the counterparts.</li> <li>• The position was well explained by Professor Rennie in his evidence on 30 September 2014 when he said that:</li> </ul> <p style="padding-left: 40px;">“Section 2(3) is a technical provision, which is designed to cover the situation in which a single person holds a document for the benefit of both or all parties to that document. It is designed to make things clear.</p> <p style="padding-left: 40px;">Let us say that the solicitor acting for party A is the nominated person to hold the document. The provision is designed to prevent party A going to the nominated solicitor and saying, “You’ve got that document. You act for me. I’m not happy now. Tear it up.” The solicitor for party A cannot do that, because he or she is not holding the document in the capacity of a solicitor; they are holding it for all the parties. That is why the provision is there.”</p> <ul style="list-style-type: none"> <li>• The Committee will be aware that section 2(4) allows for the duty in section 2(3) to be displaced if the parties agree.</li> </ul> <p>-----</p> <p>The function of section 2(3) as a signpost and the fact that section 2(4) allows for the duty to be displaced if parties agree is also relevant to the issue of how long the duty to hold and preserve persists. As noted above, it has seemed better to us to leave matters to the parties rather than to lay down even a default solution, given the variety of contexts in which these rules will operate. (For example, the Scottish Law Commission was told by solicitors during consultation that it was not uncommon in certain types of “deal” for the originals to be destroyed. This would imply that, in some situations at least, it would be expected that the nominee will hold the counterparts for a limited time only and then dispose of them. Clearly, though, it would be inappropriate to set that out as a statutory duty, even if only as an optional one.) See the Scottish Law Commission’s “Report on Formation of Contract: Execution in Counterpart”, Para’s 2.53-55. `</p> <p>-----</p>
--	--	---



	issue of liability if the section 2(3) duty to hold and preserve is not met.	<ul style="list-style-type: none"> <li>On remedies for any breach, again this would be up to parties – for example it could be a breach of the contract of nomination giving rise to a claim for damages if any loss was suffered.</li> </ul>
<u>4</u>	<p><u>Faculty of Advocates: (See comment 1(ii)(a) in Faculty's written response)</u></p> <p>It is not clear whether reference to "requirement for delivery" (section 4(1) of the Bill) is confined to situations in which delivery is required as a precondition of a document becoming legally effective.</p>	<ul style="list-style-type: none"> <li>We think there is no ambiguity here. As detailed in paragraph 19 of the Bill's Explanatory Notes section 4 of the Bill "adds to the existing Scots law on delivery by establishing that a traditional document may now be effectively delivered for legal purposes by sending a copy of it or a part of a copy by electronic means". Generally, delivery is only required for (i) written unilateral obligations and (ii) mutual obligations set out in multiple copies of a contract each of which is subscribed by its granter (ie executed in counterpart) (see the Scottish Law Commission's Report "Report on Formation of Contract: Execution in Counterpart", paragraphs 2.33-2.34).</li> </ul>
<u>5</u>	<p><u>Faculty of Advocates: (See comment 1(ii)(d) of Faculty's written response)</u></p> <p><u>Section 4(5) may give rise to disputes about what is "reasonable in all the circumstances".</u></p>	<ul style="list-style-type: none"> <li>The reasonableness requirement is not a general control upon the parties' freedom to agree what is to be done but is a "long stop" where any of the circumstances provided for in section 4(5)(a) to (c) apply. See further discussion of section 4(5) in para 22 of the Bill's Explanatory Notes.</li> </ul>
<u>6</u>	<p><u>Dr Gillian Black: (Oral Evidence)</u></p> <p>What happens where a person opts to execute a document in counterpart but does not do so in line with the provisions in the Bill?</p>	<ul style="list-style-type: none"> <li>Section 1 of the Bill sets out the way to give legal effect to a document by signing it in counterpart. There are, though, other (existing) ways of making a document legally effective. Failure to follow the statutory requirements in section 1 (and the intention is that those requirements are to a significant extent generously flexible) means that the question of whether the document is effective will be determined under the existing law. Much will depend on the particular facts but it should be borne in mind that execution in counterpart is arguably already competent under Scots common law.</li> </ul>
<u>7</u>	<p><u>Dr Gillian Black: (Oral Evidence)</u></p> <p>Section 1(3) of the Bill</p>	<ul style="list-style-type: none"> <li>Section 1(3) is particularly relevant for situations in which a document is to be registered or recorded: it is intended to make clear (when read with the following subsection) that the document can incorporate the signature pages from other counterparts of the same</li> </ul>

	creates a 'legal fiction'; is it not preferable to say that the counterparts are each separate documents rather than that they are one?	<p>written agreement. Therefore, the provision is intended to meet an important and practical need. On this see further para 6 of the Bill's Explanatory Notes which in turn refers to Chapter 3 of the Scottish Law Commission's "Report on Formation of Contract: Execution in Counterpart".</p> <ul style="list-style-type: none"> <li>What is described here as a "legal fiction" already has a precedent: e.g. section 1 of the Contract (Scotland) Act 1997 expressly envisages the possibility of a contract or unilateral voluntary obligation being made up of more than one document.</li> </ul>
<u>8</u>	<p><u>Professor George Gretton: (Oral Evidence)</u></p> <p>It's not immediately obvious what section 4(6) of the Bill means – might it be amended to say that what is received is not capable of being recorded or registered?</p>	<ul style="list-style-type: none"> <li>The provision is intended to clarify the status of what is delivered electronically. The wording is intended to make the simple point that what is received electronically is not an original. This means, for example, that to enable registration for conveyancing purposes it will remain the case that a full electronic document has to be sent and received or a traditional document with wet ink signatures physically delivered. The Bill's Explanatory Notes explain this effect (see para 22 of the same). See also paras 2.92 and 2.93 of the Scottish Law Commission's "Report on Formation of Contract: Execution in Counterpart". The effect on registration is one example of when section 4(6) is relevant. It would therefore not be right to amend the Bill to refer only to the effect on registration. We consider that a general statement of "non-effect" in section 4(6) the Bill is the right approach with further explanation for the user of the legislation provided in the explanatory notes.</li> </ul>
<u>9</u>	<p><u>Professor George Gretton: (Oral Evidence)</u></p> <p>Section 4(2) of the Bill works well for contractual documents but is arguably ill-suited for certain other types of document, such as dispositions.</p>	<ul style="list-style-type: none"> <li>Section 4(2) of the Bill is simply facilitative. It provides, read short, that where there is a requirement for delivery (see section 4(1)) the requirement for delivery <i>may</i> be satisfied by electronic means. For delivery by electronic means to be effective, it must be agreed by both/all parties (see section 4(4)) of the Bill). This reflects the current law: delivery cannot be forced on an unwilling recipient, nor can a recipient (even a willing one) be compelled to accept delivery by a particular means. If the recipient does not agree to accept delivery by electronic means then the sender must deliver it in another legally effective way as provided under the current law. As noted in the row immediately above, that would likely be the case in relation to a disposition. For documents such as dispositions, only physical delivery will suffice for the purpose of registration. (This leaves aside electronic registration, which will be competent soon). Note also the relevance of section 4(7) of the Bill in this context, further explained at para 23 of the Bill's Explanatory Notes.</li> </ul>
<u>10</u>	<u>Stephen Hart: (Oral Evidence)</u>	<ul style="list-style-type: none"> <li>We consider that this is probably already the law. It certainly seems to be well established in certain areas of practice, for example: residential conveyancing where the deed is to be</li> </ul>

	It would be helpful if traditional documents could be held undelivered in the same way as for documents executed in counterpart	held undelivered until the relevant price is received by the granter.
<u>11</u>	<u>Stephen Hart: (Oral Evidence)</u> The appointment of a nominee should be relatively informal and more implicit.	<ul style="list-style-type: none"> <li>There is no requirement in the Bill that nomination be in writing, and it might arise informally, for example it could be implied from conduct. The Bill deliberately does not place the nominee in any legal category such as agent; rather it sets out the minimum requirements of a nominee which allows parties to agree further requirements if they choose to do so.</li> </ul>
<u>12</u>	<u>Stephen Hart: (Oral Evidence)</u> Does it matter if the recipient of a counterpart signs it after the transaction is concluded?	<ul style="list-style-type: none"> <li>No. By section 1(5), the document becomes effective on mutual delivery. Therefore, the document as executed is binding and remains so regardless of any subsequent signature (or, indeed, defacing, amendment or destruction of the counterpart by the recipient).</li> </ul>
<u>13</u>	<u>Freshfields: (See comment "1" in written evidence)</u> Ability to execute documents in counterpart (section 1(1) of the Bill) – Bill contains no legislative requirement for document to be executed in counterpart to include express provision (a 'counterpart clause') permitting such execution?	<ul style="list-style-type: none"> <li>Yes that is correct. See the Scottish Law Commission's "Report on Formation of Contract: Execution in Counterpart", paragraphs 2.20-21. The aim is to enable flexibility and emergency execution in counterpart.</li> </ul>
<u>14</u>	<u>Freshfields: (See comment "2" in written evidence)</u> Definition of execution in counterpart (section 1(2) of	<ul style="list-style-type: none"> <li>We disagree with the view that it is not clear that the counterpart has to be an exact copy. "Duplicate" means "duplicate". "Copy" usually means "duplicate" but not necessarily – the term can be used to refer to documents that are not necessarily identical. "Versions" is definitely not better – there may be many different "versions" of a document? Adopting</li> </ul>

	the Bill) could be clearer.	these suggestions would be detrimental.
<u>15</u>	<u>Freshfields: (See comment “3” in written evidence)</u> The formulation of section 1(5)(b) of the Bill seems very wide.	<ul style="list-style-type: none"> <li>• The formula is explained in the Scottish Law Commission Report at paragraph 2.46 (in connection with unilateral documents). We think the example offered by Freshfields is not correct; a document is distinct from a transfer, and it is only the document that has to be effective under Scots law. The basic point is the requirement of delivery for effective documents in Scots law.</li> <li>• Our view is that the Interpretation and Legislative Reform Act 2010 defines “enactment” and does not cover non-UK enactments. “Rule of law” means non-statute law – i.e. common law. Again, it would be an odd reading to take this as including common law of a country other than Scotland, given that this is an Act of the Scottish Parliament.</li> </ul>
<u>16</u>	<u>Freshfields: (See comment “4” in written evidence)</u> Section 1(9)(b) of the Bill should be amended to include reference to the specified condition being imposed ‘by the person from whom the counterpart is received’ (in line with section 1(9)(a) and the explanation on the final sentence of paragraph 11 of the Bill’s Explanatory Notes).	<ul style="list-style-type: none"> <li>• Whilst reference to person is required in 1(9)(a) it is not necessary in 1(9)(b) .</li> <li>• We think the position is clear when as it should be s 1(9) is read with s 1(5) and (8). In addition, the repetition of the opening words of subsection (9)(a) in subsection (9)(b) would not necessarily add anything: for example, the document itself may set out the condition, in which case a requirement that a particular person must notify the recipient of the condition would be otiose.</li> <li>• As it stands the last sentence of paragraph 11 of the Bill’s Explanatory Notes simply reflects the fact that in practice it will often be the sender that specifies the condition.</li> </ul>
<u>17</u>	<u>Freshfields: (See comment “5” in written evidence)</u> It is unsatisfactory that the Bill does not contain an express requirement for the nominee to consent to act as such (see section 2 of the Bill, particularly section 2(3)).	<ul style="list-style-type: none"> <li>• As noted above, at a general level the provisions in section 2 of the Bill in relation to the use and role of a nominee are really to indicate to parties what they can, if they want, do but ultimately leaving it to the parties to agree how to proceed.</li> <li>• On the particular issue of the nominee’s consent to act, in the main the nominee would usually be one of the parties/an agent of one of the parties. In any event where A, B and C are parties to a document executed in counterpart and A and B wish C to be the nominee, C cannot, as a matter of general contract law, be required to act as nominee without his or her consent. There is therefore no need for express provision in the Bill to this effect.</li> <li>• In relation to the further amendments suggested, we consider that, against the</li> </ul>

	<p>Further amendments to section 2 (section 2(3)) should be considered to</p> <p>(a) specify a method by which a nominee can return documents and be relieved of obligations, and</p> <p>(b) to clarify that a nominee only requires to hold documents on behalf of parties nominating the nominee (and not all parties).</p>	<p>background explained in the first bullet, there would be losses in making these. Section 2(3) is primarily aimed at those using execution in counterpart without professional support. They need to agree things if they use a nominee. Professionally supported parties will agree all these things. Our aim is to encourage the parties to take control on the matters mentioned, but not to prescribe, as this amendment would require. The rules are default in nature. Further, and in relation to the proposed amendment to clarify on whose behalf a nominee holds documents, we think it is obvious in 2(3) that the nominee is holding the counterparts for the parties who made the nomination and reference to “parties” must be read in context as the parties in 2(1). This is a case of the singular including the plural and vice versa. Clearly, all the parties can nominate a person to take delivery of all of the counterparts. And the parties can nominate a person to take delivery of some of the counterparts. In keeping with the general approach to allow parties to do things in whatever way they agree, we also think section 2(1) could envisage some parties, but not all the parties, agreeing to nominate a person to take delivery of their counterparts. So the nominee holds what he or she holds for the benefit etc. of whoever nominated the person to do so. Section 2(3) doesn’t say the nominee holds “for the benefit of all the parties”.</p>
<u>18</u>	<p><u>Freshfields: (See comment “6” in written evidence)</u></p> <p>Section 2(4) of the Bill - it should be provided in the Bill that the nominee’s agreement is needed where their obligations (per section 2(3) of the Bill) are being varied.</p>	<ul style="list-style-type: none"> <li>As noted in the comments immediately above, as a matter of general contract law a person must agree to act as nominee – including the basis on which they are to act - before the person can be required to do so. The nominee can agree to act on the basis that they will be required to hold and preserve in terms of section 2(3) or, as envisaged by section 2(4), agree to act as nominee on some alternative basis agreed by the parties. Again there is no need for express provision in the Bill to this effect.</li> </ul>
<u>19</u>	<p><u>Freshfields: (See comment “7” in written evidence)</u></p> <p>The Bill does not provide for delivery of traditional document counterparts other than by electronic means – eg by post.</p>	<ul style="list-style-type: none"> <li>We think this comment is founded on a misunderstanding as to the scope of the Bill. Section 4 adds to the existing common law of delivery which continues to apply and be applicable in relation to traditional documents executed in counterpart. On delivery see further the Scottish Law Commission’s “Report on Formation of Contract: Execution in Counterpart” at paras 2.27 to 2.46.</li> </ul>
<u>20</u>	<u>Freshfields:(See comments</u>	8a. We think the position is already clear. There is material in the Scottish Law Commission’s

	<u>8 a to c.</u> <u>Miscellaneous and general</u> <u>comments.</u>	<p>“Report on Formation of Contract: Execution in Counterpart” at Chapter 3.</p> <p>8b. The Scottish Law Commission’s Report at paragraphs 2.24-26, 2.40-45, is relevant here. There is an issue here which goes wider however than execution in counterpart, and where any reform would be a radical overhaul of the law. Insofar as there is a problem in the context of execution in counterpart, it can be overcome in the ways suggested in the Report.</p> <p>8c. We think not. There is no class of document in which parties must make documents probative (cf English law of deeds), the requirements of formal validity are limited to a small number of documents not including guarantees, and the recent amendments on electronic documents are quite liberal. There may be merit in constructing a practical guide of the kind found in the Practice Note referred to but we would be inclined to leave that to practitioners unless they sought our assistance with it. It’s worth noting that the Practice Note referred to is just that: a note on practice. It’s not the law.</p>
--	--	---

## **Correspondence from Law Society of Scotland**

I write in response to your correspondence of the 3 October 2014 and in relation the Delegated Powers and Law Reform Committees request for further information on the Society's introduction of the new Smartcard scheme.

The Society's Smartcard, which is similar in size to a standard credit card and stores the member's information on a microchip, is currently being rolled out to the membership, and we hope to complete the roll-out by November 2015. The Smartcard will replace the current form of practising certificate, and thereafter all solicitors holding a practising certificate issued by the Society will hold a Smartcard. Since the commencement of roll-out, in early September 2014, the Society has issued 800 Smartcards.

The Smartcard provides a number of benefits and functions, it provides:-

- A new photographic ID for practising solicitors – allowing secure access to courts and prisons and helping reassure the public they are consulting a trusted adviser.
- An electronic ID - allowing real-time confirmation of credentials, which will evolve across a range of new and planned services throughout the justice system in Scotland and Europe, as the Smartcard is also Council of Bars and Law Societies of Europe (CCBE) compliant.
- A secure digital signature - allowing practising solicitors to sign documents and contracts entirely electronically and to receive signatures from others knowing they come from a trusted professional system. The lowest quality of a digital signature could simply be a name at the end of an email or an image of a person's written signature added to an electronic document. The Smartcard will provide Scottish solicitors with a qualified secure digital signature, the

EU digital signature with the highest form of security and 'self-proving' in Scotland. This form of digital signature guarantees the integrity of the text, as well as the authentication. Along with the Smartcard, all members are also being issued with card readers to facilitate digital signatures.



WRITTEN EVIDENCE

from

THE SCOTTISH LAW COMMISSION

to

THE DELEGATED POWERS AND LAW  
REFORM COMMITTEE

on

THE LEGAL WRITINGS (COUNTERPARTS  
AND DELIVERY) (SCOTLAND) BILL

Submitted on 10 June 2014

## *I. Introduction*

1. The Scottish Law Commission is an independent statutory body with responsibility for recommending ways of simplifying, updating and improving the law of Scotland. We want to ensure that our recommendations will result in law which is just, principled, responsive and easy to understand. It is therefore always critical for us to engage in a thorough and open process of consultation and we welcome the views of as many people as possible in response to our specific consultations. The Legal Writings (Counterparts and Delivery) (Scotland) Bill is the end product of a law reform process which we began four years ago. This submission aims to provide a broad picture of the context within which the Bill is primarily intended to operate, and so to supplement its Explanatory Notes and Policy Memorandum.

## *II. How the problem came to our attention*

2. The issue of “execution in counterpart” (or “virtual or remote signings”) was first brought to our attention as a law reform issue by Paul Hally (a partner in Shepherd & Wedderburn LLP) during the 2009 consultation process leading up to the publication of our Eighth Programme of Law Reform at the beginning of 2010.<sup>1</sup> In essence, the problem was that, despite the widespread use of such forms of execution in the English-speaking world, in particular in commercial transactions, most Scots lawyers doubted whether it was valid in Scots law. In general, it is open to the parties to a contract to select the system of law which will apply to their agreement. In many commercial transactions with a Scottish dimension parties were tending to make English law, or some other system of law recognising counterpart execution, the governing law of the transaction, or alternatively, where that was not possible, to use complex and inefficient workarounds.<sup>2</sup> There was evidence that Scots law was being side-lined from important areas of modern business.
3. A further problem which we had already touched upon in the course of our work on land registration was the law’s requirement that for a document to have its intended legal effects, delivery of it by its granter to the grantee or beneficiary was necessary.<sup>3</sup> Delivery is the transfer of a document by the granter so that the latter no longer has control of it, coupled with the intention that the document thereby become binding upon the granter.
4. Since the mid-1990s the courts have given varying decisions on whether or not electronic transmission of a copy of a paper document (e.g. by fax or by email) amounted to delivery. There is as a result persistent uncertainty on whether the use of modern communications technology is valid where parties are using paper documents. The Land Registration etc. (Scotland) Act 2012 now enables electronic delivery of purely electronic documents.<sup>4</sup> Such documents however fall

---

<sup>1</sup> Scot Law Com No 220, 2010.

