OFFICIAL REPORT
AITHISG OIFIGEIL

Net Zero, Energy and Transport Committee

Tuesday 18 June 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 18 June 2024

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NET ZERO, ENERGY AND TRANSPORT COMMITTEE
22nd 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:

Fergus Colquhoun (Faculty of Advocates)
Grierson Dunlop (Turcan Connell)
Don Macleod (Turcan Connell)
Dr Jill Robbie (University of Glasgow)
Gail Watt (Law Society of Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 18 June 2024

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Edward Mountain): Good morning, everyone, and welcome to the 22nd meeting in 2024 of the Net Zero, Energy and Transport Committee. Our first item of business is to decide whether to take in private item 3, which is consideration of the evidence that we have heard on the Land Reform (Scotland) Bill. Do we agree to take that item in private?

Members *indicated agreement.*

Land Reform (Scotland) Bill: Stage 1

09:33

The Convener: The second and main item of business is our second stage 1 evidence session on the Land Reform (Scotland) Bill. This is the first panel of legal advisers that the committee will hear from during our scrutiny of the bill, and it is likely that we will have a second such panel after summer recess.

I am pleased to welcome Gail Watt, who is the convener of the property and land law reform sub-committee at the Law Society of Scotland. Our next witness is Fergus—how will I get this right? Am I about to pronounce your surname incorrectly?

Fergus Colquhoun (Faculty of Advocates): It is Colquhoun.

The Convener: Perfect. I got it right, through you. Fergus Colquhoun is an advocate at the Faculty of Advocates. I also welcome Dr Jill Robbie, who is a senior lecturer in the school of law at the University of Glasgow, and Don Macleod, who is a partner at Turcan Connell.

Like last week, I want to declare an interest that I have in a farming partnership in Moray. It is all set out in my entry in the register of members' interests. Specifically, I declare an interest as an owner of around 500 acres of farmland, of which around 50 acres is woodland. I declare that I am a tenant of around 500 acres in Moray under a non-agricultural tenancy and that I have another farm tenancy under the Agricultural Holdings (Scotland) Act 1991. I also declare that, sometimes, I take on grass lets on an annual basis.

The deputy convener will now make a somewhat shorter declaration.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I draw attention to my entry in the register of members' interests, which shows that I am a trained lawyer. Although I am no longer a member of the Law Society of Scotland, I am on the roll of Scottish solicitors. For transparency, I state that Dr Jill Robbie and I used to work together in private practice.

The Convener: Oh, perfect. Thank you very much.

We will go through part 1 of the bill, and then we will suspend the meeting briefly to allow for a changeover of witness. Don Macleod will step down and Grierson Dunlop, who is also a partner at Turcan Connell, will take over. Dr Jill Robbie will leave us at that stage, too, because part 1 is her specialty.

Let us move on to questions—the easy bit. I ask each of you to explain briefly your experience in land management. We will start from my right—the witnesses' left—then work along the line. Gail Watt, will you say a wee bit about your experience?

Gail Watt (Law Society of Scotland): Good morning. I am the convener of the Law Society's property and land law reform sub-committee. We are a group of around nine solicitor members and non-solicitor members with experience or interest in land reform and property reform in Scotland.

As part of our response to the bill, the Law Society set up a wider working group, which took in members from our environmental law sub-groups and our rural sub-groups, and our tax and planning sub-groups have also fed into that.

For my sins, in my day-to-day life, I am an agricultural and rural property solicitor and legal director with 20 years' experience in that area.

Fergus Colquhoun: I am an advocate and a member of the Faculty of Advocates, which is Scotland's independent referral bar. My personal practice area includes rural property and agricultural property in particular. On that basis, I was included in preparing the faculty's response to the consultation on the bill, and I have been asked to speak on its behalf to that response.

Don Macleod (Turcan Connell): I act for large landholders, which covers families who have owned estates for generations and clients who are buying and selling large landholdings. I act for charities that own large landholdings, for farmers, for forestry investors and for a number of parties in the emerging natural capital and carbon market in the United Kingdom.

Dr Jill Robbie (University of Glasgow): Hello. I am an academic lawyer at the University of Glasgow. I should mention that I am deputy chair of NatureScot, but I am not giving evidence in that capacity today. I have written on and researched in the area of land reform and property law, and I have written on carbon trading and community rights to buy. I gave evidence on the previous Land Reform (Scotland) Bill, and I am a member of the land and human rights advisory forum of the Scottish Land Commission.

The Convener: The first question will come from the deputy convener.

Ben Macpherson: Thank you all for your time and for your submissions in advance of the meeting. Giving you the opportunity to build on those written submissions, we would be interested in hearing your views on the need for further land reform and on whether the bill, as drafted, will improve transparency, strengthen the rights and sustainable development of communities, and ensure sufficient and adequate supply of land. Perhaps Dr Robbie would like to begin.

Dr Robbie: There is still a persistent need for measures to tackle the concentration of ownership in Scotland. The Scottish Land Commission and many other research organisations have published evidence that shows the on-going negative social and environmental consequences of the concentration of ownership in Scotland. I have reservations about whether the bill will address the underlying problems. I have given an outline of my reservations in my submitted evidence, but I am happy to go into further detail.

Ben Macpherson: For the benefit of those who have not read your submission, could you tell us a bit more about what you think is good in the bill and how it could be strengthened?

Dr Robbie: The land management plans are a very positive development. The provisions could be strengthened, but it is positive that large-scale landholdings will have to publish a land management plan that includes information on how the estate is contributing to increasing biodiversity and to net zero.

The extended opportunity for community right to buy is a highly technical amendment to a highly technical procedure, and the timescales are so strictly defined that I do not think that the right will ever be used, unless there are extremely specific circumstances.

In relation to lotting, I am worried about natural capital developments in Scotland. That issue is not covered in the bill at all. The interaction between lotting and the purchase of land for natural capital could lead to negative consequences for communities in relation to, for example, other rural employment opportunities.

Ben Macpherson: In your written submission, you say:

> "a legal obligation of community engagement will allow those impacted by the decisions of the owner to have a say in the management of the land."

Could you elaborate on that?

Dr Robbie: At the moment, community engagement is very much recommended practice, but having an obligation for community engagement is a step up in Scotland's land reform process. That is exciting and important. However, if the obligation is nothing more than to have to engage with communities—if there are no sanctions relating to the types of obligations that would be put in a land management plan—that is quite a basic requirement that could be met by a large-scale landowner.

Ben Macpherson: My colleagues might want to drill into more of that later.

Don Macleod, thanks for waiting patiently. Do you want to answer my initial questions?

Don Macleod: First, in relation to the necessity of transparency, the bill does not add anything. Under the Land Reform (Scotland) Act 2016, there is a very complicated piece of legislation that led to the register of persons holding a controlled interest in land, which is a very effective tool for ensuring transparency in land ownership. There are pretty limited exemptions from the register, and a lot of my clients spend a lot of time going through that and making their registrations. I do not think that the bill is necessary in relation to transparency, because it does not add anything in that regard.

More generally, my overriding comment on the bill is that it does not make any sense for the Government to have introduced it without letting the review of rights to buy settle. Rights to buy have been the heartbeat of land reform for the past 20 years, and the provisions in part 1 of the bill layer on top of the existing legislation on rights to buy even more regulation and legislation. To my mind, it does not make any sense at all that the rights to buy review is being done separately from the bill, because things might come out of the review that mean that the legislation has to be changed again.

The Government has not grasped the full utility of the current rights to buy. The lotting provisions are unnecessary because, at the moment, under the provisions on rights to buy, communities can do their own lotting. They can register their interest in the land that they want to buy. They can do that themselves; it does not need the Government to make that happen. If they really want to buy a piece of land, they have four rights to buy, and they can register. It is a legal process and there are bits to it, but it is not that difficult.

Is the bill really necessary, and is it necessary pending the review of the rights to buy? I do not think that it is.

09:45

The Convener: I want to clarify something. My understanding is that the community right to buy will be put out for consultation this summer and reported on in 2025. Is that right? Is that your understanding?

Don Macleod: My understanding is that the review process has started and that it will be finished by the end of 2025. Therefore, on the current timescales, that will be after the bill has been considered.

The Convener: I apologise to Ben Macpherson.

Ben Macpherson: No problem, convener.

Having listened carefully to what has been said and having read your submission, I am not clear what the line of argument is. Is it that you do not think that there needs to be further primary legislation on land reform, or is it that there could be further primary legislation on land reform but the timing is incorrect because of the review of the community right to buy that is taking place? Is there an open-mindedness to change?

Don Macleod: Yes—absolutely. The answer is the latter. The Government has to accept that the community right to buy, as it stands, does not work. I think that there have been four registrations in four years for the sustainable development right to buy and three registrations in seven years—it might be the other way around—for the abandoned and neglected land right to buy. There have been only two applications for the ordinary community right to buy this year, and only 21 are currently registered. Something is not working. If that is the Government's policy, the rights to buy are not functioning. That is where the Government should be focusing its attention in order to make those rights work better if there is a need and a demand from communities for that to happen.

Ben Macpherson: I have one more question for you before we hear from the other panellists. In your written submission, you talked about

"the marketability of land in Scotland".

I read that with interest. For full clarity, will you say a bit more about why you think that is important and why you would want Scotland's land to be marketable? I am not sure that everyone would agree with that point.

Don Macleod: It comes down to the preservation of private property rights and the extent to which the state can control that. There are already constraints in respect of the rights to buy, planning, infrastructure issues and environmental laws. A whole range of things impinge on private ownership. From talking to clients and others in the industry, I know that there is, particularly in relation to lotting, a lot of concern that the state may be able to impose how a private property right is sold and dealt with. That is a concern.

Ben Macpherson: That does not necessarily directly relate to inward investment. Many people argue that land in Scotland is not well used enough as things stand. The line of argument that I read from the submission is that you think that we should be able to trade land and incentivise inward investment, and you are concerned that the bill might have an impact on that. I am trying to get a sense of what your line of argument is, because I am not clear about that.

Don Macleod: Okay. A free-trading property market is absolutely necessary in any civilised legal system. It is accepted that there are constraints on that. It is about the extent to which we go towards more state control rather than less state control. I believe that a free property market is important.

If we join inward investment with natural capital, some people will not like that, but inward investment is making nature restoration happen in respect of the planting of trees and the restoration of peatlands at scale. That is happening at the moment—there is no denying that. That is how things are going. If the Government wants that to happen as a policy objective, will the bill put off inward investment? I appreciate that not everyone will be on board with that happening, but I think that it will.

Ben Macpherson: Is there any evidence base for that?

Don Macleod: I could introduce you to several people who are behind inward investment in natural capital who would tell you that, yes. They would tell you that they are going to London trying to do their next raise for peatland restoration or tree planting, and are finding it pretty difficult, because they hear that you need the Government's permission before you sell land. That is not exactly correct, but it is kind of the point. They also hear that you may not be able to sell your land as you please in the future because of an extremely complicated, and possibly even unworkable, lotting rule.

Ben Macpherson: The committee will need to examine those potential sources of evidence more carefully. I am conscious that I am taking up a lot of time, convener, so I will let our other two witnesses respond.

The Convener: I thought that it was your evidence session, deputy convener.

Fergus Colquhoun: I can speed things up. I do not think that the Faculty of Advocates has a huge amount to say in response to your questions. Those are practical and policy-related questions for the committee, and we do not take a view on such questions.

Ben Macpherson: I appreciate that.

Gail Watt: The Law Society echoes what Fergus Colquhoun says. That being said, legal reform is essential for creating good law and improving the law in Scotland. The Law Society does not comment on policy, but any reform that is carried out here has to have full cognisance of the overlaps and duplications with the on-going live reviews to current legislation. They have to be properly interrogated and reported on, otherwise we will end up with an approach that is not consistent and not aligned, and that will lead to confusion from not just lawyers but the people who will be affected.

Ben Macpherson: On that, do you think that there is scope for the bill to have a more effective consolidating impact?

