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Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 15 September 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
25th Meeting 2015, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alan Barr (Brodies LLP)
Andrew Campbell (Scottish Government)
Laura Dunlop QC (Faculty of Advocates)
Rob Gibson (Caithness, Sutherland and Ross) (SNP)
John Kerrigan (Law Society of Scotland)
Fiona Leslie (Scottish Government)
Billy McKenzie (Scottish Government)
Steve Sadler (Scottish Government)
Eilidh Scobbie (Burnett & Reid LLP)
Kate Thomson-McDermott (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 15 September 2015

[The Convener opened the meeting at 10:06]

Interests

The Convener (Nigel Don): I welcome members to the 25th meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off mobile phones, and I welcome Richard Baker back to the committee. Item 1 is just to ask Richard whether he has any interests to declare.

Richard Baker (North East Scotland) (Lab): I do not, convener. I simply draw members' attention to my entry in the register of members' interests.

Decision on Taking Business in Private

10:06

The Convener: Item 2 is a decision on taking business in private. It is proposed that we take items 11 and 12 in private, to allow the committee to consider the evidence received on the Land Reform (Scotland) Bill and on the Succession (Scotland) Bill. Is that agreed?

Members *indicated agreement.*

Succession (Scotland) Bill: Stage 1

10:07

The Convener: Item 3 is oral evidence on the Succession (Scotland) Bill. We will hear first from the Law Society of Scotland, and then from the Faculty of Advocates and from a panel of legal practitioners. It is my great pleasure to welcome John Kerrigan, representing the Law Society of Scotland.

John Kerrigan (Law Society of Scotland): Good morning.

The Convener: Thank you for coming along and agreeing to be grilled. We have the interesting problem of trying, as laymen, to understand all the issues in the bill. We also have extensive notes and we need to work out which questions to ask of which panel, so if there is a degree of confusion, even in my hands at the very start, that may be something that we will need to sort out. I am therefore going to skip questions 1 and 2 and go straight to John Mason with what is listed as question 3.

John Mason (Glasgow Shettleston) (SNP): I was not quite expecting that, convener, but that is fine.

As I understand it, it is possible that there could be two new pieces of legislation on succession. Furthermore, the provisions of the Succession (Scotland) Bill could also be amended by secondary legislation. Considering the impact on practitioners, I wonder whether you were reassured by the Government's response to questions last week and by the officials' explanation that it would use the amending power only for fine tuning, which would be well publicised in advance, so that it would not need to go back to primary legislation. Were you satisfied with that explanation?

John Kerrigan: Yes.

John Mason: Thank you.

John Scott (Ayr) (Con): In oral evidence to the committee last week, the Government and the Scottish Law Commission defended the inclusion of guardianship within the scope of section 1 on various grounds. Does the Law Society want to comment on any aspect of that defence? For example, does the explanation that parental rights and responsibilities will cover most situations adequately take account of the increasing role of step-parents?

John Kerrigan: My answer to that question is yes. Our concern was about a situation in which, for example, a couple become divorced but neither person would object to the other, in the event of their death, being the guardian of a child involved in that relationship. I understand the Government's position, in that section 1 says that the will can provide otherwise. There may be a question as to whether the legal profession gets up to speed on that quickly, but I take the point that if a guardianship provision were revoked by divorce, the surviving party could seek parental rights. There is a question of the time involved in that.

John Scott: Another aspect of the Scottish Government's defence of the current scope of section 1 related to the possibility of a person subsequently applying to court to be appointed guardian. Can you shed any light on the likely timescales and costs associated with doing that? We would not want the costs to prevent such an application where there was hardship involved.

John Kerrigan: The likely timescale depends on whether the application is defended. I had notice of this point and I spoke to one of the senior solicitors in our family law department. She indicated a timescale of three to four months for undefended applications. If it were a defended application, it could take a year and a half or longer. In any court action, costs depend on how long the action runs. There could be significant costs if it were defended.

John Scott: Quite.

The Convener: Could I be uncomfortably blunt—what is a significant cost in that context?

John Kerrigan: It depends on the client for whom one is acting. If the client cannot get legal aid and the bill comes to £6,000, as it could quite easily if it were a defended action, I would regard that as a significant cost.

The Convener: Indeed—so would I.

John Scott: Do you regard the situation as satisfactory, or is there something else that we should be doing?

