OFFICIAL REPORT
AITHISG OIFIGEIL

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Net Zero, Energy and Transport Committee

Tuesday 11 June 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 11 June 2024

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NET ZERO, ENERGY AND TRANSPORT COMMITTEE
21st Meeting 2024, Session 6

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

COMMITTEE MEMBERS

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)
*Jackie Dunbar (Aberdeen Donside) (SNP)
*Monica Lennon (Central Scotland) (Lab)
*Douglas Lumsden (North East Scotland) (Con)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Emma Cooper (Scottish Land Commission)
Bob McIntosh (Scottish Land Commission)
Michael Russell (Scottish Land Commission)
Hamish Trench (Scottish Land Commission)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 11 June 2024

[The Convener opened the meeting at 09:19]

Decision on Taking Business in Private

The Convener (Edward Mountain): Good morning, everyone, and welcome to the 21st meeting in 2024 of the Net Zero, Energy and Transport Committee. The first item on our agenda is to make a decision on whether to take in private items 3, 4 and 5. Item 3 is consideration of the evidence that we will hear on the Land Reform (Scotland) Bill, item 4 is further consideration of visits and engagement as part of our scrutiny of that bill, and item 5 is consideration of our approach to a proposal for the United Kingdom Government to legislate in a devolved area. For the record, I note that we propose to formally dispose of that notification in public at a meeting in the near future; today's item involves purely preliminary consideration of our approach.

Do we agree to take those items in private?

Members *indicated agreement.*

Land Reform (Scotland) Bill: Stage 1

09:20

The Convener: Our main item of business is our first evidence session on the Land Reform (Scotland) Bill at stage 1. We will take evidence from the Scottish Land Commission, and I am pleased to welcome Mike Russell, the chair; Emma Cooper, the head of land rights and responsibilities; Bob McIntosh, the tenant farming commissioner; and Hamish Trench, the chief executive. We have allocated quite a lot of time for this session, but that does not mean that we have to have long answers to all the—I hope—short questions.

Before we start, I will make a declaration. I am happy to make this declaration, which I will make at every meeting at which we discuss the bill. For the record, as per my entry in the register of members' interests, I own approximately 500 acres in Moray, which I farm in-hand. Approximately 50 acres of that land is woodland. Under a non-agricultural tenancy, I am a tenant for a further 500 acres in Moray. I have a secure tenancy under the Agricultural Holdings (Scotland) Act 1991. When possible, I sometimes take in annual lets for grassland to help to feed my cattle. All the details can be found in my entry in the register of members' interests. I hope that that clarifies my position.

I will start with a gentle question, which is probably for Hamish Trench. Can you outline the research that led to the recommendation that further reforms are needed to address the issues of concentrated ownership?

Hamish Trench (Scottish Land Commission): I am happy to say a bit about that. Back in 2019, we undertook an 18-month programme of research to look at the issues associated with the scale and concentration of land ownership. That work comprised background research on the existing evidence base—we drew out the key lessons from what was already published and available—and research on the international experience. We looked at 22 countries and found that 18 of them have in place regular mechanisms to manage how much land someone can own. We looked at the different types of international experience and the mechanisms that are used.

We also made an open public call for evidence on the benefits, advantages and disadvantages of concentrated land ownership. We asked people very simple questions about whether they had a view on the benefits and disadvantages and whether they had experience to back up their views. There were more than 400 responses to

the call for evidence. The response profile was very balanced—about 29 per cent of respondents identified as residents, 23 per cent identified as private landowners and 19 per cent identified as land management professionals, so a good range of perspectives fed into the research.

There was strong evidence that there are risks related to the concentration of power associated with large-scale land ownership. There is by no means an automatic relationship between the scale of ownership and the public interest, but there is a very significant risk related to the concentration of power. That was our conclusion, and our recommendation to the Government was that reforms are needed to moderate the power that is inherent in the scale of land ownership.

The Convener: Was concentration of power ever seen as a good thing, or was it seen as a bad thing across the whole of Scotland?

Hamish Trench: The research showed clearly that the advantages that were identified were associated with economies of scale but that concentration of power was a disadvantage. It clearly created disadvantages in relation to, for example, local economic opportunities. Big themes that came through were the ability to unlock opportunities for local development of businesses, local housing opportunities, community cohesion and development. The disadvantages were all associated with the concentration of power and decision making.

The Convener: I am struggling to understand. In relation to the concentration of power, are you talking about big housing developments or small housing developments?

Hamish Trench: It is, potentially, across the piece. In essence, the issue is control of land supply. Where there is a very concentrated pattern of ownership, it is inevitable that decision making about the release of land is highly concentrated, because it sits with very few people. That could relate to one or two sites in a remote rural community or it could, of course, relate to a larger site.

The Convener: Is concentration of power in Forestry and Land Scotland also seen as a negative?

Hamish Trench: It is important to emphasise that our report and research showed that such issues run across all types of land ownership. It is by no means simply about private ownership; the report found that similar issues with concentration of ownership applied across public, private and non-governmental organisation ownership. It is about the risk from the concentration of power and decision making.

The Convener: I will push a bit more on that so that I understand the position. We know that Forestry and Land Scotland, various charities and Scottish Natural Heritage—or NatureScot; I am not sure which it is calling itself today—are big landowners in Scotland. Was concentration of power perceived as a problem with all those types of owners, not just private landowners?

Hamish Trench: Yes—that is right. That is why our recommendations are about moderating the power that is inherent in that scale of ownership, regardless of the type of landowner.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Mr Trench, you spoke about how, as part of your research before providing the Government with your direction, you had looked at other European countries. Do you want to say a bit more about that?

Hamish Trench: The initial research looked at 22 countries, as I said, and found that it is quite common to have measures in place to manage land ownership in relation to who can own land and how much land can be owned. For example, there are measures that put a limit on foreign national ownership, that constrain the ways in which land can be used and that require prior approval before land can be acquired.

During the last year, we undertook more detailed research on the French SAFER system, which is a system of pre-emption in an agricultural context that is designed to ensure that land can be brought forward, particularly for developing businesses and new entrants.

It is important to say that there is no simple system that we could lift and translate to Scotland. We need to design our own system based on the Scottish context. However, the research shows that it is quite common to have such systems. Indeed, Scotland and the UK are probably quite unusual in not having some sort of framework to manage the public interest in relation to land ownership.

Michael Russell (Scottish Land Commission): I will emphasise two things. First, all the material that we are talking about has been published and is available on our website. Indeed, the documentation that the committee has received is footnoted so that you can see where the information comes from. I hope that that is helpful.

Secondly, on the convener's point about the different types of landowners, we have not differentiated in that regard. I am a new boy to this, but, from my previous experience, I think that there should be, and are, obligations on the state as a landholder, which it sometimes does not fulfil. It is very important that we draw attention to that, as we have done and will continue to do.

The Convener: Thank you. I would never suggest that you were a "new boy" to this game, Mr Russell. You have been pioneering land reform for some time, so I will not take the "new boy" bit—I am sure that you come with views.

Jackie Dunbar, do you want to come in with a question in this area?

Jackie Dunbar (Aberdeen Donside) (SNP): In this area or something else?

The Convener: You had a question.

Jackie Dunbar: I have a fair few questions, convener.

I am interested in your view on whether it would be fair to say that private ownership of land, particularly at scale, has historically afforded significant privilege to the folk who have owned that land?

Michael Russell: That is true, without a doubt. There is evidence of that. We have been talking about people, power and prosperity—we use those three words extensively. The question that we ask is how we can redress the balance of power so that people who live on the land and are involved in it can have a stronger influence, leading to greater prosperity. The prosperity issue is key, particularly as new and additional sources of income from land are found.

Hamish Trench might want to add to that by talking about some of the work that we are beginning to do to try to get community profit, rather than simply individual profit, from new issues that arise.

09:30

Hamish Trench: I am happy to expand on what has been said. It is interesting to look at the current context relating to the emergence of the natural capital value of land. Our land is becoming increasingly valuable in different and perhaps unexpected ways. That is quite a useful demonstration that the underlying pattern of ownership is hugely important in relation to the way that the benefits of that value are shared, distributed and used. As Michael Russell said, it is about using that value productively and about how we reinvest it in local communities and economies. That is partly to do with the land ownership pattern and the land reform measures, and it is partly to do with wider policy on tax, fiscal measures and other issues.

Jackie Dunbar: I have had a few meetings with members of the tenant farming community, who have spoken very highly of the tenant farming commissioner. They have said that he has been doing a cracking job, but one of their frustrations is that he has no power and that everything seems to be done voluntarily. To his credit, he has still managed to get some things done, but he has perhaps not quite got as much done as the community had wanted.

There have been instances of landlords just not engaging with the commissioner or other landlords, and certain land agents will not engage with them, either. What are your views on stronger statutory powers? Would such powers help? What would you like to happen if I could give you a magic wand?

The Convener: Bob McIntosh, I know that you will want to answer in some detail. We will look at part 2 of the bill later in the session, when some of these questions might be answered, but I am happy for you to give an answer about all that you have achieved.

