OFFICIAL REPORT
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Net Zero, Energy and Transport Committee

Tuesday 25 June 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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NET ZERO, ENERGY AND TRANSPORT COMMITTEE
23rd 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:

Sarah Boyack (Lothian) (Lab) (Committee Substitute)
Gemma Cooper (NFU Scotland)
Jackie McCreery (Scottish Land & Estates)
Jeremy Moody (Central Association of Agricultural Valuers Scotland)
Christopher Nicholson (Scottish Tenant Farmers Association)
Mhairi Robertson (Royal Institution of Chartered Surveyors)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 25 June 2024

[The Convener opened the meeting at 09:15]

Decision on Taking Business in Private

The Convener (Edward Mountain): Good morning, and welcome to the 23rd meeting of the Net Zero, Energy and Transport Committee for 2024. We have apologies from Monica Lennon and I welcome her substitute, Sarah Boyack, to the meeting.

The first item on the agenda is a decision on taking items 5, 6, 7 and 8 in private. Item 5 is consideration of the evidence that we will hear today on the Land Reform (Scotland) Bill. Item 6 is consideration of correspondence about appointments to the Scottish Land Commission. Item 7 is consideration of correspondence about an appointment to Environmental Standards Scotland. Item 8 is consideration of the committee's work programme. Are we agreed?

Members *indicated agreement.*

Land Reform (Scotland) Bill: Stage 1

09:16

The Convener: We turn to agenda item 2, which is our fourth evidence session on the Land Reform (Scotland) Bill. Our focus today is on part 2 of the bill, "Leasing Land".

I am pleased to welcome Gemma Cooper, the head of policy of NFU Scotland; Christopher Nicholson, the chairman of the Scottish Tenant Farmers Association; Jackie McCreery, the legal adviser for Scottish Land & Estates; Mhairi Robertson, the land manager and chartered surveyor with the Royal Institution of Chartered Surveyors; and Jeremy Moody, the secretary and adviser for the Central Association of Agricultural Valuers. Good morning to you all.

A heap of questions will come your way this morning, so I will open with a simple yes or no question. [*Interruption*.] Before I do that—thank you for reminding me—I have to declare my interests, as I do every time. I have an interest in a farming partnership in Moray, as set out in my register of interests. Specifically, I declare an interest as an owner of approximately 500 acres of farmed land, of which approximately 50 acres is woodland. I also declare that I am a tenant of approximately 500 acres in Moray under a non-agricultural tenancy and I have another farming tenancy for about 20 acres under the Agricultural Holdings (Scotland) Act 1991. I should also declare that occasionally, if I can, I take on annual grass lets.

We have allowed about 90 minutes and we will see how we go. I will go to my easy yes or no question, after the interesting session that we had at the Royal Highland Show on Friday. Will part 2 of the bill create more agricultural tenants in Scotland? You can give a yes/no or a simple sentence.

Gemma Cooper (NFU Scotland): No, we do not believe that it will.

Christopher Nicholson (Scottish Tenant Farmers Association): It will not, for reasons that are not in the bill, but it will help to preserve the tenanted sector that we have at present.

Jackie McCreery (Scottish Land & Estates): I agree with Christopher. It will strengthen the cocoon for the existing Agricultural Holdings (Scotland) Act 1991 tenancies but it will not facilitate new tenancies.

Jeremy Moody (Central Association of Agricultural Valuers Scotland): No, it will not. The only hope in the bill is if something more

positive and stronger is done with the land use tenancy to create a new start for lettings. Otherwise, it is just part of the palliative care for a decaying sector.

Mhairi Robertson (Royal Institution of Chartered Surveyors): I agree with Jeremy. No, we do not think that it will.

The Convener: I was hoping for a positive start to the meeting, but it sounds like we have a negative start. Douglas Lumsden will ask the next question.

Douglas Lumsden (North East Scotland) (Con): I think that that negativity might continue, because I am going to talk about the model lease for environmental purposes. In all your submissions you have said that the status of the model lease is unclear where part of the activity will be agricultural. Can you expand on that?

Gemma Cooper: This is a new form of tenancy that the Scottish Government is looking to bring forward, to allow for sustainable and regenerative farming to take place. However, it has become clear in discussions that the status of that lease is unclear. It is designed for situations, according to the Scottish Government, where less than half of the activity on that holding is agricultural practice. The issue with there being any agricultural practice is that that potentially creates an agricultural lease. The committee took evidence last week where the lawyers went into more detail on that.

Essentially the lease, as the bill is written, will probably have a bit of an identity crisis. The bill puts a duty on the Scottish Government to prepare a model lease that the sector would then follow. We have not had any positive feedback on the proposal. It will lead to confusion. We are not convinced that it will create opportunity and our tenants in particular are very worried that it might be a competitor to traditional agricultural leases. As it stands, therefore, we think that it will not be used and it is not needed. There is already potential to create commercial leases, which do not have to be complicated and do not have to be expensive to prepare. As drafted, the provision is superfluous and it will not meet the objective that the Scottish Government wants for it. It is possible at the moment to achieve that objective with a commercial lease and, as it is now, the provision will cause confusion.

Jeremy Moody: I am inclined to be more positive about what was originally proposed as a vehicle for future lettings in the way that the rural economy may go. However, what is in the bill is not even a new form of tenancy. It is simply offering a draft agreement. That is all that it is. It does not create anything new with legal or statutory force. It is simply volunteered out into the field. The problem with that, as Gemma said, is that anything that falls within the purview of the 1991 act and the Agricultural Holdings (Scotland) Act 2003 will fall under those acts, be entirely bound by them and will not have achieved anything that might be new. The test is that "agricultural land" means

"land used for agriculture ... for the purposes of a trade or business".

You simply get caught. You are back where you started, having done nothing, and all the freedom to use a commercial lease is already there. The provision is less than was consulted on and offers nothing.

Douglas Lumsden: Part of my other question is that the provision is different from what was consulted on. Would you like to go back to the approach that was consulted on?

Jeremy Moody: That would have been more beneficial. If what is in play is to be made useful, the very basic requirement is that there be an additional section in the bill that excludes such leases from the 1991 and 2003 acts. That would silence the whole line of critique and people could know with certainty where they were with the deal that they had struck. At the moment they do not know whether they could slide into the old law. They could think that they were out of it and be mistaken; they could think that they were in it and be mistaken.

Douglas Lumsden: So, more clarity is required from the Government.

Jeremy Moody: A legal barrier is needed between the proposed form of lease and traditional agricultural tenancies. That begins to bring certainty to the provision and we can then try to build something useful out of it.

Jackie McCreery: I agree with what has been said. I also want to be positive, because the provision has the potential to bring change to the tenanted sector. If it is done properly, it could make a massive difference. One of the issues is to make it clear that such a lease would sit outwith the restrictive regime of agricultural holdings.

I am loth to advocate another form of tenancy relating to land, because there are so many as it stands, but there could be a place for a hybrid between a farm tenancy and a commercial tenancy. Farm tenancies are being pushed to their absolute boundaries at the moment. They are very heavily regulated and heavily restrictive tenancies that are not suitable for a lot of other activities and land uses, but we want to enable tenants to undertake other activities while still having the protections of agricultural holdings. If we had a hybrid tenancy, we could move those other activities into it without the tenant losing

everything. You could have a hybrid whereby, if a tenant wanted to undertake a new activity that was not farming, they could move into one of the more flexible tenancies where the parties could come to their own arrangements for rent, rent review, improvements and all that sort of thing. If that activity ceased, for whatever reason, they could, as a compromise, move back into the old tenancy. There are ways of using such tenancies to enable other activity to happen and for tenants to be assured that they will not lose all their protections.

That might be helpful, because the issues that we find with the agricultural holdings legislation is that things are happening that were never intended when that tenancy was entered into. It was entered into between a landlord and a farmer to farm land. People are now trying to use it for lots of other things that it is not necessarily capable of dealing with, particularly, from a landlord's point of view, in terms of rent and what can be rentalised and improvements and so on.

The provision has potential, but we need to move away from calling it a model lease. We need to say that we will consult on a new form of tenancy. There needs to be an obligation within the bill for full consultation with the sector. I know that the policy memorandum indicates that there will be further stakeholder consultation, but that needs to be the direction of travel.

Christopher Nicholson: I agree with Jeremy that we would like to see clear water between the new proposed land use tenancy and the existing 1991 act tenancies. There is a fear among existing agricultural tenants that they will be pressured into taking on a new type of lease—carving land out of their existing leases and taking on a new lease to accommodate, for example, regenerative or climate-mitigating measures. As an organisation, that is not what we want. I do not think that tenants would be willing to do that because they would end up with two different leases with mismatching tenures. It is more important, for a just transition for tenants, that we take this opportunity to make sure that existing agricultural leases and tenants are able play their part in the future and to engage in the non-agricultural activities on which future support may be conditional—the environmental and climate change mitigating options. That is part of the aim of the bill.

Douglas Lumsden: Has the Government taken the wrong approach to the model?

Christopher Nicholson: I am not sure which stakeholders asked for the land use tenancy. I can see that there is a role for it outside of agricultural holdings and it should stay outside of agricultural holdings legislation. It is possible that it may not affect tenants in any way, but there is a worry among tenants that the focus might now be on encouraging tenants to use this new lease rather than making sure that existing leases are fit for purpose in a changing world. That is what has brought about part 2 of the bill. It is to make sure that existing agricultural tenants have a level playing field going forward and are able to play their part in all the new options that land managers will be expected to undertake.

Jackie McCreery: I do not necessarily agree with Christopher that the bill is about entrenching the rights of existing tenants further. The bill should be, and states that it is, about creating a vibrant tenancy sector. Such tenancies could be used to address the exact problems that Christopher is talking about. A lot of environmental land management may need a joint venture, either with the landlord or with another party, to get the activity going. It may not be the natural place for a farmer to undertake activity and they may not be comfortable about doing that with another partner. Such tenancies—that are more suited and can be designed by the parties to suit their individual needs or as joint ventures—could exactly fill that gap.

Jeremy Moody: To add to that, and being more positive again than Christopher, the bill is an opportunity to look at a new form of tenancy, for new agreements between new people, between the owners who may no longer feel fit to farm and people who are looking for opportunities to farm, for the expansion of the let sector that Scotland is so sorely lacking, and facing how the rural economy may itself be evolving under climate change pressure and other opportunities.

We are at risk of seriously missing the opportunity. I would far rather look at it in those lights and at how we make it fit for the future. In principle, the provisions are about new rights, new obligations, new duties and new opportunities. It is not about rewriting about anybody's existing arrangements. That is for them to choose and agree if they please, but the bill should be forward looking. At the moment it is not rising to that challenge.

Douglas Lumsden: If there were safeguards and protections—

The Convener: I get enthralled listening to the questions and answers. My problem is that I have other committee members who will be nipping my head. I note that there are about 12 different sets of questions that people want to go through. There was a positive and a negative note from Jeremy. Maybe we could gently leave it there and I will move to the deputy convener to come in with his questions. I apologise, Douglas.

09:30

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I remind members of my entry in the

register of members' interests—I am on the roll of Scottish solicitors—in case that is relevant in today's proceedings.

I have a question about smallholdings. Some stakeholders, such as the Scottish Crofting Federation, feel that small landholdings should be converted to crofts. Other respondents have said that there are equally good arguments for bringing these holdings under either crofting or agricultural holdings legislation. The Faculty of Advocates suggested last week that from the point of view of legal clarity it may be more helpful to wholly codify small landholdings legislation without leaving elements of the old legislation in force. Do you have any views on those points? Do you agree with the approach taken in the legislation as drafted or would another approach have been preferable?

Christopher Nicholson: The options were for small landholders either to become crofters or to come under the umbrella of the tenant farming commissioner with legislative modernisation similar to agricultural holdings. There are not many of them left and I do not think that any of them are here today. Among the ones that I have spoken to—I believe that Scottish Government officials have met them, too—there is far more appetite for coming under agricultural holdings legislation than the crofting option.

Ben Macpherson: Can you evidence that to the committee?

Christopher Nicholson: All the ones that I have spoken to would prefer to come under the umbrella of the tenant farming commissioner. There is a legal mechanism for small landholders to convert to crofting at the moment, but it is a complex mechanism. However, the small landholders that I know and have spoken to about whether they want to do that and whether it would be helpful to have a code of practice for that conversion process—and I have not spoken to all of them—do not seem very keen on that idea.