Gail Watt: Potentially. It is not something that we looked at in our response, but there is potential for that. However, that is part of a much wider piece in terms of the review of legislation and the on-going consultations and the impact that it will have on the existing legislation and commercial arrangements.

The Convener: Mark Ruskell wants to come in briefly with a supplementary question.

Mark Ruskell (Mid Scotland and Fife) (Green): Dr Robbie, you mentioned natural capital regulation not being part of the bill. What sort of form do you think that regulation could take? Also, for Mr Macleod, could that regulation deliver more certainty for investors, depending on what it looked like?

Dr Robbie: Natural capital is an important driver in the context of land transactions in Scotland. There is emerging evidence that investment-motivated actors are taking part in land transactions in order to set up natural capital projects through carbon trading. There is a risk associated with the implications for community benefit and unwanted environmental impacts. The natural capital market at the moment relies on two PDFs and a website. The underlying system is the environment and property laws that already exist.

In the context of lotting, if there are no restrictions on the buyer of a lotting decision and there are new investment-motivated actors, you could facilitate the transfer of Scotland's land to those new actors because of potential natural capital projects. That interaction between land reform and lotting worries me. The existing community rights to buy are very targeted as to who is the beneficiary, the need for a connection with the land, and the need for the approval of the body by the Scottish ministers. Lotting has none of that. There is no restriction on the buyer. Looking at it from that perspective, it worries me. There could be further regulation of natural capital in the bill, if that was desired.

Don Macleod: In my opinion, natural capital is already very heavily regulated. The two PDFs that Jill Robbie mentioned are excellent: they cover the woodland carbon code, which regulates natural capital—carbon that relates to trees—and the peatland code, which regulates peatland restoration and the natural capital units that come from that. That layer of regulation is first class. Around the world, the United Kingdom standards are held to be very good.

Mark Ruskell: They are not set out in law, though, are they?

Don Macleod: No, they are not. They are part of the voluntary carbon market. If you create carbon units under those codes—with recognition and endorsement by the codes—you have to play by their rules. The science is very developed and the regulation is very good.

Mark Ruskell: That regulates the what, but it does not regulate the who, which I think is Dr Robbie's point.

Don Macleod: That is right.

The process for planting trees is really quite complicated. You have to go through a very detailed, pretty expensive consents process with Scottish Forestry. Typically, it takes ages to give you your consent—two years is not unheard of. That is very heavily regulated as well.

The consequences of seeking to restore peatland may be much less significant. You comply with the peatland code as the standard and you need to give prior notification to the planning authority. Most of the time, you do not need planning permission.

There is already a big process around this, so my view is that the regulation is very good.

The Convener: Bob Doris has a sequence of questions.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Good morning, everyone. Thank you for supporting our evidence taking on the bill. I will start with large-scale landholdings and land management plans. Last week, I noted to the Scottish Land Commission that its recommendation was for land management plans to start at 1,000 hectares, with 3,000 hectares being at the upper end of where it might start. The Scottish Government has gone for 3,000 hectares. As a city boy, I do not really know what a hectare is, but 3,000 hectares is 30 million square metres, which seems quite big: several thousand football pitches—Euro 2024 is on at the moment. Is 3,000 hectares maybe a wee bit high for starting with land management plans? I would like an initial view from each witness.

Dr Robbie: Yes, I think that 3,000 hectares is high. It could certainly be lower. In addition, it does not quite make sense that the test for lotting involves 1,000 hectares but that the figure for land management plans is 3,000 hectares. For the sake of consistency, having the same threshold would be useful.

Other stakeholders have suggested lower thresholds—for example, 500 hectares; 3,000 hectares is definitely a high threshold.

Bob Doris: Thank you. My question was just to get on record an initial viewpoint from witnesses. We will move on to other related questions.

Don Macleod: I have two thoughts. The first is about the accuracy of the data when it comes to transactions. The commission's reports are excellent, but there are issues with the underlying data. If you layer the composite holding test on top of what the commission has already, the situation could be quite different. If the commission says that there would be X number of landholdings in relation to the 1,000 hectares figure, that may be so; however, under the composite holding rules, there may be aggregation, which would change the figures—I do not know what the outcome would be, but it would change the figures. There is a real issue with data accuracy. I am not sure how you would get it better, though.

Bob Doris: Can I check with you, Mr Macleod? So, 30 million square metres is 30 million square metres, irrespective of what the data shows. Is that too big, too small or just about right?

Don Macleod: My first point was about questioning the underlying data. Secondly, I think that it is arbitrary that 1,500 hectares has been chosen. I really cannot understand the distinction. I listened to the evidence from the Scottish Land Commission last week, in which it cited resource issues. I invite the commission to be a bit more ambitious, in the sense that, with regard to land management plans, its job is largely to receive the plan and make it public. If there are—

Bob Doris: We will come to that in a wee second, Mr Macleod. To be honest, it is a straightforward question: do you think that 30 million square metres is too high, too low or about right?

10:00

The Convener: Sorry, Bob—I do not want to stop you, but I note that it would make it easier for me, because I am a simple soul, if we talked about hectares rather than square metres, just so that I understand.

Bob Doris: To a lot of people who are watching this session, 3,000 hectares will just be a random number; 4,000 or 5,000 football pitches is a meaningful amount, and 30 million square metres signifies a lot to people.

I am not even saying what my view is, Mr Macleod—it is just a wee starter for 10, if you like. Is it too high, too low or about right?

Don Macleod: Instinctively, it feels too high, because there are all kinds of land managers who are doing things that would not be covered by land management plans, and who may make an

excellent contribution if they had to do a land management plan.

Bob Doris: I am sorry, but that is what I wanted to get to—that is really helpful evidence for the committee.

Mr Colquhoun, do you want to answer?

Fergus Colquhoun: I do not think that I could say. On whether it is 1,000 or 3,000 hectares, that is, again, not a matter on which the Faculty of Advocates would have any expertise, so my feeling would be as good as yours.

Bob Doris: Likewise—that is why I am trying to elicit evidence from people with expertise in order to work out how I feel about it.

Does Gail Watt want to come in?

Gail Watt: The Law Society has no view on the actual hectarage limits that are imposed in the bill, although we would say that, whatever those limits are, and whatever they are agreed upon to be, that has to be supported by robust evidence in respect of the reasons for choosing those levels.

Bob Doris: That is very helpful; we will come on to more about that in a second.

I apologise in advance to witnesses for moving them on, because there are a lot of questions to get through. I am trying to get an indication of where witnesses are, and then move on to the next question. The speed of my interactions perhaps came across as a bit rude—I apologise for that, but I am trying to get through the questions.

There is no point in having land management plans unless there is a system of compliance. We can talk a bit more in a moment about what that means in practice. For now, let us assume that there has been non-compliance—I know that it is a big assumption, Mr Macleod, but let us play that game for a wee second. The maximum fine is capped at £5,000. Do the witnesses feel that that amount is about right? Again, I do not have a background in this area, but it feels pretty low to me.

We will come to cross-compliance and penalties in a second, but in relation to direct penalties, is £5,000 too low, too high or about right? Perhaps Gail Watt can start this time.

Gail Watt: In the Law Society's written response, we were clear that the penalties that are imposed, whatever level they are set at, have to be proportionate and reasonable. As part of our discussions leading up to that submission, however, there was commentary from several of our members, as an aside, on the fact that whatever level a penalty is set at, it obviously has to have a deterrent attached to it—otherwise, what is the point? Someone will just pay it and walk away, and that is it—job done.

Bob Doris: I agree with all that, but you have not taken a view on the level of the fine. Do you think that the level of fine in the bill would act as an adequate deterrent?

Gail Watt: That is not for the Law Society to comment on. Whatever level is agreed, it has to be ensured that it is proportionate and reasonable, and that it has a deterrent attached to it.

Bob Doris: Would you have a view on whether it would be affordable?

Gail Watt: We would have no view on that.

Bob Doris: Okay. So you would not have a view on whether, if someone was managing 3,000 hectares, a £5,000 fine in that respect would be affordable to them.

Gail Watt: We do not have a view on that.

Bob Doris: Okay. Does Fergus Colquhoun want to come in on that?

Fergus Colquhoun: The Faculty of Advocates has no view on the level of the fine as such. However, I observe that £5,000 is the current statutory limit for a fine imposed by a sheriff on summary conviction in a criminal matter, and my presumption would be that that is why £5,000 has been chosen.

The fines proposed in the bill are certainly summary in nature, albeit non-criminal, and it would perhaps feel slightly strange if they were substantially different from or greater than the fine that a sheriff could impose if the matter were prosecuted in court as an offence under summary procedure.

Bob Doris: That was really helpful. Would that be a barrier to making the fine greater than £5,000? Is that an impediment to going further, irrespective of whether the fine itself is affordable?

Fergus Colquhoun: Not that I can see—it would not be a barrier as such. The proposal is that the fine be imposed by the proposed land and communities commissioner and subject to review by the Lands Tribunal for Scotland rather than subject to review by the sheriff or imposed through a criminal process.

Bob Doris: That is helpful. Mr Macleod?

Don Macleod: In the context that Fergus Colquhoun has just described, £5,000 feels about right compared with other things that are punishable by other types of fine.

Bob Doris: So there is consistency in that respect.

Don Macleod: Yes.

Bob Doris: Do you think that it provides a strong enough incentive to comply? Are there any affordability concerns?

Don Macleod: Perhaps I can base my answer on my typical client base. Would they want to avoid a £5,000 fine? Yes, they would.

Bob Doris: I think that we all would, but I will leave it at that. Dr Robbie?

Dr Robbie: I do not think that it is a substantial disincentive. Indeed, it could be seen just as the cost of doing business. If you wanted to avoid preparing a land management plan, you could just pay the £5,000.

Bob Doris: I think that we have had written and other evidence on that, so we have a spectrum of evidence in that regard.

We heard from the Land Commission about the possibility of cross-compliance, which I have mentioned. In that respect, we might not just be talking about £5,000, but, for the sake of precision, I want to read out the question that I have in front of me.

The consultation on the bill proposed that the outcome of any investigation into a breach could be taken into account in any subsequent public interest test and that additional conditions could be attached to the receipt of public funds, such as registration in the land register and, if in receipt of subsidies, registration and liability for UK or European Union tax. However, none of those proposals has been brought forward in the bill.

I am now going to roll a couple of questions together, convener, given the time constraints. First, why do you think those proposals have not been included, and would there be any legal difficulties in doing so? Secondly, would those proposals provide a greater range of remedies to ensure compliance? Last week, we heard that cross-compliance penalties could be a lot more substantial than £5,000.

I know that I have thrown a lot of things together there. Mr Macleod, if you would like to comment first, that would be really helpful.

Don Macleod: I think that it makes a lot of sense to link this with cross-compliance. If the state is paying out money to farmers or estate owners to do something, that is good, but if that person is not fulfilling their contract or other things that the state requires them to do, it makes a lot of sense for them not to get public money.

I suspect that this is not an issue for today, but there is an irony if you delve into that more deeply. Are the underlying land management practices that give rise to cross-compliance issues compatible with net zero aims, tackling the climate emergency and all the rest of it? You might find that money is being paid out to farmers and estate owners to do things that might not be completely compliant with the bill's principles. In principle, though, I see the logic in connecting the two things.

Bob Doris: Would you like to see more in the bill in relation to that?

Don Macleod: If the Government and the committee were concerned that the bill did not have enough teeth, there would be logic in that. Looking at this issue and thinking about my client base, I am pretty relaxed about this, because you will find that most landowners are already doing most of the things that we think that the land management plans will require. I thought that there was useful evidence from the tenant farming commissioner last week; when he was asked whether he thought that he needed more teeth and more enforcement powers, he did not seem terribly enthusiastic about the prospect. I think that you will find that there is a pretty high degree of compliance across the country.

Bob Doris: Does Mr Colquhoun have anything to add?

Fergus Colquhoun: I will return to my "No comment" position.

Bob Doris: That is fine. We are scrutinising the bill, but I am not going to force you to answer something that you are not in a position to answer.

Fergus Colquhoun: That is not an area of practice that the faculty is involved in.

Bob Doris: Is Gail Watt in a similar position?