Bob McIntosh (Scottish Land Commission): The statutory powers are limited. I produce codes of practice, and people are entitled to complain if they think that a code of practice has been breached. I can carry out an investigation, but all that I can do is name and shame people on our website. Is that enough? Most of the time, it is, because my aim in carrying out this role has generally been to be a facilitator rather than a policeman. I have tried to help people to sort out their problems without coming down with a big heavy hand. Have there been occasions when I would have liked to have come down more heavily? You bet there have. I would, occasionally, have liked to have had powers to require certain recalcitrant individuals to do something or to fine them for something that they had not done.

Jackie Dunbar: We can leave the questions about part 2 until later, but would you like the bill to give you or the next tenant farming commissioner powers to do more?

Bob McIntosh: It is interesting that the proposed powers for the new land and communities commissioner include the ability for him or her to fine people who do not follow the rules. That is one route that could be used. I have mixed views about whether that is the right thing to do, but, on balance, I think that it would be good if the next tenant farming commissioner—it will not be me, because I am nearly finished—had some additional powers.

The Convener: I will park that question, because I know that another committee member wants to ask about the new appointment.

Jackie Dunbar: I was going to ask about land agents engaging voluntarily.

The Convener: I do not want you to tread on the toes of another committee member, but go with that question.

Jackie Dunbar: What could be done on that issue? Land agents tend to be businesses and way above the folk who deal with stuff day to day. Land agents tend to be companies—I was going to say that they might not understand the issues, but that might be a bit rude—and it might just be an investment to them rather than a way of life, so they might not engage, given that it is voluntary.

Bob McIntosh: The codes of practice apply to tenants, landlords and their agents. Any lawyer or land agent who is acting for a landlord or a tenant is caught by the codes of practice and everything that goes with them. I engage a lot with the land agent community, because land agents are very important in this.

When I started, one of my statutory duties was to, in a sense, review how land agents behave. That showed that, as in every other sector of the community, there are some not-so-good land agents, but, by and large, they do a good job in helping to oil the wheels between landlords and tenants.

The Convener: Bob Doris is joining us remotely.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Good morning, and thank you for supporting our evidence session this morning.

I want to ask about land management plans, but can I ask you not to talk yet about compliance, enforcement, monitoring, reporting or the size of holdings, as I will ask questions about those things later.

First, and principally for large holdings that will be required to produce a land management plan, do the provisions adequately articulate meaningful extensive community engagement, including using the land rights and responsibilities statement? I am not sure who is best placed to answer that.

Michael Russell: Perhaps I could introduce the answer to that question. I think that both Hamish Trench and Emma Cooper will be able to tell you about practical experience on the ground.

Plans in themselves do not do anything. There is a process to go through. The plan has to be comprehensive but also comprehensible. There is no point in producing a plan that nobody reads and cannot understand.

We should not be seeking to increase burdens on landowners and others unnecessarily and therefore, as this issue develops with the bill, we want to simplify the reporting process rather than complicating it. We also need to make sure that whatever people are reporting on, it is something that they are responsible for; somebody who has a tenant or a number of tenants cannot be held responsible for everything that those tenants do, for example. We need to be very clear about how reporting will work.

Another issue is that plans have to be read and made available. The commission is looking at how we can make sure that the material is accessible and that people could understand it.

We are thinking about the plans and hope to provide some advice about what they would look like, including their publication. I hope that that will lay to rest some of the fears that people have about those plans. Emma Cooper will say a word or two about the plans.

Emma Cooper (Scottish Land Commission): Any good business would be thinking about what their purpose is and what their objectives are and sharing those things with others. The land management plans are the same kind of process that we see in the corporate world and often in the community sector, too. They will set out those basic things for others to understand and see where they can engage with them.

The land management plans bring transparency and also allow people to be held accountable for the things that they are planning to do. However, the process of preparing them is also very important. Where communities engage with the planning process with landowners, managers and agents, we see good benefits for all parties.

Bob Doris: Engagement is the crux of the question, along with time constraints. What will be the requirements for community engagement under the legislation? If a landowner has 3,000 hectares, any community directly impacted by that ownership should have an absolute right within the land management plan to be meaningfully consulted. There should be cognisance of that and steps should be taken to address their concerns and aspirations. How will the bill, and the management plans—if done properly—achieve that?

Emma Cooper: We do not have all the detail in the bill of how that would work and how communities will be engaged. However where we see good practice, it involves building relationships with key organisations and individuals in a community. In the forestry sector, for example, projects have an issues log, where issues that have been raised by core stakeholders and how the sector will be addressing them are shared. A similar approach could be taken with community engagement and land management plans. We are looking for meaningful relationships between landowner-managers and communities where aspirations can be shared, enabling opportunities for collaboration and allowing mutual benefits to be realised. It is all about the collaboration element.

Bob Doris: I am sorry to focus on you, Emma, but this is a line of questioning that I was hoping to pursue. Land management plans would have to take cognisance of the land rights and responsibilities statement, but they would not have to follow it. I understand that they will have to have regard for the land rights and responsibilities statement, but that it has no statutory underpinning and will be voluntary. What is your view on that? If any of the other witnesses have different views, it would be good to get them on the record, too.

Emma Cooper: The bill sets out specific criteria that must be included in the land management plans. The bill could go further and more broadly address the principles of the land rights and responsibilities statement. Our protocol set out expectations for landowners, land managers and communities around each of principles in the land rights and responsibilities statement and land managers across Scotland have implemented them. Our good practice programme shows that the protocol is perfectly workable. Land managers have checked themselves against it. We have a self-evaluation process for people to follow. For the most part, that process shows up a few actions that landowners and land managers can take to further align with the land rights and responsibilities statement. It is certainly feasible.

A range of things need to be included in land management plans. Thinking about the purpose of the bill, we could strengthen that purpose by talking about the sustainability of rural communities, which could enhance what it is already included because, when we think about the sustainability of rural communities and how to achieve it, we think about the land rights and responsibilities statement providing that definition.

I think that Hamish Trench would like to come on this.

Hamish Trench: We are clear that our advice is that compliance with and delivery of the land rights and responsibilities statement should be a core requirement of the land management plans and that that should be either in the bill or the secondary regulations.

Another aspect that I would flag is that this is also important from a reporting and disclosure perspective. I know you asked us not to go there but I will flag it very briefly. At present, it is quite hard and difficult to monitor the progress and delivery of the land rights and responsibilities statement but the bill offers a very effective route to doing so.

Bob Doris: I asked you not to go there because I am definitely going to go there. I just wanted to break the questions up a bit.

The Land Commission initially considered that land areas from 1,000 hectares up to about 3,000 hectares should be within the scope of land management plans—and beyond 3,000 hectares of course—but the Government has opted for 3,000 hectares.

Convener, can I check that people can still hear me? My screen has gone blank.

The Convener: We can definitely hear you. I am wondering whether you are about to ask the question that I was about to ask—but crack on, Bob.

Bob Doris: I hope not, convener, because this is my line of questioning.

So, 3,000 hectares is 30 million square metres, which is 5,000 football pitches. Should the scope not be 1,000 hectares? Are there any concerns that the Government has gone too high? Some suggested going as low as 500 hectares and the Land Commission thought maybe 1,000 hectares but the Government has gone for 3,000 hectares. What does the Land Commission think about that?

Hamish Trench: I am happy to comment on that. Yes, our initial advice was that between 1,000 and 3,000 hectares would be reasonable. We think that there is a fair and strong argument for potentially reducing that threshold to bring more land into scope and therefore having a wider impact. Of course, the trade-off is the resource burden for landowners, the Government and the land and communities commissioner. If you were to reduce the scope to 1,000 hectares, the number of holdings in scope would more than double.

Michael Russell: Hamish Trench's point is very important from our perspective. There is a strong argument for reducing the scope. We have acknowledged that argument. Other people are arguing it, too. However, the figures are quite clear. At 3,000 hectares, the scope is 430 landholdings; at 1,000 hectares, the scope is 1,066 landholdings and at 500 hectares, the scope is 2,025 landholdings. In those circumstances, that would increase the work that we would be required to do quite substantially and therefore we could not do it within our own resources. I also make the point that 95 per cent of registered agricultural holdings are under 500 hectares so the current scope would not bring in the vast bulk of agricultural holdings.

Bob Doris: That is helpful. There is a balance to be struck, of course, Mr Russell, which I think is the point that you are making. The bill does not include cumulative holdings. A landowner could have four concerns each of 2,000 hectares—a massive operation that would not be covered by this bill. Should the bill consider cumulative holdings, Mr Russell?

09:45

Michael Russell: Yes. That would be another way of making sure that this is a comprehensive—and comprehensible, which is a point I made earlier—innovation. We could do that by ensuring that contiguous holdings were not treated as they are currently treated in the bill.

Bob Doris: That is helpful.

I move on to penalties for non-compliance. Mr Russell said at the start that it is nice to have land management plans. Hopefully landowners will have consulted meaningfully and effectively with communities and other relevant interested groups so that the plan is sensible, practical and sustainable for the land, the people on it and all those who benefit from that land. However, if a plan is not implemented in practice, it is irrelevant. I understand that there are fines of up to £5,000 for not producing a plan but that, within the bill, there is no consequence for non-compliance. Is that your understanding, Mr Russell? Do we have to look at that again?