Jackie McCreery: I do not have personal experience, as Christopher Nicholson has, of small landholders, but we need to respect their view. You could see them slotting into either regime. However, in the bill there is a hybrid. There are some elements of crofting such as the seven-yearly rent review cycle that have not been simply picked up and moved into agricultural holdings. Perhaps that might have been simpler because it is a complex tenancy landscape out there and it might have been simpler to completely move them into the agricultural holdings landscape rather than having provisions that are very similar—they are being given pre-emptive rights to buy and compensation for improvements and similar provisions under the tenant farming commissioner—but slightly different. It does not necessarily create the simplification that we wanted.

Dealing with the small landholdings issue and providing them with that codification to an extent is welcome but perhaps it would have been simpler just to pick them up and put them into agricultural holdings.

Jeremy Moody: We are broadly content with where the Government is going on this and there seems a natural alignment with the 1991 act at this point. I suspect that, over the decades quite quietly, by behaviour of the parties, some small landholdings have been lost that way and have simply evolved into being 1991 act tenancies.

There is a wider point here. By having a specific regime for just a small number of tenancies, it is quite difficult to maintain the professional infrastructure so that both parties are adequately advised. There is a larger pool of advisers experienced in the 1991 act and able to assist people than there would be outside the crofting counties for people in crofting. We favour the 1991 act approach as a broad sense of direction.

Gemma Cooper: I agree with what Jeremy said. My understanding is that there are about 60 of these small landholders left, so it is a very small number. This is an area where modernisation is definitely welcome. We do not have a particularly strong view about whether they should be identified as crofters or come under agricultural holdings, but I agree with what Jeremy Moody said about the capacity to help and support them. I also think that the potential for bringing them under the umbrella of the tenant farming commissioner is very positive. Our experience of working with the current tenant farming commissioner has been excellent and I know that he has been a great support to landlords and tenants. From their point of view, I suggest that that is a positive step forward.

Mhairi Robertson: We agree with the approach that Jeremy and Gemma have suggested on that front. There are more knowledge bases available for either crofting or a 1991 act tenancy. Given that we are already creating other options for tenancies across Scotland, if we are going to protect a small number of tenancies, it would simplify the process if they were to come under one structure.

Ben Macpherson: Thank you all for that feedback. My next question is on the registration of tenants' right to buy. This is a question that I asked our panel last week as well. Do you agree with repealing section 99 of the Land Reform (Scotland) Act 2016, which removes the requirement for tenants to register their interest in exercising their right to buy, and do you agree with

provision for registration to be amended by regulations?

Jackie McCreery: Yes, we agree that section 99 should be repealed. We are not entirely convinced that the new provisions are absolutely necessary. However, we welcome the fact that a pre-registration stage is being retained, because that is important for transparency. Anyone with an interest in the land will know whether their tenants have registered an interest to buy or not.

I notice that the Delegated Powers and Law Reform Committee has written to this committee with some concerns over how wide the powers are in relation to secondary legislation and I concur with that. However, as long as those powers are defined enough and we know that the purpose simply relates to the process of registration, that will be fine.

Talking to members and professional advisers, they have told us that the idea that a plan or a map at this stage of registration is important. Tenants have told us that they feel that it is too onerous a burden to have to produce a plan. However, when you look at the potential benefit to them of acquiring a farm at a severely discounted price, that is not too much to ask. It can avoid disputes down the line if you have some sort of a plan.

We could have a compromise here. If a tenant was not willing to provide a plan, maybe the landlord could do that, but there is a necessity to have that at the outset. If a landlord wants a little strip of ground for a substation or something else and the tenant believes that that is within their tenancy and the landlord does not, it could inadvertently trigger a right to buy on that area. There needs to be clarity to avoid such disputes arising further down the line. The cost of producing a plan at that stage should not be onerous or burdensome in the bigger picture.

Christopher Nicholson: Tenants have had a pre-emptive right to buy since 2003 but it requires registration and it requires that registration to be renewed every five years. There are quite a few obstacles to tenants registering, which is evidenced by the number of tenants who have registered. I have not checked lately but there are probably fewer than 1,000 active registrations in the land register. Given that Scottish Government figures suggest that there are about 4,000 1991 act tenants in Scotland, it is not a very big proportion of tenants.

Tenants are easily deterred from registering. Some landlords are not very keen to see tenants register and will simply say something along the lines of, “If any tenants on this estate register, they will be treated in a different way to those who do not”. That is enough to put off an entire estate from registering. That was the real reason why, back in Richard Lochhead’s review of agricultural holdings in 2014, an automatic right was recommended.

I struggle to believe that there are landlords in Scotland who do not know that they have secure tenants on their holding, but maybe there are some—it cannot be very many. However, there is no reason why there should not be an automatic right to buy. Most tenants have a written lease. If they do not have a written lease, there is still a contractual arrangement there: they are paying rent and landlords know the extent of their holding.

Modern mapping requires detailed discussion about where a particular boundary is. The maps that you see attached to leases—most 1991 act leases date from before the 1960s—usually look like something that a child has done with a felt-tip pen on a very large-scale map. When you look at them, one mark of a felt-tip pen is maybe 40 metres wide around the edge of the holding.

The next obstacle for tenants is to agree the extent of the boundary. We have lots of members who have tried to register their pre-emptive right to buy but they have got nowhere because the landlord keeps objecting to the detail of the mapping. I think that mapping is largely irrelevant because I know of no tenant who has bought his farm and where it has followed the exact boundary of the tenancy. There is always a bit of negotiating—there will be bits that the landlord wants to retain and bits that the landlord does not want, for example islands of woodland within the tenancy that the landlord does not want to hang on to.

I am not aware of any mapping issues preventing a tenant from buying their farm. However, it is a problem for registration. There are several reasons why a landlord would not want to agree to the extent of the holding through a detailed map. One of them is because if a tenant is to follow the statutory relinquishment and assignation provisions, a way for a landlord to defeat it is to say that they cannot agree to the extent of a holding on a map.

The Convener: Sorry to interrupt. Most farmers will be submitting claims every year and they will be using a field identification system as laid out by the Government. I know from experience that somebody has walked around probably with a satellite dish to make sure that the cropping is exactly as per the holding. Is that not definitive mapping?

Jackie McCreery: That will not necessarily be the extent of the land under the lease.

Christopher Nicholson: It shows you what fields the tenant is occupying, but when you get into the modern mapping, you can zoom into it

digitally. At the edge of the field there might be a fence, a dyke, a ditch and another dyke on the other side of the ditch. Which one is the boundary? Looking at the 1960s map with the felt-tip pen, the felt-tip pen covers all of that. If there is a farm road along the edge of it, it will cover that as well. There are endless little niggles that can easily deter someone from registering.

There are a couple of examples where it is to the advantage of the landlord not to have an agreed boundary. That is one of the reasons why tenants struggle with the registration.

Jackie McCreery: However, there is a process in the legislation to resolve that dispute, if there is one, so that is not necessarily an argument not to do it.

Christopher Nicholson: Yes, but that requires a submission to the Land Court under section 4 and very few tenants are willing to go to the expense of a Land Court hearing to establish that. There are real obstacles there and that is why Richard Lochhead's review group—there were two lawyers on it—suggested that it should be an automatic right. However, if it is not going to be automatic, we have to look at means to make the registration easier.

Ben Macpherson: Your clear view is that automatic is a preference. If automatic is not provided—

09:45

Christopher Nicholson: Then tenants are not opting in. They could opt out if they wanted to. Tenants come under so much pressure from landlords not to register. We have seen the consequences in the last few years. Several estates have been sold—some were sold privately—and the tenants have had no opportunity to buy. Likewise, any interested community group would not have had an opportunity to buy if they had not registered.

Jackie McCreery: Again, the legislation should deal with that. We would be interested to know the examples that Christopher is referring to because we would encourage tenants to register. For transparency reasons, that is the best thing across the board. We can follow up with examples where Christopher has had to deal with particular issues on particular estates but the broad view would be that it is a good thing to register.

Christopher Nicholson: Just look at the facts: there have not been many registrations in the past 20 years and there is a reason for that.

Ben Macpherson: That was helpful feedback from both of you, thank you. It is good to get some recommendations, particularly based on previous Government work. The committee would welcome any follow-up from either of you. Before I move on to other questions, does anyone else on the panel want to add anything?

Gemma Cooper: In the previous legislation we supported making the right automatic for tenants. Our understanding is that the Scottish Government has said that it is not legally competent not to have some form of notice, which is part of the rationale for revisiting the issue in the bill. It is positive that it is being revisited now.

I cannot say that the NFUS has any significant evidence of tenants being discouraged, although I recognise Christopher Nicholson's concern on that. Our tenants have said to us that if there is a notice it should be a simple as possible. It is also important to view this through the lens of broader land reform and the objectives on clarity of information and transparency. I do not think that tenancies should sit outside of that.

Jeremy Moody: We favour repeal at this point of what appears to be unimplementable provision. I stand with Gemma in calling for simplicity in this. The question of mapping is about when you choose to have your argument. Is it when you are negotiating or when you are starting at the beginning? That seems to me to be something that people can debate.

Ben Macpherson: For clarity, when you refer to repeal, do you mean the repeal of section 99 of the 2016 act?

Jeremy Moody: Yes.

Ben Macpherson: Mhairi Robertson, do you want to add anything?

Mhairi Robertson: No, I do not have anything.

Ben Macpherson: Thank you all.

Jackie Dunbar (Aberdeen Donside) (SNP): I welcome the panel. I will go back slightly to ask for clarity. Christopher Nicholson talked about an automatic right to buy. Did you mean first refusal?

Christopher Nicholson: Yes—an automatic pre-emptive right.

Jackie Dunbar: I wanted that on the record, for clarity.

Christopher Nicholson: It is confusing that the term is "right to buy", in general, because it is not a right to buy—it is a pre-emptive right.

Jackie Dunbar: Thank you.

My questions will be on resumption, which different folk have different views on. I will start with a simple question. Do you agree in principle that compensation for tenants on resumption or in the case of a notice to quit needs to change?

Christopher Nicholson: The simple answer is yes. The compensation arrangement at the moment is historical. Whether there is a notice to quit or resumption, the effect on the tenant is the same—they lose all or part of their holding. The compensation that a landlord pays a tenant is so small that it does not come into the equation for the landlord in making his future plans. The cost to the tenant is no consideration for the landlord.

Jackie McCreery: On resumption of a part of a tenancy, compensation should certainly be payable. Compensation is intended to put someone back in the position that they would have been in if the part of the ground had not been taken away, in so far as money can do that.

There is a very different position for resumption; I agree that the terminology is confusing. An incontestable notice to quit is issued when a landlord has perhaps promoted a site for planning and development, has received planning permission for a large area and wants to take back the whole farm. The word “resume” has been used in such situations, but that is not a resumption under statute, although it is a situation that is governed by statute.

A statutory process applies when a landlord has obtained planning consent to develop the whole farm, and the tenant is then given notice to give back the whole farm. That is a specific situation. My understanding is that, in practice in such cases, very few—if any—landlords and tenants stick to the statutory definition for the heads of compensation, and an additional payment is usually negotiated. That is very much a horse trade between the landlord and the tenant.

Resumption is a very different thing; it is contractual. The landlord has the ability to resume a bit of the tenancy only if that is in the lease. When the lease was agreed, the rent will have been adjusted, as it will have been in the two parties’ contemplation that a bit of the land might be resumed at a future date.

Jackie Dunbar: Can I stop you there? Do you mean that, when the lease is first drawn up, if that provision is not in the lease, the parties cannot go for resumption later?

Jackie McCreery: Yes—the process is contractual.

Jackie Dunbar: If a family farm was leased in 1960, resumption has to have been in the contract then to allow the landlord to get it now. Is that what you are saying?

Jackie McCreery: That is the case for the landlord. If the landlord wants to be able to resume any of the land for any purpose—

Christopher Nicholson: That is the case for 1991 act tenancies but not for modern tenancies.

Jackie McCreery: For modern tenancies, there is a statutory right, but for secure tenancies, the bill will retrospectively change contractual provisions. In such situations, the lease says how long the resumption notice needs to be and what the compensation would be under the heads of claim. I agree with Christopher Nicholson that such figures are low, because they are multiples of the rent, and rents in agricultural tenancies tend to be very low. As an alternative to what is proposed, there is certainly an argument for reviewing that.