<sup>2</sup> See e.g. Appendix A2, B1, B2, B6, B8.

<sup>3</sup> Report on Land Registration (Scot Law Com no 222, 2010), vol 1, paras 34.55-34.57.

<sup>4</sup> Land Registration etc. (Scotland) Act 2012, s 97 inserting s 9F into the Requirements of Writing (Scotland) Act 1995.

to be distinguished from “traditional”, i.e. paper, documents, even if these are print-outs that began life in word-processors or other computer systems.

### *III. How we handled the matter*

5. Our Eighth Programme includes a review of contract law with the aim, amongst other things, of removing those parts of it which might cause Scottish parties to choose some other law for their transaction. Execution in counterpart clearly fell within this remit, although its application is not limited to contracts.<sup>5</sup>
6. We consulted on the matter in a Discussion Paper published in 2012, and produced recommendations and a draft Bill in a Report published in 2013.<sup>6</sup> The Bill before the Committee adjusts our draft text in some respects but we are satisfied that the substantive effects are the same.

### *IV. The basis for our recommendations*

7. For the purposes of our Discussion Paper and Report we researched the relevant law in other jurisdictions, in particular England & Wales; but probably the most valuable part of our work was interaction with Scottish practitioners familiar with English law and practice in this area through use in their own practice. They were also able to identify for us the situations in which counterpart execution is used and is useful as well as the problems, legal and practical, to which it can give rise. That interaction extended to consideration of draft Bills to give effect to law reform proposals as they were developed, to ensure that, as far as possible, any new law did not give rise to new problems as it solved others. The practitioners who helped us are listed in our Report, and the content of the interaction is often reflected in comments made throughout that document. Much of this submission is also informed by the material with which we were provided through these exchanges with practitioners, and a sample is provided in the Appendix to this submission. We are again grateful for this assistance.

### *V. The problem*

8. The basic problem which is solved through execution in counterpart in its modern form is that of completing the multi-party, multi-document and quite often multi-jurisdictional transaction. Such transactions arise in a wide variety of commercial settings: for example, mergers and acquisitions, commercial property, banking, joint ventures, university spin-outs, share purchases, secured transactions, fund financing, oil and gas, and other energy-related contexts.<sup>7</sup> Often in these situations it is necessary to ensure that all the documents are executed, that is, made legally effective or binding on the parties by their subscribing (i.e. signing at the end of the document) more or less at the same time and together, usually to ensure the release of transaction finance at a particular moment.<sup>8</sup>

---

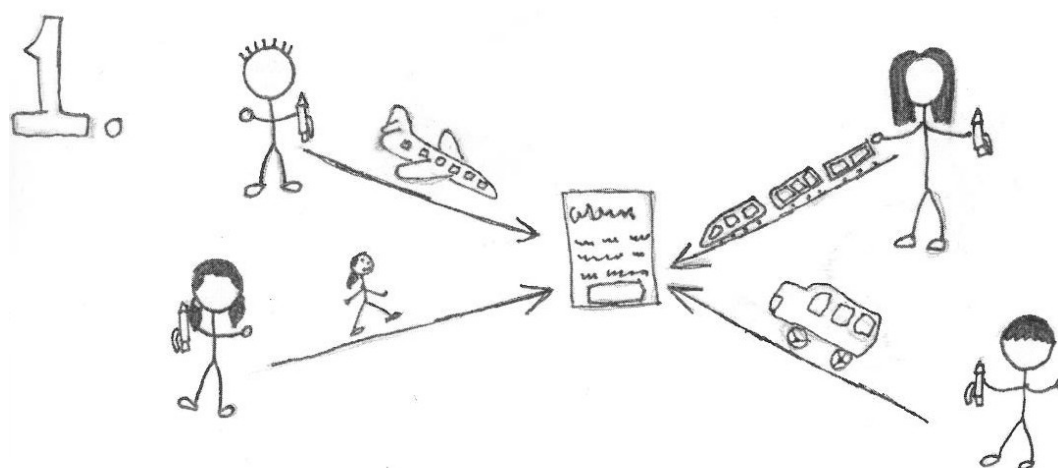
<sup>5</sup> See Review of Contract Law: Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231, 2013), para 2.23.

<sup>6</sup> Review of Contract Law: Formation of Contract (Discussion Paper No 154, 2012), chapters 6-8; Report cited above, note 5.

<sup>7</sup> See the Appendix in general for examples.

<sup>8</sup> See e.g. Report, paras 2.24-2.26, 2.37-2.42; Appendix A2, B2, B3, B6.

9. Traditionally this simultaneity of execution was achieved by way of a “signing ceremony”, at which all parties gathered together to check that the documents were in order and then to apply their signatures to the ones affecting them. If each party wishes to have its own fully signed copy of the documentation, it is necessary for all to sign several copies of the same document. The signing ceremony can therefore be lengthy. Arranging the ceremony is also demanding, involving the coordination of the diaries and movements of extremely busy and increasingly mobile business people.<sup>9</sup> The simple diagram below shows the nature of the problems:



10. An alternative is the cumbersome process of “round-robin” signing of documents, which, however, is not really practical for complex, high-value transactions in which time may be critical.<sup>10</sup>

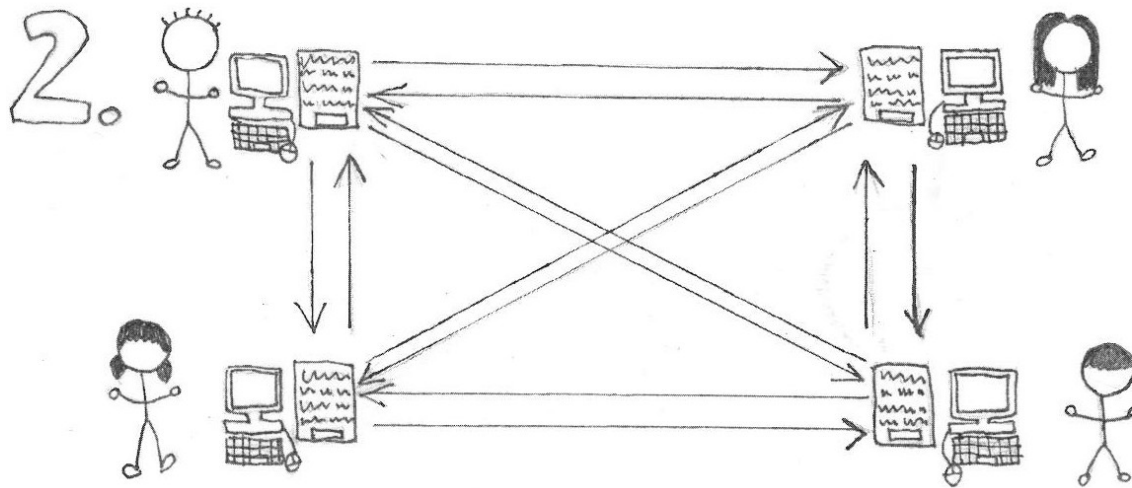
#### *VI. The proposed solution*

11. The solution to all this offered by counterpart execution, and made lawful and effective in Scotland by the Bill, is for parties in their different locations each to sign a paper copy (counterpart) of the document and to transmit a copy of that signed document electronically to each other person involved. Counterparts are documents requiring delivery to be effective in Scots law. It is therefore necessary to make clear, as the Bill does, that electronic transmission of a duly signed copy of a paper counterpart can be delivery for these purposes.

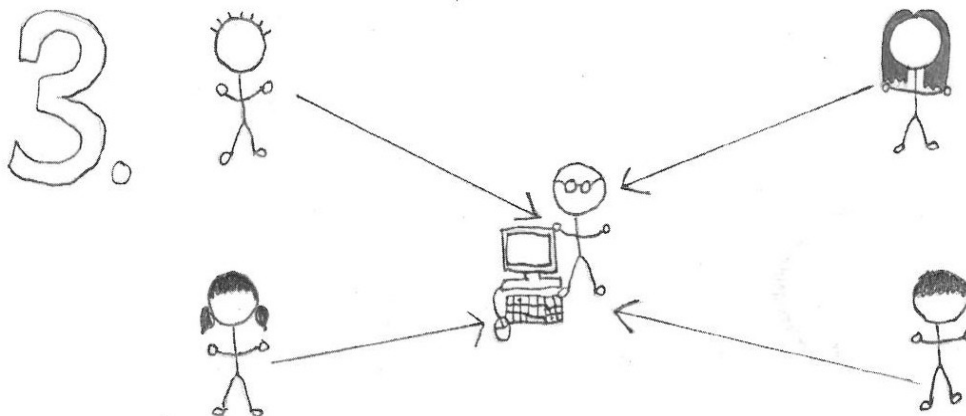
<sup>9</sup> See Appendix A1, A3(a), B2.2, B4, B5, B8.

<sup>10</sup> See Appendix A1, A2, A3, B3, B6, B7.

12. But merely providing for this is not enough to modernise and simplify the law. A further simple diagram illustrates the potential complexity arising if every party has to deliver its counterpart to all the other parties:



13. This problem explains the freedom of the parties under the Bill to appoint a “nominee” or “administrator” to take delivery for all of them. Execution (the document’s becoming effective in law) is completed when all relevant electronic copies reach the parties’ nominee (who will normally be the solicitor of one of the parties). The whole process can be illustrated by a final diagram:



14. The electronic transmission can be by faxing the signed document, or by emailing a scanned version (in best practice a PDF, because it cannot in that form be readily altered by the recipient). The Bill also allows other forms of electronic transmission to be effective for these purposes and to that extent at least is future-proofed against further developments in electronic communications technology.

15. This recognition of electronic transmission as delivery in the context of counterpart execution also provides an opportunity, duly taken in the Bill, to remove the present uncertainty on whether such transmission can be delivery of *any* paper document (e.g. an acceptance missive in a house sale). Our consultation suggested that making this clearly possible would be a welcome modernisation as well as clarification of the law on this point.<sup>11</sup>

16. A final key element in the Bill, reflecting well-established practice elsewhere, is that the electronic transmission of copies of the signed signature pages only can be enough to complete the execution process. This avoids the practical difficulties and delays inherent in faxing or scanning bulky documents as a whole.<sup>12</sup> The protection against mis-use of signature pages is the requirement that it be clear in all the circumstances that it is part of the document actually signed by the party from whom it is sent.

#### *VII. The parties are in control of the process*

17. While the Bill thus lays down a framework which will make the usual form of counterpart execution clearly valid and effective, it leaves the parties a considerable degree of freedom of manoeuvre to structure the process according to their particular circumstances. So it will be possible for parties to sign and physically exchange their counterparts while meeting in person.<sup>13</sup> They do not have to appoint an administrator; they can agree that electronic transmission of copies will not constitute delivery, or that possession of physical documents can be transferred without it becoming delivery immediately; they can determine what the administrator may do with the copies received or what a sender may do with the hard copy of a document after it has been electronically transmitted; and they can respond flexibly to problems in the transmission process.

#### *VII. Who benefits from the Bill?*

18. The Bill results from the difficulties encountered by Scottish solicitors in completing complex commercial transactions for their clients. But its potential benefits are not limited to this context. It facilitates the completion of legal documents wherever the parties are unable, for whatever reason, to meet together in person in order to sign them.<sup>14</sup> So execution in counterpart may be used in non-commercial situations such as domestic conveyancing, for example to complete a contract of sale without using missives,<sup>15</sup> or to execute a disposition where the property to be sold is co-owned but it is more convenient for each of the owners to sign and then transmit to the selling solicitor its own copy. It is available to government and other public bodies, e.g. universities in different parts of the world entering joint research or student/staff exchange agreements. It may also be used by small business parties (or indeed private persons)

<sup>11</sup> See Report, paras 2.61-2.66.

<sup>12</sup> See Report, paras 2.72-2.86. For what a signature page to a self-proving counterpart may look like, see Report, para 3.7.

<sup>13</sup> *Smith v Duke of Gordon* (1701) Mor 16987 (contract for supply of medical services).

<sup>14</sup> See the Appendix and also e.g. *Wilson v Fenton Brothers (Glasgow) Ltd* 1957 SLT (Sh Ct) 3, where the parties to a patent licence executed in counterpart were located in Glasgow and the USA respectively and negotiated through an agent in London.

<sup>15</sup> See for an example of the difficulties that can be created by the exchange of missives in a commercial sale Appendix A2.

transacting without professional advice. With this last in mind, the Bill is designed to provide sign-posts as to the procedures to be followed and the issues to be considered, such as the appointment of a nominee and what is to be done with the hard copy executed counterparts after transmission, or with what is received via the electronic transmission.

#### *VIII. An intermediate solution only?*

19. The ultimate solution to the difficulties of commercial parties unable to meet for a traditional signing ceremony would be an all-electronic one in which parties, wherever they happened to be, applied electronic signatures to a file or files held in some repository of the central administrator; but, although there is now nothing in the present law to prevent this happening, it lies some way in the future as a regular business practice.<sup>16</sup> For the moment, we operate in a mixed world of paper and digital communication, and the proposals in the Bill reflect these realities: full-blown e-signatures remain a relative rarity,<sup>17</sup> and parties still sign with wet ink on paper to authenticate documents in business and elsewhere. The commercial context, in particular, is one where parties prefer to put high-value transactions in signed writing on paper even although the law does not require that for the transaction in question.<sup>18</sup>

20. The Bill does provide for the mixed situation where one or more of the parties to a counterpart execution process is operating entirely electronically (that is, electronically signing an electronic counterpart) while other parties are signing in wet ink on paper counterparts. While we believe such a situation to be very unlikely to occur, we cannot say that it will never happen (perhaps in a situation where a party does not have access to a printer, for example). It would be unfortunate if the scenario arose and because the statute did not provide for it the document in question was held not to be validly executed.

*What may happen after counterpart execution and electronic transmission of signature pages to an administrator?*

##### *(i) Production of conformed copy*

21. In many cases, after completion of the counterpart execution process, the administrator of a commercial transaction will next produce a **conformed copy** of the document, containing all the elements that were common to the counterparts plus the signatures in the right places. But the conformed copy will not necessarily be absolutely identical in all respects with the counterparts. In particular the signatures of the parties will simply be typed in place. Manuscript amendments of the principal text made during the execution process will also be typed into place. The conformed copy may exist in hard copy form and be multiplied so that all relevant parties have a copy; or it may be electronically produced, or the hard copy scanned onto a CD or equivalent, with that electronic

<sup>16</sup> We discuss this possibility in Chapter 4 of our Report, especially at para 4.2. See also paras 1.34-1.35 and 3.6 note 9. It should be noted that s 9E of the 1995 Act (inserted by s 97 of the 2012 Act) came into force on 11 May 2014 together with the implementing Electronic Documents (Scotland) Regulations 2014/83 (Scottish SI).

<sup>17</sup> Though we note that the Law Society of Scotland intends to provide all its members in the near future with a smart card incorporating an advanced electronic signature: <http://www.lawscot.org.uk/smartcard>.

<sup>18</sup> See the Appendix in general.

version then being sent out to all relevant parties. This is the scenario in which the signature pages actually signed are of no significance, and may indeed be disposed of. This conformed copy may be **certified** as a true copy of the document by a qualified professional such as a notary public. The conformed copy, or the collection of conformed copies of the various documents relevant to a particular transaction, is sometimes colloquially known as “the bible” or “the transaction bible”.

*(ii) Collated copy*

22. In some cases, all the paper counterparts with their signed signature pages may be physically as well as electronically gathered in by the administrator. The objective here will be the assembly of a text of the document (i.e. one of the counterparts) with the signed signature pages collated in order at the end. This may be done simply for the record, but most often it will be for the purpose of producing a **collated** version of the document with all its signatures in wet ink in order for it to have self-proving or probative form for purposes of registration (whether for preservation only or also for execution in the sense of enforcement of the obligations set out in the document). The main purpose of the provisions in the Bill about “single documents” is to facilitate this collation process for those who wish to use it. This assumes the present law which is that a signature page can only be attached to a document which is otherwise identical to the one actually signed by the party in question, unless that party has authorised attachment to a different document (typically, this would be a corrected version of the document actually signed) or ratifies the attachment after it has taken place.

*IX. Self-proving (probative) paper documents*

23. The usual way of making a paper document self-proving or probative is for a party to subscribe it in “wet ink” before a witness who also signs. The principal legal effect of this form is that any challenger to its authenticity has the onus of showing that it is not, e.g. that signatures have been forged, that dates and places of signing are false. This reverses the usual onus, which is that a party who wants to rely upon a document for legal purposes must prove that it is authentic. Under the Bill it is possible to execute a self-proving document in counterpart, by each counterparty’s subscription being witnessed and signed by a witness.
24. Another benefit of self-proving documents is that they can be registered in public registers such as the Books of Council and Session. This provides a means of preservation and also, where there is an appropriate clause in the document, a means of enforcing obligations contained in it without having first to obtain a court decree. We understand that registration of commercial documents is most likely with commercial leases of land for a period of 20 years or less (longer leases *must* be registered, but in the Land Register). Further, parties may wish to preserve the possibility of registration against future needs; there is no need for registration to be contemporaneous with the time the document first becomes effective.



*X. Effect on documents executed before the Bill comes into force*

25. Existing documents will be unaffected by the changes in the Bill. But it should be noted that in the highly unlikely event of the courts having to deal with a pre-Bill document executed in counterpart under Scots law, lawyers and judges will be able to refer to a few common law sources from the eighteenth century in which counterpart execution was seemingly treated as valid. We presented these hitherto forgotten authorities in our Report,<sup>19</sup> and can now add one more from the early 1750s in the light of further research.<sup>20</sup>

*XI. Why is statutory provision needed?*

26. We are firmly of the view that, despite the old and obscure common law, the provision of a statutory system will be valuable for the future, in particular because it enables clarification and development of the position on a number of points of practical importance. The major issues are where the completion of a document or of a transaction involves multiple parties, not just two (which was the characteristic situation found in the old cases); and the facilitation of using electronic means of communication as a form of delivery in relation to documents (about which there is considerable doubt in the common law). The latter issue causes problems in practice extending beyond execution of documents in counterpart to execution in general. The Bill therefore deals with these other situations as a much-needed modernisation of the law in this area.

27. There are other advantages to having clear statutory provision in Scotland. Elsewhere execution in counterpart rests on a mixture of common (that is, judge-made) law, often of elderly provenance, and contemporary practice. South of the border, a key document is a Practice Note issued by the Law Society of England & Wales early in 2010, issued after a High Court case in 2008 cast serious doubt on the validity of attaching pre-signed signature pages to documents.<sup>21</sup> The Practice Note understandably emphasises practical steps rather than rules of law. Resting as it does on a view of the law taken by a leading QC and a joint working party of the Law Society and the City of London Law Society, the validity of the content of the Practice Note will not be completely certain until it is endorsed judicially in a contested appellate case. In Scotland, by contrast, once the Bill becomes law, practitioners and their clients may be certain what the rules of counterpart execution are, including those on signature pages; and this may even attract practitioners from other jurisdictions to deploy Scots law in this area in order to complete their transactions. So far as we know, this will be the first legislation on this subject anywhere in the world, and we think that it will attract attention beyond Scotland as a result.