Michael Russell: I am looking at Hamish Trench.

Hamish Trench: Yes.

Michael Russell: Yes, that appears to be the case. We are quite clear that cross-compliance has to be an issue. Fines as a stand-alone issue would probably not be sufficient to ensure compliance. Cross-compliance, which is perfectly possible, would be a useful part of the tool.

Bob Doris: Can I push you on that, Mr Russell? Cross-compliance is not direct compliance. Some family concerns can be very large companies and they might consider it to be cheaper to just pay £5,000 rather than comply fully, which is burdensome.

Could we increase the fine threshold? Could we look at penalties based on turnover of the business?

Michael Russell: Any of those things would be possible. However, I would assume that the vast majority of people engaged in this would want to deliver those plans. As Emma Cooper has indicated, the plans and the process of drawing them up will be useful to them. However, there are other options and cross-compliance is one of them. Funding from the state could be withheld if the plan was not delivered. There are other things that you could do. However, I would like to think that there would be broad support for this and that only a very small number of people would not wish to support it.

Bob Doris: I hope you will not mind me pushing you a bit further, Mr Russell, but I did not ask about cross-compliance. I understand cross-compliance. I asked about direct compliance and whether for some businesses, a £5,000 fine just would not cut it. Is it the view of the Land Commission that the £5,000 fine should be reviewed?

Michael Russell: We have not taken a position on that.

Bob Doris: Will you take a position on it?

Michael Russell: We are listening to what you are saying, Mr Doris, and we will consider it as we offer further advice. Presently, however, we accept that there is a risk of non-compliance and we suggest that cross-compliance would be an additional tool in the box or should be in the box.

Bob Doris: That is helpful. Convener, you will be relieved to hear this is my final question—I know that other members need to get in and that you want to move on the lines of questioning.

Some concerns have been raised about the reporting process and it has been suggested that we should widen the scope of who can report and that investigations should be more robust. I must admit that I am not across the detail of this particular area, but I would be very keen to have witnesses to put on record their thoughts to better inform our consideration of this legislation.

Michael Russell: We agree that there is a need to expand on this. Emma Cooper has been involved in this.

Emma Cooper: Yes. Through casework in our good practice programme, we hear from various community bodies, different kinds of organisations and stakeholders about their concerns. A lot of those organisations are in a good position to understand what is happening at a local level and perhaps more so than some of the bodies that are currently listed as being able to report breaches. We support those organisations being able to report breaches but think that widening the scope would be helpful and would feel more empowering for communities, perhaps particularly for community councils, as democratically appointed bodies in local areas.

Bob Doris: Okay. That is very helpful.

The Convener: Thank you, Bob. Mark Ruskell has a supplementary question.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to go back to Mr Doris's point about the decision on whether the threshold should be 3,000 hectares, 1,000 hectares or something in between. Is it fair to say that there is something arbitrary about the selection? We know that 3,000 hectares in one part of Scotland could look very different from 3,000 hectares in another part of Scotland and might bring in quite dramatically different sets of issues in terms of

management, local communities, opportunities for housing and so on. We live in a geographically diverse country. Putting into legislation that land of a certain size needs to have a land management plan does not reflect the nature of the land.

Michael Russell: I will ask Hamish Trench to comment in detail on that but it is an issue that we have been considering. There are differences between the south of Scotland and the north-east of Scotland and the bill does recognise differences in relation to islands. I know that people often get bored when I talk about islands, but there is an island dimension here. There are issues of significance in a landholding. There are some examples—I will not go into the detail—where the purchase of a significant item within a community is a very difficult and damaging thing. We are very aware of that. It is a subtlety that may be difficult to express in legislation.

Hamish Trench: There is no question but that where that threshold should lie is essentially a matter of judgment for Parliament. Clearly, it could lie at any number of levels. The point about there being variety across Scotland is quite right. That leads me to the key considerations here. We recommended looking at criteria beyond scale for thresholds. When we initially made our recommendations on the public interest test and other matters, we were looking at wider criteria, including sites of community significance. Having said that, we recognise quite straightforwardly that scale is probably the simplest, most transparent and predictable basis on which to set a threshold and it therefore seems very reasonable.

As we have already touched on, the ways to address the issue are either to bring the threshold down to bring more land into scope in a broad-brush approach across Scotland, or to include more specific criteria that would address the cumulative issue and sites of local significance, which might allow more flexibility or discretion.

Mark Ruskell: Your point about land management plans is that regardless of the size of the holding, the plans need to be transparent and proportionate. Is that correct?

Michael Russell: Yes.

Hamish Trench: Yes. One further point is that of course it throws into relief the importance of continued voluntary good practice for landholdings that are outwith the scope of the legislative requirements.

The Convener: Before we leave this topic, could you clarify the duration of a land management plan?

Hamish Trench: My understanding is that what is proposed is a duration of a maximum of five years and that the plan would need to be at least reviewed within the five years. I think it reasonable to expect that any significant changes in the land use should also prompt a review but it is also sensible to have a backstop time period.

The Convener: Do you think that five years is reasonable? Forestry and Land Scotland's land management plans are for considerably longer than five years. Bearing that in mind, and the comment that you have just made, what do you estimate to be the cost of producing a management plan?

Hamish Trench: I think that five years is a reasonable timescale for a review period. Clearly, the plan itself should be looking at the longer term and we would expect that.

I also think, given that we are at a headline stage in the bill, that there is work to be done on looking at the learning from existing processes. We are well aware of land management plans that operate across the forestry sector, private sector initiatives such as wildlife estates Scotland, and other land use sectors. We can take a lot of learning from how those plans operate to make sure that we include that long-term perspective.

The Convener: And the cost?

Hamish Trench: We have not done any parallel costing. I am aware of the Government's costings in the memorandum. We have not done any separate costing proposals ourselves.

The Convener: I agree with management plans. I tried to look at the management plan for Glen Prosen, which was purchased off the market two years ago. There is still no management plan. In answer to my question, Forestry and Land Scotland told me that there is still no duration for how long it will take to get a management plan, any ideas of costings or whether the community has been able to feed into that. Is that situation something that you would be trying to prevent?

Hamish Trench: Yes. It is clear that there should be transparency and predictability. I know that Forestry and Land Scotland has provided the Government with some costings to assess the likely cost of land management plans. Emma Cooper engaged directly with Forestry and Land Scotland on Glen Prosen, as an example.

Emma Cooper: The reality is that the cost of land management plans will vary considerably depending on the context in which the landholding sits and the prior relationship with communities. Where there are established relationships and where there is a history of that kind of planning process, it will be less expensive for an estate. Where landholders are trying something new and different from the start, it will be more expensive the first time. However a five-year review period seems very sensible to me. If you think about

communities and how they are looking at and addressing things, five years is quite common in that context. I agree with Hamish Trench that there should be a long-term plan within the land management plan and just a regular review period.

The Convener: So for drawing up a long-term management plan, do you think that a cost of £15,000 to £20,000 is not unreasonable?

Emma Cooper: The cost will vary significantly.

The Convener: For 3,000 hectares, is it not unreasonable? I do not know.

Hamish Trench: We currently have no basis on which to second-guess those figures.

The Convener: Jackie Dunbar, you wanted to come in before I go on to my next questions.

Jackie Dunbar: I apologise, convener—I probably should have asked this question at the very beginning. I am sorry to go back to the beginning, but can you give us an indication of the current situation in Scotland? How much of the country is owned or controlled by folk?

Michael Russell: Let me give you Andy Wightman's figures because we think that they are very accurate and dovetail with our own. Privately owned land is 83 per cent; publicly owned is 11.7 per cent; community owned is 2.8 per cent and non-governmental organisation-owned is 2.5 per cent.

Of course, there is much greater detail available from Andy Wightman online. You can dig down into it. I am not his agent in any sense—

The Convener: Are you suggesting we buy his book, Mr Russell?

Michael Russell: A great deal of work has gone into those figures and they appear to be accurate.

Jackie Dunbar: Thank you. I will have a look into that.

The Convener: I am going to ask some questions about the pre-notification and registration requirements in the bill. Do you think that they would be complex and difficult to navigate or easy to navigate? I am interested in hearing your views on that.

Michael Russell: In general, the bill is complex in places and very complex in some places. As you know, it seeks to amend previous bills, and it is quite difficult to follow it and be absolutely clear about what it means.

We would want processes to be as simple as possible, particularly in relation to community involvement. One of the regrettable things at the moment is that the review of community purchase, which is taking place in parallel, will not come up with legislative proposals. The commission has made suggestions about how that process could be simplified. If we could get the process simplified, I think that it is likely that there would be greater take-up.

The Convener: May I interrupt? My recollection is that that review is due to report in December.

Michael Russell: Is it this December or next December? I do not think that we know yet.

The Convener: It would surely seem to be logical to try to shape the bill with that information.

Michael Russell: We would hope so, but I am not aware that that is going to take place. We would have to find that out.

The Convener: The timescale for the bill would preclude that, would it not?

Michael Russell: At the moment, it would, yes.