We want the policy objectives to be achieved in the least detrimental way possible. Looking at the multiple would be a way of reviewing compensation to ensure that it stays abreast. If a tenant is losing a field or part of a field because a landlord needs it for another purpose, they will experience inconvenience, which we call disturbance in statutory terms. They will have to move fences and gates and do reorganising, so there is certainly an argument for compensation, but not in the way that the bill proposes, which is not appropriate for resumption.

Jackie Dunbar: Do you agree that compensation needs changing in the future?

Jackie McCreery: There is a view about reviewing the position. That can be done and in a way that does not damage the sector in the way that the bill will.

Jeremy Moody: The starting point to answering your question is a simple yes. Beyond that, the present arrangements date back in effect to 1968, when the law was amended to add the additional payment of four times the rent. At that point, rents were more valuable in real terms than they are now and the tenanted sector was much more lively than it is now. The intention was to assist people to find other land and manage that movement in a way that is now not feasible. We are now in a very different environment.

There is a clear economic case—to put it no higher—that, when we are looking at decisions about land occupation and use, we should properly recognise that the costs that change in use imposes on the agricultural tenant are a factor. The approach that the bill takes is broadly the approach that would be taken for compulsory purchase. You have the disturbance to the tenant and you have the loss of value of the tenant’s interest. Recognising that seems to be a valid and useful approach.

I will pick out points from that. First, the value is that of the tenant’s interest in the tenancy. It is absolutely clear—as it is clear for compulsory purchase and everywhere else—that the tenant has no interest in the landlord’s reversion. Any downstream use that the landlord might have for the land is not a matter for the valuation of the

tenant's interest, so we are looking at the value to the tenant that lies in the tenancy.

A significant value—as is shown in tax cases, compulsory purchase cases and elsewhere—lies in having a 1991 act tenancy, because of its below-market rent. That is the difference that a tenant faces. Under a 1991 act tenancy, he has a benefit that he would not be able to replicate in the marketplace. That difference has a value, which is the profit rent.

That gets us to the next point, which is that that is a significant issue qualitatively for 1991 act tenancies, which have been there for a long time. I recognise Jackie McCreery's argument that, at this point, long-term interests have that benefit. The issue is not as relevant or as appropriate for 2003 act tenancies.

Jackie Dunbar: Why not?

Jeremy Moody: There are two arguments. The first is that such tenancies have a much lesser value, for the simple practical reason that they are almost all market rents, so there is next to no value—if any—in the interest. The disturbance remains a question, and the cap on disturbance could be lifted. However, the value of the interest in the property is negligible.

Secondly, we touched earlier on looking at a chance of encouraging more people to let. Entering into a letting with the risk of having to pay back far more rent than you have ever received is very problematic. That seems to be counterproductive. Between two pragmatic arguments, the balance is quite strongly against extending compensation to 2003 act tenancies but towards recognising it for 1991 act tenancies.

Jackie McCreery: We have a further concern about the significant increase in compensation. It is not really compensation, because it is not compensating you—if a tenant had paid a premium for their tenancy, they would be compensated for a proportion of that premium on resumption, but that is not the case here.

Another issue for the whole rural sector is development being discouraged. Landowners may have incurred tens or hundreds of thousands of pounds in promoting development. If resuming a strip for access to a housing development or for utilities became very expensive, it could throw a whole project askew. The bill imposes a one-year notice period, whereas a period of two or three months will have been agreed under a lot of resumption clauses. Landlords may have entered into agreements with developers or other contractual arrangements with others, under which the landlords assumed that they could get the land back for an access strip within two months, but that will not be possible if a 12-month notice period applies.

The impact on existing arrangements for rural development and housing could be massive, and we are in a housing crisis. Some developments may be stifled or stopped. The downstream effect really needs to be considered, given that there are other approaches. As I said, if we believe that the compensation payment is too low, let us look at that and the rent multiplier, but we should not just automatically throw in a capital payment that will discourage landlords. Jeremy Moody outlined much more eloquently than I could the arguments against that for 2003 act tenancies, but the issue is also political. The 2003 act tenancies were hailed as the future of the tenanted sector. They were to be safe to use, and we were encouraged to use them. If we are taking the wheel off them, that could really damage the sector. We need to understand what that could do.

The point about the incontestable notice to quit needs to be taken away and looked at, but to attach a capital value to a compensation payment for a resumption of part of a 1991 act tenancy is a step too far. We need to go back to the drawing board on that.

Let us review the compensation, but we should not bring in something that has been copied and pasted from the relinquishment and assignation provisions of 2016, which were inserted as a stage 2 amendment, so they did not get full scrutiny or the proper consultation that should have happened. Very little was mentioned about valuation at that time. A stage 3 amendment was inserted to provide for secondary legislation, because it was recognised that the change was quite big and that amendment might be needed further down the line. There was to be further extensive engagement with stakeholders, and that still needs to happen. Mike Russell, who is now the chair of the Scottish Land Commission, was in government at the time, and he said:

> "I have said several times in the committee that I do not believe that the bill's two declared objectives of providing greater security and more opportunity for tenants and of giving reassurance to landlords can go together in the same package".—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 10 February 2016; c 27.]

Mr Russell's words stand. The recognition back then that this was a new provision for valuers and that it needed to be consulted on further still stands. The 2016 provisions have never been tested in court—they have never been used when there was non-agricultural value attached to land. It makes sense that, if land has been in a 1991 secure act tenancy, it is not going to have been promoted for development in the same way. To simply lift, copy and paste provisions that have never been tested and put them in the bill is wrong.

10:00

Jackie Dunbar: To be clear, the land that you are speaking about is greenfield. Local development plans would need to be changed if that land was to be zoned for housing.

Jackie McCreery: It depends.

Jackie Dunbar: I am very conscious of time, and I do not want the convener to waggle his pen at me. However, I would like to bring in Christopher Nicholson and Gemma Cooper, who had their hands up, if you do not mind, convener. I am in your hands.

The Convener: You are in charge of your questioning session, Jackie.

Jackie Dunbar: Oh. You all heard that, didn't you?

The Convener: I have noticed that all of the witnesses are waving their hands at me. If you want to come in, look at the questioner.

Jackie Dunbar: It is only fair that I take in Christopher and Gemma, so that they have a chance to answer as well.

Christopher Nicholson: I have a couple of points about resumption. I listened to the Scottish Land Commission give evidence here a couple of weeks ago. It is broadly in agreement that the bill's provisions should apply to the 1991 act traditional tenancies, but it questions the appropriateness of those for the 2003 act tenancies.

There are a couple of things to note about the 2003 act tenancies. Those tenants are not necessarily people who have been in occupation only since the 2003 act. Some of the leases are long leases—limited duration tenancies—where previously the family was in occupation under a limited partnership agreement, which was a mechanism before 2003 to circumvent security of tenure. Some people who find themselves with LDTs facing resumptions now have been in that holding for 40 or 50 years through two leases and have made considerable investment. I would urge you to make sure that whatever compensation mechanism is introduced, it takes those people into account.

The other thing about 2003 act resumptions is that there is no limit in respect of fraud on a lease. The resumption can be the whole farm or a large part of it. I know of tenants who are facing resumptions of about half their farm, half their in-buy and all their hill ground on 2003 act tenancies. Originally, those would have been let to the family on limited partnership tenancies.

Landlords are not particularly happy with that part of the legislation, because it increases resumption. You hear the usual story that retrospective legislation will not help future letting of land. However, the real barrier to the letting of the land is our tax framework; it is nothing to do with tenancies and what is in them. There is nothing wrong with short limited duration tenancies or LDTs for letting land. The barrier—certainly to the owner-occupiers who might be looking to let land—is that, if they let land on a tenancy, they lose all their tax advantages regarding trading income and the reliefs that are available for capital gains tax and inheritance tax. That is why landowners of all sizes are going down the contract farming route or granting grazing licences and cropping licences nowadays, as that allows them to retain their status as the active farmer.

You will not fix the tenancy sector with this bill. The tax framework within which landlords make decisions needs to be addressed.

Gemma Cooper: This is about balance. That is what we are most concerned about. We have landlord members, tenant members and everybody in between. I absolutely agree that the compensation that tenants get following resumption needs to be revisited. The rate of five times annual rent is too low, because that is linked with the rent that they pay and, as has been said, those are generally below market rents.

The tenant farming advisory forum has already had a wee chat about that and the figure that was mooted was something like 10 times the annual rent. We think that that would balance things. The idea of passing on what could be quite significant capital value from one party to the other perhaps is not the right balance, so I hope that the issue can be revisited.

On the subject of extending compensation to 2003 act tenancies, we have very significant concerns about doing that. We want a healthy and vibrant tenanted sector. Jeremy Moody has already described the sector as palliative care in decline. That is what we see. We view tenancies as a vital opportunity for the next generation of farmers coming through. Land prices are particularly high, so it is vital that the supply is there for them. We do not see that at the moment.

Our owner-occupiers in particular have told us that they might be in a situation in which they do not have a son or daughter coming on after them, because they do not want to farm. Although they would love to provide an opportunity, if there is any sniff that they would have to give up capital value to a future tenant by giving them a 2003 act tenancy, they will not let it, and they will opt for contract farming or for an annual agreement. It is important for the committee to hold in their minds that this is about achieving the right balance.

Jeremy Moody: I would be less troubled about that being a capital payment. If it were not for the inheritance tax reliefs, a Scottish agricultural

tenant would be paying inheritance tax on the value of the tenancy after death and that would be recognised for compulsory purchase.

I strongly agree with what has been said. The 12-month notice provision is inappropriate. It is inappropriate to the practicalities of development, but it also jars slightly with the principle of fair compensation. There is an element of double value at the point that that is brought in. The approach to incontestable notices to quit for development should be the same as for resumption—it should be one of working through the arguments—but, again, that should be only for the loss to the tenant's interest and should go no further. We are aware that there is a level of chatter around that, with people looking at more value than the tenant has a claim on.

The last point, because I suspect that you will want to move on, is that the tenant farming commissioner should not, in those circumstances, be a first resort for dealing with those matters. Those are overwhelmingly dealt with by agreement. The commissioner could be used as a last resort if necessary, but the poor man cannot possibly want the amount of work that would be involved here, which has been massively underestimated. Aside from the larger cases that Christopher Nicholson referred to, his having to deal with every bit of garden ground that gives up, every little substation and every little bit of this and that would be an unreasonable load on the role and totally unnecessary in the circumstances.

Jackie Dunbar: I am deliberately not looking at the convener so I cannot get into trouble. Jeremy, you said that you thought that the 12-month notice period is too long. However, people do not farm on a yearly basis; indeed, sometimes they plan up to a decade or more in advance. Should that be taken into consideration for compensation?

Jeremy Moody: Then you pay less compensation.

Jackie Dunbar: Pay less or get less?

Jeremy Moody: You would pay less compensation if you were guaranteeing that year, because effectively you are now double awarding on that basis. Significant issues on development are looked to be dealt with on shorter notice than that. The point of compensation is dealing with the genuine intrusion on the tenancy. Choose what you want.

Jackie McCreery: Having read everyone's evidence, I think that it is fair to say that the view is that those provisions should perhaps only apply where there has not been agreement between the parties. Therefore, the legislation would sit as a backstop.

Certainly for the 2003 act, instead of changing provisions in the way that is proposed, it would very helpful to clarify that parties can come to their own agreement on resumption and that they can agree whatever they like on compensation. That whole benefit of 2003 act tenancies was that parties could act as grown-ups and come to business decisions themselves. That would be very helpful. It would also be helpful in relation to the 1991 act tenancies. For example, if the lease is silent on notice, perhaps there could be a backstop in the bill.

I definitely agree with Jeremy Moody, because one of the heads of compensation claim is net profit that the tenant might have benefited from for a year. Therefore, if there is a 12-month notice period, that is double counting.

Jackie Dunbar: I will finish there, convener, unless anybody else wants to come in. I realise that I have taken up a fair bit of time.

The Convener: As you asked my question, Jackie—

Jackie Dunbar: Did I? I apologise.

The Convener: I know that you did not mean to.