Gail Watt: We have not discussed our response to that question in full, but I would be more than happy to take that away and come back with further written evidence, if you would like that.

Bob Doris: That would be really helpful. What does Dr Robbie think?

Dr Robbie: Cross-compliance would be a really useful tool. Whenever you are encouraging any change in behaviour, it is useful to have several options, and that is also useful if there is a possibility of escalation. It might not have been included in the bill because it might be difficult to work out how to get everyone to communicate to ensure that cross-compliance actually works, but that is an internal administrative issue for the Government, rather than anything else.

The issue might not have been taken into account in the public interest test because lotting was not originally imagined as being part of a public interest test. It would also be challenging to consider the lack of land management plans in the context of lotting, as the bill is currently drafted, but it is not beyond reason. I would support having a range of sanctions, so that there is the possibility

of encouraging behaviour change by someone who is not compliant.

Bob Doris: That is helpful.

My final question goes back to the idea of the £5,000 fine for non-compliance and where and when that can be levied. The committee has found a lack of clarity about that, so perhaps the witnesses can help us.

Proposed new section 44B(3)(c) of the 2016 act will require the land management plan to set out

"how ... the owner is complying or intends to comply with ... the obligations set out in the regulations",

and proposed new section 44E will allow specific persons to allege a

"breach of an obligation imposed by regulations under section 44A".

Is the drafting adequately clear to ensure that there are obligations to produce and to comply with land management plans? It sounds a bit like gobbledegook to me. I would rather have no one being fined because people are complying with good practice and everything is positive, but can a person be fined £5,000 for not producing a land management plan and then later down the line be fined another £5,000 if a plan appears but they are not complying with it?

I am also keen to know whether more than one £5,000 fine can be levied. Someone who does not comply with a land management plan can be fined £5,000. If three months pass and they are still not complying, can they be fined another £5,000? We are grappling with that. We will, of course, ask the Government to give some clarity about how those things might operate, but can Mr Macleod offer some assistance?

Don Macleod: On your first point, I had to do the exact same second read when I was looking at the bill. Proposed new section 44A(1) of the 2016 act says:

"Scottish Ministers may by regulations impose obligations",

so it is the regulations that will impose the obligations. Proposed new section 44B talks about breach of those obligations. You make a good point, but I think that the drafting has covered that.

In relation to your second point, I do not think that a landowner could be fined more than once for the same breach, but I suspect that the legislation would allow the commissioner to keep fining an owner for different breaches of the land management plan and the obligations that arise from that. That is my interpretation of the bill.

Bob Doris: I would like to bring in Dr Robbie next. If the commissioner gives one fine for non-compliance across a swathe of obligations in the land management plan, it sounds as if they will not be able to return with a second fine, but individual aspects could each be the subject of individual £5,000 fines. What is Dr Robbie's take on that?

Dr Robbie: That is a difficult question, because it depends on what is in the regulations. Proposed new section 44B says that a land manager has to make a plan and ensure that there is engagement and that the plan is reviewed. That is the minimum that the regulations must require.

There could then be obligations to comply with certain things but, because the regulations are not there, it is not clear whether there would be an individual obligation to reach a particular goal, so that the landowner could be fined for that non-compliance if they did not do that. Because of how the bill is drafted, it is possible that, as long as they publish the plan, the obligation would be met.

Bob Doris: Okay.

Dr Robbie: I am just looking at the other witnesses.

10:15

Bob Doris: I love it when people who have a legal background start looking at one another to see what their thoughts are.

Dr Robbie: Yes—I was just checking.

Bob Doris: Fergus Colquhoun and Gail Watt have not had the opportunity to comment. Does Gail Watt want to add anything?

Gail Watt: We need more information about the regulations. I say again—I feel as though I keep repeating myself—that our members raised the issue of duplication and overlap with other avenues of recourse that might be open.

Bob Doris: If that is the point that your members made, you should keep making it.

Fergus Colquhoun: I associate myself with what Gail Watt said. There is a lack of information at this stage. We cannot really comment on what the breaches might be or might look like, because the bill leaves it to secondary legislation to specify the obligations. In our submission, we questioned whether it was desirable or appropriate for the imposition of quite substantial obligations on landowners to be left to secondary legislation, but that is a separate issue.

Bob Doris: That is fine. I know that the convener has a line of questioning in this area, so I will ask just one more question.

I was a wee bittie surprised by the concerns that were raised in some of the written evidence about the cost of developing a land management plan. I think that Mr Macleod said that a lot of responsible landowners were already getting on with doing

that, without the need for legislation. I would not have thought that, if the threshold was set at 3,000 hectares, developing a land management plan would be that burdensome or that costly in the greater scheme of things. I am asking whether that is the case; I do not know. In life, it is dangerous to assume things.

Do the witnesses have any concerns about the administrative burden and the cost of developing a land management plan? It is important that the committee takes a balanced view and that we get our witnesses' opinions on that on the record.

Don Macleod: The difficulty in answering is that we do not know what the regulations will say. They could be very detailed and very long, or they could be very short. Two pages might suffice, or 20 might be required. I am guessing that quite a bit of detail will be required.

If people are asked to prepare something under pain of having to pay a fine if they do not do it, I think that most responsible landowners will take the time to do it. They will have to review matters and will have to disclose quite a lot of information in the plans. I would think that the costs of complying with that requirement will be quite significant; we are talking about more than just a rounding error.

Bob Doris: Do the witnesses have any other comments? I do not want to single anyone out, but I see that Dr Robbie is looking over.

Dr Robbie: There are other elements that could be included in the land management plans. It is wonderful that the plans involve commitments—or, rather, that people have to explain how they are increasing or sustaining biodiversity and adapting to climate change. If we are thinking about community impacts and fulfilling the human rights of the population, there are other considerations that it would be beneficial to include in the plans—

Bob Doris: I am sorry to cut across you, but I probably did not articulate my question sufficiently well. Some witnesses' written evidence said that it might be burdensome to do community consultation, to consider biodiversity and net zero and to undertake the cost of preparing a land management plan. More things could be included in the plans, and I generally support what you are saying, but others might contend that the more we ask people to do, the more burdensome and costly the process could become. Do you have any thoughts on that?

Dr Robbie: I understand that such work is burdensome, but the purpose of land reform is to tackle the negative social and environmental consequences of large-scale land ownership. I do not think that putting more requirements on landowners in order to tackle those negative consequences is a bad thing, as long as imposing such requirements is effective.

Bob Doris: Your point is that doing the right thing is not burdensome.

Dr Robbie: Yes.

Bob Doris: Does Fergus Colquhoun or Gail Watt have anything to add? If not, you will be glad to hear that I will be bowing out of my line of questioning.

Fergus Colquhoun: No, thank you.

Gail Watt: There must be a clear expectation of what is to be included in the land management plan in order to guide people to understand the responsibilities and to guide their conduct. The financial memorandum was not available when we submitted our response. I will leave it at that, but I have read the financial memorandum.

As Jill Robbie said, there is a multiplicity of rights that affect everybody's land. Scotland is very unique in the sense that we have crofters, graziers, agricultural tenants, residential tenants and commercial tenants who could all be within the 3,000 hectare limit. The Law Society wants whatever is taken forward to be in line with the principles of transparency and engagement and in the public interest.

Bob Doris: Thank you.

The Convener: I will press a little bit on management plans. Don Macleod said that, when it came to the costs of drawing up plans, they were not rounding errors. Let us say that you have a medium to large-sized estate with three communities on it, you go out and consult them, get their input and draw up the management plan, which, for landowners, is probably for 20 years rather than five years, because nothing happens in five years. Is a cost of £25,000 unreasonable for that?

Don Macleod: Instinctively, it is hard to say, but, if someone is doing that properly and they are doing the community engagement, which is important, and if they are talking to other stakeholders, which is also important, that takes time, and then they must write that down. In some ways, quite a lot is covered by the framework for the plans in proposed new section 44B of the 2016 act. I could see the cost being at that level, but that is just an instinctive, shooting-from-the-hip view.

The Convener: When it comes to buying an estate for natural capital, for example, a management plan that was drawn up would have to be quite detailed, would it not? It would probably have the planting schemes on a year-by-year basis and the harvesting scheme, which would be quite complex. Jill Robbie has sort of nodded.

What I am trying to get at is that that is not something that will just happen overnight. Two years ago, the state bought Glen Prosen, which is only 3,000 hectares, and it still has not come up with a management plan for it, for goodness' sake. That will not happen overnight, will it?

Dr Robbie: No.

The Convener: I will talk about expectation and community input. Let us say that consultation goes on and one of the community inputs is to create a mountain bike track from A to B—that is what the community would like, because that would give it some input into a local business. If that is put into the management plan, who pays for it? Does the funding have to go in the management plan, or will it all be down to the landowner to fund it if the community wants it?

Dr Robbie: The process of making the plan allows those discussions to take place. Just because the community wants something, that does not necessarily mean that it will get it. There is a forum in which those discussions could be had. The community might not get exactly what it wants, but there is a process of discussion that allows a compromise in that context, which is positive and beneficial. The plans could create conflicts, but that is not necessarily a negative thing as long as there is a process to work them out.

The Convener: So you think that, in cases in which something might not be deliverable because there are no funds to do it, despite the fact that it is a big landowner who owns the land, expectation can be managed if the communities have an input.

Dr Robbie: Yes, that can be the case if everybody is around the table and if there are processes to discuss matters, including, for example, whether having a partnership with other parties that are affected is possible in order to provide the facility.

The Convener: I saw Don Macleod put his hand up.

Don Macleod: This touches on what, to my mind, is an important point in the drafting. It is not clear whether the bill and the regulations will require positive or different changes in land management in order to comply. For example, I note that the plan

"is to include ... how the owner is managing or intends to manage the land in a way that contributes towards"

net zero, climate change and all the rest of it, and that is very unclear. Can the landowner, when asked, "What steps are you taking?", just say, "None"? I know that that is an extreme example—indeed, it would not happen, because so many are doing these things now—but will that be allowed, or do you have to say what you are doing to contribute to these things? In other words, is a positive obligation being imposed on the author of the land management plan to do something? That is something quite different from what I think the Government is possibly intending.

The Convener: When I read that, I was concerned that, if somebody bought something for a hill farm, the Government might come along and tell them to take all the sheep off the hill, as that was not contributing to net zero. Would that concern you?

Don Macleod: Yes. If you bought a hill farm to keep it as such but then, when putting together your land management plan, you came to the section that asks how you are managing or intending to manage the land in a way that contributes towards net zero, you might have a problem. Is the legislation going to require you to do something different, or will it be okay to say, "I have been asked this question, and my answer is that I am not contributing or cannot do so"?

The Convener: What is not clear to me is whether, if you had cattle and an average 365-day calving interval—which meant that you were reducing the amount of barren periods—that would be sufficient to prove that you were moving towards net zero. Would it be sufficient if, say, your lambing percentage was up above 100 per cent, because you were not carrying excess animals? I do not know—that is unclear.

Does Douglas Lumsden want to ask a question?

Douglas Lumsden (North East Scotland) (Con): Yes. I just have a brief question about Mr Macleod's written submission, in which he says that there might be some confidential and "commercially sensitive" information that you might not want to put in a plan. Can you give us some examples of that information?

Don Macleod: In a land management plan, you have to say when you plan to sell the property. I think that that is private information, as saying when you plan to sell might have consequences. As I am sure that the committee knows, it is difficult to find staff for estates. You might require a new stalker, but if someone checks your plan and sees that you intend to sell up in five years, he will probably not be interested in going to an estate that the owner is planning to leave.

Moreover, it could distort the market. Someone could look at the plans and say, "Well, now I know when this estate or that big farm in this glen or that region is coming on to the market." Such things are not cast iron, but nonetheless, I think that such information is very private and should not be part of the plan.

Douglas Lumsden: Is the only issue, then, the sale date, or is it what people want to do with the land?

Don Macleod: All the other things on the list are fair enough as concepts, but having to disclose when you plan to sell your property crosses a line.

Douglas Lumsden: Thank you. That was helpful.