---

<sup>19</sup> Report, paras 2.2-2.10.

<sup>20</sup> I.e. Bankton, *Institute of the Law of Scotland in Civil Rights: With Observations Upon the Agreement or Diversity Between Them and the Laws of England* (1751-3), I, xi, 36 (confirming the requirement of delivery). Note too his comment on the relevant English law, at I, xi (Observations on the Laws of England), 17.

<sup>21</sup> *Execution of documents by virtual means*, available at <http://www.lawsociety.org.uk/productsandservices/practicenotes/executionofdocs/4447.article>. The preceding case is *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin).

## GLOSSARY

### *Counterpart*

A copy (often a duplicate, but there may be more than two copies) of a document. Historically, a document intended to have legal effects and bind the parties to it was written out twice on a single piece of paper or other material which would then be divided (usually with a ragged cut) into two parts, called counterparts, one of which would be held by each party to the contract. If necessary, it could be proved that the documents were counterparts by fitting the two sets of ragged edges together. In modern times counterparts are simply created by printing out the document the required number of times.

### *Delivery*

Delivery is generally required under Scots law for a signed document to take effect and create obligations. As a rule two elements are needed: the document must be handed over by (or on behalf of) the granter and the granter must intend to be bound by its terms. Thus there is both a physical and a mental element to the legal concept of delivery.

### *Electronic and traditional documents*

A document created and subsisting in electronic form (*electronic document*) is contrasted for some legal purposes with one written or printed on a tangible surface such as paper (*traditional document*).

### *Execution in counterpart*

The process by which a document may be completed as a source of enforceable rights and duties ("executed") by each party signing its own copy (*counterpart*) and then exchanging it with the other party or parties in return for their signed counterparts. *Execution* means in law making something (e.g. a document providing for the parties' rights and duties; a court order) legally effective or enforceable.

### *Probative/Self-proving*

A document is probative or self-proving if, by visual inspection, it appears to be validly executed. Usually it must appear to have been subscribed by the granter and also by a witness. The witness' name and address must be stated too. The Requirements of Writing (Scotland) Act 1995 as amended by the Land Registration etc. (Scotland) Act 2012 provides for probativity to be conferred upon any electronic document by the application to it of an "advanced electronic signature". The document so executed is proof of what it contains unless successfully challenged, whereas other documents have, if necessary, to be proved to be what they appear by other (extrinsic) evidence.

**APPENDIX**  
**SOME EXAMPLES OF COUNTERPART EXECUTION ISSUES**  
*(provided to us by consultees)*

**PART A**

**1. Mergers and Acquisitions**

Target was an SPV<sup>22</sup> that owned a Scottish property. The proposed purchaser of the property, the seller and the target were all Scottish companies. All parties were advised by Scottish law firms. As part of the transaction a guarantee was needed from the seller's parent, a company incorporated in Germany ("Guarantor"). As a result, the seller's parent had to become a signatory to the main sale and purchase agreement ("SPA"). The signatories to the SPA were as follows:

- (a) Seller.
- (b) Purchaser.
- (c) Guarantor.

The Guarantor's board of directors were all resident in Germany and there was not enough time for the Scottish parties to sign the documents, then to post them to Germany to be signed there and then to be posted back. If the SPA was governed by English law then the SPA could be executed in counterparts, circulated via email to all parties, signed and returned. To overcome this obstacle presented by Scots Law, to enable a swift completion and despite the fact that the whole transaction involved a Scottish property, primarily Scottish companies and Scottish lawyers, the choice of law for the SPA was changed to English law.

**2. Commercial Property Transactions**

Every property deal is made more difficult by the requirement to sign one document and a move towards counterparts could fundamentally improve the pace at which transactions are completed. At present almost all property deals have an exchange of missives then a 5 -10 working day period to completion to allow documentation to be signed. Not only is this a practical problem, but because the documents are in transit, we are often in a situation where the "dating" of the document itself is a problem.

For example, we recently sent a standard security to our clients for signing in relation to an obligation in a contract. At the same time we sent the disposition, another standard security and an option agreement to the other parties to the transaction to sign. We had funds in place and all parties were keen to complete as soon as possible. However, because the documents could not be executed in counterpart they had to be circulated for signature leaving everyone in limbo. In terms of dating the documents, the contract

---

<sup>22</sup> Special Purpose Vehicle - The SPV is usually a subsidiary company with an asset/liability structure and legal status that makes its obligations secure even if the parent company goes bankrupt. Its operations are limited to the acquisition and financing of specific assets, used to isolate financial risk.

referred to in the security documents had to be specified as dated "*on or around the date hereof*" (obviously vague and unhelpful) and the entry date in the disposition was stated as the Friday of that week, but if we did not achieve completion by that date then we would have had to arrange for the documents to be re-signed.

### **3. Banking Transactions**

Very often in banking transactions there are multiple banks based in different parts of the UK which are providing money to multiple companies who can also be based in different parts of the United Kingdom.

Where a company (or group of companies) is entering into new banking arrangements with a group of banks and this is not part of a larger transaction (for example an acquisition of an asset or company) then it is very unusual for the parties to sign the documents face to face at a meeting. In this situation we would ensure that the governing law of the documents to be signed was English law so that each bank and borrowing company could sign the documents in counterpart and the transaction could complete on the day of signing. If Scots law is used as the governing law of these documents then they will not be effective until they are signed by all of the parties. This is time consuming (particularly where the banks that need to sign are based in different cities in the UK) as the document needs to be posted / couriered to each party and the timing of completion becomes uncertain.

We have also been involved in several transactions where the governing law of the banking documents has been changed from Scots law to English law very late in the transaction simply to allow the documents to be signed in counterpart and enable a remote completion. Two examples are noted below:

- (a) We were acting for a Scottish bank which was lending money to a Scottish company (by way of a Scots law facility agreement) to acquire a group of companies incorporated in Scotland and England. As part of the acquisition, the borrower company was also raising equity (shares and loans) from an equity house based in London. The vendor in the transaction was an English company. Each of the solicitors in the transaction (other than ourselves) were based in London. A physical completion meeting was to be held in London with all parties present and we were meant to attend this with our client, the Scottish bank. It became apparent that the Scottish bank would not be able to attend the completion meeting and in order to ensure that the facility agreement could be signed by both parties on the same day and take effect on that day, the Scots law facility agreement was amended and changed to an English law facility agreement. If Scots law permitted the execution of documents in counterpart then this would not have needed to be done.
- (b) We acted for a Scottish Bank on a transaction where they were lending money to a Scottish group of companies which included lots of joint venture companies. There was a large number of joint venture

parties who were based in different parts of Scotland and the rest of the UK. These joint venture parties needed to sign the banking documents on behalf of the joint venture companies but it was not possible (or realistic) for them all to attend one physical meeting where the documents would be signed. The banking documents therefore had to be governed by English law in order that all of the joint venture parties could sign in different places on the same day and then completion could take place on that day.

## **PART B**

### **1 EXAMPLE 1: AVAILABILITY OF LIMITED NUMBER OF AUTHORISED SIGNATORIES**

- 1.1 We act for an organisation which is a prolific investor in Scotland. Given that the investments tend to be made in Scotland, the investment documents are usually governed by Scots law, and therefore require all parties to sign the same physical document. The client has a relatively small number of authorised signatories and, given the sheer number of investments it makes, it is not always possible (given geographical and diary considerations) for an authorised signatory to attend completion meetings, nor is it practical for it to grant powers of attorney for each such meeting.
- 1.2 This can pose obvious difficulties when it comes to signing the completion documents.
- 1.3 Over time we have, in conjunction with the client, developed a solution to this issue which is workable but not ideal, and requires a co-operative and pragmatic attitude from the lawyers acting for the other parties involved. An express ability to sign documents in counterpart under Scots law would eliminate this issue in our view.

### **2 EXAMPLE 2: SAME DAY EXECUTION/SIGNATORIES LOCATED IN DIFFERENT CITIES**

- 2.1 We were advising a company that was spinning out from one of the Scottish Universities as part of a multi-million pound fundraising led by a science fund which was co-investing alongside a secondary lender.
- 2.2 The principal transaction documentation required to be signed by the 3 existing shareholders of the Company, various signatories with the University, the lead investor and the secondary lender. All parties were based in Edinburgh, with the exception of the secondary lender, which was based in Glasgow. The secondary lender's execution requirements meant that it had to sign the documentation last. It was important that we completed the transaction before close of business on the day concerned. We therefore had

to arrange for a signing meeting in Edinburgh during the morning, which all parties required to physically attend (which was not easy to co-ordinate), with the original signed documents then being taken through to Glasgow by one of our employees for execution by the secondary lender later in the day, with the signed originals then having to be brought back to Edinburgh for completion purposes. A significant amount of time (and cost) was incurred in planning the execution logistics, which could have been easily avoided had counterpart execution been an option.

### **3      EXAMPLE 3: SHAREHOLDERS BASED OUTSIDE SCOTLAND**

We recently acted on a corporate transaction involving a Scottish business with Northern Irish and English shareholders that was being sold to a Scot. It was a distressed sale and the timing implications of getting everyone to sign the one document caused significant difficulties and significantly jeopardised the deal.

### **4      EXAMPLE 4: PURCHASER BASED OUTSIDE SCOTLAND**

We recently acted on a transaction where the purchaser was based in America. The options were for the purchaser to travel to Scotland to sign the deal or appoint the lawyers involved as their attorney, neither of which was particularly satisfactory.

### **5      EXAMPLE 5: USE OF ENGLISH LAW AS GOVERNING LAW FOR EFFICIENCY**

We recently acted for a Scottish headquartered business, whose senior executives were based across the UK. Given the signing difficulties, the decision was made to have all of the incentive and employment agreements subject to English law.

### **6      EXAMPLE 6: 21 DAY LIMIT FOR REGISTRATION OF SECURITY**

6.1 We act for a number of major oil companies. Generally, management for such companies is based outside the UK (for example, in Houston, Norway, Canada or Australia). However, often it is UK banks that provide funding to the oil companies, particularly for their Scottish based operations. In return, the UK banks will look for securities over the Scottish operations, usually in the form of a Scots law bond and floating charge.

6.2 The floating charge needs to be registered at Companies House in Edinburgh within 21 days of it being signed by the Scottish company; failure to do so renders the security unenforceable by an administrator (and effectively a worthless form of security for the bank). In practical terms, the Floating Charge will be signed abroad by the senior management and, once signed,

the UK bank will then release money to the oil company. However, the floating charge must still be couriered over to Scotland to be counter-signed by the bank and then registered at Companies House in Edinburgh within 21 days (of execution by the oil company).

- 6.3 While 21 days may sound like an ample period of time, the reality is that it doesn't take account of public holidays, postal delays, availability of signatories or old fashioned human error. If the company and the UK bank could sign the floating charge in counter-part, it would ease this process.
- 6.4 Further, each of the American, Norwegian, Canadian and Australian jurisdictions (ie. the jurisdictions we typically deal with in the oil and gas sector) permit execution in counterpart and so the Scots law system is criticised for being comparatively inflexible and parochial.

## **7 EXAMPLE 7: FUND FINANCING/EXECUTION BY OFF-SHORE GENERAL PARTNER**

- 7.1 We are regularly involved in fund financing. In such transactions, the bank will generally require an assignation in security of certain of the Scottish partnership's rights. Such assignations require to be signed by the general partner who is typically based off-shore (usually in Guernsey or Jersey) and the bank which is typically based somewhere other than Guernsey or Jersey.
- 7.2 We had a recent situation which required to be signed by the fund (Scottish partnership). Thereafter, it had to be couriered to the bank in Australia for execution, holding up completion by a week.
- 7.3 The lack of flexibility around execution causes a completion issue in virtually all fund financing transactions that we have acted on.

## **8 EXAMPLE 8: FUND FINANCING/EXECUTION BY GLOBAL INVESTORS**

- 8.1 We were acting for a bank in relation to the financing of certain activities of a Scottish-headquartered investment fund. The fund was structured as a limited partnership and its constitutional documents were governed by Scots law. The investors in the fund were a collection of individuals and institutions based in different places around the world.
- 8.2 As a condition of the financing, the bank asked each of the investors in the fund to give certain direct undertakings for the benefit of the bank. The undertakings were to be documented in a side letter entered into between the investors, the fund and the bank. It was important for the investors that they could see that they were all giving the same undertakings. Since this document affected the fund's constitutional documents, it had to be governed by Scots law.

- 8.3 The side letter language was agreed the night before the financing transaction was due to complete. The financing was required to allow the fund to enter into an investment deal, so timing was crucial.
- 8.4 All parties were available to sign, but Scots law signing requirements meant that it was not possible to circulate the same physical copy of the side letter around all the parties in time to allow the financing to complete as planned.
- 8.5 We resolved this problem by restructuring the side letter as a series of unilateral obligations by each of the parties to it. This was clearly an artificial solution – the obligations of each of the parties were necessarily reciprocal, and conditional on each other. This problem would not have arisen if Scots law had permitted counterpart execution.





The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

**46th Report, 2014 (Session 4)**

### **Delegated Powers in the Legal Writings (Counterparts and Delivery) (Scotland) Bill**

**Published by the Scottish Parliament on 6 August 2014**



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (a) any—
    - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
    - (ii) [deleted]
    - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
  - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
  - (c) general questions relating to powers to make subordinate legislation;
  - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
  - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
  - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
  - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
  - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

#### **Membership:**

Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
Margaret McCulloch  
Stuart McMillan (Deputy Convener)  
John Scott  
Stewart Stevenson

**Committee Clerking Team:**

**Clerk to the Committee**

Euan Donald

**Assistant Clerk**

Elizabeth Anderson

**Support Manager**

Daren Pratt



The Scottish Parliament  
Pàrlamaid na h-Alba

## Delegated Powers and Law Reform Committee

### 46th Report, 2014 (Session 4)

#### Delegated Powers in the Legal Writings (Counterparts and Delivery) (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meeting on 5 August 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Legal Writings (Counterparts and Delivery) (Scotland) Bill at stage 1 (“the Bill”)<sup>1</sup>.
2. As lead committee for the Bill the Delegated Powers and Law Reform Committee will consider and report on the general principles of the Bill.
3. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. The Committee may also consider and report on any provision in such a Bill conferring other delegated powers.
4. This report relates solely to the Committee’s consideration of the delegated powers provisions in the Bill.

#### OVERVIEW OF BILL

5. The Bill gives effect to two distinct policies relating to the formation of contracts under Scots law. Firstly, it provides a framework by which parties may “execute a document in counterpart” under Scots law and secondly, it provides a mechanism to enable documents created and signed on paper to have legal effect where delivered by electronic means. In doing so, it implements the majority of the legislative recommendations contained in the Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 231 - April 2013<sup>2</sup>) (“the SLC Report”).

<sup>1</sup> Legal Writings (Counterparts and Delivery) (Scotland) Bill (as introduced):  
[http://www.scottish.parliament.uk/S4\\_Bills/Legal%20Writings%20\(Counterparts%20and%20Delivery\)%20\(Scotland\)%20Bill/b50s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd.pdf)

<sup>2</sup> Scottish Law Commission Report on Formation of Contract: Execution in Counterpart:  
[http://www.scotlawcom.gov.uk/index.php/download\\_file/view/1149/138/](http://www.scotlawcom.gov.uk/index.php/download_file/view/1149/138/)

## DELEGATED POWERS PROVISIONS

6. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)<sup>3</sup>.

7. The Committee’s conclusions on the delegated powers provisions in the Bill are set out below.

### **Section 5 – Ancillary provision**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>order</b>
<b>Parliamentary procedure:</b>	<b>affirmative procedure if it amends an Act, otherwise negative procedure</b>

8. Section 5 makes the usual ancillary provision generally found in Government Bills. It provides the Scottish Ministers with the power to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Such an order may modify any enactment, including any provision made by the Bill.

**9. The Committee finds this power to be acceptable in principle. The Committee also reports that it is content that the power is subject to the affirmative procedure where it amends primary legislation, but otherwise to the negative procedure**

### **Section 6 – Commencement**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>order</b>
<b>Parliamentary procedure:</b>	<b>laid no procedure</b>

10. Section 5, 6 and 7 of the Bill will come into force on the day after Royal Assent. Section 6(2) provides that the Scottish Ministers may, by order, appoint days on which the other provisions of the Bill come into force. Subsection (3) provides that a commencement order may include transitional, transitory or saving provision.

**11. The Committee finds this power to be acceptable in principle, and is content that the exercise of the power is not subject to Parliamentary procedure.**

---

<sup>3</sup> Legal Writings (Counterparts and Delivery) (Scotland) Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4\\_Bills/Legal\\_Writings\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Legal_Writings_DPM.pdf)

12. The Committee therefore reports that it is content with the delegated powers provisions in the Bill at stage 1.

**FINANCE COMMITTEE CALL FOR EVIDENCE**  
**LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND)**  
**BILL; FINANCIAL MEMORANDUM SUBMISSION FROM**  
**ABERDEENSHIRE COUNCIL**

**Consultation**

***Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?***

1. NO

***If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?***

2. N/A

***Did you have sufficient time to contribute to the consultation exercise?***

3. N/A

**Costs**

***If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.***

4. IT SHOULD NOT. YES ACCURATELY REFLECTED IF THERE WERE FINANCIAL IMPLICATIONS.

***Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?***

5. YES

***If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?***

6. YES

***Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?***

7. YES

**Wider Issues**

***Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?***

8. YES

***Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?***

9. NO

## FINANCE COMMITTEE CALL FOR EVIDENCE

### LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL;

### FINANCIAL MEMORANDUM SUBMISSION FROM EAST AYRSHIRE COUNCIL

#### Consultation

***Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?***

1. No

***If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?***

2. Not applicable

***Did you have sufficient time to contribute to the consultation exercise?***

3. There was sufficient time to allow a response to the call for evidence but as indicated above at 1 no earlier responses were submitted to any preceding consultation exercise.

#### Costs

***If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.***

4. After consideration it is not anticipated that the Bill will have any financial implications for East Ayrshire Council.

***Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?***

5. On the basis of the response to Q4 the estimated costs and possible savings set out in the FM would appear to be reasonable.

***If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?***

6. If applicable – yes.

***Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?***

7. Generally speaking the margins of uncertainty associated with the Bill's costs would appear to be minimal.

#### Wider Issues

***Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?***

8. It is believed that the FM reasonably captures any costs associated with the Bill.



***Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?***

9. It is not anticipated that there would be any future costs associated with the Bill.

Stuart McCall  
Legal and Licensing Manager

## FINANCE COMMITTEE CALL FOR EVIDENCE LEGAL WRITINGS

### (COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL;

#### FINANCIAL MEMORANDUM SUBMISSION FROM FACULTY OF ADVOCATES

##### Consultation

***Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?***

1. Faculty did not take part in any earlier consultation exercise.

***If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?***

2. Not applicable.

***Did you have sufficient time to contribute to the consultation exercise?***

3. Not applicable.

##### Costs

***If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.***

4. Faculty does not see any material financial implications for itself.

***Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?***

5. It is accepted that there may be some modest savings in expense to parties who execute contracts in counterpart. Faculty does not, however, find the financial modelling persuasive. The figures seem speculative but Faculty must assume that the figures are produced on some informed basis. The FM does not give the impression of the raw figures being derived from real information nor does it give the impression that the use made of those figures is soundly based. Faculty also points out that in many transactions in which the parties meet face to face it is not just the formal execution of a document that brings them together.