Tinkering with legislation retrospectively caused all sorts of problems for the Scottish Government the last time that it did it. The Salvesen v Riddell case is the best example of that. I guess that people would not want to see a return to that, as it was deeply hurtful for a variety of reasons. Could changing the legislation through the bill have a similar effect? Could you get resumptions going ahead now on the basis that there might be changes in the future?

Christopher Nicholson: All policy makers since the Salvesen v Riddell case have been very conscious about breaches in respect of the European convention on human rights. That has resulted in a very cautious approach to tenancy reform and land reform. The measures that are in the bill are balanced and I am sure that they have all been checked for ECHR compliance, so I do not see that as being a problem. However, there is a risk if legislation goes too far. An example of that is the legislation that led to the Salvesen v Riddell case.

The Convener: I bring in Jackie McCreery briefly—you will literally get 30 seconds—before I move on to Mark Ruskell.

Jackie McCreery: I agree that no one in the sector wants to go back to that place. The bill's draftspeople have perhaps drafted it on the assumption that compensation will be based on the permitted use in the lease. There seems to be some talk in the valuation area about whether there could be any element of uplift for development value. If that were the case, we

would definitely stray into ECHR issues and a massive hornet's nest. Therefore, it would useful if the cabinet secretary or the minister could clarify during the process, and, ideally, in the bill, that any compensation will be calculated on the basis of the permitted use within the lease. I know that they think that they have covered that with paragraph 4(2)(c)(v) of new schedule 2A to the 1991 act, as inserted by section 11 of the bill, but valuers still seem to be in disagreement with each other.

The Convener: Jeremy Moody eloquently made that point previously and I have noted it. I am short of time, so I will move to Mark Ruskell.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to focus on compensation for improvements. Will new schedule 5 to the 1991 act, which will be inserted by section 14(9) of the bill, improve the process for agreeing improvements between tenant and landlord? In some of the evidence that we have had there has been a bit of concern about the split between those measures that require notice and those that require consent. What are your thoughts on those splits and on schedule 5?

Jeremy Moody: We welcome the broad review and the shift to a principles-based approach here. From 1949 until 2019, we lived with a list that was unchanged and increasingly outdated. We managed interim changes in 2019, but the world is moving so fast with so many changes in technology and other things happening. The principles-based approach, supported by examples, works well in those circumstances. That resolves some of the discussion that we had in 2019 when I was urging the adoption of a principles-based approach but was told, "No, no—we need to know for certain. Give examples."

The structure of consent—is it notice or is it not?—is the ancient one that is recognised. I would not particularly look to disturb that unless a more fundamental review was going on, which I do not think is something that we are looking to do.

The awkwardness in what is proposed lies in part 4 of schedule 5, on what is broadly considered as being sustainable and regenerative.

Mark Ruskell: Can I come on to that issue separately?

Jeremy Moody: Of course.

Mark Ruskell: I will come back to you on that.

Jeremy Moody: The starting point is that the modernisation of the three parts of the 1991 act, into which part 4 would then slot—which we would have to discuss—is welcome.

Gemma Cooper: We agree with Jeremy's points. Moving to a principles-based approach is better. It is easier to future proof it, and we would not be handicapped by something that will become out of date over time, so that is welcome. There potentially needs to be more conversation on the new part 4 improvements, but the proposals are generally welcomed.

Christopher Nicholson: I echo what Jeremy said. Back in 2019, we argued in favour of having a principles-based approach rather than having an exhaustive list. The list was updated in 2019 and it already needs updating again. In its current form, which is an exhaustive list, it has been a barrier to tenants undertaking modern improvements for many years, so we welcome that approach.

The part 4 measure in the bill adds an element of confusion because it is not clear for landlords and tenants. Does that require notice to be given to your landlord or does that require consent from your landlord, which is a much higher bar? A solution would be to divide those aspects so that they go into part 1, which deals with things that require consent, or part 2, which deals with things that require notice. That is a technicality, but the general spirit of the provisions is sensible.

10:15

Jackie McCreery: We can see the sense in having a principles-based approach for reasons of flexibility, rather than having a fixed list. I worry slightly about that creating scope for dispute as a tenant may feel something just requires notice whereas a landlord may feel that it should have had consent. When it comes to considering the same activity, we need to be clear—perhaps this needs to be in guidance—on the point at which something tips from requiring notice to requiring consent. Perhaps that is to do with scale. We would worry about the possibility for dispute. We need quite clear guidance on that.

Mhairi Robertson: We agree with Jackie. It is a welcome change, but it is important that the right guidance is in place for advisers to be able to help landlords and tenants come to an agreement where there may be a dispute about what has happened.

Mark Ruskell: Part 4 of new schedule 5 to the 1991 act lists the improvements that facilitate sustainable and regenerative agriculture. Is the inclusion of that list helpful? Are things missing from it? There was a comment about soil carbon, which of course will be hugely important, but perhaps raises a question about landlord and tenant. Who has access to that resource? Who stewards it? Christopher, do you want to come in?

Christopher Nicholson: The proposed changes to schedule 5 to the 1991 act are about creating a level playing field for tenants so that they can undertake all the measures that they might be expected to undertake in the future that

essentially have a non-agricultural element. Obviously, soil carbon is important. There are already schemes in operation that allow farmers to benefit from soil carbon increases if they are undertaking practices that improve soil carbon. Soil carbon is a vital part of soil health. I think that part 4 of new schedule 5 includes improvement to soil health, but it needs to quite clearly mention soil carbon so that tenants can undertake schemes that focus on improving soil carbon. That is very much in the public interest because it is carbon sequestration and improving the health of our soils. Without soil carbon, we would not have much in the way of topsoil.

Jeremy Moody: I think that part—

Mark Ruskell: Sorry, I just want to say that there are other things that, in time, may be added to that list. Our understanding of carbon sequestration is rapidly evolving. At the moment, we are talking about salt marsh codes and blue carbon. Say that 10 years from now we start thinking about new markets. I am wondering to what extent the list in the bill captures everything. I will ask you to answer that briefly, Christopher, and then go to Jeremy and Jackie.

Christopher Nicholson: It should be possible to make tenancy legislation through the Scottish Parliament that is fit for purpose for future support schemes that are determined by the Scottish Parliament. The more challenging problem for the tenanted sector is how it can take part in the private market schemes, which will be governed by codes of practice. To date, I do not think that the drafting of the existing codes of practice has looked hard at the matter from the tenanted angle. We have only two codes at the moment: the woodland carbon code and the peatland carbon code. There is very little leasing of woodlands; support is largely claimed by people who are owners. More thought needs to go into how those codes apply to leased land.

Mark Ruskell: Thanks. Sorry for cutting you off, Jeremy.

Jeremy Moody: Part 4 of new schedule 5 to the 1991 act is, in many ways, a distraction. The issues that you are looking at—and they are important, as Christopher Nicholson has described—are all there, in effect, to be covered under parts 1, 2 and 3. The principles-based approach divides. For example, the drafters have moved one very long-standing provision—it has probably not been tested for well over a century—on the

"warping or weiring of land",

which is in effect the management of water meadows, from part 1 to part 4 of new schedule 5. You are left with the argument about where it sits. That activity is almost inevitably a part 1 item. Other items you would allocate according to the circumstance and scale, as has been discussed.

The second problem with part 4 is that it lists items that are potentially compensatable, because they are listed, but that does not automatically mean that they necessarily have value. That is a challenge in this area. Some of the issues that we have just been touching on are subject to considerable discussion and debate, and everybody retreats to saying either that they are nascent markets or the wild west. Some of those things may not have value; they may simply be what is expected under terms of leases or other farming, rules of good husbandry and the rest. Part 4 has a slight air of being a gesture and making a statement, but it is a distraction from real practical purpose.

Mark Ruskell: Thanks. That is useful.

Jackie McCreery: I can see the purpose from the Scottish Government's point of view. Part 4 of new schedule 5 to the 1991 act is to help tenants overcome the first barrier when they get to the Land Court because it would automatically be assumed that those particular items were beneficial to the environment.

I agree, however, with what others have said. Part 4 feels as though it is crowbarred in because the first three parts are very clear that consent is required, or notice is required, or you go ahead and do the work—one of those three things will apply. The scale of the activities in the part 4 list will determine which of the other three parts they fall into. I get that the reason for putting part 4 in the bill is as guidance to the Land Court that, if a tenant has undertaken those kinds of works they automatically pass test 1. I take your points that the list may be out of date within a couple of years, that we might need to add other things to it and that there could be things on it that are not appropriate.

To back up what Christopher said, a lot of the carbon schemes will require joint ventures. If they are on tenanted land and there is permanent land use change happening, you will require the landlord and tenant to work together. There is certainly an argument for non-agricultural environmental works to be done in a vehicle that is designed for the purpose, where landlords and tenants can come to those agreements themselves, together, collaboratively.

Gemma Cooper: I agree with the majority of what has been said. Our view is that we should stick with parts 1, 2 and 3. We do not necessarily need part 4. Perhaps it is about consolidating and then providing additional guidance. However, we definitely welcome the principle of updating generally and moving to a principles-based approach.

Mark Ruskell: Mhairi, do you want to come in?

Mhairi Robertson: No.

Mark Ruskell: My final question is about the process of diversification and whether you have comments on that, following on from our discussion about environmental improvements.

Jackie McCreery: I will repeat what I said. If diversification is of a non-agricultural nature and at such a scale that it changes the nature of what is happening on the land, maybe let us look at another vehicle to do that.

As Christopher said earlier, the Land Court can sometimes be used as a tool because it gives a right for the party who has the right to go there, but it is sometimes a dissuasion as well. The ability of the landlord to object, or to have comment or input in a diversification, is in some cases being overridden by the Land Court and the bill is leaving it to the Land Court as the way that the landlord has to object or to get involved in a diversification that will make substantial changes. We completely agree with the principle that diversification is vital for many farms and will have to happen for farms to be economically sustainable.

Mark Ruskell: Okay. If there are no further comments on that, I will hand back to you, convener.

The Convener: Thank you. I was trying to find the list of things that are allowed. I seem to remember that when I read the bill, osier beds were in there somewhere. I did not quite understand how you would value that diversification.

Jackie McCreery: That is in part 1. Maybe we could also update that list.

The Convener: Jeremy, do you want to pass comment on that? It is quite difficult to understand how there is a value attached to some of the things on that list.

Jeremy Moody: You are dealing with a very antique list, probably of 19th century origin. That is why we needed to update it even in 2019, never mind since. On osier beds, in the days when timber and leather were the plastics of the age, the ability to manage a willow bed and produce material from it had economic value—in 1880. Such beds probably have not had much value in most circumstances, except the more unusual ones, for many decades, but the provision has been carried forward, partly I think because draftsmen are reluctant to drop things, lest they have meaning, and partly because it has become so much part of the furniture. It would be rare for an osier bed now to have noticeable value but it could, of course, be short rotation coppice, at which point we would look at it quite differently.

The Convener: That will be an interesting one to look at. I will move on to compensation for game damage. There are specific provisions that allow the tenant to claim against the landlord. I am not disputing anything about game birds. It is a question of deer. The tenant has a right under the Deer (Scotland) Act 1996 to control deer, where they are within enclosed areas, unless they are specifically reserved to the landlord. However, in the bill there is an ability for the tenant to claim for deer damage against the landlord, even though the tenant has the right to control deer themselves. Have I misunderstood that, Christopher?

Christopher Nicholson: Yes. The tenant does have a limited ability to control deer through the Deer (Scotland) Act 1996. It is a very limited ability. The tenant can only control deer on land that is subject to damage and where the land is improved land. It does not include other lands within or outwith the tenancy that are the natural habitats of deer.

Take an example of a tenant farmer with a field of forage rape that might be completely destroyed by marauding deer at night, while during the day those deer are in woods or on hill ground that may or may not be part of the tenancy. The tenant has no right to control deer on that ground. An analogy would be that it is a bit like telling Police Scotland that they can only arrest or interview a suspect if they are caught at the scene of the crime, and that they cannot talk to suspects once they have returned home. It is incredibly limiting. If a tenant has a field that is surrounded by trees, by woodland, they will not have the right to shoot deer in that woodland and probably will not have the right to use that woodland for approaching or stalking deer because the tenant would be on land where they should not be, with a firearm. I think that a more balanced measure would be to say, possibly, that the landlord is not liable if the tenant has the ability to control deer over the whole holding and a bit of a buffer zone, if there is a large area of hill ground.