The Convener: Before we leave that and go to Monica Lennon for a supplementary question, can you clarify that you do not expect land management plans to include financial information? Do you expect them to say how much it costs to run an estate? That might be quite interesting—and frightening. Jill Robbie, do you want to answer that?

Dr Robbie: It would be interesting to see the amount of profits being made from natural capital projects and the percentage predicted to go into, for example, community benefit funds.

The Convener: So, you would like to see the entire cashflow.

Dr Robbie: No, I would not like to see the entire cashflow, because that would be very sensitive information. I do realise that a lot of expense is involved in running an estate, and that should not be underestimated, either, but if the level of profits being made from natural capital were disclosed, that would be very interesting to see.

The Convener: It might put them off or it might encourage them.

Monica Lennon has some questions.

10:30

Monica Lennon (Central Scotland) (Lab): I will bring us back to net zero, because that was starting to sound like an interesting discussion.

We know that land and land use have the biggest role in Scotland's emission of greenhouse gases. Do the owners of large landholdings have a moral and societal responsibility to promote net zero and climate change measures? If we agree on that point, is it reasonable to accept that there should be obligations on the biggest emitters to reduce their emissions? If so, how could the bill be strengthened and improved in that area? I am looking at Mr Macleod in particular.

Don Macleod: I absolutely agree. Big polluters should pay, and that already happens in the mandatory carbon market, for fair enough reasons. There are opportunities in the voluntary carbon market—I guess that we are talking about degraded peatlands, which do emit—that I think that landowners are incentivised to take up. They really are doing their peatland restoration projects enthusiastically, which has the effect of reducing carbon leakage and improving biodiversity. You will find huge excitement in the sector about that.

Monica Lennon: Is there scope to do more?

Don Macleod: Yes, there is scope to do more. The odd thing is that the Government has cut the funding to do it, which is a problem. That comes back to the earlier question about inward investment. If the Government wants the change to happen realistically and sustainably and to be achievable, the money has to come from somewhere. If the Government is not going to provide as much for tree planting or peatland restoration, it is inevitable that it will come from somewhere else.

Monica Lennon: We might return to that if there is time.

Dr Robbie: There is a moral responsibility on large-scale landowners to contribute to tackling the climate and biodiversity crises. The bill is a step in the right direction for land management plans. We are going through a process of land reform. The land rights and responsibilities statement provided a vision. That is getting further into ensuring compliance of large-scale landowners to those responsibilities. In order to ensure compliance, the obligations have to be realistic, and that is the tricky balance that we are all involved in. Otherwise, you will lose the room and you will just get people who are not fulfilling their obligations. However, trying to do that at the pace and scale that is required is almost impossible.

Monica Lennon: Perhaps Fergus Colquhoun could build on that point about balance and where we might need to see more clarity in the bill.

Fergus Colquhoun: I cannot, on behalf of the faculty, take a position on whether owners have a moral obligation to do anything. Having said that, finding a balance between the rights and responsibilities of owners is something that, if it has to be anything at all, has to be workable, otherwise it will just end up in a dispute in court. It is for people who are better qualified than me to say how exactly that balance is found. However, it is very important to find that balance because, otherwise, the legislation will end up not achieving the goals that Parliament wants to achieve or achieving them only by lining the pockets of individuals like me.

Monica Lennon: I do not want to push you beyond your remit, but I will go back to Don Macleod's point that the polluter should pay. If we are looking at responsibilities and obligations, would it be fair to say that there should be an evidence base on the impact of certain activities? Is it better to look at it as being about ensuring that there is clarity on any impact and what should be

an appropriate form of compensation or mitigation?

Fergus Colquhoun: I do not think that I can say much more.

Monica Lennon: That is okay. If you have nothing more to add, I will move to Gail Watt.

Gail Watt: The Law Society takes the same position as the Faculty of Advocates on moral obligations. As we said in our submission, there needs to be careful consideration of any overlaps with existing legislation and existing rights and, as Don Macleod has said, the existing environmental polluter pays principle. We need to ensure that there is no duplication and that there are no loopholes or bear traps that fall in between those things, because making sure that everything is straightforward will be the best way to ensure that there is compliance.

Monica Lennon: On the point that Gail Watt has raised, which came up in discussion with Bob Doris, is there a wider concern that the Government is doing too much at once? A lot of different legislation, strategy and policy is coming through, but the cohesive approach is getting lost somewhere in the process. Is that something that you can comment on, or is there any advice that you can give to committee members as we try to scrutinise what is, at times, a busy landscape of Government activity?

Gail Watt: That is not something that I can comment on on behalf of the society, but we are more than happy to take that away and respond to the committee in writing. As I have said, and as you have mentioned, the level of movement in legislation in this sector is immense—it has been for quite some time. Unless that is looked at in a collaborative and cohesive manner, we are concerned that there will be unintended consequences, not just for members of the Law Society, but for everyone who will be affected by this and subsequent legislation.

Monica Lennon: Thank you for that point and for your offer to provide further advice.

The Convener: As always in this committee, we are up against time constraints. I will push people to ask quick questions and respond with quick answers, where possible. I think that Mark Ruskell has a supplementary.

Mark Ruskell: I will be quick, convener. I have been struck by how we discharge the obligation on climate. Perhaps I could direct this question to Mr Macleod. You will be aware that the Scottish Government is looking at a carbon land tax. Would you agree that creating a mechanism and a financial incentive is the best way to do that? You have said that a lot of your clients desperately want to move forward with their investments in this area. Would a carbon land tax be an appropriate way forward? Could something on how landowners are meeting their obligations under a carbon land tax go into land management plans?

Don Macleod: I am aware that various industry voices would push for a carbon land tax, but the general consensus is that any kind of land tax is immensely complicated. Two or three years ago, I was part of a group with the Land Commission that looked at land taxation. I could maybe dig out that information and send it to the committee clerk, but I am pretty sure that that group concluded that land value taxes were just too complicated. If it is okay, I will check that detail and send it to the clerks. It is quite interesting.

Dr Robbie: I am supportive of a carbon land tax. Currently, we are trying to bring about change on, for example, net zero, through incentives, but often, that results in more resources being channelled to people who already have a lot of resources. If we acknowledge the distributive question behind all of this, which land reform is intended to tackle, we must acknowledge that there are a few people in Scotland with a lot of the resources. In that context, having a tax would be a useful tool.

Mark Ruskell: So, the issue is wealth in its broadest sense—not just land ownership but what the land generates.

Dr Robbie: Yes.

The Convener: I have some quick-fire questions before I let Monica Lennon come back in, and I fear that they will be for Don Macleod and Jill Robbie.

You said that what the bill sets out in relation to the community right to buy is fearfully complex and that we have not sorted out the previous arrangement. Does the bill make sense on community right to buy?

Dr Robbie: Who do you want to answer?

The Convener: You can.

Dr Robbie: I do not think that the power in the bill will change anything. I would be surprised if there is a community that is able to use the new process. Basically, there is a 40-day period in which to make a late application. I do not know about anybody else, but I do not think that anything can get done in 40 days. It is just too hard.

The Convener: Could the Government issue a letter recognising the community in 40 days? The average is 70 days, is it not?

Dr Robbie: I hear that it takes at least two months at the moment, so I just do not think that the provision is useful. It is also an additional and complicated route. Perhaps I should not be saying

this but, even for me—I teach law at the University of Glasgow—it is really hard to understand what all the timescales are. I do not think that a person on the street who wants to buy a piece of land and gets an email that has some sort of information about how they navigate the process will be able to do so within the timescales.

The Convener: Don Macleod, was it a walk in the park for you? Did you understand it?

Don Macleod: It is absolutely mind-boggling. Yesterday, in preparation for this meeting, I re-read part 1 of the bill from beginning to end and I found it to be extremely complicated. I confess that I read one section of the bill 50 times and still do not understand what it means. It is the section that deals with the 50 hectare condition in relation to lotting—I do not know what it means. That is a serious problem. If you add in the fact that communities that really want to get things going can do their own lotting at the moment by forming a community body and registering a claim under the right to buy, the provisions around lotting and prior notification are unnecessary.

In particular, the prior notification provision seems bizarre. The example that I have used before involves someone in a village calling the estate office and saying, "My greenhouse has been on estate land for 30 years, and I need to buy 0.2 acres" or whatever. That happens all the time in estate conveyancing. Under the bill, the owner cannot discuss the proposal with the concerned resident, because they first have to tell the Government, which has to broadcast the fact to the nation, presumably via a website, and then they have to tell the local authority and the community council, all for a piece of ground that somebody needs in order to rectify a title anomaly in relation to a greenhouse. It is totally unworkable.

The Convener: I just want to make sure that I have got this right. Is your understanding that, under the bill, if someone who has a large holding wants to sell a little plot of land to a builder who wants to build a couple of houses for the local community, they would have to lot the whole estate and go through the prior notification process?

Don Macleod: No. If it is small enough, they would not have to do lotting; they would just have to do the prior notification. However, in that scenario, the landowner could not talk to the builder or the people who wanted to buy the houses. They could say nothing to them and take no steps to progress a sale. First, they would have to phone the Government.

The Convener: So, 70 days after they phone the Government to say that they want to build a couple of houses on a small plot, they can start talking to people.

Don Macleod: Yes, I think that that is right. However, at the point at which they are obliged to talk to the Government, they know nothing, because they have not been able to talk to the builder or the people who want to buy the plots. If they own 1,000 hectares or more, they can do absolutely nothing and take no steps in relation to a sale without going through the prior notification process.

10:45

The Convener: Okay; that sounds interesting. I think that we will deal with lotting later.

I have a final quick-fire question. You are saying that the process is too complex. Could we make it easier by completely rewriting the section on registration? Do we need to do that? It seems like, ever 10 years, we do something different, but we never seem to get it right.

Dr Robbie: Are you asking about community notification?

The Convener: Yes, and all of the associated things, such as the community right to buy.

Dr Robbie: The good thing about prior notification is that it is an attempt to avoid a situation in which there are private sales going on. Again, that is exacerbated because of natural capital markets where there are just a few buyers who are phoned up, and it is that closed group of people who know about the sale. So, that is a useful part of the bill. However, I do not think that the part that involves an accelerated process and giving communities an additional extended and highly complex procedure will benefit the communities in the way that is intended.

Don Macleod: I do not think that the prior notification process is necessary at all, because we already have rights to buy. If there is work to be done, which there probably is, it should be around looking at the rights to buy, how they work and whether they are meaningful. At the moment, the evidence is that they are not, because no one is really registering.

The whole point about the legislation is that it puts a trumpet blast on top of the rights to buy, so that everyone knows that a sale is about to happen. However, if the fundamental rights to buy themselves do not appear to be working in a way that benefits communities, something is not quite right there.

The Convener: At the risk of repeating myself, I note that there seems to be a bit of dichotomy here, in that the Government wants to be able to buy Glen Prosen and not tell the Parliament for

three months after it has bought it, which it would not be able to get away with if this legislation was in force.

Bob Doris has a quick-fire question.

Bob Doris: I am not sure whether the Government did or did not get away with anything, but I will stick to the bill that we are scrutinising.

In relation to land management plans, the bill places consultation responsibilities on land that exceeds 3,000 hectares, although a case has been made for that limit to be set at 1,000 hectares. Might one of the ways to soften the prior notification element be to say that landowners should be discussing with communities the community right to buy framework as part of that consultation process? Hopefully, if that is part of the land management plan, communities would be empowered and would register an interest anyway, irrespective of whether the land was coming up for sale. Might people be looking at the issue from the wrong end of the telescope?

Dr Robbie: The proposed section 44C says that the owner of land must give consideration to a reasonable request from a community body "to lease the land", not to sell it. So, there could be a possible question around how the owner has considered diversification of ownership and reasonable requests from a community body to purchase parcels of land.

Bob Doris: Do you mean as part of the land management plan consultation process?

Dr Robbie: Yes.

Bob Doris: Don Macleod, do you have any views on that?