The Convener: Is that a failure?

Michael Russell: We would have liked to have seen action on community purchase at the same time. There is also a review of compulsory purchase, which we have had and continue to have views on.

The Convener: It seems that they have become disjointed.

Michael Russell: Yes.

Hamish Trench: I agree with Michael Russell that the pre-notification requirements are a complex aspect of the bill. However, I would not want to lose sight of the importance of a form of prior notification. We recommended that very clearly, given what we see in the land market. We see the rural land market operating at a very fast pace with very high prices. It is also important to say that this is not just about ensuring that communities have access to acquisition of land. It is just as important to open up opportunities for other individuals, such as farmers, and businesses to know when land is coming to the market and, therefore, to be in a position to negotiate if they are seeking to acquire land for a particular purpose. Pre-notification is an important measure and one that goes well beyond enabling community ownership.

Michael Russell: It could be simplified in the bill. The advertisement of land through the local press or whatever might have benefits both for the local press and for those who are interested in acquiring land. To simplify pre-notification in some way would be helpful.

The Convener: Are you comfortable that prior notification and the lotting that leads to it are easy to do? When I was lotting estates as a land agent, I found it to be the most difficult thing that I had

done in my life. In the bill, it appears to be quite easy.

10:00

Michael Russell: We are about to start looking in some detail—I think this week—at the issue of lotting. It will certainly not be simple, but we want to find a way or make recommendations to make it as simple as possible.

The Convener: If lotting was carried out to allow a community purchase, which I think is within the scope of the bill, it could devalue the rest of the holding. There is provision in the bill for compensation, with the Government buying the whole thing, but that would surely be on the basis of an open market value without the lotting.

Hamish Trench: It is important to acknowledge that it is expected that, under the bill, all the transactions would be on an open market basis.

The first thing that I would flag up about lotting is that it is a direct response to the issue that the bill is trying to address, which is the concentration of ownership. Lotting land in those circumstances would be a direct way of opening land up and making it available in a different way from how it would otherwise come forward. It is a logical response to the issues that the bill seeks to address.

We certainly need clarity about how the lotting would be considered. We would like to be thinking about the factors that the land and communities commissioner would need to take into account, such as the criteria that they would consider in relation to lotting. It is really important that that process develops in a way that is predictable so that all parties can understand the kind of decision making that would take place. I have no doubt that the commissioner would have to seek professional advice in doing that.

The Convener: I would find it odd if the commissioner, if there is to be one, could make that decision without taking professional advice, because only a limited number of professionals understand that aspect of the market and can do that work well.

If somebody wanted to sell a bit of a landholding that was over 1,000 hectares to a small community group but they did not want to sell the rest of it, would that require lotting?

Hamish Trench: My understanding is that it would not. My reading of the bill is that, if a landowner with a landholding of over 1,000 hectares was to sell a part of that holding, it would trigger the prior notification procedure. If the intention was to sell to a community body, the first stop would be a negotiated sale, as at present. The prior notification would kick in and it would be there as a backstop, but there would be nothing to prevent a negotiated sale and transfer from taking place.

The Convener: If the land was being sold to an individual for them to build a house, would that trigger lotting? That is not the same as a sale of land to a community.

Hamish Trench: As I read the bill, that would not trigger lotting. It would trigger the prior notification procedure. The two measures are separate. There is a question about what will happen in the case of very small transfers from within holdings that are over 1,000 hectares. Some clarity is needed on proportionality in such cases and how, for example, sales of individual house sites and sales to tenants would take place.

The Convener: Given that one of the aims is to free up rural housing and allow land for development, that may be a negative. You think that a further bit of work may be required in relation to cases where the sale is for a small-scale development such as a couple of houses for local people to live in, but it is not a sale to the community?

Michael Russell: It is important for the bill to be as clear as possible on those matters.

The Convener: And is it?

Michael Russell: I think that there is work still to be done.

The Convener: Okay. I will let the rest of my questions go, because some of them have been asked already. We will move on to questions from Mark Ruskell.

Mark Ruskell: I would like to explore the difference between the transfer test in the bill, which applies to the seller prior to sale, and what you wanted to see in the bill, which was a public interest test that is applied as the land is being sold and which puts conditions on the future ownership. Will you comment on that, please?

Hamish Trench: Yes. The key practical difference is that the transfer test in the bill applies to the seller of land before they bring the sale forward, whereas the public interest test that we proposed in our recommendations would apply to an incoming landowner on the acquisition of land. The implication is that the transfer test could intervene and require lotting prior to sale but it will not introduce any influence or conditions over the on-going ownership and use or governance of the landholding.

Having said that, we recommended that lotting be one of the outcomes of the public interest test. I go back to what I said earlier: lotting is a direct way of intervening and delivering a less-concentrated pattern of land ownership in a

particular landholding. We welcome the lotting proposals, which are an effective way to bring more land forward. However, the transfer test is different from the public interest test as it does not affect the on-going ownership of the landholding.

Mark Ruskell: Why do you think the Government has chosen the transfer test? Were you asked for advice on the matter?

Hamish Trench: No. I do not know. As far as I am aware, the decision was a judgment about practical delivery and legal context.

Michael Russell: It is not an either/or, in our view. We could do both.

Mark Ruskell: The bill contains only a transfer test, but we could also introduce a public interest test, in theory.

Michael Russell: Yes.

Mark Ruskell: Okay. You have covered this in relation to land management plans, but should the transfer test also apply to aggregate landholdings that are over 1,000 hectares?

Hamish Trench: The same consideration applies to the question of cumulative holdings and whether they are in scope or not.

Mark Ruskell: You believe that there should be consistency between the different measures in the bill—the transfer test and land management plans.

Michael Russell: Yes.

Mark Ruskell: Regarding the transfer test applying to large landholdings, the bill refers to holdings that are over 1,000 hectares. Do you see an argument for reducing that? If so, why?

Hamish Trench: Our data suggests that, at 1,000 hectares, the bill would catch between five and 15 landholding transactions per year, looking at the last three years of the land market. If it was reduced to 500 hectares, we could probably double that, with a further five to 15 holdings being within scope. The more the scope is reduced, the more it would be taken into the territory of smaller holdings and agricultural holdings.

Mark Ruskell: I know that Monica Lennon wants to come in, convener.

The Convener: Yes. Members are being very polite to each other, which is great to see. Monica, do you want to come in this point?

Monica Lennon (Central Scotland) (Lab): Yes. Thank you, convener. We are a very polite committee.

Mark Ruskell asked about the transfer test and the public interest test, and Mr Russell said that it does not need to be an either/or, because we could have both. Would you like to see amendments to the bill to build that in?

Michael Russell: Yes. We support the bill—we have supported it from its publication—but that does not mean that it cannot be improved as it goes through the system. Everybody in the room knows that. There are areas in which we think that it could be more ambitious, and the area that we are discussing is one of those. We think that reinstating some measure of public interest test as originally envisaged would be helpful.

There are a number of areas in which we would happily say that the bill should be more ambitious. There are areas that we would like to question. For example—I do not know whether this is going to come up—the role, responsibilities and function of the new commissioner is an area that we have considerable interest in, and we would like to see some changes there. The test is one of those areas, and that is a positive thing, because bills are improved as they change, and it is useful to have continuous improvement.

Monica Lennon: That is what we like to hear. No bill ever comes to us in a perfect form. Before I hand back to Mark Ruskell, I have a question about lotting. We have heard concerns from some stakeholders that the lotting process as proposed has quite a few loopholes that could enable further concentration of land ownership. Do you recognise or share that concern?

Michael Russell: I will ask Hamish Trench to comment on that but, as I indicated, we are beginning to look at the lotting proposals. One of our roles is to look in detail at some of the things that are not fleshed out and to make recommendations. Lotting is one area where we want to make sure that, if there are such loopholes, we draw attention to them. We have not done that work yet, so I cannot comment in detail.

Hamish Trench: As with any bill, probably, there are inevitably potential loopholes, which I know that the Government and stakeholders are looking at keenly. The particular one that I have heard flagged up is that the bill suggests that no individual will be able to acquire more than one of the lots, but there is nothing that would prevent onward sale in the future. It comes back to the question of proportionality and where the bill is looking to intervene. It partly comes back to why we proposed a public interest test on acquisition. The question is whether it is possible and reasonable to control what happens beyond the initial transfer at lotting.

Monica Lennon: I recognise that there is more work to be done and that you have more research to do. Perhaps we could get an update in writing as we continue with our scrutiny.

How do the proposals compare with international regulatory mechanisms? Are there any parallels to be drawn on oversight, intervention and outcomes? You mentioned that, in your research, you have looked at 22 other countries. Is there anything that you can say about lotting in that context?

Hamish Trench: In broad terms, and with the caveat that I mentioned that no country can just be lifted to match Scotland, it is quite common to have reasonable interventions at the point of sale to make sure that land is structured in a way that will help to deliver opportunities. I mentioned the French SAFER system, which is all about opening up opportunities and making land available for developing farmers and businesses. There are other mechanisms in Europe, largely at a municipal level, that influence the structure of landholdings and who is able to acquire them, and that maybe set conditions on future use, residency use and so on.