The ironic bit is that while the law says that a tenant cannot claim for damages if they have the right to control, in any cases that I can think of where a tenant has made a successful claim it has been by threatening to exercise that right to control deer. It is nearly always on sporting estates where there is no real commitment by the landlord to maintain numbers and there is a sporting interest with either the tenant or the landlord, who really does not want the tenant to be shooting any deer at all. The tenants have only been able to make a claim for damages by threatening to exercise their right to control deer.

The Convener: The perspective that deer come from the landlord’s holding is very narrow. I think

of the number of times that I have seen big herds of deer move a long way to eat rape. If 100 deer are in a rape field at night and have come out of adjacent land, under the bill it would fall to the landlord to compensate for that and to take responsibility for the fixed equipment that was damaged. I am thinking of fences that may be knocked over in the process, although a march fence, as I am sure that Jeremy will confirm, is a joint responsibility between the landowners of the two sides of the holding.

I see the principle of what you are saying if it is just an oasis or an island where the landlord—no one owns wild animals—owns the responsibility for controlling the deer and has the ability to do it, but just as the tenant could not go into neighbouring forestry, nor could the landlord if they do not own it. Jeremy, do you want to comment on that?

10:30

Jeremy Moody: I think that you are right. The origins of this lie in positions where the landlord has reserved the right to control and the tenant has no defence but to make a claim, reasonably. I think, broadly, that what is on the table in the bill is modernising. There are a number of questions, particularly around dispute resolution. The critical things are, first, getting the evidence ascertained immediately, as soon as possible, so that you can show that the damage is as said and, secondly, a proportionate means of dispute resolution. In the end, having recourse to the Land Court is not sensible. There are practical points around this one.

The provision should apply only where the landlord is frustrating the tenant from being able to undertake control. As you say, deer cross the landscape and do so in large numbers, and the landlord may have an equal hostility to the deer that have come in, but if the landlord has reserved rights, the landlord has reserved rights.

The Convener: Jackie, you wanted to come in briefly, and then we will move on to the next subject.

Jackie McCreery: You made the point that the landlord may have no control over the deer coming in. I think that the principle is fair if there is something happening that the landlord has control over. There may be shooting tenants and we may need to look at agreements between shooting tenants. Of course, if sporting rights are reserved to the landlord, that will be reflected in the rent as well. The tenant will pay less rent because there are shooting rights.

The Convener: The issue is quite niche, Christopher, and a lot of other committee members want to come in. Jackie Dunbar has the next set of questions, and then I will move to Sarah Boyack.

Jackie Dunbar: Is it me? So it is. My apologies, I thought that I had been and done.

I would like to move on to the standard claims procedure. Many of the folk who have come back to us have suggested that the standard claims procedure should act as a backstop where a landlord and tenant are unable to reach agreement, rather than something that is up front and is followed in every single case. I would be keen on folks' views on that. Should that procedure be used when agreement cannot be reached or should it be used for everybody, to make everybody the same?

Christopher Nicholson: You need a strong, statutory process. If you have that, and people know what the law says and what will happen if they cannot agree, they will be encouraged to agree around the table without following the statutory process. That is clear to see in the existing legislation. For example, relinquishment and assignation provisions were brought in in the Land Reform (Scotland) Act 2016. My guess is that about 19 out of 20 tenants and landlords who go through that process do so by agreement around the kitchen table, without going through the statutory process. However, they know what the statutory process is and that provides a steer to the agreement. People should be free to agree and it is only necessary for the tenant farming commissioner to step in where there is disagreement.

Jackie McCreery: I agree with Christopher that we should have a backstop in the legislation. I think that it is helpful for parties to focus their minds and start the process a bit earlier. The timeframes given in the bill may not work in every situation, although they may work in some. I do not think that we should be too prescriptive and, as Christopher said, people should be allowed to come to their own agreements.

It needs to be borne in mind that some of the items that need to be valued will not be able to be valued until the day the tenant leaves. I completely accept the point that payments should be made as quickly as possible because they could be quite substantial—hundreds of thousands of pounds—and tenants need that money to move on with their lives. However, not all of the claim will be known at the expiry date and for interest to run on the whole amount from that date is slightly unfair. A large percentage of the claim could be known by the expiry date, but not all of it. Interest should run from the point that the sum is agreed.

Jeremy Moody: We see the timetable as being completely unreasonable, completely sheering the objective of getting people paid promptly. In effect,

it makes what should be a backstop a frontstop if you are to start the process several months in advance, because of the circumstances that change between the monthly timetables that are set out in the bill and the end of the tenancy. Value can only be done as at the date of waygo; a prior value may be an overvalue or an undervalue. The timescale of months entails crops that might not be planted but that you want to have there at the end of the tenancy, or silage that might not have been made. You have all the issues, particularly as you run into the Martinmas tenancy, of early winter storms that may make a previously valuable building useless—all those various things.

The bill comes at this too early. By all means, indicate a willingness to have heads of claim and so on and begin to look at it, but large parts of a valuation will not necessarily be as they will be at waygo. That is a real problem with the way that the procedure is laid out. It is meant as a backstop, but coming to it months earlier in effect makes it a frontstop, making it quite hard to have the processes that people have suggested that they would like—and which I would like—of active and voluntary negotiation.

An alternative to play with, building on where present law might be, is to say that you have until two months after the waygo date and at that point the statutory commercial rate of interest on debts cuts in. I think that there would be a significant focusing of minds at that point.

Gemma Cooper: This is one of the parts of the bill that we have highlighted as problematic. I agree with a lot of what has been said. The principle is that outgoing tenants should not have to wait too long to be compensated and we support that. We are not, however, clear on the scale of the problem. How often is this happening? My understanding is that the Scottish Government has that information. We have asked for it and we hope that it will be forthcoming soon, so that we can judge just how much the provisions are needed.

I agree with what has been said, particularly Jeremy's comment about this being a backstop rather than the first thing that you should go to. We should try, where possible, to encourage situations where parties are able to negotiate, within reason.

This is another provision that ties in the tenant farming commissioner quite heavily, which needs to be highlighted. Every single report on the value of a claim needs to go to him. I think that we need to question how we use that resource to best effect.

I definitely have sympathy for the view that we should potentially revisit the timescales to make sure that they are workable, because the last thing that we want to do is to introduce complexity that will snarl things up further. However, there should be a backstop and potentially the idea of applying commercial interest rates after a certain time would focus minds.

Jackie Dunbar: Okay, grand. The full answers that I got, convener, mean that I do not need to ask my second question, so I will pass it back into your hands.

The Convener: I have a question on the period of time after the end of the tenancy. Jeremy, you mentioned Martinmas. It might be that the hefted flock to the hill are being bought at that stage but the tup has only just gone in. If you set the date before or too shortly afterwards, you will have no idea what you are buying, as well as the crop. Is two months too tight? Where do you strike the balance?

Jeremy Moody: That is a very real and challenging question. I put the two months out for discussion on the basis that it sits there in the current legislation, with the extensions for negotiation. Ultimately though, of course, you are valuing as at the waygo date. You are taking the view that the market would take of the potential as at that date. You are not trying to ascertain a future value any more than you are trying to ascertain a past value.

I can argue whether the final date is two months or three months after waygo. I suspect that if I went longer than that, people would say that I was dragging it out. I see a significant interest rate as being a stimulus, as and when it cuts in, to people focusing their minds. However, I come back to the point that it is a valuation as at the waygo date, with its potential, its opportunities and its risks, not turning on events after the waygo date when the tenancy has ended.

The Convener: My issue is that if you are valuing 500 ewes at Martinmas and they are all empty, the valuation is considerably less than if the ram has been put in and has been working and some of the ewes could be in lamb.

Jeremy Moody: Yes, but at some point somebody is having to make an assessment as to how effective that has been.

The Convener: It is a difficult one. Christopher, do you want to add something?

Christopher Nicholson: I will give a little bit of background. This measure is aimed at the 2003 act tenancies. If you remember, the 2003 act introduced limited-duration tenancies, originally with a minimum period of 15 years. We started to see the first waygoes in 2018, 2019 and 2020, and it was clear that there were issues with how long some tenants were waiting for payment. That is a problem for tenants looking to retire because they need to work out whether they can afford to buy a

house or not and they have no clarity at the point of the end of their lease as to what their waygo compensation will be. It is even more of a challenge for a new entrant who is coming out of, say, a 10 or 15-year lease and has to go mid-career to another farm. They need to know what capital they have available to plan that move. The only way to get clarity about that at the end of the tenancy is to start those negotiations earlier.

I know that there was quite a bit of comment from agents about some of the timelines. I accept that, but there is no harm in starting the negotiations earlier. The big arguments tend to be about large items of fixed equipment such as buildings, which are unlikely to change much in value over the course of six months unless there is a storm or something like that, but that is an unusual situation. If they make a start with the big items that are unlikely to change—if they change a little bit, you can argue about that—that gives a bit of clarity to the tenant as to what funds they will have available, whether for retirement or moving.

The Convener: Sorry, one other thing. It is a long time since I did all of this and I am probably well out of date, but is it still the situation that incoming tenants pay the outgoing tenants for the benefits that they will accrue when they take on the lease or is it all straight at landlord level?

Jeremy Moody: If there is an incoming tenant, classically they would pick up the payment to the outgoer. They are assessed at value to the incoming tenant. However, there are only so many circumstances where there is an incoming tenant.

The Convener: Should it be different for landlords and tenants or should it be the same for both?

Jeremy Moody: The problem—we keep coming back to it—is that it is a valuation as at waygo. That is the date. I am entirely happy with Christopher Nicholson's notion that we enter into earlier discussions, but if the buildings have burned down five days before waygo, the buildings have burned down five days before waygo and they are not there to be taken to.

The Convener: Okay. Christopher, did you want to briefly add anything?

Christopher Nicholson: Where there is an incoming tenant—that still happens; there have been a number of cases of incoming tenants—they will typically take on from the outgoing tenant stocks of silage, standing crops and so on. However, the landlord will be paying the outgoing tenant for the improvements that they have made in terms of fixed equipment. That is where the disputes happen and where the biggest risk is to the tenant.

The Convener: Are you narrowing it down to fixed equipment?

Christopher Nicholson: It is fixed equipment that you can start talking about six months in advance. You cannot start talking about what is in a silage pit before silage is made.

The Convener: Okay. Residual manual values, unexpired manual values and all the rest of that can wait until the day, but fixed equipment valuations can start earlier. That is helpful.

I will move straight to Sarah Boyack.

Sarah Boyack (Lothian) (Lab): I volunteered to ask about rent reviews. I thank everybody for their evidence on that. There is quite a lot to unpick in that regard. Earlier, we talked about disagreements on tenant's right to buy and about the registration of tenants' right to buy not being implemented. In addition, we have the provisions on rent review in the 2016 act that have never been brought into force. I want to kick off with Christopher Nicholson. Is anything missing in the bill as to how rent reviews will work in practice?

10:45

Christopher Nicholson: The rent review provisions that are in the bill come from a paper by Bob McIntosh, the tenant farming commissioner. He made those recommendations in August 2020, I think. We have had quite a long period to think about them. They were fairly thoroughly studied and I am confident that they will work. Similar provisions work well in other countries. What we have at the moment is completely outdated and unworkable.

In addition to the actual rent test, one element is missing: dispute resolution. The bill provides a good opportunity to include a statutory mechanism that allows a rent to be set by an expert arbiter, without the risk of appeal to the Scottish Land Court. As far as I know, the Scottish Land Court has set only three rents in the past 20 years. People do not want to go there simply because of the expense of doing so. When a rent review is disputed, it would be a huge help for the default position to be that that goes to an expert determination without appeal to the Scottish Land Court. Bear in mind that when rent is set, either party has to live with it for only three years before they can serve another rent notice. I do not see the need for allowing an appeal to a higher court. It should be a cheap and effective dispute resolution mechanism.

However, some elements in the bill need to be copied and pasted from the 1991 act. We stakeholders thought that the Government was just going to amend section 13 of the 1991 act. That would have required only a few lines of

amendment. Instead the Government is working with the 2016 act. There are important disregards to do with tenant improvements and dilapidations, the fact that the tenant is in occupation of the holding and in relation to publicly funded grants that need to be copied and pasted across from section 13 of the 1991 act. I think that that is just an omission. I do not think that is controversial and it would not be a difficult amendment to make to the bill.