Don Macleod: On Jill Robbie's point, at the moment, if a community were interested in buying those parcels of land, it would register a note of interest under the sustainable development right to buy, and it could either force the landowner to sell those plots even though the landowner does not want to sell—that is one tool that is already there—or it could wait until the landowner takes steps to sell. That highlights the point that the utility of the rights to buy is the thing to focus on.

Bob Doris: Do you think that there is scope within land management plan regulations to say that that consultation process is an opportunity to discuss with communities what their rights actually are, because not every community will be aware of what their rights are or will have organised in such a fashion. Should that be part of the discourse during that consultation process?

Don Macleod: Yes, if that is the policy objective, looking at it from that perspective is a much better starting point than what we have at the moment.

The Convener: I said that we were up against it timewise, and I want to get through part 1 of the bill in the next 11 minutes. I invite Monica Lennon to ask her questions, followed by Douglas Lumsden.

Monica Lennon: I want to cover lotting. Quite a bit has been said about it already and we have had helpful written submissions. Again, not everyone needs to answer; I appreciate that Fergus Colquhoun might sit this one out.

Are there criteria beyond scale that might be appropriate, and what would be their advantages or disadvantages? We know about the 1,000 hectare threshold.

Who wants to start on that? Jill Robbie—perhaps you do.

Dr Robbie: Yes—there are possibilities for other criteria that do not relate to scale. The evidence in relation to the problems of concentration of ownership can be very nuanced in a local environment or situation. The Scottish Land Commission discussed local monopolies, for example, in which a landowner has the majority of local employment in the area or owns crucial community facilities such as jetties and petrol stations—the kind of stuff that results in concentration of power and of crucial resources. That could also include ecosystems.

The threshold is, in a way, trying to be simple, but it does not quite reach that and does not reflect where that concentration of power can be. One way of dealing with that could be to map concentration zones. We have had repopulation zones, for example: that would be an extra layer. Where concentration of power through ownership of facilities exists could be determined through the planning system, for example.

Monica Lennon: Thank you. Does anyone else want to come in on that question?

Don Macleod: I am sure that the committee is well versed in the distinction between scale and concentration. In Caithness, a large landholder's two particular acres could be very inconsequential. On the outskirts of Penicuik, however, a farmer's 400-acre farm holding including two acres next to the village could be very consequential. The lotting tool is far too blunt. It might catch some things, but it probably would not catch a lot. It focuses on the wrong thing and it misses the point about distinguishing between scale and concentration.

Monica Lennon: Thank you.

Issues of local context and the role of ministers in making decisions have come up. How might the process be improved to take account of local context? Is it appropriate that ministers make the decision, or is there another way in which that could be done more proportionately?

Don Macleod: I will jump in on that point. I will first make what is quite a niche point, before coming to a more general point, in a moment.

There is a real issue with the fact that one of the biggest landowners in the country is the Scottish Government. How is it going to make lotting work? Let us say that it asks itself for a lotting decision and speaks to its own appointed commissioner asking for advice, and that does not work. It then asks itself for a review of the lotting, considers whether it might buy, then appoints its own valuer. That could stink and has "conflict of interests" written all over it. The Government's being a very large landholder is a real problem.

Monica Lennon: Does anyone disagree or agree with Don Macleod on that point? Maybe you are neutral on it.

There is silence. Okay.

I will go back to Fergus Colquhoun. In its written submission, the faculty set out that—

I have lost my notes.

It was about the part about provision for a right of appeal against a lotting decision to the Court of Session. The submission highlights that appeals ordinarily go to the Lands Tribunal for Scotland or the Scottish Land Court but that, under this process, they will go directly to the Court of Session, which might produce procedural difficulties. Will you explain a bit more about that?

Fergus Colquhoun: Yes. Ultimately, there are four obvious potential options where you could direct an appeal: the sheriff court—the traditional option, which is not often used these days—the Lands Tribunal, the Land Court or the Court of Session. The Court of Session has been chosen for the bill. It was not particularly clear to us why—the Lands Tribunal might be thought to be the more obvious choice. Equally, the Lands Tribunal is, by definition, an expert tribunal, and proposed new section 67U of the 2003 act explicitly provides that the appeal should be

"based on an error of fact"

or law, or on the ground that the lotting decision "is unreasonable". We are not talking about a re-hearing or taking a new decision to substitute the decision that the ministers have taken. The Lands Tribunal would be where you would appeal to if you wanted the tribunal to take a fresh decision rather than simply act as a control to make sure that the decision maker had got the law right. There is nothing objectionable about using the Court of Session as the appeal route if you want the appeal to be restricted to a review of whether the decision maker has understood the law and the facts, rather than the appeal involving a fresh decision.

If the Court of Session is to be the appropriate appeal route, we have two points to make. The first is that 28 days is an awfully short time in which to decide whether to appeal: the standard for a statutory appeal is six weeks. If you are looking at a judicial review, the standard is three months, and the ability exists to extend that period if it is appropriate to do so in the circumstances. A lotting decision probably would be a pretty complex issue to analyse. Before you could lodge an appeal, you would need to collect expert evidence and work out exactly what you objected to, but 28 days is quite a short timescale in which to do that.

The second point is that, invariably, statutory appeals to the Court of Session go to the inner house, which is the Court of Session sitting as an appeal court with three judges. There is, in that, very limited ability to hear evidence, which might sometimes be relevant to such an appeal. It is also a more expensive and slower procedure than you might get under, for example, judicial review or an appeal to the Lands Tribunal.

If you want to keep appeals subject to the jurisdiction of the Court of Session, judicial review might be a more sensible way to review the decisions.

Monica Lennon: Thank you. That is helpful. I am interested to hear how others respond to that, including the Government.

Douglas Lumsden: I will ask about the establishment of the land and communities commissioner. In the interests of time, I will probably wrap all my questions together.

Is it appropriate that landowners are disqualified from that role? What further powers should the commissioner have in relation to supporting and enforcing the measures relating to community engagement and land management plans?

Mr Macleod, you suggest that the commissioner should not be

"responsible for investigating and enforcing breaches of community engagement regulations".

Will you give a bit of context to that?

Don Macleod: The ban on large landholders is a bit bizarre. No other appointment in the commission is subject to the same exclusion. There are many large landholders in Scotland who would be very good as a land and communities commissioner. Just because they are large landholders does not mean that they always think that large landholding is the only way, or that they are against community ownership. There is a missed opportunity, there.

Douglas Lumsden: Would there not be a conflict of interests? I guess that is why the exclusion would be put in the bill.

11:00

Don Macleod: I think that it is too much to assume that, just because a person owns an estate, they will make poor decisions in relation to other land management situations. There is a mine of experience there that could be tapped—the situation could be much better.

Douglas Lumsden: Does anyone else have comments on that exclusion?

Dr Robbie: I am supportive of the exclusion: it makes sense to me. I suppose that the purpose of the land and communities commissioner is to investigate where there are problems with large-scale landholders, so the exclusion makes sense.

In relation to your question about other functions or powers, the ability of the commissioner to initiate their own investigations would be helpful. As the bill is drafted at the moment, a complaint to the commissioner from a defined set of bodies is needed; however, the commissioner being able to initiate their own investigation would be useful.

Douglas Lumsden: Mr Macleod, I will come back to you on the point about the commissioner having the powers to investigate and enforce breaches. You seem to be against that.

Don Macleod: The function of the Land Commission—I guess that it is more for it to speak about that—is more in relation to policy, good practice and engagement, at which it does an excellent job. It seems to be strange that it is being given a quasi-judicial function in addition; it is possible that that will change the dynamic in the Land Commission.

I think that I am right in saying that the new land and communities commissioner would be the only person in the Land Commission who would have the power to issue fines. I think that that is right, but I can double check if necessary. That, to me, does not sit very comfortably with the Land Commission and all the good work that it is doing in other ways.

Douglas Lumsden: I am not trying to put words into your mouth, but do you think that that power almost takes it from being an organisation that advises and helps landowners to one that suddenly polices them?

Don Macleod: Yes—exactly. The Government should reflect on the experience of the tenant farming commissioner, who has in some ways, on the face of it, pretty limited powers, but who has done a very effective job in improving things and discharging his functions. If he or she does not need a fine-issuing power, is it really logical that a colleague in the Land Commission can issue fines? That does not relate to whether a fine is right; rather, it is about whether the Land Commission is the appropriate place for it to be issued. I am not sure that it is.

Douglas Lumsden: Are there any other comments on the commissioner's role?

Dr Robbie: There have been calls for the tenant farming commissioner to have further powers, too. I appreciate that the work of the tenant farming commissioner has been quite well received, but other people have suggested backing up the good practice codes with further penalties.

Douglas Lumsden: Thank you.

The Convener: I will stop you there, because I have broken my own deadline and I am under a little bit of pressure from my deputy convener to get in a final question for one person. I will move to Ben Macpherson for the final question.

Ben Macpherson: I have a subjective question for Dr Robbie and Mr Macleod. Earlier, we talked about the transfer test. The Scottish Government previously consulted on a public interest test. Do you have any views on the public interest test and whether there would be merit in amending the bill to include one?

Dr Robbie: I think that the criteria in proposed new section 67N of the Land Reform Act (Scotland) 2003 are really quite weak. For example, the other community right-to-buy criteria are much more extensive and require that many more factors be taken into account. There should be more detail about the test and what is to be taken into account.

There is also no restriction on the buyer. I have a fear about what the implications of lotting in that context would be.

The public interest test that was consulted on was concerned not only with who is selling, but who is buying, whereas the provision in the bill will potentially free up land for new purchasers, but we do not know what will happen then. Given the number of pressures on land in Scotland, I am not sure that we can allow that to happen.

Ben Macpherson: So do you think that a public interest test would be a good addition?

Dr Robbie: Yes.

Ben Macpherson: Okay. Thank you. Mr Macleod?

Don Macleod: I very much agree with Jill Robbie that section 67N is weak. There is no requirement for the lotting to be directed towards community ownership, so all that would happen would be that there would be lots and private

ownership would be replicated time after time, with each lot. That is the major weakness in the stated policy aim.

I do not think that a public interest test is the way to address that, because it is temporary: it relates to what happens at the point of purchase. Who is the person wanting to buy, and what are they going to do? It would open up a very complicated industry of regulation.

Looking at it the other way, therefore—looking at land management plans, cross-compliance, the land rights and responsibilities statement, the planning system and enforcement of environmental law—would be the way to achieve the policy objectives, rather than using the blunt instrument of a public interest test.

Ben Macpherson: So, we do not want to consider the public interest in relation to somebody buying land in Scotland.

Don Macleod: What do you mean by that?

Ben Macpherson: I am sorry. I did not mean to put words in your mouth. I did not mean to question your position in terms of wanting to see land being well used in Scotland; I did not mean to insinuate otherwise.

What interests me about the public interest test—to go back to the issue that I raised in my first question—is that there is a view, which many people in Scotland hold, that land is not well used at present. I include urban Scotland in that. A public interest test has the potential, as some people have argued in evidence to the committee, to help to ensure better utilisation of land—not just in rural, agricultural and island settings, but in urban settings.

Don Macleod: I hope that I am not being too repetitive, but I would look at it another way. The tools that already exist under the rights to buy are hugely powerful, but no one is taking advantage of them. If someone is going after natural capital, for example, and that is not regarded as positive, could the community force the sale of some land? Yes, it could. Could the community have a pre-emptive right to buy land as it becomes available for sale? Yes, it could. In the urban sphere, if there is a problematic and negligent landowner, can the community force the sale of that land under the right to buy? Yes, it can.

There is a real underestimation of what communities can do, when we look at it from their point of view, rather than from a buyer's point of view.

Ben Macpherson: I will leave it at that, convener, given the time constraints. I thank you for your flexibility.

The Convener: I think that you have pushed your one question into becoming several questions.

That brings us to the end of the first part of the meeting. I thank Jill Robbie and Don Macleod for their evidence this morning. Fergus Colquhoun and Gail Watt are staying put for the second session.

The fact that this session has taken so long probably proves that there are complexities with a 110-page bill. There is always the chance for the witnesses to feed in written comments as a result of today's discussion. That is not to say that we will not ask them—or other solicitors, for that matter—for further comment at future meetings.