John Kerrigan: The only way it could be changed would be to change section 1 to say that it would not apply to an appointment of the surviving spouse or civil partner as guardian.

John Scott: Right.

John Kerrigan: Otherwise, the situation is as you have outlined.

John Scott: It would need to be written either into law or into the will, I suppose.

John Kerrigan: In fairness, section 1 says that it is possible to contract out of its terms.

John Scott: Thank you.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): The Government's bill and

TrustBar appear to have a slight divergence over domicile in relation to section 1, which is on divorce, dissolution and annulment. The Government's position is that it is the domicile at the point of death that applies, whereas TrustBar seems to be suggesting that it is the domicile at the point of the ending of the relationship in legal terms. What are the pros and cons of each?

John Kerrigan: I can understand TrustBar's attitude. What would be the situation where a couple are domiciled in Scotland and become divorced in Scotland, and then one of them moves permanently to France and becomes domiciled in France and dies there? Arguably, section 1 would not apply if it is domicile at date of death that matters.

Stewart Stevenson: But if a person is domiciled, for the sake of argument, in France at the point of death, would it not be French civil law that would cover the estate that is derived,—

John Kerrigan: Yes—

Stewart Stevenson: —leaving aside issues around heritable property.

John Kerrigan: Yes, it would be the law of the place of domicile that would apply to moveable property. That at least is the Scots law interpretation of private international law.

Stewart Stevenson: Indeed. Therefore what the Government is proposing at least has the merit of synchronising the law that would apply at a single point in time. That might be said to be the advantage of the Government's proposal.

John Kerrigan: I understand the Government's argument. This is a law dealing with succession and succession arises from death. I can see the point of the Government's argument, but I can also see the point of the TrustBar argument.

Stewart Stevenson: That is a very "on the one hand, on the other hand" answer, which I understand. Would you choose, please?

John Kerrigan: Would I choose? Frankly, I would choose domicile at the time of divorce.

Stewart Stevenson: If that were to be the case, what second-level effects might derive from it that would add or subtract complication?

10:15

John Kerrigan: I take your point entirely that, if somebody who had heritable property in Scotland went to France, the law that would govern the succession to their estate would be French law. However, the argument could be that the heritable property in Scotland could still pass by the will which, if the revocation takes place at death rather than at the time of divorce and the original Scotsman was then domiciled in France, would be unrevoked because he was not domiciled in Scotland at the time of death.

Stewart Stevenson: As a layperson, I want to be absolutely clear about what you are saying. Would that be the effect if we were to apply the domicile at divorce rather than the domicile at death?

John Kerrigan: No, it would be the effect if you were to apply the domicile at death.

Stewart Stevenson: So it is the more complicating one.

John Kerrigan: In my view, yes.

Stewart Stevenson: You appear before us on behalf of the Law Society. Are you speaking on behalf of the society, rather than in a personal capacity, when you say that?

John Kerrigan: It is a personal view, to be frank.

Stewart Stevenson: Thank you. That is helpful.

Richard Baker: My question is on the society's suggestion, which has also been made by TrustBar, that the scope of sections 3 and 4, on the rectification of wills, should be broadened to include wills drafted by the testator, such as handwritten wills or wills that are created using templates that are found online. Why does the society prefer that approach? Is there a danger that the broader the provisions are, the higher the risk will be that every disappointed beneficiary will seek to use the powers?

John Kerrigan: I understand that the Scottish Law Commission's view was that the provisions should not apply to home-made wills. Its view was based not on that risk assessment but on the fact that, if someone makes their own will, the question arises what evidence we have or can have that it is not the will that they intended to draft and that they got it wrong.

Richard Baker: If they have made a will online using a template, is the capacity for errors much greater?

John Kerrigan: Yes.

Richard Baker: Does that not impact on the provisions in sections 3 and 4 on assessing what is a simple error? Does it not become difficult at that point?

John Kerrigan: It is a question of evidence. If we can rectify a will that a solicitor drafted because there was an error in the drafting, evidence would need to be produced that that was the case. I see no difference. It is an evidential point.

Richard Baker: That is a fair point. Thank you.

Stewart Stevenson: Is it the process of review—a third party looking at the will and working with the person who is drawing up the will, regardless of whether they are doing it on their own account or with professional advice—that touches on the matter, or is it the fact that the third party is legally qualified and, therefore, might be expected to get the legal aspects of the will correct as distinct from the intention? Is that where the distinction lies?