Sarah Boyack: One of the other suggestions that you made was about "related earnings capacity". Do you want to speak to that at this point?

Christopher Nicholson: Yes. If you go back to the recommendations in 2020, I think that they relate to earnings potential or earnings capacity. In other countries, factors that are taken into a rent review are productive capacity and related earnings capacity. My fear is that, if you just stick with productive capacity, you are back to where we were with the 2016 act, which did not work and focused purely on output. Rent is paid out of profit, not out of output. If you do not refer to the related earnings capacity, the focus is on the wrong part of a budget. The focus should be on the divisible surplus after all the associated farming costs.

Sarah Boyack: Thanks. I wanted you to explain that and to put some of that on the record.

Christopher Nicholson: Productive capacity is simply looking at what a farm can produce; it ignores all the costs of production.

Sarah Boyack: Gemma Cooper, do you want to comment on the issue?

Gemma Cooper: It is an interesting one. I will go back a step. Previously, it was agreed that productive capacity was the best way to look at rents. The Scottish Government has carried out a huge amount of work on rents, and it has had external contractors carry out modelling on it. I think that we have got to a sensible place now. There has been lot of stakeholder engagement via the tenant farming advisory forum and, as Christopher said, the tenant farming commissioner wrote a really useful paper.

I agree with Christopher's comments on the potential for introducing measures for dispute resolution. I do not think that parties should have to go to the Scottish Land Court every time there is a dispute. I also agree with his points about omissions in the bill.

The provisions in the bill come at the end of a very lengthy conversation that has been on-going since 2016, and it is likely that landlords and tenants will welcome getting to a point where there is a bit more clarity.

Sarah Boyack: That is really useful. I do not know whether the other witnesses would like to come in on this. The hands have shot up.

The Convener: All of them.

Jackie McCreery: I completely agree with what Christopher said. On having a simpler and quicker dispute resolution, I would ask for a process in which rent is not necessarily a private issue but can be used for comparables in future. Jeremy Moody will have a view on that. To me, the only downside of having binding arbitration was that the rent could not be used as a public figure. We have talked in the tenant farming advisory forum about having a rent register. If that were ever possible, that would be very useful.

I completely agree with Christopher that this has been done the other way around from what we expected. There is a need to look at section 13 to ensure what Christopher has picked up are taken account of and that nothing else has been missed.

There is one thing that we think has been missed. I was looking back at old TFAF papers from January 2022, when the tenant farming commissioner asked the Scottish Government to look at the treatment of housing in rent review. It has failed to cover that in the bill. We have lots of housing legislation coming down the track that will require improvements to houses on tenanted farms. The Agricultural Holdings (Scotland) Act 2003 treats houses as fixed equipment and neither the tenant nor the landlord is obliged to improve anything. However, if they choose to improve something, there are provisions for compensation or rentalising that improvement.

Houses are different. They are not sheds, silos or slurry stores; they are places where people live. Where a separate piece of legislation requires improvements to a house, it needs to be clear that that can be dealt with properly at rent review. Insulation will not increase the productive capacity of a farm, but upgrading or improving a property by installing insulation might have incurred significant cost.

There needs to be proper provision in the bill to ensure that that is dealt with fairly across the board. I think that the provisions for compensation for improvements specifically deal with dwellings and will cover tenants adequately, although that needs to be looked at ensure that it is fair. However, if landlords are required to invest, they should be able to rentalise and get a return on that investment.

Sarah Boyack: Your recommendation would be to amend that section of the bill?

Jackie McCreery: Yes. I know that there is provision to make further regulations, but I would make that aspect clear now because, as of 27

March 2027, all houses will need to be at the repairing standard. Some of those houses may be in poor condition and even the repairing standard might require improvements, if you know what I mean. It needs to be clear in the bill that, if there are obligations imposed by another legislative regime, that is dealt with—

Sarah Boyack: It is about joined-up thinking.

Jackie McCreery: Yes, exactly—

Sarah Boyack: We do not want buildings that are—

Jackie McCreery: —and it is not a new issue. We have been talking to housing and agricultural holding folks for years about that, and things need to be joined up. There is a unique opportunity, with two bills, to do that.

The Convener: Sarah, would you just excuse me for one minute? Jackie McCreery used the phrase "binding arbitration", which means that, once you have signed up to it, you take the outcome whether you like it or not. The two previous witnesses mentioned "arbitration", which means that, if you do not like it, you can go to somebody else. Is everyone talking about binding arbitration?

Christopher Nicholson: For rent reviews?

The Convener: Yes.

Christopher Nicholson: Yes. You only have to live with it for three years.

The Convener: You are talking about binding arbitration.

Christopher Nicholson: Yes.

The Convener: My understand is that that is different to arbitration. Jeremy Moody may correct me.

Sorry to interrupt, Sarah.

Sarah Boyack: Not all, convener—the detail is important. Did you want to come in, Jeremy?

Jeremy Moody: Yes, if I could. The first point to make is that the provisions in the 2016 act have proven to be unimplementable. We have had to spend a long period talking our way through all that. That is why it is a slight surprise that we are working from the basis of an unimplemented piece of legislation rather than amending a piece of legislation that we have worked with over the years and understood. It is slightly ethereal, working against what is effectively a piece of non-legislation that has not been tested in practice, but that is where we are.

The bill is a significant improvement. Placing all the load of assessment of rent review on one factor alone, as the 2016 legislation did, was simply not practical for the circumstances of farms. The changes will allow a wider range of load-bearing pieces in the structure to take the strain and help arrive at answers. That is a welcome development from where we have been.

The distinctive omissions in this bill—they come from the way in which the legislation has developed—are the important, ancient disregards that have been in place in almost any other rent review provision that you can think of in statute, in agriculture and elsewhere. Those are section 13(3)(a) of the Agricultural Holdings (Scotland) Act 1991, on tenant's occupation, section 13(5) on improvements, and section 13(7) on dilapidation. Those should all be in the bill; there is no need for regulations around them.

I take Christopher Nicholson's point about productive capacity. I would talk more generally—as I have done throughout—of the tenant's capacity to benefit because there is residential benefit in many tenancies as well as opportunity to profit. It is that capacity for the tenant to benefit for which a rent should be paid. In the end, when you strip away all statute, rent review arguments boil down to two questions: what is this worth to me as a prospective tenant in the marketplace, and what are other people paying? All that is putting flesh on those bones. However, the bill is very definite progress.

I think that you have gathered effective unanimity around the notion of final and—I confirm that this is the phrase—binding arbitration. That is the point about arbitration. It is, in principle, final and binding. There are quite specific provisions under construction legislation for non-binding arbitration as a means to keep cash flow going. There is adjudication. However, here—and, indeed, under the Arbitration (Scotland) Act 2010—arbitration is expected to be final and binding, unless people choose that it not be. We start from that default premise. I think that we were all taking for granted the point that you have now made us express.

Having proportionate resolution right the way through is important. It is something that CAAV and the Scottish Agricultural Arbiters and Valuers Association have set their hand to over the years. They have worked up the models and looked at that. There is an opportunity to learn from the 2010 act, possibly either by extending it, recognising where we are under section 17 for statutory arbitrations, or—perhaps more appropriately for this legislation—simply by amending the 1991 act so that there is no longer recourse to the Scottish Land Court. Arbitration can then be final and binding. However, there needs to be safeguards should there be a complete failure of procedure, as you would have in the statutory arbitration rules. You could simply

invoke them into this framework. I think all those questions are soluble.

On the question that was referred to me by Jackie McCreery, at this point, I think that we would be moving into a world where awards become public. That gives us a common law sense of precedent for people to understand the arguments, the flow of the marketplace and which arguments have worked and which have not. We can build on precedents in the way that we can at the moment from the Scottish Land Court, but we cannot with the statutory confidentiality for arbitrations that is distinctive in Scotland. That is where we might again come back to modifying the 1991 act rather than applying the 2010 act.

Overall, the bill is an improved package. It should have the disregards and a proportionate means of dispute resolution, but it is vastly better than the unimplementable work of 2016.

Sarah Boyack: Does anyone else want to respond on the issue of getting arbitration that works rather than people having to go to the Scottish Land Court, which is very expensive? Is support available, or is support for negotiations between tenants and landlords needed? Is there something that would make that work better, or are the measures in the bill enough?

Jeremy Moody: What we have outlined could be added to the bill would be enough. We are doing a lot of work on encouraging early effective negotiation and on using neutral evaluation as an opportunity to take an early opinion before people get too entrenched, the red mist comes down and they lose perspective. We have worked up models for effective arbitration for the active arbitrator—using the powers that an arbitrator has—to drive process to focus on the points that really matter.

In Roxburghe v Elliot, one of the three cases that went to the Scottish Land Court, the landlords spent ages boring the court witless on budgets when it said that there was no need to do so as that was not material. It was all unnecessary cost and effort, adding to the pain of it all. At the end of its ruling, the court said:

> "To use what is perhaps an improbable image, a lighter touch with a broader brush might serve equally well."

That is what we would rather have: effective focus on the issues and on getting to an answer. Parties need answers early. It is like the waygo discussion. People need answers to get on with their lives and businesses. We see arbitration, properly delivered, as the means to do that.

Sarah Boyack: Jackie McCreery is keen to come in.

11:00

Jackie McCreery: I want to make a point about the role of the tenant farming commissioner. I think that the code of practice that the tenant farming commissioner has developed can also be used, because that will set out things such as behaviours and ideal timescales. Where one or other of the parties is deliberately acting in such a way as to frustrate the process or to delay things unnecessarily or unreasonably, there could be a comeback in terms of costs or in some other way. I think that the tenant farming commissioner's code of practice has a role to play in helping the process to run smoothly, without unnecessary delay and without either party acting vexatiously.

Jeremy Moody: I can respond on that point very quickly. Unless the parties jointly instruct otherwise, the arbitrator has powers to cap costs, to control costs, to propose mechanisms for costs and to drive procedure by giving directions. We need to have purpose rather than process, and proper use of those powers is essential to that. The tools are there; it is a case of getting them to be used.

Christopher Nicholson: There is a role for the tenant farming commissioner and the Land Commission here, not just through codes of practice but through the establishment of a panel of Land Commission-approved arbiters or experts to determine rent. I think that we should use the bill as an opportunity to extend dispute resolution to other areas. An example would be determining whether a particular schedule 5 improvement is an eligible improvement.

To go back to what Jackie McCreery said about legislation from outside of agricultural holdings cutting across the tenanted sector, that is nothing new. The most recent rules and regulations that are impacting the farm sector at the moment are those around slurry and silage storage and fuel storage. I have forgotten their names, but they represent a draconian expense for farmers. There are numerous other examples, which include the legislation on health and safety and asbestos. In our view, the rent test can cope with that. We need only look at some of the textbooks on rent in Scotland and in England to see that there are ways of dealing with that through the rent test.

Jackie McCreery: I would like to come back on that. I agree with Christopher—the nitrate vulnerable zones regulations could mean that you need a bigger slurry store, but if your landlord helps to pay for that, I think that that has a clear connection with the productive capacity of the farm. I feel that housing is different, and that needs to be clear, because it is not at the moment.

Christopher Nicholson: It is not. I do not think that any of the statutory requirements in question

increase productive capacity. If they did, people would be meeting them of their own free will without statutory—

Jackie McCreery: But if you are not operating legally, you cannot operate at all.

The Convener: Before this turns into a discussion between the two of you, I remind you that the committee is here. We will go back to Sarah Boyack, who will ask her last question rapidly so that I can go to Bob Doris, who has been very quiet throughout the meeting.

Sarah Boyack: It is interesting that, even in this discussion, it is difficult to get 100 per cent agreement. If we are talking about arbitration, the rules and the support need to be in place, and we need to make sure that what is in the bill will help to make the situation clear in the future. I do not know whether the other witnesses want to come in on that issue. It seems that they do not.

We want to make sure that the bill provides the right framework. We have talked about rent reviews and the issues of improvements, game damage and diversification have been discussed. Is everyone happy that the bill is framed in such a way that people will be able to go through the process of dispute resolution without having to go to the Land Court? Although it does not sound as though there is 100 per cent agreement on the matter, are people broadly happy with what is proposed in the bill?