I suspend the meeting briefly.

11:08

Meeting suspended.

11:16

On resuming—

The Convener: Welcome back. A new member of the panel, Grierson Dunlop, has joined us. Everyone else has had a chance to say a little about what they have done before, and a short explanation about your experience in the field would be helpful.

Grierson Dunlop (Turcan Connell): I am a partner at Turcan Connell, specialising in rural property and agricultural matters. I grew up on a farm, so I am from an agricultural background and I have a keen interest in agriculture. The majority of my clients are farmers and landowners and I act for landlords and tenants. My day-to-day work is on agricultural holdings and rural property.

The Convener: Douglas Lumsden will ask the first question.

Douglas Lumsden: In your view, would a non-binding model lease serve a useful legal or practical purpose? Can you foresee any potential legal issues? Who would like to go first?

Gail Watt: I am happy to go first. Could I clarify what you mean by a non-binding lease?

Douglas Lumsden: I am trying to work it out myself.

The Convener: I think that what Mr Lumsden means is a model lease for environmental purposes. We are starting with the easy question about something that we have never seen, and we are asking your opinion on it.

Douglas Lumsden: Thanks, convener.

Gail Watt: It was just in case I had missed something. The Law Society considers that there has to be greater clarity on the purpose of and necessity for any new model of lease that would be introduced. There are already numerous forms of leases that can be adapted to include different types of uses, commercial considerations or practical points. Our view is that developing model clauses for insertion into relevant leases and lease forms, as opposed to having a brand new form of specific lease for this purpose, would be a simpler, more flexible approach.

Douglas Lumsden: Mr Dunlop, do you have a view?

Grierson Dunlop: I do not think that we need it, because there could simply be another form of commercial lease. Mixing an environmental lease with agricultural holdings would further complicate what is already one of the most complicated areas of law. I support the principle of an environmental lease, but the same thing could be done under a commercial lease. Although I understand the reasoning behind the suggestion, I do not think that it is needed.

Douglas Lumsden: Mr Colquhoun, do you have a view on this?

Fergus Colquhoun: We found section 7 of the bill confusing, in the sense that we did not understand what it was for.

We appreciate that having a model lease for an environmental purpose might be useful. Looking at the explanatory notes in the policy memorandum, we understood that it was not intended to fall within agricultural holdings legislation—at which point, as Mr Dunlop says, it is fundamentally just a commercial lease.

If the Scottish Government wants to prepare a draft commercial lease that is focused on environmental uses of land, we were unable to think of any reason why it could not do that already—at which point, we questioned the purpose of section 7. It is not something that parties would need to use. There is no proposition, as we understand it, to create a new statutory scheme and a new type of lease to stand alongside the existing agricultural holdings legislation and whatnot. Therefore, although we have nothing to say on the benefits of a special form of environmental lease, section 7, as drafted, seemed unnecessary.

Douglas Lumsden: But is it not helpful that the Government has got that in, or is it absolutely not required? Does legislation already exist to deal with this?

Fergus Colquhoun: Legislation does not already exist to deal with environmental leases—that is true. This is certainly a new idea, but it does not seem to be one that requires legislation at this stage. What is proposed is simply to draft what would be, in law, just an ordinary commercial lease.

Grierson Dunlop: I do not think that we need to be given a style of lease. Other incentives could be provided—financial ones, perhaps—to encourage people to enter into such leases. However, we do not, with the greatest respect, need the Government to draft a model lease for us.

Douglas Lumsden: From your point of view, then, it is just unnecessary—

Grierson Dunlop: We can do leases for land just now for that kind of purpose, so I do not think that we need it. That is not to be disingenuous in relation to the Government's aims of encouraging environmental activity, but it is another complexity on top of something that is already too complex.

Douglas Lumsden: But is this not a way for the Government to try to encourage that environmental element that we are all aiming for?

Grierson Dunlop: Yes, I assume that that is the intention, but I do not think that the Government needs to produce a model lease for us to achieve that.

Douglas Lumsden: Okay. Thanks.

The Convener: Monica, I think that you have some questions.

Monica Lennon: Just one, convener—it is on small landholdings. From the written submissions, I think that the Faculty of Advocates and the Law Society of Scotland are broadly supportive of the small landholders provisions, but in Turcan Connell's—

Fergus Colquhoun: I would say that they are definitely supportive.

Monica Lennon: Okay. I will let you expand on that in a moment.

In contrast, the Turcan Connell submission raises concerns. You state that you disagree with those provisions and that

"The Bill introduces some rights for small landholders from croft tenure and others from 1991 act tenure which could result in"

unnecessary complexity. Can you expand on what rights you are referring to?

Grierson Dunlop: Probably only to a small extent as, in 25 years, I have never dealt with a small landholding, although other colleagues have. It was a colleague who fed into that part of our submission. To summarise, the feeling is that the bill is dipping in and out of crofting and agricultural holdings legislation. In my view, we should bring it

into agricultural holdings legislation just to simplify matters and I have no difficulty with extending the role of the tenant farming commissioner in relation to that, but I am afraid that I have very little personal experience of small landholders. I think that there are only 50 or 60 in Scotland. I think that they have a page each in the bill.

Monica Lennon: The Faculty of Advocates raised a practical point about

"whether the opportunity should be taken to wholly codify the law relating to small landholdings, rather than (as proposed) leaving elements to the Landholders Acts in place."

So that I do not misrepresent that position, I put that point to Fergus Colquhoun.

Fergus Colquhoun: We are certainly broadly supportive of updating the law as it relates to small landholders. Exactly how that is done is obviously a matter for the committee, and we do not have any comment to make on that.

We would observe, however, that small landholdings are now subject to a quite complex statutory scheme. There are three main acts that govern them, the oldest of which is the Crofters Holdings (Scotland) Act 1886, which does not govern crofts any more. There are also the Small Landholders (Scotland) Act 1911 and the Small Landholders and Agricultural Holdings (Scotland) Act 1931, and there are potentially two other acts, dating from 1891 and 1908, relating to crofters' common grazings, which might apply to some small landholdings. So, there are three main acts and two others. The fragmentation of the legislative scheme is probably a greater issue, at this point, in working out how small landholdings work than the age of the legislation. Broadly speaking, the legislative provisions make sense, but they are scattered here and there.

The changes in the bill add to the problem, because they would add a fourth main source of law relating to small landholdings, rather than either adding provisions to the existing legislation or codifying the existing legislation into a new scheme that got rid of the 1886, 1911 and 1931 acts.

There is a recognition that the legislative time and resource that would be required to do that might be disproportionate, considering the number of small landholdings that are left. It does not look likely that any landlord, or indeed the Scottish Government, would create any more. If that is how the rights of small landholders can realistically be brought up to date, that is fine, but we express some concern over the complexity that that will create in an already complex area of law.

Monica Lennon: I think that you have explained that issue of fragmentation quite well, but are you saying that the Government is taking a pragmatic approach, given that some of those older acts would apply only to a small number of cases, or is there more that it could do to counter what you have described as fragmentation?

I am sorry if I have not understood the point; it is quite complex.

Fergus Colquhoun: There are three acts at the moment that you need to look to and, if the bill becomes law, there will be a fourth, and they all deal with different aspects of small landholders' tenure. If the aim is simply to bring things up to date and to ensure that landholders have the same rights of succession as agricultural tenants, for example, then the bill is a pragmatic way to do that. Our concern is that it will be quite difficult for someone who is not a lawyer—and indeed for many lawyers who are not familiar with agricultural holdings legislation—to work out exactly what the rights and responsibilities of small landholders are.

Monica Lennon: That is helpful—thank you.

The Convener: Now you have confused me—I am totally confused.

I am sorry, but I need to ask this question. Is it simpler, as the tenant farming commissioner said, just to shove small landholdings in with agricultural holdings legislation? That has been suggested.

11:30

Fergus Colquhoun: Historically, they are crofts: they came out of the crofters' holdings legislation. There is currently provision for the conversion of small landholdings into crofts in certain designated areas of Scotland. I do not know, however, if any have actually been converted back into crofts.

Most of the new rights that are granted to small landholders in the bill look more like agricultural holdings legislation than crofters legislation. From a point of view of legislative simplicity, legislatively converting them to agricultural holdings might be a solution.

The Convener: The concern is that some of the smaller holdings—and there are very few of them, as Grierson Dunlop was right to point out—fall outside the crofting counties. The complexities of making them part of crofts make it easier to make them agricultural tenancies instead or to bring them in line with agricultural tenancy. I would be interested to hear what others have to say about that.

Ben Macpherson has the next questions.

Ben Macpherson: I will move on to section 10 of the bill, on the tenant's right to buy. I would be interested to hear the witnesses' thoughts on the fact that the bill will repeal section 99 of the Land Reform (Scotland) Act 2016 and, instead, will give

Scottish ministers the power to make regulations modifying the requirement to register a tenant's interest in exercising their right to buy. Do you agree with that approach?

Perhaps you would like to go first, Mr Dunlop. I appreciate that you have made a substantial written submission on this point.

Grierson Dunlop: I am happy to do so.

After the passing of the Agricultural Holdings (Scotland) Act 2003 but before the 2016 act, a 1991 act tenant had to register his or her right to buy. They had to take action. There was a register so that people could see which tenants had registered their right to buy. The 2016 act sought to remove the need to register but, as you will be aware, that legislation has not made it to the statute book, in that it is not enacted. We are now looking at changing that.

I support going back to what we had before—or what we still have—which is that a tenant has to register. The reason for doing that is that it removes any uncertainty as to where the boundaries of a tenancy lie. In practice, I have come across a number of situations in which there has been a dispute over whether the tenancy starts in a certain field or across a certain boundary. In the world of land transparency, it makes perfect sense to have a register of the tenant's right to buy.

I do not agree with the views that have been expressed about the process being cumbersome or onerous. I have done it for clients, and it is not difficult. People have to fill out a form and submit a map. Sometimes, there is a bit of coming and going with the landlord as to where the boundaries stop and start, but I really do not understand any objection to the tenant having to register the right to buy. It is a good thing.

Ben Macpherson: I presume that that also goes towards the completion of the land register, which is helpful.

Grierson Dunlop: The tenant's right to buy would not appear on the land register, but it all ties in with transparency and visibility.

Ben Macpherson: Sorry—I mean having a full account on the land register.

Grierson Dunlop: Indeed.

Ben Macpherson: That is what I meant—apologies.

Grierson Dunlop: That is quite an easy thing to sort out. There are other parts of the bill that deserve your time more than this one.

Ben Macpherson: I saw you expressing some thoughts on this point, Gail Watt. I wonder if you want to verbalise them.

Gail Watt: I completely agree with Grierson Dunlop. It is very welcome that section 99 of the 2016 act will be repealed—for reasons of clarity, if nothing else. We think that robust stakeholder engagement will be required for anything that will be proposed in the future, but we are 100 per cent supportive of the register of community interests in land, which brings increased clarity and certainty to all parties concerned.

Grierson Dunlop: I would like to add one further point, although I appreciate that it is not in response to a question—forgive me. One of the problems that we have had in the past 20 years following the right to buy coming in concerns the point at which a right to buy is triggered—its trigger point. We have no clarity on that through legislation or case law, and it might be beyond the remit of the bill, but it would be really helpful for all of us in practice, and for all our clients—tenants and landlords alike—to have some clarity from Holyrood as to when the right to buy is triggered. By that, I mean establishing whether, if a tenant registers his or her right to buy, that is triggered when the landlord has an informal chat with the house builder or when a formal legal contract is signed. We do not know, and we have been debating that for 20 years.

Ben Macpherson: If it is within scope, do you see the bill as an opportunity to clarify that matter?

Grierson Dunlop: Yes. If that could be taken away by the committee, it would make a lot of lawyers smile.

Ben Macpherson: Okay. [*Laughter.*]

The Convener: You do not have to say, Ben, whether that is an incentive or a disincentive. However, I note that the bill team is sitting in the public gallery, and it is probably noting that, as well.