Monica Lennon: Who should make lotting decisions? Should they be made by ministers rather than by more local bodies such as councils? What scope is there for communities to be involved in the lotting process?

Hamish Trench: We have been clear in our advice that, where possible, the decisions should be made as locally as possible. In other countries, it is quite common for the decisions that we are talking about to be made at municipal level. We do not have an equivalent local governance structure in Scotland, so we have to look afresh at our conditions and our context here.

On the way that measures are proposed, it is entirely reasonable that decisions lie with ministers, given the balance of things that they will take into account: the balance of public and private interest, the human rights context and the question of compensation. It seems to be entirely appropriate for those to be ministerial decisions.

On the involvement of communities, I fully expect that the land and communities commissioner, in the way that they approach advice on lotting, will seek views and take account of local knowledge, expertise and experience.

Monica Lennon: Thank you.

The Convener: We will go back to Mark Ruskell. I will then bring in the deputy convener.

Mark Ruskell: We have covered most of the questions that we wanted to ask, but I want to ask you about the definition of community sustainability. What was your thinking when you chose not to recommend that a definition should appear in the bill? Is it too difficult to provide a robust definition? If we do not provide a definition, is there a danger that areas such as community housing, for example, become less considered and less defined in the bill and that missed opportunities might arise as a result?

Hamish Trench: We would suggest that it is important to have as broad a definition of the public interest as possible in shaping the transfer test. If we want lotting to be effective and have the most impact, a broad definition of the public interest would enable that. It is fairly common in bills not to try to define the public interest, in recognition that the definition changes and is a judgment for Parliament, Government and ministers over time.

In our advice, however, we recommended some practical criteria on, for example, the control of local resources, the local housing supply, local economic opportunities and local infrastructure. We could envisage having practical criteria, perhaps in guidance, that would start to bring clarity to how one might interpret the public interest.

Mark Ruskell: So you see that coming through guidance and not in a big list in the bill.

Michael Russell: That was also the situation with the Land Reform (Scotland) Act 2016 in the end, if you recall. The definition did not appear in the bill but the subsequent documentation, guidance and secondary legislation tied that down more closely.

Mark Ruskell: Okay—thanks.

10:15

Ben Macpherson: Good morning, all. I want to go back to the considerations around a public interest test. I represent the most densely populated part of urban Scotland, and this point applies to all of urban Scotland in the housing emergency that we face. In many instances, the cost of land is a real prohibitor of social landlords building more housing, and the land banking of areas of our cities is a problem. Measures that have made an impact have been taken but there is still work to do. I know that you have produced papers on a public-interest-led approach to development. Will you say a bit more about how a public interest test could make a difference in an urban context as well as a rural one?

Hamish Trench: I will be upfront: the evidence base and the research that we did that led to the recommendation were clearly based in a rural landholding context, but we acknowledged at the time that the same issues of concentration of power can occur in an urban situation. On how the measures in the bill might or could apply in an urban context, the most likely connection is with the inclusion of sites of community significance

and the flexibility or discretion that that criterion would bring.

More widely, we continue to see big opportunities, and frankly a big need, for land reform in urban Scotland. I draw attention to recommendations that go beyond the scope of the bill, particularly those on compulsory sales orders to bring vacant and derelict sites back into use, and the housing land recommendations, which you referred to in talking about public-interest-led development. The connection is that we see a much stronger and more active role for public bodies to be deliberate about making land available for development and bringing it forward in conditions that could allow that to happen.

Ben Macpherson: Were you disappointed that land value capture was not considered as part of this process?

Hamish Trench: We have offered advice on land value capture. We recognise that that is another complex topic that probably requires its own legislation. We are engaged with the review of compulsory purchase orders, where we see significant opportunity to simplify and modernise and to ensure that the process is practical and that local authorities have the capacity and confidence to use it. That brings us back to looking beyond the scope of the bill to the range of other measures that need to be taken forward in parallel to deliver on the land reform ambitions.

Ben Macpherson: Within the scope of the bill, could the public interest test make a meaningful difference in urban Scotland?

Hamish Trench: Yes. I think that that is the one aspect that could connect most strongly to urban Scotland.

Ben Macpherson: Thank you.

The Convener: I will go to Douglas Lumsden for the next question, and that will bring us to the end of part 1, although I have a question before we finish it. I will then take a short pause before we go on to the intricacies of part 2.

Douglas Lumsden (North East Scotland) (Con): We heard earlier about the new land and communities commissioner. The financial memorandum for the bill says:

"The Commission will require ongoing resource funding to cover the costs for the new Commissioner and additional staffing costs."

However, it is proposed that those costs will be met only partially through new funding and

"partially ... through existing funding to the Commission, by reducing their current activities, such as their policy work."

In practice, Mr Trench, what will that mean for the commission and for all the other work that you do? Will it have an impact?

Hamish Trench: I should be clear that we cannot deliver the new functions that are proposed for the land and communities commissioner within our existing resources without significantly changing what we currently deliver. The choice is that we would either reduce the advice that we give on policy, legislation and practice and/or reduce the good practice advice. Over the years, we have seen a growing demand for the advice that we provide on practice to support people to make change happen on the ground, and we would expect that to continue to grow. That would be the choice facing the commission if we did not have additional resource commensurate with the burden of the functions coming in.

Douglas Lumsden: Will you appeal to the Government to fully fund the new remit that you will have?

Hamish Trench: We can be straightforward about the funding that would be needed to deliver that. It is perfectly reasonable for us, the Government and others to question what the balance of that spend should be, but I see a continued value in the policy advice and the good practice advice that we provide at the moment.

Douglas Lumsden: However, as it stands, that will have to reduce to fund the new functions?

Hamish Trench: Yes.

The Convener: Before we leave the appointment of that new commissioner, I want to ask whether you were all in total favour of having a separate person to do that. Mike, were you in favour?

Michael Russell: No. Let me put it this way: it is a perfectly acceptable proposal, but we would like to discuss it in the light of other possibilities. We would make two observations, the first of which is that it is possible to envisage a situation in which the powers are vested in the entire commission and not in a single commissioner. Mr Lumsden made a point about the cost of a new commissioner, and the approach that I suggest would change the cost balance substantially. That model exists in other bodies such as the Scottish Environment Protection Agency and NatureScot, where the regulatory function is held by the commissioners. The present proposal is modelled on the experience of the tenant farming commissioner.

Secondly, if the model is to be the one that is proposed in the bill, we want to make sure that the collegiate nature of operation of the commission is sustained. Therefore, we want to make sure that there is a closer relationship between the new commissioner and the existing commissioners and that there is an obligation on the new commissioner to work with and consult with his or

her colleagues. Those are live issues relating to how this eventually pans out.

The Convener: I am not quite clear. Does that mean scrapping one of the land commissioners and bringing in the new person?

Michael Russell: No, that is not the proposal at the moment—

The Convener: No; it never gets smaller.

Michael Russell: —but you could envisage not increasing the number of commissioners and ensuring that the function was held corporately by the commission, although that would increase staffing costs. You made a point, convener, about land agents. There will, for example, be significant increased costs for professional advice and for the support that will be required. The tenant farming commissioner has dedicated support within the commission. The new role would require at least as much and probably more.

The Convener: I have another question before we finish this topic, and Jackie Dunbar may want to come in on the back of something that I will ask. When the Bute house agreement was in place, Lorna Slater announced that £2 billion of investment would be needed from private investors to help us to reach our net zero and tree-planting targets. Will part 1 of the bill effectively stop those investors wanting to come to Scotland? Will it frighten them or will they continue to invest, as the Government has said is needed?

Michael Russell: The bill should not frighten anyone. The bill is redolent with opportunity. The question is whether the bill can be improved to be even more advantageous for the entire nation and for people, power and prosperity.

Hamish Trench worked closely on the issue prior to my becoming chair and might want to comment on it.

Hamish Trench: On that specific context, no, I do not think that the bill will have that effect, partly because we have seen over the past couple of years a shift where corporates and financial institutions are less interested in buying land directly in Scotland for those purposes. Of course, to invest, they do not need to acquire and own land. They are also seeking to invest through existing land managers, partnerships with communities and other ways. Therefore, there is no automatic impact there.

The Convener: We have heard, for example, that Gresham House is quite a big landowner in Scotland and it would say that it is delivering benefit for Scotland in reaching our net zero targets. Do you think that Gresham House will be unperturbed by the lotting and notification provisions and all the other things in part 1?

Michael Russell: If Gresham House was perturbed, I hope that all of us would be seeking to give it some comfort that we think that the bill is redolent of opportunity for the entire sector.

The Convener: It looks like I have opened up a lot of questions, but I promised that Jackie Dunbar would be next.

Jackie Dunbar: My question is a bit blunter that yours, convener.

Do the witnesses have a view on the belief that those with the broadest shoulders—for example those landholders who are privileged enough to own multimillion-pound estates—should bear the greatest burden in reaching our goals of net zero and nature restoration?

Michael Russell: Clearly, the obligation on biodiversity and other issues goes with the property, so there has to be a recognition of that—from each according to his or her ability, so to speak. I do not know whether Hamish Trench wants to add to that, but we would accept that that is an obligation that people have and are willing to enter into.