***If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?***

6. Not applicable to Faculty.

***Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?***

7. Faculty refers to the answer to Q.5.

##### Wider Issues

***Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?***

8. The FM does not notice the potential litigation cost that will be imposed on some parties as certain matters in the Bill are clarified.

***Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?***

9. In particular in relation to Section 4, in its present form, subordinate legislation might be required to clarify some matters. Faculty is unable to quantify the costs.

**FINANCE COMMITTEE CALL FOR EVIDENCE LEGAL WRITINGS**  
**(COUNTERPARTS AND DELIVERY) (SCOTLAND) BILL; FINANCIAL**  
**MEMORANDUM SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL**

**Consultation**

***Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?***

1. No.

***If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?***

2. Not applicable.

***Did you have sufficient time to contribute to the consultation exercise?***

3. Yes

**Costs**

***If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.***

4. The Council agrees that the financial implications have been accurately reflected in the FM. There may be additional costs involved in upgrading Council IT systems to allow for the use of electronic signatures. However these systems may already be in place; any costs are likely to be outweighed by the financial savings associated with the Bill; and the use of electronic signatures will be optional so there would be no obligation to incur these costs.

***Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?***

5. Yes.

***If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?***

6. Yes. The provisions of the Bill are likely to allow the Council to reduce costs associated with signature and delivery of documents, and as per point 4 above, use of the provisions will be optional.

***Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?***

7. Yes.

**Wider Issues**

***Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?***

8. Yes. Any costs would reflect those associated generally with the enactment of any new legislation.

***Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?***

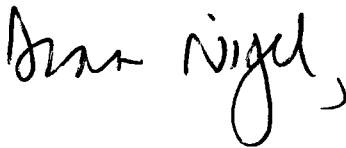
9. None apparent at this point, it is noted again that the provisions of the Act are optional.

Mr N Don MSP  
Convener  
Delegated Powers and Law Reform Committee  
Scottish Parliament  
EDINBURGH  
EH99 1SP

In 2014 Scotland Welcomes the World



14th November 2014



## LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) SCOTLAND BILL- STAGE ONE REPORT

I would like to thank the Committee for their very thorough and considered Stage One Report on the Legal Writings (Counterparts and Delivery) (Scotland) Bill. In particular I am pleased to note the Committee's recommendation that the general principles of the Bill be agreed to and the very positive nature of the Report as summarised in the Conclusions and Recommendations.

There are 2 points I would like to specifically respond to. The first relates to the Committee's suggestion that "wherever possible, statistical evidence should be provided with Scottish Law Commission Bills". I am certainly happy to look at how this may be achieved for future Scottish Law Commission Bills, always recognising that, as was the case with this Bill, sometimes no such statistical evidence is available and gathering it from scratch may not be straightforward.

The second point I would like to comment on was my commitment at the Stage One evidence session to take account of any further suggestions by the Faculty of Advocates on how the risk of fraud or error may be reduced. I can confirm that at this time I have not had any further correspondence with the Faculty but should they make any suggestions I will of course give them proper consideration.

I would also like to take this opportunity to provide an update on my undertaking given at the Stage One evidence session to write to the Keeper with a view to providing the Committee with further information relating to the creation of an electronic document repository – an electronic facility for the electronic execution (signing) and preservation (holding) of electronic documents - which might be provided by Registers of Scotland. I have done so and the Keeper has indicated that she would welcome discussion on this matter and

anticipates being in a position to engage in preliminary discussions with the Scottish Government early next year. We look forward to those discussions in due course.

Finally, we had reserved our position on whether or not to bring forward any amendments to the Bill at Stage Two, until we had the benefit of the Stage One Report. While we will continue to reflect on the Report I can however confirm that, at this time, we are not minded to lodge any Stage Two amendments.

I hope this response is of some assistance to the Committee.

  
**FERGUS EWING**

**EXTRACT FROM THE MINUTES OF PROCEEDINGS**

**Parliamentary Year 4, No. 51 Session 4**

**Meeting of the Parliament**

**Tuesday 25 November 2014**

Note: (DT) signifies a decision taken at Decision Time.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Minister for Business, Energy and Tourism (Fergus Ewing) moved S4M-11664—That the Parliament agrees to the general principles of the Legal Writings (Counterparts and Delivery) (Scotland) Bill.

After debate, the motion was agreed to (DT).



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

**The Presiding Officer (Tricia Marwick):** The next item of business is a debate on motion S4M-11664, in the name of Fergus Ewing, on the Legal Writings (Counterparts and Delivery) (Scotland) Bill.

I call on Fergus Ewing to speak to and move the motion. Mr Ewing, you have 10 minutes.

I note that the Labour front-bench spokesperson is not here.

15:29

**The Minister for Business, Energy and Tourism (Fergus Ewing):** I am pleased to open the debate on the general principles of the Legal Writings (Counterparts and Delivery) (Scotland) Bill. I thank everyone who gave evidence in writing and in person, and I thank the Finance Committee and the Delegated Powers and Law Reform Committee for their detailed scrutiny of the bill at stage 1. In particular, I welcome the Delegated Powers and Law Reform Committee's support for the bill's general principles.

As many members are aware, this is the first bill to have been considered under the new Scottish Law Commission bill procedure. When the Parliament decided in May last year to accept recommendations for changes to its standing orders to allow certain Scottish Law Commission bills to be referred to the Delegated Powers and Law Reform Committee, it recognised the commission's valuable role in reforming the law of Scotland.

It was intended that the new process would go some way towards increasing the implementation rate of commission reports. In my view, the process is working well. I have been impressed with the way in which the committee has taken on its new role and I hope that this will be the first of many bills to be considered in this way. I note the committee's recommendation in its stage 1 report, that

"the Scottish Government takes steps in order to ensure appropriate research has been undertaken"

to provide statistical evidence to the committee in connection with Scottish Law Commission bills in future. The committee has my response to the stage 1 report.

A key objective of the Scottish Government is sustainable economic growth and business competitiveness. We want to ensure that Scotland is an attractive place for business. The reforms in the bill might be modest and technical but they

will, in no insignificant fashion, promote business and economic growth and modernise Scots law.

The bill does two main things. First, it enables documents to be executed in counterpart, which will put beyond doubt that such execution is permissible in Scots law—a matter about which there is currently great uncertainty—and will give the legal profession and the business interests that it represents the necessary confidence to use Scots law for transactions.

Secondly, the bill makes provision for the facility to deliver—I use the word “deliver” in its legal sense—traditional documents electronically. Any document that is created on paper may become legally effective by being delivered by electronic means such as email or fax.

I was pleased to note that the Delegated Powers and Law Reform Committee supports the general principles of the bill and, in particular, those two key provisions.

The provisions have the potential to help people who are involved in complex transactions in which the parties and their legal advisers can be in different countries or even on different continents and meeting might be impossible or highly impractical. The provisions also have the potential to help anyone in Scotland who is conducting a transaction that involves a number of parties who are unable to get together, for practical reasons, for example because parties live in remote rural or island areas.

For the avoidance of doubt, let me say that the consequence of the current uncertainty in this area is that practitioners sometimes choose not to use Scots law to govern a document. There is a consistent view that that is common, happens regularly, and might happen at the outset of a transaction or just before the transaction is finalised. I am talking about not just multinational and multijurisdictional transactions but transactions that are entirely Scottish in their make-up and for which, for want of clarity about the use of execution in counterpart, the decision is made to use another law. When Scots law is not used, there is often the knock-on effect of consequential litigation not being conducted in Scotland.

The committee recognised that the current uncertainty about whether execution in counterpart is competent under Scots law appears to have led to a drift away from transactions being concluded under Scots law, with parties opting to conclude under the law of a different jurisdiction—for example, English law—where execution in counterpart is recognised.

A number of people who gave evidence to the committee described the bill as being capable of addressing that drift. A clear benefit of the bill will

be that, in circumstances in which Scots law should be used but is currently not used because of doubt over the legality of executing in counterpart, parties will now have the confidence to use Scots law.

Scots law requires some documents to be delivered—again, in the legal sense—to take full legal effect. In the same way as doubt exists around whether execution in counterpart is valid under Scots law, there are conflicting authorities on whether a paper document may be legally delivered by its electronic transmission to the grantee or a third party such as a solicitor or agent for one of the parties.

That question arose from the 1990s onwards mainly in respect of purported delivery by way of fax of documents relating to land. One of the bill's principal aims is to resolve that uncertainty, particularly but not only as it impacts on transactions completed by way of execution in counterpart. The bill does so by saying that delivery of a copy of a paper document or a copy of part of that document by electronic means constitutes delivery; beyond that, it does not attempt to alter the law on delivery.

During the stage 1 evidence sessions, the Faculty of Advocates levelled some criticisms at the bill. The Faculty's concerns were around increased potential for fraud and, what was more likely in its view, error associated with execution in counterpart particularly if, as the bill allows, only the signature pages of documents are exchanged between parties as part of that process. We have considered those concerns very thoroughly and have concluded that the bill will do nothing to increase the prospects of fraud or error as a result of executing in counterpart and exchanging only the signature pages of the document.

That view was shared by other stage 1 witnesses, and the committee noted that the majority of those giving evidence at stage 1 expressed the general view that fraud and error would always occur to an extent and that the bill was unlikely to lead to an increase in either fraud or error. The committee was particularly thorough in its examination of this issue, and I note that it is not persuaded that the bill will lead to any increase in instances of fraud and error.

In summary, this is a small but important bill that will provide certainty in relation to execution in counterpart and electronic delivery of traditional documents in Scots law. Importantly, the approach has been to ensure that the legislation is permissive and as flexible as possible. Inherent in that flexibility is the ability of the parties to a transaction to set out how the process will work for them. The bill has been very warmly welcomed by the majority of the legal profession and there have been some very positive and encouraging articles

about the bill in the press and in other publications.

I firmly believe that the bill creates a light-touch yet helpful framework for a variety of transactions. We in the Scottish Government are confident that the bill will meet a clear and pressing demand from those likely to be affected by it, and we cannot overestimate the value in bringing clarity, flexibility and certainty to the law.

I move,

That the Parliament agrees to the general principles of the Legal Writings (Counterparts and Delivery) (Scotland) Bill.

**The Deputy Presiding Officer (Elaine Smith):**

I call on Nigel Don to speak on behalf of the Delegated Powers and Law Reform Committee—around seven minutes or so, please.

15:38

**Nigel Don (Angus North and Mearns) (SNP):** I genuinely welcome the opportunity to speak on behalf of the Delegated Powers and Law Reform Committee on the Legal Writings (Counterparts and Delivery) (Scotland) Bill, which is, of course, of particular significance as it is the first to be known as a Scottish Law Commission bill following changes to standing orders last year that provided that certain SLC bills might be referred to the Delegated Powers and Law Reform Committee.

The Scottish Law Commission plays a vital role in recommending reforms and in updating and improving Scots law. However, until recently the implementation rate of the commission's proposed bills has been low. The new process, which we are undertaking for the first time, will allow such bills to be given the consideration that they deserve and will allow important reforms to be implemented.

I pay tribute and give my thanks to the parliamentary staff who, a couple of years ago, did the background work that considered whether we should change our standing orders. I also pay tribute to Christine Grahame, who of course is the convener of the Justice Committee, and Bruce Crawford, who was the Government minister responsible at the time, for providing the political impetus that enabled us to change the standing orders to ensure that SLC bills go forward.

We must do what we can to ensure that Scottish law is up to date and competitive. During the passage of the bill, it has been interesting to see what other jurisdictions have been making of this process. I believe that some of them might even be envious of the process that we now have in the Scottish Parliament.

I thank all those who provided written and oral evidence on the bill. In addition to receiving written submissions, we heard from legal, business and

academic representatives over five oral sessions. The detailed evidence that was received was greatly appreciated by the committee.

As the minister says, the bill has two key provisions: that execution in counterpart should be clarified as being a valid process in Scots law; and that paper legal documents should be deliverable, in the legal sense of the word, by electronic means. Execution in counterpart is the process by which documents can be given legal effect by each party signing separate but identical copies of a document rather than the same single physical document. The bill seeks to remove the current uncertainty as to whether that is a valid way of creating legally effective documents in Scots law. In providing for the delivery of paper legal documents by electronic means, the bill aims to resolve any doubt as to whether a document is legally effective if it has been faxed or emailed rather than delivered by traditional means.

Evidence to the committee suggested that there is widespread support for the provisions among the legal, business and academic sectors. The current system for signing contracts under Scots law is generally considered to be inefficient and burdensome, with parties having to go to great lengths to ensure that a single document is signed by them all. To achieve that, they must organise signing ceremonies whereby all parties are required to gather at an agreed place at an agreed time in order to sign a single document. Alternatively, the document is sent to each party sequentially for each signature to be attached one by one.

By making it clear that documents may be executed in counterpart under Scots law, and by allowing for traditional documents to be delivered electronically, the need for such procedures is completely removed. It therefore follows that the process for agreeing a contract may be much more efficient and straightforward, as each party can simply sign their own copy before delivering it to the others.

In the committee's view, one of the main benefits of the bill is its potential to increase the number of contracts that are made under Scots law. The committee heard that a perceived inability to execute documents in counterpart often leads parties who would otherwise have drawn up their contracts under Scots law to state within a document that it will be governed by another legal system, such as the English legal system, allowing them to avoid processes such as the aforementioned signing ceremony.

Many witnesses argued that, by providing for execution in counterpart, the bill could lead to an increase in the number of contracts that are contracted under Scots law. However, we should not get carried away about that. The bill is unlikely

to bring an influx of contracts to Scotland from those who would otherwise have no reason to use Scots law. Parties choose which law will govern their contract for a variety of reasons, and the committee also heard that English and New York law are dominant internationally and will, in all likelihood, continue to be so.

For some, however, the inability to execute a document in counterpart is the determining factor in their choice of law. The committee heard examples of contracts that were switched to English law at the 11th hour when it became apparent that all parties would be unable to gather together to sign a single document. It could be argued that, by allowing for execution in counterpart, the bill will encourage such parties to use Scots law rather than switch to another form of law. The committee therefore considers that the bill has the potential to stop the drift away from Scots law of contracts that would otherwise have been made under our law.

In addition to assessing the potential benefits of the bill, the committee considered its potential challenges. In its evidence to the committee, the Faculty of Advocates suggested that the bill's provisions could lead to an increase in the incidence of fraud or error. The faculty was particularly concerned that the bill allows parties to exchange signature pages as opposed to whole documents. It considered that that would increase the likelihood that the content of the document could be altered.

The faculty's view was not, however, shared by other witnesses. Having considered all the evidence, the committee was not persuaded that the bill will lead to an increase in the incidence of either fraud or error. In reaching that conclusion, the committee took account of the lack of evidence of instances of fraud or error in other countries in which execution in counterpart and electronic delivery of documents are already commonly practised. Further to that, the committee noted the existing safeguards that are in place in our law to both prevent and deal with fraud and error. At the same time, the committee encourages the Scottish Government to continue to ensure that the potential for fraud and error is accounted for and to consider how such risks could be reduced further.

The committee therefore recommends that the general principles of the Legal Writings (Counterparts and Delivery) (Scotland) Bill be agreed to.

Thus far, the new system for implementing Scottish Law Commission bills appears to be working well. I agree with the minister on that and am grateful for his comments. I look forward to the continued progress of the bill and to scrutinising further bills under this welcome process.

15:45

**Margaret Mitchell (Central Scotland) (Con):** I welcome this afternoon's debate and thank the Delegated Powers and Law Reform Committee and its clerks, together with the witnesses and those who submitted evidence during the consultation process, for their contributions and their scrutiny of the bill.

I would be surprised if the bill did not carry the support of all members; it certainly has the support of the Scottish Conservatives, because it is a bill that seeks to improve contract law by making some important changes to the way in which legal documents can be signed and brought into legal effect in Scotland. In doing so, as the minister stated, it focuses on the signing of counterparts—identical copies of a document—rather than the same physical document, and on electronic delivery of scanned documents.

At present, as various respondents to the consultation made clear, there is considerable uncertainty about whether documents can be executed in counterpart under Scots law, despite that being deemed to be more efficient. That is because—depending on the type of transaction—the current preference of legal practitioners is to follow the often time-consuming and cumbersome practice of holding a signing ceremony or to go through the round-robin process, both of which ensure that the same document is signed by all the parties involved. In addition, those options can at times be excessively costly, inefficient and impractical, particularly if the transaction is multijurisdictional in nature and the relevant parties are in separate locations.

Location is a key issue in our increasingly globalised society. That was highlighted in the Weir Group's written submission, in which the company stated that 90 per cent of its contracts involved multiple parties and locations. Furthermore, the bill's provisions will, crucially, bring Scots law into step with other legal systems and will modernise out-of-date processes that have caused delays and ambiguity.

For example, in England and other jurisdictions such as New Zealand, Australia and America, legal documents can be executed—that is, brought into legal effect—if they are signed in counterpart. The University of Glasgow's Dr Ross Anderson made a very perceptive comment when he said that it is

“crucial that Scotland stops exporting transactions that are carried out by the ordinary people of Scotland and by Scottish businesses and companies, and which relate to assets in Scotland.”

That underscores the pressing need for change. After all, it is unacceptable that

“we cannot persuade our own citizenry to use our law”.—  
[*Official Report, Delegated Powers and Law Reform Committee*, 7 October 2014; c 5.]

As Dr Anderson remarked, that “reflects poorly” on its content.

Given that that is the case, the bill’s proposed changes are extremely positive for the development and application of Scots law, for legal practitioners and for those who seek to use Scots law. However, as Robert Howie QC emphasised during his evidence to the committee, it is important to manage expectations and to understand that the bill is not being presented as a panacea that will automatically lead to an increase in the number of contracts that are made under Scots law. Nigel Don emphasised that point.

In particular, in commercial and other transactions, it is often the legal jurisdiction that takes precedence, rather than the associated processes. In many cases, New York and English law are likely to continue to be widely used. That is recognised in the Delegated Powers and Law Reform Committee’s stage 1 report, which makes the assessment that the bill will put Scotland in a more equitable position with other jurisdictions rather than emphasise a potential competitive advantage over them.

Although the legal community is generally supportive of the bill, there has been some criticism. Both the Faculty of Advocates and the law firm Freshfields Bruckhaus Deringer have pointed to several drafting issues that may merit further consideration at stage 2. The faculty has also expressed concern that, under the proposed changes, parties might execute different versions of a document due to either error or fraud, although other witnesses suggested that that is a moot point and that fraud can occur under the present arrangements. However remote the possibility is, it is important to bear it in mind and to ensure that sufficient safeguards are put in place as the bill moves to the next stage.

The bill will have a positive impact on Scots law and will help to ensure that individuals and businesses that seek to undertake transactions in this jurisdiction do not experience obstacles or delays. I therefore confirm again that the Legal Writings (Counterparts and Delivery) (Scotland) Bill and the stage 1 report have the Scottish Conservatives’ support.

15:52

**Jenny Marra (North East Scotland) (Lab):** I start by apologising to you, Presiding Officer, to the minister and to members for my late arrival in the chamber this afternoon.

I am pleased to open this stage 1 debate for Labour. As other speakers have done, I welcome

the general principles of the Legal Writings (Counterparts and Delivery) (Scotland) Bill, which is important for businesses here.