Christopher Nicholson: Yes, everything that we expected to be there is there, but, as Bob McIntosh suggested in his evidence, there needs to be a bit of tinkering. As stakeholders, we were not consulted on the detail; we were consulted on the principles. There are a few surprises in the bill, for example in the way that the new rent test has been attached to the 2016 provisions and not the 1991 act.

Sarah Boyack: It is useful to get that on the record, because the issue of detail is critical, given all the different pieces of legislation that are being referenced. In order for people to be able to negotiate in the future, it needs to be clear what parts of the bill relate to previous legislation and what is new. That has prompted a comment from Jeremy Moody.

The Convener: It will have to be the last comment on this section.

Jeremy Moody: That has reminded me of a point that has occurred to me in relation to previous rounds of legislation, particularly in an area such as agricultural tenancy legislation, which is relatively complex and detailed, in that it is spread across several acts and quite a lot of statutory instruments. There might be merit in the committee instructing—if it is able to—a technical review of what the wording that has been drafted actually means. In some places, there are conflicts between the memoranda and the bill. There are various points at which all the bodies that are represented here have highlighted in our submissions that the wording is not clear or other things might be picked up.

Given the bill's importance and the fact that there are just two stages of parliamentary consideration to come, as well as the principles being scrutinised, there needs to be as much precise scrutiny of the bill's provisions as possible. Ultimately, as a sector, we will have to live with, make livings, draw rent and advise on these issues, so the more stage 1 can be used to look at the bill technically, the more it will be beneficial for us.

Sarah Boyack: That is a good point to finish on, because it feeds into Christopher Nicholson's comment about not necessarily being consulted on all the detail in advance. That is what the committee's questions are all about. We want to make sure that we get all your points on the record so that we can consider them as we draft our report.

Those are all the questions that I wanted to ask.

The Convener: Bob, I commend you for your quietness throughout the meeting. Now the floor is yours.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Thank you, convener. I apologise to the witnesses. I have been quiet not out of a lack of interest but because I have a blinding headache. That is why I have been so passive during the evidence session.

I hope that I have picked a small but beautifully formed part of the bill that we can get some evidence on: the part that makes changes to the rules of good husbandry and estate management, which, my notes tell me, have not changed since 1948. I understand that the reason that we are changing them on this occasion is that they might cut across the reforms to agricultural support and the four tiers that will be introduced. An enhanced level of direct payments will be brought in, and there might be a conflict between meeting lease obligations under the current rules and getting the relevant payments under tier 2.

The Scottish Tenant Farmers Association made some comments on that issue in its written evidence. Christopher, do you think that the changes that are proposed are adequate? Is there anything else that you would like to see being included in the bill?

Christopher Nicholson: I think that the changes in the bill are adequate to allow tenants to take up whatever non-agricultural options might

be part of the conditions of our rural support scheme in future. To allow them to do that, changes require to be made to the rules of good husbandry and good estate management, which were drafted at a time when there was food rationing and farmers were encouraged to grow three blades of grass where there was one before, without any consideration for the environment.

I think the bill provides an opportunity to give tenants a balancing measure. In circumstances in which a landlord is in breach of their obligations, whether under the rules of good estate management or other obligations, there is no useful balancing measure for the tenant. Even if the tenant goes to the tenant farming commissioner, there is nothing that the tenant farming commissioner can do to help in such situations. There is no useful mechanism for the tenant to deal with a landlord who is in breach of the rules of good estate management.

If a tenant is in breach of the rules of good husbandry, the landlord has measures available to him—the agricultural textbooks are full of case law examples that explain all that—but there is little that a tenant can do when a landlord is in breach of the rules of good estate management. In fact, the only use of those rules to a tenant is in defence of an allegation that they have breached the rules of good husbandry. I think that there needs to be a balancing measure there.

There is a balancing measure in the 2016 act that has not been commenced yet—a forced sale in circumstances in which the landlord is in breach of his obligations. That mechanism was not designed to force landlords to sell; it was designed to ensure that landlords meet their obligations under the terms of the lease. If that was commenced, I think that we would see much better behaviour and much better relationships in the tenanted sector.

Bob Doris: Can I check what you are saying? Is it your position that you are content with the balance that is struck in the bill, but on the basis that the relevant provision in the 2016 act is brought forward?

Christopher Nicholson: Yes—if that is brought forward. That is a key balancing measure that tenants need.

Bob Doris: Do you have any specific recommendations in that regard? This is a three-stage process, and we have stages 2 and 3 to come. Is there anything that is not in the bill that it would be advantageous to have in the bill?

Christopher Nicholson: It would be advantageous to expand on the rules of good estate management to include some of the more recent issues that have developed that tenants are faced with. Examples of that include deer management. There is a big reluctance among a certain group of landowners to engage with deer problems.

Bob Doris: That is helpful. I think that NFU Scotland has commented on that area. Gemma, is there anything that you want to add? Is there anything missing that should be in the bill in order to get the balance correct?

Gemma Cooper: Our comments on the sections on the rules of good husbandry and the rules of good estate management were that we were broadly content with them. I am interested in Christopher Nicholson's comments about the 2016 act provision that has not been implemented. That relates to a sale where a landlord is in breach. Reflecting on the discussions that took place at the time, it was clear that that was to be used in a worst-case scenario.

To go back to part 1, which I know that we are not here to discuss today, that hooks into the land rights and responsibilities statement and the provision whereby a new commissioner for the Land Commission will have the power to levy sanctions of up to £5,000. There might be other mechanisms that could be introduced under part 1 that could help.

If the Scottish Government is to bring forward the relevant provision in the 2016 act, that will require significant stakeholder engagement. It included that provision in the 2016 legislation, but there were ECHR concerns at the time. If the Scottish Government is looking at implementing that provision, a lot of work and a lot more thinking will need to be done before that happens. There might be other mechanisms that could be useful.

In sum, we do not have significant issues with the sections on the good husbandry rules and the good estate management rules. We recognise that those rules need to be updated, and we welcome them coming forward in a newer format.

Bob Doris: Do the other witnesses have comments on that?

Jackie McCreery: We had worries about the tie-up with the definitions of agriculture, given that we are now looking at efficient, sustainable and regenerative farming. It might be quite difficult to have all three.

Secondly, there is a lack of definition. I completely understand why the bill does not provide a definition. The explanatory notes to the bill indicate that that is because a definition will come through the code of practice under the Agriculture and Rural Communities (Scotland) Bill, but we need to be able to understand the Land Reform (Scotland) Bill within the four corners of that bill. If a definition is in a different piece of legislation, that means nothing to the definition in

here. There might need to be some cross-referencing to the definition in another bill so that we have consistency.

Bob Doris: Are we talking about a lack of clarity? Is that the issue? Are you content with the definition that is contained in the other bill, which was recently passed by the Parliament?

Jackie McCreery: We do not yet have a definition. Legislation is being passed on something without us knowing what it means. The explanatory notes say that a definition will come later, but that will be in a separate code of practice under a separate piece of legislation. The bill might need to state that the definition of sustainable and regenerative agriculture that is being used here is the same as the one under the code of practice.

Bob Doris: So you are concerned that we might be passing a bill without having clarity on what it will mean in practice.

Jackie McCreery: At least, without a guarantee of consistency of definition between the two pieces of legislation.

Bob Doris: Right. You think that they should connect with each other in a meaningful and coherent way.

Jackie McCreery: Yes.

Bob Doris: That is very helpful.

Jeremy Moody: In principle, we are content with what appears to be relatively gentle modernisation of rules that come from the late 1940s.

However, Jackie McCreery has touched on a significant point. As I recall from the debates on the Agriculture and Rural Communities (Scotland) Bill, the extraordinary difficulty of defining "sustainable and regenerative agriculture" is the reason why that bill does not provide a definition of that but leaves it to be discussed in general terms in a code of practice. In a sense, what the code of practice will provide will not be a definition; it will be an illustration or a guide. I think that we are dealing with concepts that are impossible to define on a sustainable medium-term basis.

Bob Doris: I did not take part in the scrutiny of the Agriculture and Rural Communities (Scotland) Bill, but it appears from what you and Jackie McCreery have said that that definition could change over time, because practices change. Therefore, it makes sense to have the definition in a code or secondary legislation and to keep a watching eye on it. Does that not make sense?

11:15

Jeremy Moody: Yes. I think that that is where we are. We are talking about something that will not have a definition. It will be a mood, a process or an understanding; it will not be anything concrete.

Bob Doris: Okay. Whenever I hear the expression "relatively gentle", it makes me wonder whether what is being proposed is a bit too modest. Would you like the bill to have done more in that area?

Jeremy Moody: That depends on how much stress we are trying to place on the rules. They have surfaced periodically in tenancy law. When they were drafted, they were meant to be applied much more widely, including to owner-occupiers. They surface amid other arguments. A wider look could be taken at other environmental issues and so forth, but that is a matter of policy to play with. What is on the table serves a purpose.

Bob Doris: It is a case of being damned by faint praise.

Mr Nicholson, I am not quite sure about the background to this, but you suggested that, if good husbandry is not being undertaken, there are set processes for remedies that the landlord can follow to achieve a resolution, but that if good estate management is not being undertaken, there is not an equitable or balanced process for tenants to address that. Is there anything more that the bill could do on that?

Christopher Nicholson: Yes. There are two things that it could do. One of those—I think that Bob McIntosh touched on this when he gave evidence—is that it could give slightly more statutory powers to the tenant farming commissioner to deal with difficult cases. Failure to meet the rules of good estate management could be linked with the provision on sale where a landlord is in breach. I do not know whether it would be possible to amend the bill to include a timeframe for the introduction of that measure. The knowledge that that provision has not simply been parked in the long grass and will be looked at will help behaviours.

Jackie McCreery: No one around this table is here to defend poor behaviour by anyone. There is certainly an argument that any penalty relating to any provision in the bill needs to be proportionate. I suspect that that is where the issue of that provision not having been implemented yet arises, because there needs to be a proportionate consequence for poor behaviour.

Bob Doris: The 2016 provision does seem like a nuclear option. That was a helpful point to put on the record. I have no further questions.

The Convener: We have run out of time, which is annoying, because I had one further question, but I will let the witnesses write in with a response, if they want to. At the beginning of this session, you all said that the bill would not create any more agricultural tenancies. I would like you to consider providing us with a note of what you think might create more agricultural tenancies. It would be helpful to get one idea from each of you. I would be happy to receive written answers on that after the committee meeting. If you crib Lord Gill's words about making agricultural tenancies simpler, I will know where that has come from.

Thank you very much for the evidence that you have given this morning, which has been very helpful. We will look at the bill again after recess. At this stage, we are not quite sure when we will take it up again—that will depend on what happens with other legislation.

We will have a brief suspension to allow the witnesses to depart. If committee members could be back here at 11.25, that would be very helpful.

11:18

Meeting suspended.

11:29

On resuming—

Subordinate Legislation

Persistent Organic Pollutants (Amendment) Regulations 2024

The Convener: Agenda item 3 is on a United Kingdom subordinate legislation consent notification. We are considering a type 1 consent notification relating to a proposed statutory instrument, the Persistent Organic Pollutants (Amendment) Regulations 2024. On 21 May, the Cabinet Secretary for Net Zero and Energy notified the committee of the proposed UK SI. The instrument will involve the UK Government legislating in a devolved area of competence, and it is seeking the Scottish Government's consent to do so.

Members will recall that we discussed our approach to consideration of this UK SI on 11 June and agreed to write to the Scottish Government and stakeholders to seek their views on the proposal. The Scottish Government's response is provided in an annex in the committee papers. Other responses were circulated to members on Friday.

The committee's role is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making the regulations within devolved competence and in the manner that the UK Government has indicated to the Scottish Government. If members are content for consent to be given, the committee will write to the Scottish Government accordingly.

In writing to the Scottish Government, we have various options. We can draw matters to the Government's attention, pose questions to it and/or ask to be kept up to date on relevant developments. If the committee is not content with the proposal, it may make one or two recommendations, which we could come to.

Do members have any comments?