Mark Ruskell: There are huge opportunities, with or without the bill, for investment in nature and carbon markets, but do you see the bill as an opportunity to regulate those markets? At the moment, they are largely unregulated and it can feel to some communities a bit like the wild west.

Michael Russell: We have our toe in that water. Hamish Trench might want to explain what we are doing and what our thinking is.

The Convener: For a variety of reasons, Hamish, I ask you to do this briefly, because I need to bring in Bob Doris and we also have a wee break coming up shortly.

Hamish Trench: Briefly, whether it is through the bill or another means, we think that there is a need for stronger regulation of the carbon and nature markets, particularly at the buyer end. There are existing codes on the supplier side. The other key issue is the distribution of benefit. We publish guidance on the way that communities benefit. Some of that needs to be embedded much more strongly through policy and through requirements of conditionality.

Mark Ruskell: Is it too earlier to codify some of that work in legislation? Does it need to go into legislation?

Hamish Trench: It seems clear that regulation has to play a part in that. We are providing advice for the nature markets framework that the Scottish Government is developing, which I hope will clarify the balance of incentive and regulation that is required.

The Convener: I will bring in Bob Doris, who has a question on resourcing.

Bob Doris: My question is inspired by your question, convener, about potential financial burdens on the Land Commission and compromising other areas of what it does. Right now, in relation to those with the broadest shoulders paying, what about the largest landowners or large management companies? Gresham House, for example, owned no land in Scotland in 2012 and currently has 53,000 hectares. We see a direction of travel there. Is there any levy on those largest landowners or land management companies in relation to regulatory functions and is there an opportunity to do that in a proportionate and responsible way?

Hamish Trench: The short answer is no—there is no provision such as that directly in relation to these measures.

Bob Doris: I am new to this, Hamish, and you are not, and I am trying to scrutinise the bill. Are there examples where that happens elsewhere in the world and has the Land Commission thought about what a model in Scotland could look like?

Hamish Trench: Yes. In an international context, you find levies and also tax. That takes us to our advice on the tax and fiscal policy. We have, for example, proposed that there could be a surcharge on land and buildings transaction tax for high-value land transactions, again recognising the significant public value or the value that is created by public policy, particularly in a nature and climate context. There are mechanisms, but we would advise looking to the tax system to deliver that transfer back into public value.

Bob Doris: Thank you.

The Convener: Thanks, Bob—that is a thought for the financial memorandum.

On that note, I will suspend the meeting. It is 10:28, and I ask everybody to be back at 10:35 or thereby.

10:28

Meeting suspended.

10:36

On resuming—

The Convener: I reconvene the meeting.

I will ask the next question, so it was appropriate that I had a break to get myself ready for it—although I was ready for it anyway. The Scottish Land Commission hosts the tenant farming advisory forum. How much has the development of part 2 of the bill been based on agreement in that forum? Bob McIntosh is probably the expert on that.

Bob McIntosh: We had quite a lot of engagement with Scottish Government officials on part 2 of the bill up to a certain point. That engagement was very helpful, and the officials were very open with us. We would have liked that engagement to have gone a bit further so that we would have seen more of the details because, as always, the devil is in the detail. Had we seen more of the details, perhaps we could have avoided some of the issues that have come up.

The Convener: I am not sure that that specifically answered my question. I was trying to delve into whether the Scottish Tenant Farmers Association, Scottish Land & Estates, NFU Scotland, the Scottish Agricultural Arbiters and Valuers Association, the Royal Institution of Chartered Surveyors and the Agriculture Law Association as well as the Scottish Government had a big input into part 2 of the bill.

Bob McIntosh: They were all at the meetings when part 2 of the bill was discussed with Scottish Government officials. As I have said, the officials were very good at bringing stuff to us and discussing it with us. However, I would have liked that engagement to have gone a bit further into the details of what came out in the bill, because I think that we could have added some extra value at that stage as well as at the principles stage.

The Convener: Okay. Indulge me, Bob. Which area do you feel that you did not have enough engagement on?

Bob McIntosh: All of them, when it got down to the details. Things have been thrown up that we did not discuss when we talked about the broader principles. I could say that about quite a few of the issues in the bill.

The Convener: Okay. That slightly concerns me. With my background in agricultural tenancy law, I struggled to understand all of the bill. Maybe when we delve into it, we will find out a bit more.

Monica Lennon: What are your views on the model lease for environmental purposes? What needs do you see that responding to? Is that the most effective way of responding to those needs?

Bob McIntosh: The background is that there is recognition that letting land for more than agriculture will be a bigger thing in the future with all the natural capital, forestry and so on. Could that be done under existing agricultural leases? No. There is a limit to how far we can stretch the definition of “agriculture”. The background and the feeling were that a new form of tenancy with a broader approach, including land being let for all sorts of different purposes, might be helpful.

That might be helpful, but, at the moment, there is a lack of clarity about whether that is a new form of lease that would operate within the current agricultural holdings legislation or a new form of tenancy that would be outside the current legislation and would leave more for landlords and tenants to agree on. The latter is what we had expected, and that is probably what most stakeholders are looking for. Maybe the Government needs to clarify whether that is what is intended. I think that it is what is intended, but that is not clear from the bill.

Monica Lennon: Okay. So you are looking for more clarity on that.

On the model lease, I have already asked about practices from elsewhere, but are there examples of that approach from other places or other countries? Are there any other lessons that we could learn?

Bob McIntosh: I am not aware of any other similar things.

Monica Lennon: Okay. Do you have a view on the relationship between the model lease proposals and existing legislation relating to agricultural holdings? We have heard from some respondents that the policy memorandum states that the template should be used only where less than half of land management is agricultural, but that is not explicit in the provisions of the bill. Do we need more clarity in that area?

Bob McIntosh: Yes. My view is that that should be outside the scope of the current agricultural holdings legislation, and I do not think that specifying a certain percentage of agriculture is particularly helpful. That should be available for any letting of land that people choose if they do not want to use the current agricultural holdings leases to do that.

Monica Lennon: Okay. Thank you. Does that proposal and other aspects of the bill make adequate provision for the role that land might play in delivering a just transition to net zero and in tackling the biodiversity crisis?

Bob McIntosh: I think that they do. The important thing has been to ensure that, in the new paradigm of regenerative agriculture and sustainable agriculture, tenants are able to play a part alongside owner-occupiers. Without some of the changes in the bill, it might have been difficult for tenants to play a full part.

The bill has done a pretty good job in ensuring that tenants will not be excluded. Things such as extending the rules of good husbandry and the definition of “agriculture” were needed to allow tenants to engage in things that would not be strictly considered to be agriculture at the moment and therefore might technically be in breach of their lease if they were to do them, even though the Government is encouraging them to do them. A bit of housekeeping needed to be done, and the Government has done that.

Monica Lennon: That is helpful. Thank you.

Is there anything else that you want to add about the model lease for environmental purposes?

Bob McIntosh: No. Getting clarity on exactly how it will work would be helpful to the sector.

Monica Lennon: Okay.

The Convener: Before we leave that issue, I understand why some people might like to do that, but I am trying to understand who they are. Are we talking about the big organisations, the big charities, the environmental charities, or existing farmers? If it is existing farmers, something will be taken out of what may be a secure lease and put into an insecure lease on a short-term basis.

Bob McIntosh: Yes. People would be able to change the form of lease only by agreement. That is the key thing. No one could insist on a tenant moving to the new form of tenancy. That might be useful and of interest to a whole range of landowners. Frankly, I do not expect that to be a big issue in the future.

The Convener: How many in a year are we talking about?

Bob McIntosh: I could not even guess. A few rather than many, I think.

The Convener: Fewer than 10?

Bob McIntosh: Possibly.

The Convener: Okay. Thank you.

Mark Ruskell: Where do you see smallholders sitting? Should they be brought under the legislative framework for crofting, or does the existing provision for agricultural tenants meet the needs of smallholders?

10:45

Bob McIntosh: That is an interesting question. When that issue first came up, my first reaction was that a smallholder looks more like a crofter than a tenant to me, so maybe it would be better if they went into the crofting legislation. The Government has decided to bring them into the mainstream agricultural holdings swim. That is equally valid, and giving them the sorts of rights and responsibilities that agricultural tenants have is probably a good thing to do. They have been operating under some ancient legislation, which has caused a few problems. I think that the Government proposal will bring a lot more clarity to smallholders and their landlords about who can

do what and how they react together. That is a positive thing.

Mark Ruskell: I think that the Scottish Crofting Federation and the Landworkers Alliance take a different view. They would rather see smallholders sitting within the crofting legislation. Why do you take a different view? What are the reasons for that?

Bob McIntosh: It could have gone either way, and either approach would have worked. The Government has chosen to go down that route, and I think that that will work.

Mark Ruskell: What would be the advantages and disadvantages of going one way or the other? Is there no difference?