To date, there has been confusion about whether execution in counterpart is legally binding in Scotland. The bill clarifies that signing in counterpart is a valid way of executing a contract in Scotland under Scots law. That is one of the most important elements of the bill.

I also commend the second key element. The provision that paper legal documents will be deliverable by electronic means, including email and fax, will increase efficiency and flexibility and will make it easier for businesses to contract in Scotland under Scots law.

It is encouraging that the bill largely follows the recommendations of the Scottish Law Commission, which noted that the current law is not serving businesses’ needs in the modern electronic age, when it has been more difficult for parties in different locations to enter commercial transactions. I am sure that the law firms will be pleased to see that their taxi bills for sending their young trainees between offices with contracts will be significantly reduced as a result of the bill.

The bill could be viewed as an inevitable technical change to how contracts are concluded, but it is crucial to note that today’s debate brings to the fore a far more significant matter: it signifies a moment of modernisation that we can grasp and use to enter a new phase of digital progression and business innovation.

Let us look at the sections of the bill that allow contracts to be signed in counterpart. They mean that parties will not have to be in the same location at the same time to sign a contract. Put simply, the bill requires counterparts of the document to be supplied and delivered appropriately. Although the ability to sign in counterpart existed before, the clarification and reinforcement under the bill will make forming contracts—and therefore doing business—much easier.

As the Conservative spokesperson and the minister said, that will also prevent businesses from moving to English law at the last minute. None of us wants that for businesses in Scotland, but the practice was becoming increasingly common when all parties could not be present in the same location at the time of signing.

The bill will bring Scots law into line with many other international jurisdictions, as Margaret Mitchell said, including England and New York, which are the two biggest legal centres in the world. Crucially, they do more business than anywhere else. The bill will make it more attractive to do business in Scotland.

In its submission to the Delegated Powers and Law Reform Committee, Dickson Minto WS said:

“The Bill becoming law would represent an immeasurable improvement to the process of the execution of documents in Scotland. The Bill will provide greater flexibility to businesses and improve the speed at which transactions are completed.”

Thus, signing contracts using counterparts will not only increase efficiency, but will make it easier to form, deliver and execute contracts in Scots law.

The second part of the bill addresses electronic signatures, which will improve the efficiency of the contractual process, make the important signing of the document the centre of the process, and dispense with matters such as location, calendars, travel and accommodation costs.

Digital modernisation is key for Scotland. We have discussed the matter many times in the chamber. We can see why when we look at countries such as Estonia, which is now widely recognised as being one of the most tech-savvy nations in the world. It made innovation policy a political priority and paired it with initiatives including giving its population free access to wi-fi. Similarly, Finland’s recovery from its deep depression of the early 1990s was achieved by putting technology innovation at the heart of its response and by maintaining spend on technology in the face of wider cuts.

The Legal Writings (Counterparts and Delivery) (Scotland) Bill paves the way for time and cost savings for businesses entering contracts in Scotland, whether it is a business that provides services to another business or a business that provides services to individuals who are buying houses.

An interesting innovation that the Law Society of Scotland has been working on illustrates the legal world’s keenness to embrace what the bill outlines. That innovation is a smart-card secure scheme, which registers the secure digital signature and then allows practising solicitors to sign documents and contracts entirely electronically, and to receive signatures from others knowing that they have come from a trusted professional system. An increasing number of solicitors are registering with that scheme. The aim is that roll-out will be completed by November next year. That scheme and the proposals in the bill allow us to go forward with confidence about avoiding fraud and error as much as possible.

As well as making business easier, the bill will bring numerous other benefits. I hope that, together, we can build on them with consensus across the chamber.

Labour is pleased to support the principles of the bill at stage 1, and we look forward to its passage through Parliament.

**The Deputy Presiding Officer:** We now turn to the open debate. Speeches should be of about seven minutes, please. There is time in hand.

15:58

**Stuart McMillan (West Scotland) (SNP):** Thank you very much, Presiding Officer. You are generous with the time.

I add my thanks to those of the convener of the Delegated Powers and Law Reform Committee, Nigel Don, for the assistance that the committee received when we scrutinised the bill.

As we have heard, the bill is a first for the Parliament, and going through the process has been very interesting. 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.

The bill has been non-contentious but, as with any bill, there have obviously been elements on which there has been conflicting evidence. As we have heard, the evidence that we received from the Faculty of Advocates in particular certainly seemed to be at odds with the evidence from other interested parties. That was helpful because it provided an opportunity for further debate as the committee went through the bill process. It certainly helped with our private discussions when we were putting together our report, and it allowed us to question the bill and its stated aims a bit more.

I believe, however, that the bill will be a welcome addition for businesses in Scotland. We heard from a number of people evidence that some business transactions end up taking place under other jurisdictions’ law—predominantly English law, and sometimes New York law. Scotland has lost business as a consequence of a system that does not provide flexibility. The bill will not change the world, but it aims to rectify that problem by making this aspect of Scots law more flexible and competitive so that more business can take place in Scotland. At the very least, the bill will make it easier and cheaper for transactions to take place under Scots law, which we all welcome, I am sure. The committee was not sure how much additional business will be retained in Scotland, but we all believe that it will happen and that aiding businesses in this country will result in economic benefit.

Paragraphs 158 to 174 of the Delegated Powers and Law Reform Committee’s report discuss an electronic repository. That is an idea that first came to my attention a couple of years ago when I was a member of the Economy, Energy and

Tourism Committee and we were scrutinising the Land Registration etc (Scotland) Bill. The concept of an electronic repository for storing legal documents independently received some attention then and again when we were going through this bill. The DPLR Committee supported the concept and the suggestion that it should be maintained by Registers of Scotland. That element—an independent body maintaining the electronic repository—is important. We certainly considered an electronic repository to be a useful tool for storing records of contracts. It could also be a means of executing documents by way of electronic signature, which my colleague Stewart Stevenson was keen to highlight regularly as we scrutinised the bill.

However, the committee thought that two main issues required to be addressed. The first was that sufficient safeguards need to be in place to ensure security. In the fast-moving world of information technology and software development, that could be a challenge, but it is not insurmountable. Secondly, the committee took the view that if an electronic repository is to be created, there should be no obligation for parties to use it—it should be their choice. We heard evidence of examples where a firm might cease trading and its documents might no longer be available. We have also heard today about some activities that have taken place in the past that have not been thoroughly legal, to say the least. We were very much aware that although we might well be talking about a very small number of cases, the situation could create large problems. That was one of the strongest supporting comments for a central repository.

The bill is an important piece of the jigsaw of facilitating a more modern business legal system, and it aids the Scottish Government's digital economy policies. Scottish business transactions will be more efficient and there will be a positive environmental impact as business representatives will no longer need to travel all over the world to sign contracts.

I welcome the bill and I am sure that it will have a positive impact on the legal side of things and on business in Scotland. It will mean a better economic return; a more prosperous Scotland can come from that. I welcome the general principles of the bill.

16:04

**Margaret McCulloch (Central Scotland (Lab)):** This is the first time that a recommendation of the Scottish Law Commission has been taken forward in this way, with the bill being brought to Parliament by the Delegated Powers and Law Reform Committee. The bill that the committee is asking Parliament to consider is one that my

Labour colleagues and I are inclined to support at stage 1.

Not only do I believe that the general principles of the bill are sound, but I believe that the work of the SLC and the committee demonstrates that there is a clear need to modernise contract law in Scotland. In supporting the bill, I hope that Parliament can give clarity—as has been asked for before—on the concepts of counterparts and delivery, and that it can produce a legal framework for contracts that reflects changes in technology and business practice. I also hope that we can make a wider contribution to the Scottish economy.

I congratulate the SLC on its work on the bill. It has undertaken an informed and extensive consultation. Its work has highlighted the need for the bill and has demonstrated that there is support for reform across the legal, academic and business communities. In its work, the SLC identified two problems with commercial and contract law in Scotland, which it believes could be dealt with through Parliament's new approach to law reform. First, it highlighted the need for clarity in respect of counterparts. It was not clear whether a legal document could be brought into effect if it was signed in counterpart. In other words, the commission was not clear whether it is acceptable under current Scots law for different parties to sign identical copies of a contract instead of signing the same physical copy of the document.

Secondly, the SLC called for clarity in respect of the law on delivery. It is not clear whether a paper document, such as a traditional written contract, can be said to have been delivered if it is sent and delivered electronically.

The view of the SLC is that the current law is not fit for purpose because the letter of our law in Scotland is at variance with common practice and with contract law in neighbouring jurisdictions. The SLC even found evidence that businesses are sometimes choosing to use English law instead of Scots law to govern agreements because counterparts are permitted under English law. That disincentive to using Scots law, coupled with legal uncertainty over methods of delivery, may well be doing harm to our economic competitiveness.

By allowing the use of counterpart signatures as an option to execute a contract, and by allowing contracts to be delivered electronically, we could help businesses to make time-cost savings and reduce travel and accommodation costs.

We should bear in mind that a limited number of people within a business will be authorised to sign legal documents on behalf of the company. I also emphasise that the costs to businesses that are outlined by the SLC are costs that they would not face in jurisdictions where contract law has

already been modernised and where laws take sufficient account of technological change.

Just as we want to be clear about what the bill will do to modernise our laws in respect of counterparts and delivery, let us also be clear about what it will not do: it will not mandate use of electronic signatures, and it will not change the law on fraud. In both civil and criminal law, the existing rules on fraudulent signatures will remain in place. The bill will not change the standard of proof that is required in relation to execution; the general rules on whether a person who claims to have signed a document has actually done so will remain the same.

The bill will not alter general contract law. Issues such as whether a contract has been formed and the rules on breach of contract, damages and so forth will not be affected by the bill. It will not create an electronic repository for legal documents. Although that was a recommendation of the SLC, it is an area of work that the Scottish Government is keen to pursue once the bill has been passed.

The bill will simply bring the law up to date. It will allow for contracts to be signed in counterpart, as is acceptable in other jurisdictions, and it will allow for paper contracts to be delivered electronically.

With the bill, we have an opportunity to remove a disincentive to conducting business using Scots law, and to make it easier for parties to enter commercial contracts and transactions. With small but significant changes that are largely uncontroversial, we can bring contract law up to date and make it fit for purpose. It is for those reasons that I intend to support the general principles of the bill.

16:09

**Mike MacKenzie (Highlands and Islands) (SNP):** I am pleased to have the opportunity to speak in the debate, because the work of the Delegated Powers and Law Reform Committee is seldom properly recognised. It is unlike any of the other committees of the Parliament, because it does not deal with policy. As a consequence, few visitors and even fewer journalists attend its public meetings—a bit like now in the chamber. We members of the committee are therefore perhaps the least scrutinised of the scrutinisers in the Parliament.

**John Mason (Glasgow Shettleston) (SNP):** I feel for the committee given its lack of interest from the public, but does the member feel that that is inevitable and that perhaps some of the most valuable work that is done in the Parliament is not the most seen by the public or the most exciting?

**Mike MacKenzie:** I absolutely agree with Mr Mason. Indeed, I hope to make that point while I have the opportunity to speak about the committee.

The Delegated Powers and Law Reform Committee, as it is now known, still mainly deals with subordinate legislation, which is where our legislative teeth are often found buried rather than on the face of bills, although that is where they are most often looked for.

The committee is sometimes thought to be a dry one that deals with a dry subject, but I have found it to be otherwise. I have found its focus, clarity of thought and discipline to be demanding and instructive. I have found that the words in our Scottish statutory instruments are often words of power, and they are weighed by the committee in an almost poetic search for intent and purpose. I have sometimes said in the committee that it reminds me of a remark that is attributed to Oscar Wilde, who said that he had worked very hard on his latest poem one day—in the morning, he took out a comma and, in the afternoon, he put it back in again.

I have found the committee's deliberations on appropriate levels and forms of scrutiny, clarity of meaning and the width and breadth of powers to be at times almost philosophical. Despite the best intentions of generations of lawyers, the language of our law is much more than the language of mere mathematics, because it often goes beyond logic and is capable of carrying objective and subjective meaning. That is where the challenge for and interest in the committee often lies. We filter our legislation through the finest of sieves.

It has been interesting to see the committee's approach to its first piece of primary legislation—the Legal Writings (Counterparts and Delivery) (Scotland) Bill. I pause at this point to pay tribute to our clerks and legal advisers, who brought the same disciplined and painstaking approach to bear as they do to all our work. I commend them not just for their grasp of the law and impeccable skills of reasoning but for a most important ability—the ability to explain their thoughts in plain terms for us, the laypersons, who in the main make up the committee.

**Nigel Don:** I am very much enjoying the member's speech and I am grateful that he is heaping praise on those who do much of the work for us. Does he share the same enthusiasm for the work of the Scottish Law Commission? It 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.

**Mike MacKenzie:** I am happy to agree with Nigel Don. I note that the Scottish Government



has said that, because of the work and consultation that the Scottish Law Commission did, it is not necessary to do further consultation. That is the stamp of approval on the work of the Scottish Law Commission and particularly the way in which it has approached the bill.

I ought to say a few words about the bill, although I see that I am beginning to run out of time. By facilitating execution in counterpart and the electronic transmission of documents, the bill simply brings an aspect of Scots law up to date. In 2014, the part of our law that is within the bill's scope will once again become fit for purpose.

The merits of the bill are self-evident—they are obvious. The committee was unanimous on that, as were almost all our witnesses. Only the Faculty of Advocates perplexed us by maintaining that the bill would give rise to an increase in fraud. We were perplexed only in so far as we made a genuine attempt to understand the argument. In the end, we were not persuaded. The bill neither adds to nor removes the possibility of fraud.

It is not a bill of grand and sweeping intent. It is not radical. It is not controversial. It is perhaps not even all that exciting. However, I commend it to members, because modest improvements are often worth while and important.

16:16

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** Mike MacKenzie is being grossly unfair to the committee. 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. I will let members go and read for themselves the instrument, which will go to the policy committee shortly. 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.

**John Mason:** How can it be 120 per cent?

**Stewart Stevenson:** No, no—this is not the place. John Mason needs to go and read the relevant instrument. I can tell him that the figure is on page 7 and the explanation is in small print—six-point print—on page 10, if he can understand it when he gets there. He should believe me that it is interesting.

The point is that we deal with the minutiae, and the minutiae on contracts often have profound effects for business and life in Scotland and beyond.

Over the years, I have dealt with a number of contracts. I quickly jotted down the jurisdictions in which I have signed contracts and found 10, ranging from Delaware to Norway. I have been in

San Francisco only once in my life and that was simply to sign a contract. I was in the United States for a grand total of 14 hours and slept for 10 of them because that was overnight.

A friend of mine got up in the morning, got the plane down to Heathrow, got on Concorde, met somebody airside at Kennedy airport, signed a contract, got back on the same Concorde, flew back to Heathrow, got the plane back to Edinburgh and was home an hour earlier than usual, but what a waste of time and effort it was to go all that way to sign a contract. This modest little bill will have profound and useful effects.

Jenny Marra mentioned Estonia. I am surprised that she did not namecheck Skype, which was written by software engineers there. That country has considerable things to offer in the electronic world.

The bill will move us a little bit towards electronic signatures and electronic repositories. The Law Society is producing its electronic card, which will go out to everybody in about a year. It remains the case that the card will be shared among people in a firm, so there will not be individual certainty about who might have used it to sign something electronically. The bill takes the issue forward with its emphasis on electronic signatures but does not take it all the way.

**Mike MacKenzie:** Does Stewart Stevenson agree that the Scottish Government is due praise for implementing across the Highlands and Islands the backbone for a fibre optic broadband system that will allow such technological improvement to our law to take place? Does he also agree that the United Kingdom Government requires to do more work to roll out 2G, 3G and 4G across the Highlands and Islands and the rural parts of Scotland?

**The Deputy Presiding Officer:** I can give Stewart Stevenson an extra minute or two to his seven minutes, to make up for the interventions.

**Stewart Stevenson:** That would be helpful, Presiding Officer, although I might need about an hour to deal with the scope of that intervention. I note that the Irish Government has this very day committed itself to delivering 30 megabit broadband to every location in Ireland, so perhaps we have a little bit to travel. I would welcome 2G, 3G, 4G or any G at home; I currently have none. It is very important.

I will return to the subject of the bill—I am sure that you would wish me to do that, Presiding Officer—and electronic signatures. Electronic signatures are useful in a variety of ways, as they enable people to sign a document and if anything in the document is changed—even if a dot or comma is missing or a single letter is changed—the signature becomes invalid. That kind of

technological approach will give us certainty in the future.

Lawyers are quite reasonably conservative—with a small “c”—about adopting technology. It is very straightforward to describe public-key cryptography, with the appellation of Rivest, Shamir and Adleman—the three American mathematicians who developed the system that we generally use today. In fact, it was developed by Government Communications Headquarters some years earlier but kept secret. It is a system of cryptography that can be described on a single page, but it takes a lifetime of study to understand. It involves the multiplication of two very large prime numbers together and then a matrix formation, so that we can have one key for locking—for signing—and a different, secret key for unlocking. Keys do not have to be shared with anyone. That is the essence of a secure system.

The system is not new. Mary, Queen of Scots used the system; she had a little casket with which she corresponded with her lovers. After putting a message in, she used a key to lock the lock and then sent the casket to her lover. He locked another lock with his private key and sent the casket back to her. She then unlocked her lock and sent the casket back to him. He unlocked her lock and at last he could access the message. The key was never shared with anyone. That is exactly how electronic signatures work, except that instead of physical keys that the owners keep secret we use electronic keys.

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, as well as being useful for electronic signatures.

There is an opportunity for Scotland beyond what we are doing today, such as encouraging Registers of Scotland to develop a secure repository based on such technology, with contracts held there during their development and people able to access them securely to sign, annotate or amend. That gives us security against the failure of companies, so that contracts do not get lost over the years to come; it gives us security

of control and access, with everyone working off the same document; and it could give us significant commercial advantage.

Scots law has been around for a long time. It has stood the test of time. The Scottish Law Commission has usefully helped us to make progress and to bring us up to the mark of other jurisdictions. The debates and the discussions, as well as the information from witnesses that we have had in the committee, show us that we can do more. I hope that we take the opportunity to do that and that we pick up the challenge of secure signatures and encryption because, in mathematical terms—members can look this up—this is an NP, or non-deterministic polynomial time, problem. No one knows how to solve it, no one has yet broken such a key and no one shows any sign of doing so.

16:26

**Richard Baker (North East Scotland) (Lab):**

The debate has been interesting—perhaps much more interesting than many of us had expected when we came into the chamber. It is impossible to follow or to compete with Stewart Stevenson’s tales of transatlantic adventures, da Vinci code-style mathematical problems and—this was an interesting addition to the debate—“The Simpsons”. We always enjoy Mr Stevenson’s ability to spice up a debate of this nature.

It has been a pleasure to be part of the Delegated Powers and Law Reform Committee as, through its first considerations under its new responsibilities, it has considered the bill. The bill has proved to be a good candidate to initiate that new role because, as we have heard, there has been a great deal of consensus around the legislation and, although it is narrow in its compass, it will have a beneficial effect for legal practice.

As others, including the minister and the convener, have done, 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. For too long, bills that had been the subject of considerable consultation and a great deal of work by the commission were not taken forward and were left to gather dust. The commission was left reliant on members coming forward to take up the bills individually, as my colleague Bill Butler did successfully in the previous session with the Damages (Scotland) Act 2011, which I am sure that the minister remembers.