Ben Macpherson: All I will add is that we will also, of course, seek the views of tenant farmers on those matters. Thank you for your feedback.

The Convener: Thanks, Ben.

Mark, I think that you have some questions now.

Mark Ruskell: Yes. I want to ask about the witnesses' views on resumption—in other words, a landlord's ability to take back land under a tenancy agreement before the lease is concluded. I think that Ms Watt and Mr Dunlop both have concerns about the provisions in the bill.

Gail Watt: The society does not agree with the proposed changes to the resumption process, on the basis of their retrospective effect on existing commercial arrangements, which would have wide-ranging practical and legal implications. Whatever changes are to be made in relation to lease are a distinct issue from existing commercial

arrangements, which might have been in place for decades and might have been put in place after detailed commercial negotiations between the parties. That could also involve a shorter resumption period.

Mark Ruskell: Is that fixable within the bill?

Gail Watt: Possibly.

Grierson Dunlop: Resumption provisions are problematic. It is probably the part of the bill that jumps out most to practitioners like me. As Gail Watt said, they tend to be contractually agreed clauses in a secure 1991 act tenancy, which might not have been entered into but for the presence of a resumption clause. Typically, a two-month notice period is given by the landlord to the tenant if a resumption notice is required.

I should say that, typically, land is taken back by negotiation without the need for a resumption notice. There will be a bilateral agreement, and a compensation payment will be made to the tenant, so the statutory framework is not always invoked in certain circumstances in agricultural holdings. That is an example of where things tend to be agreed by negotiation.

There are a number of problems with what is proposed. For example, shifting it from a two-month to a one-year notice period is problematic, and involving the tenant farming commissioner is, I think, an unnecessary step. I have had many dealings with the TFC and I have found them productive. I do not think that it is necessary to invoke them in this; there will be resources questions as to whether the TFC, in his or her office, needs to get troubled with this.

The compensation provisions have been cut and pasted from relinquishment and assignation. I saw Bob McIntosh's evidence to the committee last week, when he made that point. That is also problematic.

I accept that tenants might feel that five times the rent is not a particularly generous compensation when a value resumption is followed through. There could perhaps be an increase in the multiplier, if that would appease some of those concerns. Bringing in a capital value for the resumed land is controversial. Relinquishment and assignation is when a tenant gives up the whole holding, but, with this, we could be talking about a very small area of ground, and it is therefore not appropriate to carry over the same valuation provisions.

Another concern is that the 2003 act brought in what were to be the workhorses—the go-to leases—of agricultural letting in Scotland: the SLDT and the then LDT, which became an MLDT, if that is not too many acronyms for the committee.

Mark Ruskell: Will you expand those for the *Official Report*?

Grierson Dunlop: Of course. The 2003 act brought in a short limited-duration tenancy of up to five years and, originally, a limited-duration tenancy of 15 years or more, which then became a modern limited-duration tenancy of 10 years or more.

As a quick aside, I note that, in Scotland, two consenting adults cannot enter into a farm lease of between five and 10 years. I do not understand why the committee or the bill team could not take that away and see whether we could deal with that lacuna in the legislation. That would be terrific, because, if a client tells me that they want to lease for seven years, I have to say that they cannot.

I will go back to the 2003 tenancies. I am on a bit of a rant—forgive me. Under section 17 of the 2003 act, a statutory power of resumption was introduced, and the bill proposes to tinker with that. As soon as we start tinkering with fixed-term tenancies under the 2003 act, we will diminish the already faltering faith in landlords letting land in Scotland. That part of the bill needs to be looked at very carefully at stage 1 and at subsequent stages.

Mark Ruskell: You have already mentioned last week's evidence from the Scottish Land Commission, which is concerned about the imbalance between compensation that is available on resumption and those who are offered an incontestable notice to quit. Ms Watt, do you want to comment on that?

Gail Watt: We have no substantive comments on compensation.

Mark Ruskell: Mr Dunlop, do you have any reflections on that imbalance?

Grierson Dunlop: Bob McIntosh raised that issue almost as a postscript to his evidence last week. I understand tenants' concern that their being served an incontestable notice to quit, which would remove the entire tenancy from them, is not covered by the bill. There is a slight irony in that valuation provision is being introduced for a five-acre field but not for the whole holding, if that makes sense. I understand why Bob McIntosh made that point. The matter was under discussion previously, but it is not covered in the bill.

Mark Ruskell: Mr Colquhoun, do you have anything to add?

Fergus Colquhoun: We do not get involved in—let alone have a view on—the determination of the appropriate levels of compensation, but the committee might want to consider one potentially quite important but niche point, which is about the assessment of land value. If we assume that the basis of the new compensation will be the value of

the land, there is a question in our mind about whether the valuation will take into account development uplift. The default position is that it will. We understand that resumption would take place quite frequently for a house site, for example. There would be a considerable difference between the bare agricultural value of half an acre and the value of the same piece of land with planning permission for a house. If land value is to be used as the basis for compensation to the tenant, the bill should be clear about whether the bare agricultural value or the value with the development uplift is to be used. We are concerned that that is not clear in paragraph 4 of proposed new schedule 2A to the 1991 act.

Grierson Dunlop: That is a very important point for clients. If someone who owned the land was looking to resume a five-acre plot, their expectation would be that they would pay based on the agricultural value, on the basis that it would be a lease of a farm—an agricultural lease—and not a lease for non-agricultural use. It would be very helpful to get clarity on that, because that is one of the questions that we have been asked by a lot of stakeholders since the bill was published, so I agree entirely—

Mark Ruskell: Does that reflect patterns in changing land use and diversification? Another example that comes to mind relates to a solar farm. There might still be an element of agricultural operation, but it might be quite different, and there would be the lease for the generation.

Grierson Dunlop: A lot of solar and battery storage projects are on the go, and a lot of them involve resuming land. The logical starting point would be to resume the land based on agricultural value, on the basis that, if the tenant had to find some other land, they would be looking for agricultural land and not non-agricultural development land. I am not sure that that quite answers your question.

Mark Ruskell: Thanks.

The Convener: Before we leave that issue, I will ask a question so that I understand the position. Under the 1991 act, if there is no right of resumption, there is no right to resume, so the tenant cannot be forced to give up the land.

Grierson Dunlop: That is correct. Unless it is in the lease for a 1991 act tenancy, there is no right to resume, so there would be a bilateral negotiation between the landlord and the tenant. In such cases, it is no secret that the tenant has a far stronger hand.

The Convener: From your experience of resumption, is it hard nosed that people are entitled to only five times the rent, or is there some sort of give and take on both sides, so that there might be ways to make things more palatable to the tenant? Is it just dealt with in a matter-of-fact way?

11:45

Grierson Dunlop: There would be a negotiation. In my experience, a tenant would not typically settle for five times the rent. Obviously, it depends on the tenant and the advice that they receive but, typically, a more creative negotiation takes place between the parties at the end point. It is hoped that the tenant will give up the land without feeling too sore about it and the landlord will get the land back without feeling too sore about it.

The Convener: If the tenant is being creative, does the landlord have to be creative, too?

Grierson Dunlop: Absolutely. Much of the legislation comes into play only when the landlord and the tenant cannot agree. I am pleased to report that, in the majority of cases, the landlord and the tenant come up with a bilateral settlement that does not involve the legislation.

The Convener: Gail Watt is nodding. Are you agreeing, Gail? Was I not supposed to see that nod?

Gail Watt: I agree with Grierson Dunlop.

The Convener: Okay. Thank you.

The next questions are from Jackie Dunbar, who has been very quiet during the meeting so far.

Jackie Dunbar (Aberdeen Donside) (SNP): I have two quick questions, as I notice that the time is getting past us. What are your views on the provisions for compensation payments when improvements have been made and the tenancy comes to an end? Are they clear enough? If not, how can they be improved?

Gail Watt: I can answer that very quickly. We do not have a view or a position on that.

Grierson Dunlop: I am happy to offer a view.

On the classes and lists of improvements, there are three at the moment, and the bill looks to introduce a fourth one, which I do not think is necessary. That looks to complicate what is already complicated—a theme is developing in the evidence that I am giving. I think that we could deal with compensation in a simpler way, to give clarity for all parties. The bill looks to deal with principles and not a closed list of improvements. My personal preference is to have a closed list of improvements so that we do not have to trot off to the Scottish Land Court in years to come to work out whether a particular improvement qualifies. I agree with the principle of updating the provisions,

and I think that updating and simplification would be a better route.

Jackie Dunbar: Okay. If a tenant farmer is making improvements to the land before a tenancy ends, should that be considered with the rent?

Grierson Dunlop: We might come on to rent review. Typically, the tenant would not be charged rent on a qualifying improvement, as it is there because of the tenant.

Jackie Dunbar: So you do not think that that would be fair.

Grierson Dunlop: No. If a tenant builds a shed, the landlord should not be paid for the presence of that shed, because it is there only because of the tenant. That is an accepted principle.

Jackie Dunbar: Thank you.

Fergus Colquhoun: I have no view on that.

Jackie Dunbar: My second question is about the proposals on diversification and their operation. Are they sufficiently clear?

Grierson Dunlop: I do not want to hog the microphone, but I think that it makes sense in principle to give tenants a chance to diversify into environmental projects and the like. I have a slight concern that the bill will fetter and slightly chop off the 2003 act's provisions on the landlord's right to object to diversification. The landlord can object to a diversification proposal by a tenant for certain reasons, such as that it would affect the amenity of the holding or reduce its agricultural element, or if it would cause hardship. The bill appears to seek to limit the landlord's right to object to a proposal if the diversification has an environmental purpose. A bit of clarity on how that would work in practice would be helpful.

A landlord would not want to be given a notice for a significant diversification project that would completely change the nature of the holding. I agree with the principle, but I am slightly concerned about the wording on the limits on the landlord's right to object.

Jackie Dunbar: I do not mean to put words in your mouth, and you will correct me if I am wrong, but you do not see there being an issue in principle with small diversifications, depending on what they are, but you would have an issue with big diversifications.

Grierson Dunlop: Absolutely. I am fine with small diversifications. Again, it is the age-old question of when the threshold is reached that stops something being small.

Jackie Dunbar: Does Ms Watt want to add anything?

Gail Watt: Our main point—Grierson Dunlop just spoke about this—is about the need for clarity, especially on the relevant definitions and how those will interact with the existing definitions that are routinely used throughout the agricultural holdings legislation.

I apologise for starting to sound like a broken record, but our view is that consistency is key. We cannot have two systems running concurrently that are at odds with, or slightly different from, each other. One of our members raised the point that it is unclear in the bill, as it stands, whether proposals for part use of land for non-agricultural purposes would mean that that land would fall outwith the agricultural holdings legislation.

Grierson Dunlop: I am sorry to jump in, but there is always a potential tension regarding environmental elements coming into an agricultural lease. A neater solution might be to extract any environmental use land from the agricultural tenancy, although there would obviously be a concern on the part of the tenant that they might be giving up security of tenure for that section of the lease. There is a slight tension about how to mould that or how to crowbar non-traditional farming enterprises into the traditional use of an agricultural holding.

The Convener: Mark Ruskell, did you indicate that you wanted to ask a supplementary question?

Mark Ruskell: Possibly, and then I will move to the next question. Mr Dunlop, does your last point not make the case for a model environmental lease? You said that it is very difficult to crowbar environmental improvements into standard agricultural leases.

Grierson Dunlop: If you were to extract land from an agricultural holding to use it for environmental purposes, you would enter into a regular commercial lease.

Mark Ruskell: I see.

Grierson Dunlop: If the Government is intent on producing a model lease, we will not ignore or pooh-pooh that, but I do not think that it is necessary. I agree that, in those circumstances, if you extracted 100 acres from a tenancy—I do not know how many football pitches that is—you could move that on to a different type of lease, but there might be concerns about the duration of that lease and the security of tenure that the tenant might enjoy.

Mark Ruskell: I understand your point better now and I have made a note that consistency is key.

I will turn to the waygo process that happens at the end of a tenancy. Should that standard claims procedure apply to all types and sizes of tenancy?

Is there enough flexibility within the procedure to take account of unforeseen circumstances?