Bob McIntosh: Unfortunately, I am not very au fait with the crofting legislation. I know that there are lots of implications of being a crofter that are sometimes even more complicated than the implications of being a tenant. There may be something in the crofting legislation that would make it more difficult to work or make things more unattractive to landlords—I am really not sure. However, I think that what the Government has proposed will be very helpful to smallholders and will work pretty well.

Mark Ruskell: Okay. How would you distinguish them? With crofting, there are common grazings. Collective land is managed. Smallholdings are individual holdings. Is that the big difference?

Bob McIntosh: That is one of the differences.

Mark Ruskell: Is that why you think that smallholders fall more on the tenancy side than the crofting side?

Bob McIntosh: Yes. They probably have more affinity with a normal agricultural tenant in some ways because of that.

Mark Ruskell: Okay. I am sure that more evidence will come on that. I will leave things there for now.

The Convener: I have some questions. There are a lot of things in part 2 that I understand, but I want to understand resumption and the different ways of dealing with it, which is causing me a bit of concern. If you have a 1991 act tenancy, resumption is valid only if that is in the lease and there is a way of valuing that resumption. If you are in a subsequent lease, there is a different way of doing it and it is valued in a different way. Will you explain how the bill helps with regard to that? It has certainly confused me.

Bob McIntosh: I will try not to make this too technical, if I can.

The Convener: I love technical things.

Bob McIntosh: Under certain conditions, a landlord can resume land out of a tenancy. If the landlord does that, the tenant is entitled to compensation for the loss of that land. The general feeling is that the compensation that is payable needs to be reviewed. The Government is proposing to bring in a method of valuing the compensation that was designed for another purpose. That would very significantly increase the compensation. Tenants would say that that is justified and landlords would say that it increases it by too much and that that will put off landlords from offering new tenancies.

That is the issue with all this legislation—we must look at it through two lenses. Does it help existing tenants, and what does it do to landlords' willingness to let land? There is a balance to be struck. With the proposed resumption compensation, it is perhaps swinging slightly too far towards disincentivising landlords. Compensation for resumption needs to be increased, but there is probably a different way of doing it that is not quite so extreme that would bring landlords on board a bit more.

The Convener: My understanding is that, under the 1991 act, you can only resume land providing that that is part of the lease and that it is not a fraud on the lease—that is, doing so would not make it impossible to continue farming as things stands under the original lease.

Bob McIntosh: Yes.

The Convener: There is a set formula to compensate for that, is there not? What is that?

Bob McIntosh: Yes. Essentially, it is a multiple of the year's rent.

The Convener: Is it five times—

Bob McIntosh: You could end up with five times the annual rent.

The Convener: The Land Reform (Scotland) Act 2003 brought in a different form of tenancy and that is valued in a different way, is it not?

Bob McIntosh: Yes. Compensation for a 2003 act tenancy is not quite as generous, but the proposed change would make compensation hugely more generous. That is the issue. Is it making it so generous that future landlords will say that it is a real turn-off to providing a tenancy?

We have to consider this against the backdrop in which the total area of tenanted land is declining in Scotland and it will only stop declining if landlords have sufficient incentive to lease land and to make land available for tenancies. We have to be careful not to disincentivise landlords from doing so.

As I said, the level of compensation needs to be increased, but the Government's proposal on how

compensation is calculated may have gone a bit too far. It is using a methodology that is designed for a different circumstance and maybe we need a more bespoke way of doing that.

The Convener: I will push you on something that you said. The new legislation will be applied retrospectively. Every time that the Government does that, it puts landlords off. Is that what you are saying?

Bob McIntosh: There is a risk of that happening. Much of what is in the bill that advantages tenants is very justified, but there are a few things such as this measure in which we need to be careful to get the balance right.

The Convener: Since land reform started, the number of agricultural tenancies has declined. As an agricultural tenant, I do not think that that is a great thing. I would like to see more land being made available for people to farm. Every time that the legislation has changed, landlords are put off from doing that. Is that not a fair assessment?

Bob McIntosh: Yes, sometimes the way in which the legislation has changed has had that effect.

The Convener: A qualified "yes", then, and a qualified response in relation to resumption perhaps being difficult.

Have I missed anyone out? Douglas Lumsden, do you have some questions before I continue?

Douglas Lumsden: No, my questions come later, convener.

The Convener: I have some questions about improvements and sustainable regenerative agriculture and how you value waygo compensation. When I was a surveyor, I found waygo to be the most difficult thing that I ever did, so having a formulaic process is quite good. Is it easy with sustainable and regenerative agriculture to have a formulaic waygo valuation?

Bob McIntosh: I do not think that it is formulaic. Currently, the standard claim procedure tries to ensure that waygo claims are settled before the end of the tenancy. Right now, there are too many occasions in which a tenant who might have left his tenancy six months ago is still arguing with the landlord about what waygo settlement he will have. That is often because people do not start the process early enough.

The proposal under the waygo elements of the bill is that the whole process should start earlier and have a stricter timetable that tries to ensure that the settlements are reached as the tenant leaves the holding, not way beyond that period. At the moment, that is the only application for the proposed standard claims procedure.

The Convener: I can see merit in getting that sorted out quickly, and for stopping the arguments on restricted and unrestricted market values and all the other things that are part of the waygo conversation, including the use of fodder and whether that is to be put back on the holding, and all the other technical issues that are of interest to me but I am sure will not interest other people.

Douglas Lumsden, it is definitely your turn now.

Douglas Lumsden: I will stick with the topic of the standard claims procedure. In your submission, you raised a number of issues about how a valuer is appointed. The process for appointing a valuer differs in different sections of the bill. How should a valuer be appointed? Would that differ depending on the type of valuation?

Bob McIntosh: In general, it should be left to the landlord and tenant to agree on a valuer. If they cannot agree, by all means, the tenant farming commissioner should appoint an independent valuer. There are lots of independent valuers and there is no reason why a landlord and tenant should not be able to agree on one unless they are being bloody-minded.

For all those issues, the landlord and tenant need to agree on a valuer. If they cannot do so, the tenant farming commissioner should appoint one.

Douglas Lumsden: Is the bill almost too prescriptive?

Bob McIntosh: In that sense, it is a bit too prescriptive, yes.

Douglas Lumsden: Usually, they can work it out themselves—they can get a valuer themselves. It is only when that is an issue that maybe—

Bob McIntosh: That would be my recommendation, yes.

Douglas Lumsden: Right. That is interesting.

The Convener: We go back to the deputy convener. [*Interruption.*] Do you have a supplementary on the issue, Jackie?

Jackie Dunbar: Yes, I do.

The Convener: Sorry. I missed that. I apologise. Go for it.

Jackie Dunbar: Thank you. On valuers, you mentioned approval. Is a valuer appointed to approve rent increases?

Bob McIntosh: That requirement does not apply to rent increases. That is a negotiation between landlord and tenant. At the moment, if they fail to agree, the legislation says that it must be referred to the Scottish Land Court for a determination.

Jackie Dunbar: That is very expensive.

Bob McIntosh: It can be.

Jackie Dunbar: I am going slightly off topic. Can anything be done so that a tenant need not go down the road of a Scottish Land Court hearing, because doing that is so expensive? Can you suggest a measure that could be taken before it gets to that stage, such as going to an arbiter?

Bob McIntosh: I had rather hoped that the bill might have included provision to look at that through secondary legislation, because there is a need for a cheaper and simpler way of resolving rent disputes that does not necessarily involve the Scottish Land Court.

Different forms of arbitration are available. The problem with arbitration is that, if you do not like the results of it, you can make an appeal to the Scottish Land Court, which defeats the purpose, because the arbitration just becomes an intermediate step on the way to the court. A binding arbitration that is not appealable to the court might well be a better way of resolving rent disputes.

Jackie Dunbar: Thank you. My apologies to the deputy convener for taking over that bit of the questioning.

The Convener: The deputy convener has questions on that topic, as do I.

Ben Macpherson: In your submission and in wider work, you have noted several detailed issues with the provisions on rent reviews. Will you expand on those?

Bob McIntosh: A landlord and tenant can use any method that they like to agree rent, but, if they fall out, the matter goes to the Scottish Land Court. The thing that the court largely takes into account as evidence is the rent of comparable holdings. That is okay, but it has been very difficult because, under the general data protection regulation, it is not always possible to know which holding is being presented as a comparable rent and therefore the other party has a problem verifying whether the comparable rent is indeed comparable.

The Government's proposed addition of productive capacity as an element in working out what rent should be payable is much to be welcomed. That provides another factor that can be used as evidence in a rent negotiation. It is based on an assessment of how much the holding can earn in relation to how much rent it can pay.

Having the two factors and being able to use them in a sense check against each other is much better than having one major factor to use in a rent negotiation. Therefore, I welcome that addition.

11:00

Ben Macpherson: In relation to part 2, you indicated that you supported efforts to give confidence and certainty to the tenanted sector. However, you drew attention to the continued decline in tenanted land—which you mentioned a few moments ago—and the risks of disincentivising letting land in the future.

Will you say a bit more about whether the bill strikes the right balance between supporting tenants and incentivising letting land? Are any additional changes needed to ensure the right balance is struck over and above what you said a few moments ago?