Unfortunately, that was a relatively isolated example. 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.

I join others in congratulating the convener and the committee clerks and advisers on their stewardship of the process. I have perhaps not found as many moments of philosophy and poetry in the committee's deliberations as Mike MacKenzie did. I congratulate him on doing so. He clearly sees debate over the definition of quantities of corned beef in a different light from me. However, it is important to recognise the committee's good work, so it is right to say that this is an opportunity to reflect on that. In this process, the committee's work will be beneficial not just to Parliament but to the quality of law.

As others have said, the evidence that we took was almost unanimous in its support for the bill's proposals. During our deliberations, I asked witnesses about the potential for fraud, to which members have referred, and the Faculty of Advocates expressed concerns, particularly in its oral evidence. All other witnesses were clear that they did not see the legislation opening up greater potential for fraud in transactions.

As we heard from witnesses, if individuals are determined to commit an act of fraud in such transactions, they will find a way of doing so, regardless of whether the bill is passed. We have not heard evidence of a higher number of examples of fraud or error in England since execution in counterpart and the electronic delivery of documents were allowed there. The issue was best summed up by those who said that it will neither reduce nor increase the risk of fraud if we pass the bill.

The other issue that I pursued with witnesses when we took evidence on the bill was the use of pre-signed signature pages, in relation to which specific concerns were raised about the potential for fraud. Witnesses raised concerns not about the legislation itself but about the concept of the use of pre-signed signature pages. As the policy memorandum makes clear, the bill does not change the existing position on that, but nor does it prevent a pre-signed signature page from being attached to a different document, provided that it can be shown that the party concerned clearly authorised or mandated that in advance, or subsequently ratified what had been done, with full knowledge of the content of the new document.

Witnesses expressed some unease about the use of pre-signed signature pages in general. When I asked Dr Ross Anderson of the University of Glasgow about this issue, he said:

"As a solicitor, I would never use them. ... It seems to me that the authorisation that has been given by the client in that situation is essentially a power of attorney to the

solicitor to sign the document ... I find the use of pre-signed signature pages odd."

However, he also acknowledged that the bill might be taking the approach that it is

"simply to reflect some of the practices that are going on in England and ... to be facilitative for cases that may arise."—*[Official Report, Delegated Powers and Law Reform Committee, 7 October 2014; c 9-10.]*

The committee has reached the right conclusion on this issue, given that the legislation is intended to aid flexibility for legal practice in Scotland. We concluded that, although there might be misgivings about the use of pre-signed signature pages, which we recognise and mention in our report, there might also be circumstances in which their use is justified.

It would be wrong to overestimate the economic impact of the legislation for our legal services industry, but I think that it is beneficial, even if it is narrow in its effect. It is right that we heed the advice of the Law Society that the existing practice of signing contracts under Scots law is in need of updating. The society informs us that parties to a contract are switching to English contract law at a later stage because it is more convenient for the execution of contracts. If by passing the bill we can ensure that contracts can in future be concluded under Scots law, clearly that would be beneficial for our important legal services industry, and that is why it is right to support the bill today.

16:33

**John Mason (Glasgow Shettleston) (SNP):** As members will notice, I was not a member of the Delegated Powers and Law Reform Committee, and I think that I am one of the few back benchers speaking today who has not been very involved in this subject. However, I spent some time this morning reading about it.

It had been suggested that it would be useful to have somebody from the Finance Committee speaking on this subject, but I do not think that there are a huge number of financial issues in the bill. It struck me that we could have had somebody from the Education and Culture Committee, the Public Petitions Committee, the Justice Committee or the Health and Sport Committee—or one of the various other committees—speaking on the subject.

However, it seems clear to me that the process of signing documents has become somewhat outdated, so I very much welcome this move to improve the system for executing and delivering documents. I have often been part of one of those round-robin processes in which one hard copy gets posted to somebody for signature, who eventually gets it signed, possibly with a witness, and returns it to the firm of solicitors, which then

sends it out to the second person for signature—and so the process goes on. Clearly, all that takes a considerable amount of time. We all expect things to happen a little bit faster these days.

On that point, I make the general point that there are other areas of legal process that could do with a bit of modernisation. I very much welcome the fact that a relative outsider is becoming the Cabinet Secretary for Justice. Perhaps he will come forward with more proposals about how to update and improve the legal process. Other professions and trades have to meet very tight deadlines nowadays, such as auditors in my profession who have to complete a company audit within a small number of days. It seems to me that sometimes there is not a strong enough emphasis on deadlines that could be in place for court cases and other legal processes. The bill is clearly a step in the right direction in that area.

There are two arguments that most convince me of the need for legislation, having looked at the committee's report. One is that Scots law could be losing out to other jurisdictions and the other concerns the potential cost savings, and time savings, that could result from the updated procedures.

On the second of those points, I suspect that we must accept that the potential cost savings are estimates, and time will tell whether they have been over or underoptimistic. The Faculty of Advocates certainly seemed to take that view, as quoted in paragraph 73 of the committee report:

"Most of the contracts that are made under Scots law are smaller-scale contracts, which are made not in Glasgow, Edinburgh or Aberdeen but in small towns around Scotland. In such cases, we suspect that the saving of cost and the convenience that are envisaged as a result of the electronic execution and exchange of counterparts, instead of simply having people come into the office to do all that, will be limited."—[*Official Report, Delegated Powers and Law Reform Committee*, 30 September 2014; c 22.]

**Mike MacKenzie:** Does John Mason feel that the new legislation might help to meet our climate change targets? Mr Stevenson's worldwide journeys merely to sign contracts may not be necessary in future.

**John Mason:** If it cuts down air travel, that is very much to be welcomed. Clearly, travelling anywhere takes time, even if it is locally and by car. However, I am a little bit doubtful about one of the suggestions that I noted in relation to the bill, that less paper might be used, which I accept would also help the environment. Throughout my working life, I have heard many suggestions that less paper would be used in offices. Sadly, that has not tended to be the case. My suspicion is that, if there are six people signing a document,

we will still end up with six copies, if not more, all signed by different people.

The other argument that convinces me that the bill is important is the suggestion that Scots law could be losing out, although I accept that parties to some contracts will always prefer to use the law of a larger jurisdiction, such as England or the United States. I noted the evidence given by Tods Murray, which is quoted in paragraphs 46 and 47 of the committee report, and which I thought was quite convincing. It states:

"It has been suggested that the lack of a law on counterparts can cause damage to the reputation of Scots law internationally. Tods Murray's written submission suggested that—

'The existing Scots law, particularly the lack of counterpart execution as a valid form of execution, can cause problems in terms of transaction logistics and requirements as well as giving a poor impression of Scots law and Scotland generally as a place in which to do business.'"

That latter statement is what really struck me. Although contracts may account for only a small part of what is happening in Scotland, if there is the impression that Scottish business as a whole is not up to date, not efficient and not doing things in the best possible way, I would be extremely concerned about that, quite apart from the whole legal process.

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.

I note the committee's study of the potential for fraud and error in paragraphs 106 to 129. I was going to read some of that more extensively, but I will not do that.

**The Deputy Presiding Officer:** Please draw your remarks to a conclusion.

**John Mason:** I am happy to do so.

Paragraph 110 of the report points out that fraud and error can "always occur". I experienced that myself some years ago, when a rogue photocopier salesman forged my signature on an agreement to buy a new copier.

As noted in paragraph 111 of the report, the minister acknowledged that there is an existing risk, and that raises the question of how we deal

with risk. I suspect that there are parts of the legal profession that want no risk whatsoever, but I do not believe that that is what we are aiming for. As in other areas of life, we want to manage and minimise risk, but we must weigh up the practicalities and costs of reducing risk beyond a certain level.

**The Deputy Presiding Officer:** I am afraid that you really must close now.

**John Mason:** Therefore, I will close.

**The Deputy Presiding Officer:** We come to the closing speeches.

16:40

**John Scott (Ayr) (Con):** I thank members for the quality of this afternoon's debate. It is clear that the Legal Writings (Counterparts and Delivery) (Scotland) Bill has achieved cross-party support, and I reaffirm that the Scottish Conservatives are supportive of its general principles at stage 1.

There are, however, three points that I wish to address. The first point is the potential benefits of the bill to the business community, legal practitioners and those individuals who seek to use Scots law for transactional purposes. As we heard in evidence from the minister, Fergus Ewing, and from Margaret Mitchell, there is uncertainty in Scots law at present as to whether execution in counterpart is permissible. That uncertainty has acted as a deterrent for businesses and the legal profession.

In addition, parties are often unable to undertake the time-consuming, impractical and costly signing ceremonies that are currently required. Further, it is unclear whether a traditional paper document can be delivered electronically. As a result, in many cases the relevant parties have opted instead to use English or New York law to remove any doubt, which has been to the detriment of Scots law.

The proposed legislation will help to ensure that those who wish to operate under Scots law can do so, by removing many obstacles and constraints. Although we must manage expectations regarding the potential increase in transactions under Scots law that may arise from the bill, the evidence suggests that measures to put execution in counterpart on a statutory footing will give businesses and ordinary individuals the confidence to stop exporting contracts to English law and elsewhere that would otherwise be governed by Scots law. That is an extremely positive and welcome development.

I turn to the risk of fraud, which has been raised by other members and by the Faculty of Advocates. The faculty commented that execution

in counterpart could lead to different parties signing different versions of a document, either knowingly or unknowingly. Furthermore, the faculty expressed concern that parties will be able to exchange signature pages, as opposed to counterparts in their entirety.

Expanding on those concerns, Robert Howie QC explained:

"If one permits execution by the exchange of the back pages of a contract, each signed by a particular party, plus the front page, it is all too easy for the rogue or fraudster to amend the critical stuff in the middle of the sandwich."—[*Official Report, Delegated Powers and Law Reform Committee*, 30 September 2014; c 22.]

Further, the faculty touched on the possibility that such a scenario could lead to an increase in instances of parties coming to court in order to resolve disagreements over the content of the documents. For large transactions, where millions of pounds are at stake, the potential for deception should not be ignored.

However, on balance, and based on the evidence that we heard over a number of sessions, it seemed to me—and to committee colleagues—that the potential for fraud and error is no greater than that which already exists under the current system in Scotland and in jurisdictions where execution by counterpart is commonplace, such as England and Wales, where incidents of fraud are relatively few. Nevertheless, it is worth while bearing in mind the faculty's concerns as the bill moves through its various stages in Parliament.

The bill does not include the SLC's recommendation that a central electronic repository should be established. However, that idea was broadly supported by witnesses in their evidence to the Delegated Powers and Law Reform Committee, and we felt that the concept should be explored further—always providing that adequate safeguards could be put in place and that the technology used would be suitable, adaptable and enduring.

I therefore welcomed the then Minister for Energy, Enterprise and Tourism's update earlier this month, when he indicated that the keeper of the registers of Scotland has expressed interest in exploring the creation of an electronic repository for the execution and preservation of documents. I understand that preliminary discussions between Registers of Scotland and the Scottish Government will be set in motion early next year. We will await the outcome of the discussions with keen interest. We are particularly interested in knowing whether new legislation will be required to bring the initiative into effect, given that it might allow for the execution of documents as well as their preservation.

I reiterate that the bill is helpful and will benefit the business community in Scotland, as well as the legal profession and individuals who seek to carry out transactions under Scots law. That is very much to be welcomed.

I thank everyone who gave evidence to the committee, particularly the people who appeared in person and the Scottish Law Commission. I also thank the committee clerks. I look forward to the bill becoming law.

I commend Mike MacKenzie, who managed to get through about four minutes of his speech without referring to the bill at all. Stewart Stevenson should beware; his role as the Parliament's best filibuster might be under threat.

16:46

**Jenny Marra:** This has been an interesting and, at times, entertaining debate. I thank members for that.

When I saw that we were to discuss the bill this week, I thought that the debate might not be highly popular or populated, but then I remembered the importance of the issue. I have 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. In our fast-moving technological world, such a process seems to be very slow, so I congratulate the minister on introducing the bill so that processes can be neatly and more quickly concluded.

Members mentioned climate change. I was glad to hear that people might cut down on flights, and I am sure that Patrick Harvie and the new minister Aileen McLeod will be glad of the contribution to the climate change targets. However, I am not convinced that there will be less paper in legal offices around the country. Anyone who has been in front of a lawyer's desk will know how much paperwork lawyers seem to have in their offices. There is a challenge to the legal community in that regard. The Parliament is allowing it to go electronic, and so it should do.

I was half hoping for a little lecture on Roman law from the minister this afternoon, given how learned he is in the matter. When I read the bill and the briefings on it, I was reminded of my interest in the legal concept of delivery. The Scots law concept of delivery, whereby something is not simply handed over but delivered with the intention of making things happen, has its origins in Roman law. Therefore, it is interesting that in 2014 we are debating whether email or facsimile, which we do not even use any more, constitutes delivery according to that ancient legal concept. There was still ambiguity in our law about delivery until the bill came forward.

**Stewart Stevenson:** To illustrate how cautious professions can be, in 1881 the Bank of Scotland installed its first telephone, five years after the invention was first demonstrated, but the bank's board took the decision to do so on condition that the telephone not be used to conduct business. I suspect that some of that attitude is still around in our professions today.

**Jenny Marra:** Indeed—that is very true. The attitude is that, if something is to be binding, it must definitely be on paper. The minister will probably be able to explain the ancient concept of delivery far better than I can.

This has been a useful debate on the bill, which covers the important aspect of counterpart signing for contracts and, in a very modern and up-to-date sense, delivery. Tackling the barriers of inefficiency for business means that businesses can enter into contracts and work better together to improve the economic landscape of Scotland.

I am very pleased that the committee is supportive of the bill's general principles. I congratulate the committee, the clerks and the convener on taking the bill through stage 1. I wonder whether the minister can indicate in his closing remarks whether the Government is likely to lodge amendments at stage 2 to address the questions that were raised during evidence to the committee at stage 1.

The bill is a very good piece of legislation that will help business. I think that we have all outlined some practical examples in that regard. I am very pleased that there is consensus on the bill across the chamber.

**The Deputy Presiding Officer:** I call on Fergus Ewing to wind up the debate. Minister, you have until 5 o'clock.

16:53

**Fergus Ewing:** In 15 years in the Parliament, I cannot recall there having been a debate in which there has been such a marked absence of any significant controversy. However, 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.

It is also a tribute to the work of the clerks of the Delegated Powers and Law Reform Committee, the Parliament as a whole and the members of the committee, ably convened by Nigel Don, who earlier led the debate for the committee. That solid hard work and application has produced at stage 1 a piece of legislation that appears to lack significant criticisms so far as the committee's conclusions are concerned.

I should accept Jenny Marra's invitation to comment on some of the key questions. She is quite right on that, although she is quite wrong that I am an authority on Roman law. My recollection is that, despite the excellent tuition of the learned professors and lecturers at the University of Glasgow, I only barely scraped a pass at that.

**Members:** Oh!

**Fergus Ewing:** It has taken several decades to confess that, but better late than never.

Many members asked whether I think that the suggested electronic document repository would be helpful—John Scott alluded to that—and I believe that the idea is worth exploring. Following my appearance before the Delegated Powers and Law Reform Committee at stage 1, I wrote to the keeper of the registers of Scotland seeking a general update and a firmer timescale by which he would be in a position to have preliminary discussions. They should take place early next year. Of course, we have the books of council and session, as members will be aware, in which documents can be registered for preservation and execution. That is a very useful facility that is available to Scots lawyers.

Views on electronic signatures were mooted during the debate, not least by Stewart Stevenson. The use of such signatures is still in its early stages, and market conditions will effectively dictate whether more use is made of them in the future. The bill will not restrict growth in that area.

What are the benefits of the bill? It is difficult to be clear about whether the benefits will be significant, but most members are confident that it is a valuable piece of legislation. Jenny Marra said that she had been lobbied on it, and Margaret Mitchell and John Mason gave some examples of potential benefits. There will be circumstances in which it will be possible for Scots law to be used in the future, as a result of the bill, in which it cannot be used presently.

The bill may also cut down the costs of travelling to meetings and the time that busy people have to

spend travelling. Jenny Marra referred to Dickson Minto and the evidence from Colin MacNeil, and John Mason referred to the evidence from Tods Murray. It is fairly likely that there will be financial benefits and time benefits from the bill.

**Jenny Marra:** I was reflecting on the matter before the debate. Does the minister believe that there might be an increase in the amount of business that is done in Scotland as a result of the bill, or does he believe that the bill will simply make the existing business a bit easier?

**Fergus Ewing:** I think that it will be a bit of both. I am happy to agree entirely with everything that Jenny Marra says—I do not think that I have ever uttered that sentence before in the chamber.

The serious issue that John Scott quizzed me on in the committee was the evidence from the Faculty of Advocates signifying that the bill may lead to a greater risk of fraud or error—I think that it said that error was more likely. We spent a considerable amount of time on that, and I spent a considerable amount of time with Scottish Government officials who provided me with some excellent briefing material on the subject. We concluded that the bill will not change the substantive law.

Fraud exists because there are criminals in the world. The problem is not unique to execution in counterpart, which has been used for decades in England with apparently no ill effect. Clients also place their trust in solicitors, which tends to minimise the possibility of such things happening. Professor Rennie also made the point that, since 1970, documents have been signed on the last page only.

For those reasons, after having looked carefully at the evidence from the Faculty of Advocates, I was persuaded that there is no increased risk. However, to pursue a belt-and-braces approach—which is always sensible for a minister—I am writing to the Faculty of Advocates to ask whether, in the light of reading the *Official Report* of the debate, it has any further comments to add. I will copy my letter to the Lord Advocate and the president of the Law Society of Scotland, to boot.

Reference has been made to some of the lighter comments in the debate. In the short time that is available, I will turn to those. Mr Stevenson gave us not so much a speech as a travelogue that took us from Delaware to Norway and around the globe sustained by an improbable diet of overstrength corned beef. He also ensured that Mary, Queen of Scots made an unexpected entrée into the debate—something of sub-tangential relevance equalled only by his reference to Homer Simpson.

**John Scott:** Does the minister accept that, in Mr Stevenson's speech, the one obvious and

current element that was missing was the contribution of Turing to cryptography?

**Fergus Ewing:** I am sure that he will put that right in due course. Mr Stevenson is the human equivalent of Google or Wikipedia, the difference being that, while we ask Google or Wikipedia for information, Mr Stevenson just provides it whether we want it or not. [*Laughter.*]

**Neil Findlay (Lothian) (Lab):** The only difference is that, occasionally, Wikipedia is correct.

**Members:** Ooh!

**Fergus Ewing:** I am not sure that everyone would agree with that. Would Mr Murphy? The debate is fairly livening up.

Mr MacKenzie regaled us with a terrific speech that he admitted was wholly irrelevant. He stood up for the Delegated Powers and Law Reform Committee, the predecessor of which was the Subordinate Legislation Committee. I volunteered for that committee in 1999 and so boring were my contributions that, to get away from me, one of the committee members actually resigned from the Parliament and the clerk left for employment elsewhere.

**The Presiding Officer (Tricia Marwick):** You have 20 seconds left, minister.

**Fergus Ewing:** It was Donald Dewar who said, prior to devolution, that Scotland was the only country in the world that had its own legal system but lacked a legislature. We are indebted to the Scottish Parliament for the work that everyone has done to reform our law, which—prior to the Parliament's reconvening—was something that we could not do for ourselves.