Grierson Dunlop: In almost 25 years, I have not had to deal with many statutory claim procedures because most are done by negotiation. Whatever the circumstances are that bring the tenancy to an end, the landlord and the tenant, with their respective advisers, will negotiate a financial settlement in relation to that termination.

I have not personally come across any significant delay in tenants being paid their due entitlement, but I am perfectly happy with the proposal to try to simplify and shorten that period. Much of the discussion over the years has been about allowing tenants to retire with dignity, and that should include being swiftly paid out.

The principle is fine, but we need to work on the timescales to ensure that they are realistic. A valuer should be appointed quite far in advance of the actual termination date, because things can change quickly. I entirely support the idea that there should be no delay. If interest is to be charged, that should happen only when the delay is due to actions or omissions by the person who is due to pay that money.

Mark Ruskell: You are talking about the need to codify the good practice that already exists.

Grierson Dunlop: I note that the joint submission from the Central Association of Agricultural Valuers and the Scottish Agricultural Arbiters and Valuers Association suggested that an alternative would be to get the tenant farming commissioner to appoint a valuer. I am not against that idea, but it is only fair that the processes should be simplified and made faster.

Mark Ruskell: Do Ms Watt or Mr Colquhoun have anything to add?

Gail Watt: I do not have much to add, other than to say that clear timescales encourage co-operation, which is all that anyone wants at that point.

Fergus Colquhoun: I do not really have anything to add.

Mark Ruskell: That is fine.

The Convener: I want to go back to diversification. Could you give an example of diversification that would significantly change an agricultural holding? Are you talking about things such as caravan parks?

Grierson Dunlop: Historically, examples of diversification have included things such as a farm shop, a farm park or some sort of tourist attraction. Going forward, I presume that the idea would be to have more environmental projects. I am talking about larger-scale projects that would take up more acreage than a farm shop or a smaller-scale project.

The Convener: If someone diversified a proportion of the holding to the extent that farming the remainder of the holding became impossible, would that be allowed? Is there a concern about that?

Grierson Dunlop: There is a concern about that. As I tried to mention previously, the grounds for objection in the 2003 act are that hardship would be caused to the landlord, the agricultural element would be reduced or the amenity would be affected. My concern about the bill is that those rights of objection are restricted if the diversification ticks all the boxes on the environmental front. Although that is important, there is a tricky balance to be struck between allowing the landlord to retain his or her land in its current form and meeting environmental needs through a proposed diversification.

The Convener: I want to check that I understand what you are saying. Let us take the example of a 600-hectare farm. Let us say that a proposal was made to use 300 hectares of it for Christmas trees, for example, because the existing farmer wanted to run a smaller number of sheep and cattle. Subsequently, it would be impossible to farm a greater number of sheep and cattle, because the land would be being used for Christmas trees. What rights does the landlord have in that situation, or does he not have any?

Grierson Dunlop: In those circumstances, if half the farm were to be turned into a Christmas tree farm, I think that the landlord would have a strong case for objecting to the diversification.

The Convener: Jackie Dunbar has a question.

Jackie Dunbar: The issue that is being discussed is diversification for environmental reasons, but I am keen to hear what your views are on whether a tenant could diversify part of the land—not a big part—in order to keep the agricultural part of the land going. I am thinking of something such as a scrambling park. That would not be in the tenant's lease, but the income from that might help him or her to keep going.

Grierson Dunlop: Again, in principle, I am fine with that. In its evidence, the Scottish Tenant Farmers Association has talked about the need to diversify to augment incomes in a challenging environment for Scotland's farmers. That is probably what led to the genesis of diversification in the previous legislation—it was a case of allowing tenant farmers to go outwith their regular sphere of agriculture to source other income. I am okay with that.

Jackie Dunbar: As long as it does not harm the land at the end of the day, of course.

Grierson Dunlop: You do not want to jigger the whole farm.

The Convener: I want to ask briefly about game damage. Last week, I asked a question about damage by deer. We were told that deer could be controlled by the tenant farmer if they were causing damage within an enclosed field. The bill allows the tenant to claim against the landlord for deer that might have come from the next-door neighbour's land, over which the landlord has no control. I am confused about who is responsible for what when it comes to control of deer. Maybe Grierson Dunlop or Fergus Colquhoun could help me.

Grierson Dunlop: I share that confusion and concern. I think that the relevant section of the bill needs a bit of work, in order to avoid the landlord being on the hook for something over which the landlord has no control. I do not do a lot of work in the north of the country, and I do not have a lot of experience of game damage or damage by deer, but I am concerned that the wording of that section does not quite cater for the scenario that you mentioned. I think that a little bit of work is required there.

12:00

The Convener: Fergus, do you want to add anything?

Fergus Colquhoun: It is worth noting that the proposed modified version of section 52 of the 1991 act applies only where the tenant does not have the rights to kill or take game. That aspect, therefore, is perhaps not so significant. I can quite see the difficulty that might be caused if the deer are coming from somewhere that the landlord has no control over, but generally speaking, the faculty does not take a view on this part of the bill.

The Convener: My other concern is that the bill talks about "fixed equipment", which I assume means fences, not the buildings. The convention is that, with any damage, liability falls 50 per cent either way, but under this legislation, if the deer are coming from somebody else's ground, liability will fall to the landowner affected. I am not sure that I follow that.

Grierson Dunlop: Typically, in these circumstances, the "fixed equipment" would be fencing. With a march fence, liability is normally 50:50; however, if somebody else caused the damage, there would be a common-law right of redress against that person, so you would not be left to pay out. As I have said, all of that could be improved in this section.

The Convener: My next question is on the rent review provisions in the bill. I have done a few rent reviews in my time; the indication in the bill is that, previously, I sorted out the rent by sticking a finger in my mouth and then checking which way the wind was blowing. However, it is slightly more technical than that. Do you think the bill makes light of the issue, or is it creating complexities?

Who would like to respond to that? Gail?

Gail Watt: We do not have substantive comments on this matter, but, again, we are seeking clarity on the defined terms used in the bill, a highlighted one being "productive capacity".

Grierson Dunlop: I agree with your comments, convener. Typically, a rent is, more often than not, agreed by landlords and tenants meeting and negotiating over a cup of tea or glass of whisky at the kitchen table. There are exceptions, though, and two or three very expensive and drawn-out rent review cases have gone through the Scottish Land Court, although those are really the only ones that have gone the full way.

The 2016 act focused on productive capacity. The Scottish Government commissioned a firm of land agents to carry out an expensive study on what it meant but, for a variety of reasons, that part of the legislation has never made it into practice.

I am okay with the proposals in principle. Perhaps a little bit of work is required just to ensure that some of the benefits of what we call the old section 13 and the case law emanating from that are not thrown out. What we are looking at here is a hybrid between market rents and comparable evidence based on other farms; productive capacity is going to be in the mix, too, as well as economic circumstances. I presume that the committee will be taking evidence from suitably qualified or experienced land agents who are at the coalface of these discussions—in any case, I urge you to do so, as they will be able to provide evidence beyond what I can—but I think that what is proposed is, subject to a bit of tinkering, better than other parts of the bill.

The Convener: My other question is about the encouragement of diversification. A lot of farms have more than one house, but the farm itself might produce enough work for only one family and, as a result, the houses are sometimes used as holiday lettings or, indeed, places where retired or younger members of the family can live. That sort of thing is not covered the rent review—and is, in fact, excluded. Is that right?

Grierson Dunlop: Generally speaking, I think that there needs to be more interaction between the Housing (Scotland) Bill and this bill, and this is one of the areas where I think that that interaction is needed. My plea to everybody here at Holyrood would be to try and allow housing on agriculture tenancies to be catered for in the housing bill. I appreciate that we are talking about a small

number of houses compared with the millions elsewhere, but this issue is a bit of a headache not only when it comes to rent reviews but when you look at where liability lies if you have a landlord, a farm tenant and an employee or lawful sub-tenant. Who is on the hook for putting in smoke detectors? Who is on the hook for water testing?

I realise that it might be quite a niche concern, but it is something that I come across in practice, and I ask that we have clarity on the matter. The quality and availability of Scotland's housing stock are important issues, but what we lack here are pieces of legislation talking to each other.

The Convener: If the deemed landlord were the landowner and they had to do all that work, would it not be reasonable for them to expect some return for that in the rent? If the deemed landlord was the tenant, obviously they, too, would need to offset some of the costs that they incur for all their work.

Grierson Dunlop: Yes, it is reasonable that, whoever benefits from that particular house or property, it should be reflected in the rent.

The Convener: It does seem somewhat confusing. Fergus or Gail, do you want to add anything?

Fergus Colquhoun: No. Houses on agricultural tenancies are excluded from an awful lot of legislation that otherwise affects housing in Scotland—though not all of it, and that can catch people out. There is quite a lot of complexity around how that legislation works, and it would certainly be sensible to keep the matter under consideration.

The Convener: I see that committee members have no further questions, so without opening this up to a long diatribe about everything that we have missed, I just want to ask you whether there is anything in particular that we have missed and which we ought to be thinking about in future sessions. I ask that you limit your comments in that respect, but is there anything that you think that we need to concentrate on?

Grierson Dunlop: Just quickly, I think that it would be helpful to have a clearer definition of "sustainable and regenerative agriculture", although I know that that is probably not an easy task.

A wider comment that I would make ties into what Mr Macleod and Dr Robbie said in the previous session about part 1 of the legislation. Lord Gill, the former Lord President and the godfather of agricultural holdings legislation, who might be known to some of you, made an excellent speech at the Agricultural Law Association conference in 2016, pleading for simplicity in and consolidation of the legislation. When he started in the 1960s, there was one act, with eight schedules; we now have more acts than I care to count, with lots of schedules and intermingling with land reform legislation. It is complicated for people like me who are supposed to know what they are doing, let alone people who do not know what they are doing. Consolidating the legislation will not be easy, but if we could get to that point, it would be wonderful.

Ben Macpherson: Just on that, you will be aware that Parliament will, in all likelihood, be passing another bill in that space today. Obviously we are at stage 1 of this land reform bill at the moment, but are you arguing that the process of this bill presents an opportunity for consolidation, or are you, perhaps in a more practical way, proposing that a consolidation act might be a good option for consideration in the next parliamentary session?

Grierson Dunlop: It is the second of those. I have maybe gone slightly off piste with my plea for a consolidation of agriculture holdings legislation, but we have not touched on the Agriculture and Rural Communities (Scotland) Bill, which is important to the future of agriculture and ties in with the rent review discussions and the future of the tenanted and the owner-occupier sector. My hope is that all of the parts of this legislation can, where possible, talk to one other.

Ben Macpherson: Thank you.

The Convener: Fergus or Gail, do you want to add anything?

Fergus Colquhoun: No. I think that I have said all that I can say, although it would be perfectly reasonable for me to echo what Grierson Dunlop has said about simplicity in the legislation. That is important, for the very obvious reason that people who are not lawyers need to be able to read and understand these things. Speaking personally, I think that, as a general rule of thumb, if you are putting new sections into a bill that have more than one letter after them—for example, section 32ZB—it might be time to consider consolidating legislation at some point.

Grierson Dunlop: I should finish by saying that the reason for simplifying the law is that we have a problem with rented farmland in Scotland. We have lots of willing tenants who are not able to rent farms, because the legislation discourages landlords from renting land; the very aims of the legislation that has come out of this place have had the opposite effect, with people scared to let land, because of further legislation that will further restrict their rights as landlords. The right people are not farming lots of Scotland's land, because the legislation is stopping that happening, when it should be making it happen.

The Convener: I have to ask this question on the back of that: is this going to result in more or fewer tenanted farms?

Grierson Dunlop: Fewer, I think.

The Convener: Fewer—okay.

Thank you very much. It has been a long session, and I am sorry that we have taken more of your time than we had anticipated. However, it is a complex bill, and we will be struggling to come to terms with it over the autumn, too, as we complete our scrutiny of it. Thank you very much for your time and for sharing your views so freely.

We will now move into private session.

12:10

Meeting continued in private until 12:28.

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