Mark Ruskell: In this case, I am not content for consent to be given. I believe that the Scottish Government should legislate in this area to ensure maximum alignment with the European Union approach and regulations in the area. It is clear that persistent organic pollutants are a danger to human health and the environment, and that we should aim to drive them out of our environment as quickly as is practicable.

The European Union's approach to the issue has been wise. It has fully considered the precautionary principle and the fact that there are numerous hazards and risks associated with such chemicals. As a result, it proposes two limits—one

in 2025 and further regulatory action at the end of 2027—to allow industry and the waste management sector to make adjustments to how they deal with these toxic chemicals.

I believe that that is the right approach. I have reviewed the responses that we have had from the cabinet secretary and other stakeholders and I do not see a clear reason to diverge from that European Union thinking. The European Union has not only worked on the precautionary principle but assessed the economic impact of driving regulation in the area and considered some of the economic questions around adjustments to waste disposal. It has still come to the conclusion that it needs to increase regulation and drive these chemicals out of use.

I do not see a reason for Scotland to diverge from European Union environmental regulations. We are now eight years from Brexit. Of course, if we were still in the European Union, we would just adopt the regulations as a matter of course with some oversight from the committee, but there would not be a proposal on the table to diverge from the good work of the European Union. Given that the Scottish Government's policy is to remain in alignment with the European Union, this is a key area where I want to stick my neck out and say that I am not content with diverging from European Union policy, which is fundamentally about protecting human health and our environment.

The Convener: That is very much noted.

Sarah Boyack: I have a couple of comments. We could have had more information on the issue, and it feels like the instrument is flying through. I want to refer to comments from two stakeholders that I think are important. The issue that Environmental Standards Scotland raises about indicative timelines for reviews or setting lower limits is really important. We need to ensure that industry and regulators have appropriate notice to plan for the adoption of those lower limits. It is important to monitor the impact of the change and whether we need a lower limit in Scotland.

I also want to put on the record the Chartered Institution of Wastes Management Scotland's comments that we need a review of the approach to persistent organic pollutants that considers all aspects of risk to human and environmental health so that we do not have any unintended consequences that impact negatively on other important areas. The institution suggests that there is significant cost and environmental burden in the proposed approach and that we need the human health risks that are still to be investigated to be properly addressed and analysed.

I support the principle of a short-life industry working group because, whether or not the instrument goes through, the issue needs to be followed up. We need more action so that there is information and monitoring of what is happening. We should draw on expertise in Scotland but also link up with the rest of the UK so that we have a wider UK group as well.

Regardless of whether the committee supports the instrument, it is important to raise those issues and put them on the record.

Ben Macpherson: I note colleagues' contributions with interest, and I think that the committee will want to keep an eye on developments in this area. However, I am comforted to a large extent—to the point where I wish to give my consent to the SI—by the cabinet secretary's response. On the second page, it states:

> "It is important to note that the proposals in the UKSI will bring the UK POPs regulation into closer alignment with the EU regulation than is currently the case."

The SI that is before the UK Parliament and that we are being asked to consent to will be a step forward in the area.

I am also comforted by the fact that the cabinet secretary sets out that, as we would expect, at ministerial and official level, the Scottish Government will continue "engagement with counterparts" at the Department for Environment, Food and Rural Affairs and continue to monitor these matters.

All things considered, I am content that we consent to the instrument.

Bob Doris: Mr Ruskell makes reasonable points. On the question of whether, on balance, we should support the SI that is before us, I am minded to look at the cabinet secretary's reply to the committee on 21 May, which says:

> "The SI also revises and adds new conditions to substances in Annexes IV and V of the UK POPs regulation, which relate to the disposal of waste containing POPs. These proposed changes go beyond the requirements of the Convention and are designed to give certainty to operators and industry on their responsibilities when dealing with POPs waste."

The SI goes beyond the requirements and gives certainty for operators and business, which is important.

Also, in the "EU Alignment" section, in relation to annex V, the notification document says:

> "Therefore, while there is temporary EU misalignment, it is expected that the EU POPs regulation will also soon be amended in accordance with the Stockholm Convention."

There is a temporary misalignment.

I am not seeking to block the instrument but, in allowing it to go ahead, we should ask for further information in due course on how the issue will be monitored by the Scottish Government and how

realignment will be achieved. I do not dismiss or make light of Mr Ruskell's comments, but I support the instrument as it stands.

Mark Ruskell: I will come back on that briefly. Mr Doris is right to highlight that there are elements of the statutory instrument that enable alignment with the EU. However, there are other aspects, particularly when it comes to the phasing out of certain POPs within the regulations, where there is active divergence. I do not think that Mr Doris is right to say that this is a temporary measure and that the UK's—and Scotland's—approach will eventually align with that of the EU. Yes, it is about adopting regulation of the chemicals that are highlighted under the Stockholm Convention on Persistent Organic Pollutants, and there will be continuing alignment on that matter, but on the pace of change in ruling out and removing these toxic chemicals from our waste streams and our environment, there is now active divergence. That is why I oppose this SI; it is not to do with the other elements that Mr Doris mentioned, which are welcome.

Bob Doris: That is helpful, Mr Ruskell. I suggest that we support the instrument, but that the committee should have an on-going role in due course to scrutinise the impact, which is important. Although Mr Ruskell and I may disagree on whether to support the instrument today, there is a common cause across the committee that this should not be a one-off act by the committee and that there should be on-going scrutiny.

The Convener: Thanks, Bob—that is very helpful.

Douglas Lumsden: To add to what Bob Doris said, as a committee, we all agree that we have to remove these toxic chemicals. I presume that there is no doubt about that. We are seeing a practical approach to doing that, which is where there may be a slight disagreement—it is on the path to get there.

The response from the Convention of Scottish Local Authorities highlights financial pressures on councils resulting from new regulations. We have to be very mindful of that, which is why it is right that we take a practical approach. That is why I am happy enough to agree to the SI as it is before us today.

The Convener: That is helpful.

As Mark Ruskell has indicated that he is not prepared to agree, we will go through the process of seeing what the committee wants to do and ask members to vote. When we have decided on that, we can decide on the next steps. The substantive question is, are members content with the SI?

Sarah Boyack: I can see arguments on either side. I want to abstain, because I want to go into the issue in a bit more depth.

Bob Doris: On the basis that the committee will carry out on-going scrutiny, I am content.

For

Doris, Bob (Glasgow Maryhill and Springburn) (SNP)
Dunbar, Jackie (Aberdeen Donside) (SNP)
Lumsden, Douglas (North East Scotland) (Con)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Mountain, Edward (Highlands and Islands) (Con)

Against

Ruskell, Mark (Mid Scotland and Fife) (Green)

Abstentions

Boyack, Sarah (Lothian) (Lab)

The Convener: The result of the division is: For 5, Against 1, Abstentions 1.

The majority of committee members are content.

I suggest that we write to the cabinet secretary to indicate our views and concerns. We should say that the result of the conversation is that we think that there would be merit in the cabinet secretary considering limits on POPs, reviewing that matter and keeping the committee up to date. This was only mentioned once, but I wonder whether we would support a short-life industry working group to look at the issue to further inform our opinion. That might be a useful way to enable further scrutiny. Are members happy with that?

Members *indicated agreement.*

The Convener: On that basis, are members happy for me to sign off that letter once it has been drafted by the clerks? We are quite up against it for timescales, so are members content with me signing the letter?

Members *indicated agreement.*

Invasive Alien Species De-listing Regulations 2024

The Convener: The next item on the agenda is consideration of a type 1 consent notification relating to a UK statutory instrument. On 29 May, the Minister for Climate Action notified the committee of the proposed UK SI. As with the previous item, the UK Government is seeking the Scottish Government's consent to legislate in an area of devolved competence. Again, the committee's role is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making the regulations within the area of devolved competence in the manner that the UK Government has indicated to the Scottish Government.

If members are content for consent to be given, the committee will write to the Scottish Government accordingly. In writing to the Scottish Government, we have the option to pose a question or ask to be kept up to date on relevant developments. If the committee is not content with the proposal, we can make recommendations, which I can go through. Before we do that, do committee members have any views?

11:45

Mark Ruskell: I am content to support the regulations because I do not see this as an issue of policy divergence with the EU. It is more of a technical issue about how lists of invasive species are drawn up and whether they are fully inclusive on a European basis, or whether they are drawn more tightly with regard to the likely spread of species within the UK.

I note that on the list of species that are to be effectively excluded from the list of invasive alien species, there are, for example, aquatic species such as water hyacinth, which are highly invasive. However, because they cannot survive in winter in this country, scientists have made a judgment that there is no point in including them on the list. I also note that there has been quite a lot of lobbying from the aquatic ornamental trade bodies who want to see that plant sold again within the UK.

My only point on that, which could perhaps be reflected in a letter to the cabinet secretary, is that we are obviously in an age of climate change. A mild winter might be very different in ten or 15 years' time, as the climate gets warmer, and those kinds of invasive species may be able to get a foothold in this country as the climate changes. I am interested in what the review process looks like when the list of species that can or cannot thrive in this country is drawn up.

The other aspect on which it would be useful to get feedback from the Scottish Government is trade. As I understand it, the new regulations effectively will not apply in Northern Ireland because of the Windsor framework, and it will not apply in the Republic of Ireland, which remains a member of the EU. If those ornamental species are being sold in the UK, that raises a question about what implications there are for exports, say from Scotland through Cairnryan to Northern Ireland and the Republic of Ireland. That is just a query about how trade of those species is being regulated and the checks that exist, given that we do not have a phytosanitary agreement with the EU.

Sarah Boyack: I am not against the SI, but I would like to know what monitoring will take place. Four of the 10 species were previously sold commercially in the UK, and there is an issue about what will happen once businesses are allowed to sell them again. Who will be doing the monitoring? Where will the species be coming from? Mark Ruskell made the point that our climate is changing, so we need to make sure that we keep an eye on the matter. I hope that we can put that feedback to the minister.

The Convener: If no other members wish to say anything, I would like to make a couple of observations. One is that when I got the bundle of committee papers for this week—there were 206 pages of them—I looked forward to reading the UK SI notification and to finding out instantly what it all meant. However, it took quite a lot of reading to get through it. I do not think that the Government's briefing was helpful or concise.

I then looked at each of the species, some of which I had never heard of before. They include small Asian mongoose, which I am sure cannot survive here; coati, which is another form of mongoose; whitetop weed, which is sometimes confused with hoary cress in this country; and the water hyacinth, which has already been mentioned. My concern is the fact that things are changing quickly, climate wise, and we are seeing invasive non-native species coming into this country that are never meant to thrive, but do thrive.

The example I see from home is ranunculus weed. It was never an issue on the Spey, because that was always too cold and too fast flowing, but things have changed, temperatures have warmed, and ranunculus weed now is a major problem on the Spey. I declare an interest that I have a fishery there. It does not affect the fishery but it absolutely smothers out freshwater mussels, which are an endangered species.

We need to be really careful in what we are doing. Therefore, I support the committee's recommendation that if we are going to approve this SI, which I am minded to do, we ask the Government to keep it under review and to look at the effects of the changes. In addition, if other species are going to come off the list in the future, the Government should make somewhat clearer what it is doing. There is mention in the paper that DEFRA was asked for a comment, but that is still forthcoming. We are making this decision slightly in the dark.

Those are my comments. If there are no other comments from the committee, I move to the substantive question. Is the committee content that the provision set out in the notification should be made in the proposed UK statutory instrument?

Members *indicated agreement.*

The Convener: When writing the letter, are we happy to say to the Government that we would like reviews to be carried out and for there to be a

simplified process, should we be asked to look at the matter again, so that we understand what the species are and what reviews have been carried out to determine that it is acceptable to de-list them from the invasive non-native species legislation?

Sarah Boyack: I strongly agree with that, convener. For a vast majority of us, the issue is right under the radar and it is important that somebody effectively monitors it.

The Convener: Is the committee happy for me to sign off the letter on behalf of the committee when it is prepared by the clerks?

Members *indicated agreement.*

Douglas Lumsden: Is it also worth writing to DEFRA again, stating that we asked for an impact assessment and that, whether or not it has been carried out, we have not received it? We should say that we would like to see it and ask DEFRA to respond to us in future.

The Convener: Absolutely. We can ask the Government for the impact assessment of the species and ask it to make sure that that is available in the future. The committee is agreed on that, so we will move into private session.

11:52

Meeting continued in private until 12:44.

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