**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**EXTRACT FROM THE MINUTES**

**3rd Meeting, 2015 (Session 4)**

**Tuesday 20 January 2015**

Present:

Nigel Don (Convener)  
Margaret McCulloch  
Stewart Stevenson

John Mason (Deputy Convener)  
John Scott

**Legal Writings (Counterparts and Delivery) (Scotland) Bill:** The Committee considered the Bill at Stage 2.

The following provisions were agreed to without amendment: sections 1, 2, 3, 4, 5, 6, 7 and the long title.

The Committee completed Stage 2 consideration of the Bill.

## Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 2

10:32

**The Convener:** Agenda item 2 is formal stage 2 proceedings of the Legal Writings (Counterparts and Delivery) (Scotland) Bill. I welcome the Minister for Business, Energy and Tourism, who is accompanied by Ria Phillips from the civil law reform unit and Neil MacLeod from the solicitors constitutional and civil law division of the Scottish Government.

We have no amendments to deal with, but under standing orders we are obliged to consider each section and the long title of the bill and to agree to each formally. Before we do that, I invite the minister to make any comments that he wishes to make.

**The Minister for Business, Energy and Tourism (Fergus Ewing):** I have no comments, convener.

**The Convener:** Do members have any questions or comments?

**Members:** No.

**The Convener:** We will take the sections in order and then the long title. Standing orders allow us to put a single question when groups of sections are to be considered consecutively.

*Sections 1 to 7 agreed to.*

*Long title agreed to.*

**The Convener:** That completes stage 2 consideration of the bill. I thank the minister and his staff for coming along, and I thank members of the Scottish Law Commission for coming to witness this historic day. That is where we have got to—I look forward to stage 3.

**Fergus Ewing:** I look forward to more meetings like this. [*Laughter.*]

**The Convener:** Thank you, minister.

I suspend the meeting briefly to enable the minister and his staff to leave.

10:34

*Meeting suspended.*

**EXTRACT FROM THE MINUTES OF PROCEEDINGS**

**Parliamentary Year 4, No. 81 Session 4**

**Meeting of the Parliament**

**Tuesday 24 February 2015**

Note: (DT) signifies a decision taken at Decision Time.

**Legal Writings (Counterparts and Delivery) (Scotland) Bill – Stage 3:** The Minister for Business, Energy and Tourism (Fergus Ewing) moved S4M-12381— That the Parliament agrees that the Legal Writings (Counterparts and Delivery) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).

## Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 3

**The Presiding Officer (Tricia Marwick):** The next item of business is a debate on motion S4M-12381, in the name of Fergus Ewing, on the Legal Writings (Counterparts and Delivery) (Scotland) Bill. This is the first bill under our new rules, which allow certain Scottish Law Commission bills to be scrutinised by the Delegated Powers and Law Reform Committee at stages 1 and 2. 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 bills to be considered in this way.

14:16

**The Minister for Business, Energy and Tourism (Fergus Ewing):** I echo you, Presiding Officer, in acknowledging that the bill is the first to have been considered under the new Scottish Law Commission procedure, so 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. Nonetheless, we must recognise that it 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 thank the Delegated Powers and Law Reform Committee for its detailed consideration of and support for the bill, and I thank other members of the Parliament, academics and those in the legal and business community who have expressed their support for the bill. 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. The late Donald Dewar often alluded to that in saying that, prior to the inception of devolution, Scotland was the only country in the world to have its own legal system but lack a legislature.

These views are widely shared across the parliamentary spectrum, and in the passage of the bill we have seen the process working well. 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.

I thank the Scottish Law Commission for the sterling work that it has done in producing a report that has met with widespread support. It makes the task of legislators much easier when the thoroughness and diligence of the commission results in a report that commands such

widespread support, which has continued throughout the bill's passage.

Although the bill is small and modest, it is an important piece of legislation that addresses the current uncertainty as to, first, whether execution in counterpart is competent under Scots law and, secondly, whether Scots law permits legal delivery of a paper document by electronic means.

The bill does two main things. First, it makes specific provision to enable documents to be executed in counterpart. The bill will put it beyond any doubt that that is permissible in Scots law, which there is currently great uncertainty about. The committee recognised that the uncertainty as to whether execution in counterpart is competent under Scots law appears to have led to a drift away from transactions being concluded under Scots law, with parties instead opting to conclude under the law of a different jurisdiction—for example, English law—in which execution in counterpart is recognised.

When Scots law is not used, that might have the knock-on effect of any consequential litigation not being in Scotland. A key aim of the bill is to address that drift. We want legal work to be undertaken in Scotland, in so far as that is possible, and we do not wish the law itself to be a reason why such enterprise should be conducted elsewhere. The bill will give the legal profession and the business interests that it represents the necessary confidence to use Scots law for transactions in which execution of a document in counterpart is part of the process.

Secondly, the bill provides for the facility to deliver—in the legal sense—traditional documents electronically. There are conflicting authorities on whether a paper document may be legally delivered by its electronic transmission to the grantee or to a third party such as a solicitor or agent for the grantee. The bill resolves that uncertainty so that any document that is created on paper may become legally effective by being delivered by electronic means such as email or fax.

I was heartened by the unanimous support for the bill's general principles from the committee and from all the members who took part in the stage 1 debate. Given the bill's permissive nature, it is not easy to quantify how significant its benefits will be, but it is clear that all participants in the process agree that it is capable of delivering benefits.

For example, Margaret Mitchell pointed to the positive impact that the bill would have on Scots law by helping to ensure that individuals and businesses that seek to undertake transactions in Scotland do not experience obstacles or delay. Jenny Marra commended the provisions on

delivery by electronic means, which she saw as increasing efficiency and flexibility.

I believe that the most obvious benefit of the bill relates to transactions in which Scots law is the obvious choice to govern the transaction but is not used because of doubt over the legality of executing a document in counterpart. The bill will mean that parties will have the confidence to use Scots law.

The bill creates a helpful framework for a variety of transactions, including transactions involving parties in remote rural or island areas, where distance makes meetings more of an issue. A clear strength of the bill is that it provides a flexible and light-touch framework. I am sure that it will initially be used mainly by practitioners and their business clients for commercial transactions, but I share the view of one stage 1 witness that, by enabling parties to be more comfortable with the use of Scots law, it creates the potential for innovation to flow from that in the future.

I am grateful to all who gave evidence in writing and orally to the committee. In that evidence, suggestions were made that were worthy of our detailed consideration. We considered them thoroughly and concluded that the bill as introduced was fit for purpose and capable of achieving our policy aim. I take further comfort from the fact that the bill will have completed its parliamentary passage without any amendment; I do not know whether that, too, represents a new chapter in the history of our parliamentary proceedings.

The bill is a compact but vital piece of legislation that will provide certainty in relation to execution in counterpart and electronic delivery of traditional documents in Scots law. We are confident that it will meet a clear and pressing demand from those who are likely to be affected by it and, in my view, its value in bringing clarity, flexibility and certainty to the law cannot be overstated. I hope that future Scottish Law Commission bills that are selected for this process meet with the same level of consensus and success.

It is my duty and pleasure to move the motion. I move,

That the Parliament agrees that the Legal Writings (Counterparts and Delivery) (Scotland) Bill be passed.

**The Presiding Officer:** Thank you, minister. In relation to your question about whether this is the first bill to have had no amendments, I confess that I do not know, but I suspect that it is not. I can think of a couple of candidates, but I will check and will try to answer the question by the end of today's meeting.

I point out to all members that throughout this afternoon we have some time in hand so, if

members wish to take interventions or to expand on the very important points that I know that they have to make, I will be more than happy, as will the Deputy Presiding Officers, to allow them time to do so.

14:25

**Lewis Macdonald (North East Scotland) (Lab):** Thank you very much, Presiding Officer. It is notable that the bill is a departure, but on whether it is the first bill to remain unamended, I and others look forward with great interest to hearing from you, Presiding Officer, before the day is over.

As has been said, the Legal Writings (Counterparts and Delivery) (Scotland) Bill is perhaps not the stuff of legend and it may not even attract many newspaper column inches outwith the specialised press, but as the Presiding Officer and the minister have said, it is significant in its own way. It is the first bill to come through the new process led by the Delegated Powers and Law Reform Committee. I, too, thank the committee for its diligence in that matter.

The new process reflects our shared experience as a Parliament; it is a timely innovation, as the powers and responsibilities of the Scottish Parliament are set to increase substantially in the period ahead. The bill is also in itself a modernising statute in that it seeks to bring the law up to date in the electronic age. The ways in which individuals and companies do business are changing and will continue to change, so it is important that our legal system keeps up with that process.

The case for devolution over the past 40 years has been based on many arguments, both great and small. Since 1999, this Parliament has initiated major changes in social policy, but at the same time we have also made small but important adjustments to statute in order to reflect changes that have been made elsewhere. However, the need to adapt Scots law to reflect change in the modern world has been recognised for even longer; it is now 50 years since the Scottish Law Commission was established to keep the Scottish legal system under review.

Mr Ewing referred to the late Donald Dewar; for Scots lawyers like him and John Smith the process of continuously updating Scots law was an important one, and the Scottish Law Commission was therefore seen as a very valuable institution. The United Kingdom Parliament, in their view, lacked the capacity to deliver in a timely and efficient manner all the reforms of Scots law that would be required. With the best will in the world, the parliamentary time

that is available at that Parliament was simply never going to be enough.

Devolution was, of course, promoted for much wider reasons, but a devolved Scottish Parliament has had the additional benefit of offering a way around delays in enacting law reforms on which everyone was agreed. 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. We have from the beginning passed legislation to clarify the law: for example, to conform to European human rights legislation, which is fundamental to the constitution of the Scottish Parliament and the founding act of Parliament that created it. 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 substance of the bill is also welcome. We live in an age of electronic communication and in an age of ever more rapid technological change. The Scottish Law Commission has rightly identified areas of uncertainty in the application of Scots law to contractual arrangements in this electronic age, and has produced measures to resolve those. This is what the bill is all about: it is about making clear the terms on which signatures of counterpart documents can form a single agreement, and how delivery by electronic means can have the same effect as delivery of a physical document.

As the minister said, there has been little dissent from the terms of the bill, other than through increased clarity being sought. That consensus in support will doubtless be reflected in our debate today.

It is important to recognise that the agreement that is represented by the bill applies to the current position; it would be a mistake to assume that passing the law will be enough to address the impact of technological change on the terms of Scots law. It will do for now, but it is certainly an area that the Delegated Powers and Law Reform Committee and the Parliament will have to revisit before too long. The nature and pace of technological change are such that we will be back here to repeat the process in order to meet the next challenge—whatever it may prove to be—that renders uncertain the existing status of legal rules and procedures.

Even as members of this very young Parliament, we have seen quite dramatic change since the first election in 1999. Those of us who were members at the outset were rightly pleased that the Parliament was ahead of the game in enabling us to communicate by email to respond

quickly to our constituents and to access information from across the Parliament and beyond. However, the scope of electronic networking has grown dramatically since then, and although the Scottish Parliament was trailblazing in its adoption of new technology compared with older parliamentary institutions, we have had to work hard to stay in touch with the people we represent.

For young people under 30, the internet is not just another tool, but is part of the definition of how we live; the internet is as much an accepted part of ordinary life as phones and aviation were a generation ago. If that means that constant change and adaptation are required in Parliament, the same is true for business, both in Scotland and further afield. Marketing is increasingly done online; contracts—thanks to the bill—will go the same way; and the whole idea of how people do business will come to reflect the virtual environment in which we all live and work.

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 focus of Scots law must continue to be on the justice system to ensure that our courts are first and foremost about delivering justice for the people of Scotland. The bill can help to ensure that we also have a legal system that is modern, up to date and fit for purpose, and that our courts can settle business disputes effectively and efficiently and can therefore support Scottish business and the economy.

On that basis, I am pleased to welcome the bill and to offer the support of the Labour Party.

14:32

**Annabel Goldie (West Scotland) (Con):** Insomniacs might regard the bill as the equivalent of Mogadon, but to former lawyers such as the minister and myself, it is beyond fascination, because the substance of the bill is important.

I, too, echo the tributes that have been paid to the Scottish Law Commission and the Delegated Powers and Law Reform Committee, both of which have performed important functions in getting the bill to its current legislative state.

As we have heard, the bill seeks to improve the way in which legal documents are signed and brought into legal effect under Scots law. It is true that there is currently a great deal of uncertainty

among legal practitioners as to whether documents can be executed in counterpart. Sources from the 18th century indicate that it is an acceptable practice, but that is not widely recognised within the legal profession and so in Scotland signing ceremonies, or round robins, of one document have long been the practice for executing documents. However, for multijurisdictional transactions, which are now commonplace in the commercial world, that can prove to be costly and inefficient. It is the case that parties to contracts have often opted instead to use English law or even New York law instead—both of which permit execution by counterpart. That is not a positive place for Scots law to be, so the desire to reform this area of contract law is understandable.

Although I am unconvinced that the bill will give Scots law a so-called competitive advantage, as the stage 1 report highlights, it will put Scotland in a more equitable position with other jurisdictions, as Mr Macdonald suggested.

However, I want to sound a couple of cautionary notes as the bill concludes its passage through Parliament this afternoon. The first is that section 1(4) provides that the single executed document may be made up of all the counterparts or might comprise one entire counterpart, together with the pages on which the different signatures have been subscribed. That may have practical advantages, but if the document is registered in the books of council and session, that means that the remaining counterparts will potentially be lost. That practice has implications if, at some point in the future, a solicitor wants to check the additional counterparts for inaccuracies or inconsistencies, or if it is suspected that there has been a fraud. Indeed, the policy memorandum underscores the importance in practice of preserving documents where the transaction involves “loans or leases of land.” However, under the new regime, the paper trail would not provide a complete picture.

The Faculty of Advocates gave evidence to the committee on that point. It expressed concern that execution in counterpart could lead to different parties signing different versions of a document, either through error or fraud. Robert Howie QC explained:

“If one permits execution by the exchange of the back pages of a contract, each signed by a particular party, plus the front page, it is all too easy for the rogue or fraudster to amend the critical stuff in the middle of the sandwich.”—[*Official Report, Delegated Powers and Law Reform Committee*, 30 September 2014; c 22.]

However, the faculty was in the minority in that view and was unable to provide quantifiable evidence in support of its concerns.

**Graeme Pearson (South Scotland) (Lab):** I presume that Miss Goldie would acknowledge that

the public will expect the Faculty of Advocates, as professionals, to give a high level of attention to the need to administer documents thoroughly in order to ensure that the kind of difficulties to which Miss Goldie alluded will be prevented on as many occasions as possible.

**Annabel Goldie:** I imagine that, in practice, it is more likely to be practising solicitors than advocates who will deal with the transmission of the documents and the advice to clients on executing them. I will come to that in a moment—it is a point well made.

The minister was perhaps not convinced of the need to lodge amendments at stage 2 to provide additional safeguards. I have some sympathy with that view; I understand that the risk of fraud and error is not new. However, even though the faculty's concerns were ultimately dismissed, it is my view that it put forward valid concerns.

The obligation to register a document in the books of council and session is not mandatory. To come to Mr Pearson's point, there is an imperative on the Law Society of Scotland to issue practice guidance notes to practitioners to ensure that there is retained physical evidence of to what signatories believe they are putting their names.

**Nigel Don (Angus North and Mearns) (SNP):** Will Annabel Goldie take an intervention?

**Annabel Goldie:** I am into my last minute, Mr Don, so I will just proceed—

**The Presiding Officer:** I can give you a bit more time, if you wish.

**Annabel Goldie:** Presiding Officer, how can I refuse?

**Nigel Don:** I am grateful, Presiding Officer, and I thank the member for taking the intervention.

As I heard the evidence to the DPLR Committee, there was essentially a recognition that if we allowed two different documents—because that is what counterparts are—we would open up the box to their being different. We could do it no other way. Therefore the member has probably reached the right point by saying that the professionals involved need to ensure that the two, or multiple, copies are available for inspection later. That is the best evidence that we have. However, there is no alternative to having execution in counterpart other than having several copies, which could be different.

**Annabel Goldie:** The dilemma is how we, as a legislature, strike that balance. To be fair, there is a genuine attempt to do that. I have proffered my view of what the professional body that is responsible for solicitors in Scotland might think of doing; it has a useful role in that respect.

I would also be minded strongly to urge Parliament to commit to undertake post-legislative scrutiny of the bill once its provisions are implemented. Scotland is a small country and the legal profession is fairly contained. I do not think that it would be difficult to secure evidence and find out how the bill is working in practice.

Those are what I described as cautionary concerns. The bill received cross-party support at stage 1 and no amendments were lodged at stage 2. It is broadly non-contentious. I can confirm that the Legal Writings (Counterparts and Delivery) (Scotland) Bill has the support of the Scottish Conservatives today.

14:39

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** My experience says that this is a real issue and it is not a particularly new issue. On one occasion, 25 years ago, I had to fly from Vienna to San Francisco so that a contract could be signed. I had a very nice dinner with a director at Bank of America, who was the other party to the contract, I had a good night's sleep, and then I got a taxi back to the airport and flew to Glasgow. I spent a total of 14 hours in San Francisco and for most of that time I was sleeping. Anything that helps us to address such situations—which, frankly, are a waste of time and money—has to be good news.

Quite reasonably, Annabel Goldie raised the issue that, potentially, different versions of a document could be signed in the belief that they were the same version. One issue that I pursued in the committee at stage 1 of the bill—with the Faculty of Advocates and with others—is harnessing the power of mathematics and of electronics to inhibit that particular possibility. It is perfectly possible, with a public algorithm and a public key, to derive a hash that represents uniquely a particular document. A single dot, comma or letter being changed in the document would result in a different key, so even if there were multiple copies, it would be possible to know whether those multiple copies were identical by the application of appropriate technology.

The bill does not provide for that option but it formed part of the consideration of the bill and I hope that, at some future date, we will be able to return to that subject and enable and require that procedure to be used.

**Mike MacKenzie (Highlands and Islands) (SNP):** I seem to recollect that a similar mechanism was used by Mary Queen of Scots, yet some of her letters were intercepted, which ultimately led to her demise. Would the member care to comment on how effective that mechanism may be in reality?



**The Presiding Officer:** Mr Stevenson, can we keep to the topic of legal writings?

**Stewart Stevenson:** I was referring, of course, to some of the stage 1 discussions. I will simply say that of course we should consider the decryption work of George Scovell, who worked for Wellington and broke the codes of Napoleon. That is a much more significant thing. However, that is beyond the scope of the debate and perhaps cannot be fitted in, even in a generous six minutes.

The real point that came up and which we put to witnesses at stage 1 was whether we should create the electronic infrastructure in Scotland so that a single copy can be held in one place and signing can be done electronically from dispersed geographic positions. There was some acceptance by witnesses that that was a good idea, but it was an idea that they would like to be the second jurisdiction to implement rather than the first. However, there comes a time when we have to be bold and perhaps take up that option.

Sometimes we have to take such things for granted if we cannot understand some of the mathematics that make them possible; in mathematics, there are P problems and NP problems. In essence, the NP problems are the ones that cannot be solved and the encryptions that we use these days are of that character.

The Faculty of Advocates and others in the legal profession are, not unreasonably, intensely conservative in their approach. They want to move in small steps, test, confirm that things work and provide the necessary security. However, the 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 difficult bits have been removed from the proposals, so we end up with something that is the lowest common denominator, to some extent.