Bob McIntosh: It does, by and large. My main concern, as I said, is with the resumption situation. That is one aspect in which the balance perhaps needs to be reconsidered. I generally support the rest of the proposals in the bill.

The Convener: I want to go back to the issue of rent, which has always been a difficult one. In my day, it was a question of sitting around a table with a cup of tea and working out what was best and what was acceptable to both parties. I think that that is the way that it worked. There are certain formulaic provisions in the bill, the need for which I understand, but there is something that I do not understand. You are making some changes, but farming has changed a lot since 1991. House letting might be vitally importantly—it certainly is to my farming enterprise, in enabling costs to be offset by letting redundant cottages on the farm—but no account is taken of that in the rent. Is that fair and right?

Bob McIntosh: I think that it will be taken into account in the rent. If the tenant is using some of the fixed equipment that has been rented to him for non-agricultural purposes—for example, if he is letting it as bed-and-breakfast accommodation—that would be taken into account in the rent negotiation.

The Convener: Of course, there is then the question of who is responsible for maintaining the fixed equipment. Is that the tenant's responsibility or the landlord's?

Bob McIntosh: Yes—that is an area that causes an awful lot of problems between landlords and tenants. In principle, the law is clear, but there are lots of grey areas there.

The Convener: Fixed equipment does not include houses, does it—or does it?

Bob McIntosh: Yes, it does include houses.

The Convener: If housing legislation were to come in that made various stipulations about what the letting conditions on the housing would have to be, it would fall to the landlord to meet those

conditions, and the landlord would then expect to receive an increase in rent if the housing was being used for non-agricultural purposes. Is that what you are saying?

Bob McIntosh: One of the big discussion points at the moment is how any changes to housing legislation will affect the agricultural holdings sector. In the past, the Government has got round that by exempting the agricultural holdings sector. That will not be tenable in the future.

Discussion needs to be had about how, in the future, those responsibilities will be divided up between landlord and tenant in housing situations. As well as a farmhouse that is occupied by the farmer, there might be a tied house that is occupied by a worker and a house that is let to the farmer's parents, who have retired, or to a third party. In each of those situations, there is a debate to be had about who the deemed landlord is and who is responsible for new insulation and so on. That is an area of active discussion that we hope to resolve through the future housing bill.

The Convener: It will not be resolved as part of the Land Reform (Scotland) Bill process, so we will have no idea of whether a rent is appropriate.

Bob McIntosh: I do not think that we can resolve that housing issue through the bill that we are considering at the moment.

The Convener: My other question is on game damage, which I am a bit confused about. That will include damage to fixed equipment. Could you explain that? I am imagining a deer charging into a farm building and knocking it down, but that is obviously not what you meant, is it?

Bob McIntosh: No. The definition of damage by game is being extended beyond just crops to things such as fixed equipment. It is very common for a herd of red deer to enter silage fields overnight and to knock down the fences or the walls in the process. That is not damage to crops, but it is damage that is caused by game. Such things will now be caught under the legislation where they were not before.

The Convener: I want to make sure that I understand that. If deer were to come marauding out of Forestry and Land Scotland's woods and they went into a March field and knocked the fence down, would the landlord and Forestry and Land Scotland be jointly responsible for repairing that? Would the responsibility be split 50:50, or would the landlord or Forestry and Land Scotland be responsible for that? There is confusion there.

Bob McIntosh: The legislation deals with game damage that is an issue between the landlord and the tenant. The assumption is that it is the landlord's game that is causing the damage. However, you are quite right to say that, often, that is not the case. The deer or whatever else is causing the nuisance might have come from a third party's land. That makes it a bit more difficult to deal with and to decide who is responsible.

In my experience, issues involving deer have often been easier to resolve by using NatureScot deer officers and the powers that NatureScot has rather than by using the agricultural holdings legislation. NatureScot deer officers have been very helpful in resolving such issues.

The Convener: I understand that, but my concern is that, as I understand it, the bill makes that a matter to be resolved between the landlord and the tenant, even though it might be a third party that is responsible for the damage. Should that be tightened up?

Bob McIntosh: If the landlord leased the sporting rights to a third party and the third party's game caused the problem, the landlord would be able to seek redress from that person.

The Convener: It might not even be a case of leasing to a third party. The wild animals might be being transferred from another landholder's holding. That is the issue that I am trying to understand. The bill seems to put the obligation on the landlord when the landlord has no control.

Bob McIntosh: The situation is further complicated by the fact that, if deer come on to a tenant's land and that land is arable or improved pasture, under the Deer (Scotland) Act 1996, the tenant himself has the right to take action to deal with the deer.

The Convener: In that case, there would be no claim.

Bob McIntosh: At the moment, there would be no claim in such circumstances, because the tenant himself has the right to take action to deal with the deer.

The Convener: There is scope there for some work to be done.

It has been a long session, in which we have looked at all sorts of issues. I am loth to ask each of you how we can change the bill to make it better, because I am sure that you will all have a long list of views. However, is there anything that we have not touched on that you think that we ought to look at?

Bob McIntosh: Yes. I go back to the issue of resumption, the early discussions on which go back quite a few years. They began with a discussion about the compensation that is payable when a tenant is under an incontestable notice to quit—in other words, the landlord has planning consent for houses over the whole holding. In those circumstances, he can issue an incontestable notice to quit and the tenant cannot challenge that. The compensation that is payable in that situation, relative to the uplift in value that the landlord has got, is minimal. That is where we started the discussions about compensation.

Somewhere along the way, we moved on to talking about resumptions generally but, as things stand, a tenant who is subject to an incontestable notice to quit will not be affected by the bill, so their compensation will not be increased. Therefore, if the bill goes through, we could end up in the strange situation in which a tenant who loses a small part of his land might get more compensation than a tenant who loses the whole of his holding and his business and livelihood. Therefore, I think that, if the Government is going to play around with the compensation for resumption, it must also look at compensation for tenants who are under an incontestable notice to quit.

The Convener: That would mean changing old legislation.

Bob McIntosh: It would mean changing the legislation on incontestable notices to quit as well as the legislation on resumptions.

The Convener: Bob Doris put his hand up. Do you want to come in briefly now, Bob, given that I want to—although this might be dangerous—give our witnesses the chance to have the final word? They might be able to address your question in their wrap-ups.

Bob Doris: I have a very general question that might be more about part 2 of the bill. In response to Jackie Dunbar's question about patterns of land ownership in the country, Mr Russell referred us to Andy Wightman's 2024 update to "Who Owns Scotland".

More generally, what will a successful bill look like in 10 years' time in relation to the pattern of land ownership in Scotland? Should we still expect to see the same 20 huge companies having the same extremely dense levels of ownership in the country? Should we see land being owned by much smaller concerns? What will success look like in that regard? How can we monitor the impact on tenants and those with smallholdings? Data can be used to show anything. What we are interested in is the impact on the ground and whether the bill improves the quality of experience for individual leaseholders and for communities. What does success look like?

The Convener: Without giving us a whole book on that, does anyone want to respond? Emma, is there anything that you want to say?

Emma Cooper: I will pass that one over.

Hamish Trench: In the long term, success looks like a much more diverse and dynamic pattern of land ownership that opens up opportunities for individuals, businesses and communities to own and use land in all sorts of different ways. We need that; we need that mix across the sectors of private, public, NGO and community. Given the challenges that we face, we should be using the skills and energy of all those sectors in our land ownership. We think that the measures in the bill will help to deliver that.

I also draw attention to the need for wider reforms alongside the bill. I go back to some of the work that we have done on the wider pattern of tax and fiscal and other reforms.

The Convener: Without repeating that, Mike Russell, is there anything in the bill that you think that we should have addressed this morning?

Michael Russell: There are a number of areas in which the bill can be improved, and we have made those clear. We have covered almost all of them. The public interest tests, the compulsory LMPs and how they might work, the wider inclusion of urban areas in the bill, penalties, moderation of prior notification for sale and the framing of the land commissioner's role are all key issues on which we think that progress can be made.

The answer to Bob Doris's question is very clear. The classic old definition of the Highland problem was the question of how the resources of the Highlands and Islands could be used for the widest benefit of the people of the Highlands and Islands. That is a Scotland-wide question. How can the land resources in Scotland be used for the benefit of the people of Scotland? That is a central task that the Land Commission addresses. We seek to provide evidence and information on that, and to open up those debates in such a way that we can get a resolution that is, as much as possible, a consensual resolution. That is what we will endeavour to do.

However, the pattern of legislating every 10 years on land reform is a pattern that has almost had its day. We need to get to the stage where people feel comfortable with the dispensation that exists and, in those circumstances, can invest in the countryside, make sure that they are accessing the land around them and feel that Scotland has changed in a way that was anticipated at the start of devolution and has not yet been completed.

The Convener: Thank you very much for that. I thank our witnesses for attending and sharing their views. That concludes the public part of our meeting.

We will continue to take evidence on the bill for a long time—up until Christmas, at least. The committee will be stepping outside the committee room to engage with people. The first event will be at the Royal Highland Show, where there will be a panel that includes Andy Wightman, so there will be a chance to engage with him on this subject, as well as the other panellists.

11:13

Meeting continued in private until 12:18.

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