Although the bill levels the playing field for Scotland and enables us to stand shoulder to shoulder with jurisdictions that allow counterpart operations, it does not take us ahead of the pack. The witnesses agreed that there was scope for returning to the issue in the future.

We must be confident, if we decide to hold contracts in a central database, that a document's confidentiality will be protected. That raises a difficult issue for Governments of whatever complexion, and wherever they may be based. Governments naturally have a difficulty with absolutely secure secrecy of information, conversations and communication, but in this case we will not get commercial adoption unless that assurance is present.

We will need to return to looking at how—as the committee heard in evidence sessions—we can provide absolute security in a legal framework that places such onerous responsibilities on those who use that kind of unbreakable encryption and security to respond to legal requests for access. That has been done before—it is not particularly new—and we need to return to the subject.

In appearing before the committee, lawyers showed that they were willing to listen to the arguments but would proceed slowly. Indeed, it was 25 years ago that I was invited by the Faculty of Advocates to talk to its members about whether it could introduce a secure email system. They listened politely, but decided that they would not do so.

Lewis Macdonald spoke about the new generation, and how people under 30 view the electronic world. It is 35 years since I sent my first email, so some things have been around for an awful long time. We need to think about how rapidly things move on.

My grandfather was born when Abraham Lincoln was President; my father was conceived before the Wright brothers flew; and I was 11 years old when the first transatlantic telephone cable came into operation. Every life takes us forward, and we may have to speed things up a wee bit in the legal world to ensure that we keep up with the pack and that we can draw new business to Scotland rather than simply protect the business that we have.

The bill is an excellent piece of legislation, and I am sure that all members of the committee very much welcome the gracious comments with which the Presiding Officer opened the debate. I look forward to hearing what our committee convener has to say if he is called to speak; I see that his button is pressed. I am happy to support the bill, and I hope that the Delegated Powers and Law Reform Committee gets many more opportunities to engage in the overwhelming excitement that is legislation in the Scottish Parliament.

14:47

**Margaret McCulloch (Central Scotland) (Lab):** I want to reflect briefly on when we last voted on the bill at stage 1, and on the scrutiny of the bill that we have undertaken in committee. As members will be aware, the then Subordinate Legislation Committee's remit was extended in 2013 and, as the Delegated Powers and Law Reform Committee, we scrutinise not only subordinate legislation and the delegation of powers, but Scottish Law Commission bills of the kind that we are debating today. Indeed, this is the first time that a recommendation of the Scottish

Law Commission has been brought to the Parliament under the new arrangements.

The bill that Parliament is asked to consider has already been passed unopposed and unamended at stage 1 and stage 2, as has been mentioned, and I see no reason for Parliament to reject it at stage 3. I believe not only that the general principles of the bill are sound, but that—as I will explain—there is a demonstrable need to modernise our contract law in Scotland. The bill proposes to clarify how a document can be executed in counterpart, and it will expressly permit the delivery of paper legal documents electronically.

In supporting the bill, I hope that Parliament can give clarity on key concepts in Scots law and practice; reflect changes in technology and business practice; and make a wider contribution to the Scottish economy. The Scottish Law Commission has, in its work, highlighted the need for the bill and demonstrated that there is support for reform across the legal, academic and business communities.

The Scottish Law Commission identified two problems with commercial and contract law in Scotland that the bill could address. The commission highlighted the need for clarity in respect of counterparts, because it is not certain that a legal document can be brought into effect if it is signed in counterpart. The commission also called for clarity in respect of the law on delivery, because it is not clear whether a paper contract can be said to have been delivered if it is sent and received electronically. The commission's view is that the law as it stands is not fit for purpose. The letter of the law in Scotland is out of step with contract law in neighbouring jurisdictions and with common legal and business practice.

The committee heard evidence that businesses in Scotland sometimes choose to use English rather than Scots law to govern agreements because counterparts are permitted south of the border. That disincentive to use Scots law is compounded by the legal uncertainty over methods of delivery, and it could harm our economic competitiveness. By allowing the use of counterpart signatures as an option to execute a contract and by allowing contracts to be delivered electronically, we could help businesses to make savings on time, travel and accommodation.

As I said in the stage 1 debate, only a limited number of people in a business are authorised to sign legal documents on behalf of the company and the law here currently requires more of them than is required of their counterparts elsewhere. The bill is an opportunity to remove a disincentive to conducting business in Scots law and to make it easier for parties to enter into commercial contracts and transactions. With some small but

significant changes, we can bring contract law up to date and make it fit for purpose. For that reason, I will support the bill.

14:51

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

This is an interesting point to have reached, partly because, as many members have mentioned, this is the first bill that has been dealt with by the Delegated Powers and Law Reform Committee, and partly because there is relatively little in the bill. Even speaking third among the back benchers, I find myself with nothing much left to say about the substance of the bill. However, that is actually no bad thing, because I would like to consider the process of getting to where we are.

I thank my colleagues on the committee for their diligence and their careful consideration of the bill. There were one or two moments when we wondered just what we were doing next, because we had not gone through the process before. For example, we wondered how to handle the process when there are no amendments at stage 2. The minister still had to turn up and we read through the section numbers. However, we have got there, and it has been an interesting experience.

As members have said, Parliament has historically never found enough time for the repair and maintenance of Scottish law. We now have the opportunity to do that. We have done it on some occasions, even within my time. I recall in the previous session the Sexual Offences (Scotland) Bill, which came to the Justice Committee from the Scottish Law Commission. Bill Butler brought us a member's bill on damages that came from the Scottish Law Commission, and we had the Long Leases (Scotland) Bill, which we started in session 3 but which I think was finished in session 4—that was another one that came from the commission. We have managed to do some of that work, but there was a general recognition that it had not been going fast enough and that we needed to find another way of operating.

In the second session of Parliament, we had two justice committees, but I have not found anybody who thought that that was a good way forward or anyone who wants to go back to that. However, given that the legal system is firmly within the Justice Committee's remit and that we know—I know it very well, because I sat on the committee for all of the previous session—that the Justice Committee has a large number of things to do, the Parliament has a bit of a problem in moving all the stuff through.

The current idea was considered in session 3, but it really came to a head only in this session. I well recall an invitation from Roderick Campbell to

a meeting on 15 June 2011—you may recall it, too, Presiding Officer—at which the Scottish Law Commission gave one of its periodic presentations to us. Christine Grahame, the Justice Committee convener, and Bruce Crawford, the then Cabinet Secretary for Parliamentary Business and Government Strategy, were there. That was the start of the process because, at the meeting, we said that officials ought to go away and consider whether we should change standing orders. That was the date on which the process that we are just completing started.

I also pay tribute to the many officials under your jurisdiction, Presiding Officer, who thought through how we could change the standing orders and brought forward workable standing orders that we have used. I really am pleased; those officials have to do that work, and they did it diligently and effectively. That is where we started from.

The bill that we have before us fits the standing order requirements. There is a wide degree of consensus among key stakeholders about the need for reform and the approach recommended, which of course has been demonstrated by the fact that there are no amendments. The Scottish Law Commission did its consultation so well that the Government found no need to consult, and I have to say that when the committee consulted in the normal way we did not bring up very much that had not been said before.

Where should we be going? That is what I would like to address over the next couple of minutes. We know that we need to keep Scots law up to date. As Lewis Macdonald and others have pointed out, modern practice is changing, not just in commerce but in the way that we do business. Only the other day I was looking at some pension funds that I could have accessed online, set up online, paid into online and from which, in due course, I could have received payments online. Some of our quite complicated legal transactions are now being conducted online and we need to ensure that we have a legal system in which the inevitable errors and faults can be negotiated.

Not only do we live in the time of the internet but, as a result of that, we have multinational interactions in our normal, everyday lives. We also have, I would suggest, more multicultural families—more families that are the result of partnerships across nations, because we can now physically move around so much more.

Given that that is the environment in which we have to legislate, in which we are trying to operate and in which we must make Scots law workable, I suggest that we will need to do more of the kind of thing that we have done. We are both well aware, Presiding Officer, that a small bill on succession has been proposed, which will be the next bill for my committee. I am sure that both you and the

Government will ensure that it fits the criteria as they currently stand and I have no doubt that you will do that faithfully. However, having 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. 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—without it having to go through the Justice Committee, for all the reasons that we now well understand.

I commend the bill to Parliament and I thank my colleagues for their diligence in the work that has been done.

14:57

**Annabel Goldie:** It is evident from the tenor of today's debate that the bill has cross-party support, and I restate my party's support for it. It is fair to say that members have focused largely on the advantages of the reforms in the bill. That is wise, because there has been considerable doubt as to whether documents can be executed in counterpart under Scots law, and the bill provides the necessary clarification for legal practitioners.

I acknowledge the need to adapt and change our centuries-old legal system to meet the exigencies of the modern age. I am pleased that Scottish businesses will no longer be deterred by the impracticalities of the signing ceremony or the round-robin process that has been the hallmark of getting deeds executed to date.

Many members—including Lewis Macdonald, Stewart Stevenson and Margaret McCulloch—recognised that the increased speed of transactions and potential savings in travel and accommodation costs will no doubt benefit the business community, and that is to be welcomed. However, I reiterate that the issue of safeguards remains. In his opening speech in the stage 1 debate last year, the minister emphasised that

“the approach has been to ensure that the legislation is permissive and as flexible as possible.”—[*Official Report*, 25 November 2014; c 36.]

I fully accept that that is a well-intentioned approach, but I am a little anxious that the new arrangements could facilitate fraud or, more conceivably, error. As I said in my opening speech, I realise that those are both possibilities under existing arrangements and I understand that execution in counterpart is an optional process, but most practitioners and their clients will opt to adopt what is proposed in the bill.

As parliamentarians, we have to guard against even theoretical or notional risks. Although the committee and the stage 1 witnesses were satisfied that such risks were negligible, and I respect their conclusions, I do not fully agree with that assessment.

On the potential for fraud and error, Stewart Stevenson made a characteristically interesting observation about the role of mathematics and electronics. I would comment in more detail on that, but I am not sure that I understood it all. However, I understood Mike MacKenzie's colourful addendum to Mr Stevenson's speech about the potentially terminal consequences of overreliance on such techniques.

I again 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.

**Mike MacKenzie:** Does Annabel Goldie agree that contract documents often consist of huge piles of paper, with a cover sheet that is signed by both parties, and that, in principle, there is nothing to prevent fraudulent or accidental substitution of some of the meat or filling in the sandwich, even under current procedures?

**Annabel Goldie:** I accept that, and I think that most practitioners or people signing such contracts will be absolutely clear that they want to know what the document is and what they are signing. The bill makes clear a mechanism for ensuring that that can be done. However, the point is that people can in good faith negotiate a contract and reach an agreed position that they distil into the final version of the contract document, then get a signing copy of the document and a page to execute, and then return the executed page, only to find that, through mere error, that page has been appended to an earlier version of the contract. That mistake could happen simply because we are departing from physically attaching the signature to the thing.

I am not disagreeing for a moment with the proposition that we need to modernise procedure and, as I have said, I welcome the bill. However, I point out that this is a fairly major departure from what has happened in the past, and there is a potential for difficulty. All that I want to be sure about is that we try to minimise that. The Law Society has a role to play in that mitigation, as does the Scottish Parliament.

15:02

**Graeme Pearson (South Scotland) (Lab):** As someone who is not a member of the Delegated Powers and Law Reform Committee, I am grateful for the opportunity to wind up the debate on Scottish Labour's behalf. I am sure that there will be those in the public gallery and watching us on television who are in awe at Annabel Goldie's obvious excitement about and gushing enthusiasm for analysing the detail of the bill, which is mirrored by Fergus Ewing's obvious delight in introducing the details of the bill in the Parliament today. I am wide-eyed at Nigel Don's description of our debate as arriving at a very interesting conclusion.

However, to put aside those observations, 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:** 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:** I am grateful to Nigel Don for that observation. It gives me comfort to know that I have made a point in the chamber that someone found relevant.

A point was made about whether our modern approach to signing documents in an electronic form adds complication and difficulty to knowing how the documents have been compiled. In that context, I observe that such difficulties perhaps pertain to the generation to which one belongs. There is no doubt that our younger generation of legal minds might well find it far easier to collect material electronically and do so correctly and accurately than to collate paper in the way that we have done throughout our working lives.

**Stewart Stevenson:** I am with the member in what he is saying. However, I have been party to a 3,500-page contract. It is unlikely that that would be in the front of any single mind, yet a single signature is needed. Whatever system we have, there are practical difficulties that do not get us away from the need for trust and oversight of those whom we trust.

**Graeme Pearson:** I agree completely. I merely remember that in a previous life I was responsible for creating documents that thousands of people had to refer to in undertaking their duties. When those documents were typewritten, any amendments to individual pages resulted in a complete reassessment of every page thereafter to ensure accuracy. As the member suggested, once the electronic age came along, any changes

were brought to the author's attention electronically and one could see whether any amendments had been made to a document, who made them, at what time and on what date. That is enormously valuable to those who might sign off a document, who know that its authenticity can be relied on.

I am grateful to the Delegated Powers and Law Reform Committee for the work that it has done on the bill. It is a novel piece of work that shows that the Parliament's system can operate and can deliver a number of practical outcomes that the public will overlook but will no doubt find valuable in times ahead.

I had to access civil law recently, and it took six months to process the paperwork and transact a piece of business in a relatively innocuous set of circumstances. If that time and frustration can be avoided by the use of electronic communication, that only speaks well for the law and for the way in which business can be transacted in Scotland in the 21st century.

The proposal in the bill will make Scots law more attractive to its users. It simplifies what has until now been a relatively complex process in terms of the handling of paper, never mind the content of the paper. One might say that it introduces an element of the 21st century into our Scots civil law process.

There might be some lessons to be learned on the criminal justice side. A similar process pertains to the handling and signature of warrants. The time that it takes to obtain warrants for search, arrest or the interception of communications is an issue across Scotland. I would like to think that those on the criminal side will look at what has happened to see what lessons can be learned.

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.

Miss Goldie made a very important point about reviewing the operation of this new practice, particularly in relation to the threat of fraud or incompetent handling. That review will tell us whether, regardless of the ease with which the bill is being passed, the bill is effective and efficient in its outcome. One hopes that the electronic transfer of signatures will be deemed to be a door opening to Scots law becoming attractive internationally and that, in due course, people will wonder what all the fuss was about.

15:10

**Fergus Ewing:** I thank all the members who contributed to the stage 3 debate on the Legal Writings (Counterparts and Delivery) (Scotland) Bill. I will address some of the points that were made in the debate. First, on when we intend to bring the legislation into force, the answer is as soon as possible. On the assumption that the bill is passed today, we hope to commence the substantive provisions about three months from now.

Mr Don raised the question of future bills adopting the new procedure, and he informed the Parliament that it is under contemplation that the second bill under the new procedure will be the succession bill, which I understand is expected to be referred to the Delegated Powers and Law Reform Committee when it is introduced in June 2015, subject to its meeting the necessary criteria for referral. Mr Don touched on that.

He also raised issues about the procedure adopted here and how it will be applied. That is not for me, so I will not go into that. However, 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.

I turn to some of the substantive comments that were made on the bill both at stage 1 and here this afternoon. Annabel Goldie, in an extremely useful speech, for which I am grateful, raised and postulated a number of questions, most but perhaps not all of which were raised in the committee, some by the Faculty of Advocates, some by other members of the legal profession and others by her colleague John Scott. The first relates to fraud and error.

Fraud is something that MSPs and Parliaments cannot stamp out. It occurs. Sadly, it is part of life as we know it, and I suspect that it always will be, no matter what law is passed. However, my experience—and my belief—is that, in Scotland, fraud is rare and honesty is the norm. If that analysis is correct, it is something for which we should be extraordinarily grateful and something that we should cherish and foster as a society. However, we cannot rule out fraud.

I do not believe that anything in the bill increases the possibility of fraud. It may be argued that those who will have recourse to using the benefits of the bill, if one likes to put it in that way, will mostly be in the legal profession, advising businesses in the execution of what may well be highly complex documents. Mr Stevenson referred to his experience of one document having 3,500 pages, and many contractual documents have to

be executed by tens or twenties of parties, or even more. Lawyers will tend to be involved, and I think it is reasonable to say, without putting lawyers on a higher plane of honesty relative to the rest of the populace—

**Members:** Hear, hear.

**Fergus Ewing:** I am pleased to hear that there is general assent to that proposition about the honesty of lawyers. It is perhaps not something that one hears every day. Nonetheless, that seems to indicate that if there is a difficulty, it will not be fraud. Any difficulties that parties have with contracts may well relate instead to their content.

As soon as Scots law permitted documents to be valid without their requiring to be executed on every page, that could be said to have increased the propensity for fraud to be effectively accomplished. I believe it is the case, although I am certainly no expert, that until relatively recently—as recently as the early 1970s, or maybe even more recently than that—some documents, including wills, required to be signed on every page.

Of course, there is a particular reason for documents to be signed on every page, but are we really saying that, in Mr Stevenson's example of a contract with 3,500 pages or, perhaps, four or five pages with several annexes, we should impose on society a legal system in which every page requires to be signed? It is plain that that would not be a sensible way to proceed, so we have moved away from it.

As soon as we move away from that approach, however, there is—in theory, at least—the propensity for fraud. I was able to demonstrate one example of such a fraud that has taken place. It is not a private matter but one that has come into the public realm and has been raised with ministers. It is the case of Brebner, in which the first page of a disposition was fraudulently replaced with another, which resulted in an enormous difficulty.

I accept that fraud occurs, but I believe that the circumstances in which the bill will be used will tend to minimise it. I should also say that a party is not bound by a document that they have signed as a result of a fraud. Somebody who is elderly might have been induced to sign a document against his or her will. If that happens as a result of fraud, the contract will be void. Similarly, if my signature is defrauded by somebody else, the contract will be void, not valid. Therefore, the law provides protections against fraud.

Error is more likely than fraud. I think that the witness from the Faculty of Advocates said so as well. The parties will simply not have validly executed in counterpart if they inadvertently sign

different versions of a document, because the bill relates only to documents that are

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

If the parties have signed different documents, its provisions do not apply.

I see that, all too soon, I am running out of time. I had meant to carry on for quite some time and comment on Mr Stevenson's remarks. He managed to bring in references to Napoleon, Mary Queen of Scots and the Wright brothers. How he did that, I am not quite sure but, nonetheless, his speech was of occasional tangential relevance.

Ms Goldie's speech was, by contrast, an example of painstaking forensic analysis of the highest quality, as we have come to expect over several years. I must bow to her superior research, because I have not looked at the 18th century precedent. The shame of it.

That notwithstanding, it is my pleasure to thank everybody involved in the bill who has been thanked already and another group that has not been mentioned: the officials who have provided their support to me in an exemplary professional fashion.

To make a serious point, the officials made sure that the points that the Faculty of Advocates made were pursued. On 28 November, I undertook to ask the Faculty of Advocates whether it had anything else to say. We did not get a reply, so one can infer that the faculty was satisfied with the responses that I gave to the Parliament with the benefit of advice from the Scottish Government civil service.

A range of good points have been made. Some other ones have been made as well. I welcome the cross-party support for the bill. It will make a difference. It will help to save a great deal of time and, perhaps, a little bit of money and will make a modest but positive contribution to the legal profession and, perhaps, enterprise in our country.

I commend the bill to the Parliament.