John Kerrigan: I think that that is where the distinction lies. There was a recent case in England—Marley v Rawlings—in which Lord Justice Neuberger introduced a caveat into the application of the English version of the rule. He said that, if the lawyer gets a legal term wrong, that is not a simple mistake that can be rectified. In a subsequent case, the lawyer had used the word "issue". The evidence was that the deceased testator wanted to include stepchildren in the bequest, but the way in which the lawyer had drafted it using the word "issue" meant that they were not included. However, they were not given relief in that case.

Stewart Stevenson: The point is that, if someone who is legally qualified and in good standing with the profession has put into the will a term that has legal force in other contexts, a much higher certainty about intention will be placed on that than if I disappeared into a cupboard and wrote something down in half an hour.

John Kerrigan: Yes, that would appear to be a caveat that Lord Neuberger introduced in relation to Marley v Rawlings.

Stewart Stevenson: Would it apply equally in Scotland?

John Kerrigan: Yes. To return to the previous point, it is fair to say that there would likely be more cases of people turning up and saying, "That's not what my uncle intended." Lawyers practising in this field often have people turning up saying, "We want to challenge this will, because it's not what he intended." At present, the law has a degree of certainty in the sense that the courts interpret what is on paper.

The Convener: Why were you so certain that an English case would apply in Scotland?

John Kerrigan: I gave that case as an example, but in Marley v Rawlings reference was made to the Scottish case of Hudson v St John in 1977. That case was inconclusive, I believe, but nevertheless reference was made to a Scottish case.

The Convener: That is helpful. Thank you.

I want to ask about the time limit for rectification. Some of our evidence suggested that people were concerned that the date of confirmation might take a long time to come, and that it might be better to have a time limit that ran from the date of death. Different times were suggested. Could you give us a view on that?

John Kerrigan: In some cases, it can take several years to obtain confirmation. I think that, if someone has difficulty with a will and wants to see it rectified, they should not be allowed to wait until six years has passed. I know that that is an extreme case, but I agree with some of the concerns that have been expressed about time limits.

The Convener: It may be a purely personal view, but can you suggest a sensible time limit? Later witnesses will probably have a view, but I would like to know what yours is.

John Kerrigan: My personal view is that it should be one year from the date of death.

The Convener: One of the other things that came up in evidence last week was the Scottish Government's confirmation that revocation does not include a reduction of a will in court. Does the Law Society have any concerns about that?

John Kerrigan: Our concerns related to a drafting tweak, if I may call it that, in section 5. Section 5(1)(b) applies where

"the subsequent will, or part of it, is revoked."

We felt that it was necessary to add three words so that it read, "is revoked by the testator". A will can be revoked, as you have indicated, by a court, but it can also be revoked by the application of an old legal presumption called the conditio si testator, which I think is still out for consultation in the second consultation document.

The Convener: I am grateful for that suggested tweak.

John Scott: I want to ask about sections 9 and 10 and the time of death. In written evidence, the Law Society and TrustBar take issue with section 10(4), which prevents section 10 from applying when the testator is one of the people who die simultaneously or in an uncertain order. Can you describe the nature of your concerns in that regard, perhaps with the help of an example that could occur in practice?

John Kerrigan: If section 10(4) were to apply, there could be a situation in which intestacy arises. Scottish courts and Scottish lawyers have always sought to interpret a document so as to avoid intestacy, and we think that section 10(4) could have that result in certain cases. We are not sure that section 10(4) really adds anything to sections 9 and 10.

John Scott: Would you agree with TrustBar's point that when the bill refers to situations where people

"die simultaneously or where the order of death is uncertain",

the use of the word "uncertain" is likely to lead not just to uncertainty but to unnecessary litigation?

John Kerrigan: I understand TrustBar's point, yes. I think that it cited a case in which the word "uncertain" appeared to lead to litigation.

John Scott: Right. Thank you.

Stewart Stevenson: I am going to go all vice-presidential here. Is it not certain that in some circumstances there is uncertainty, whereas in other circumstances you are uncertain as to whether you should be uncertain? In other words, there are sets of circumstances in which it is clear that you cannot resolve the answer to the substantive question. The fact of the uncertainty is itself clear, whereas in other circumstances, that might not be so clear.

Let me give you an example to illustrate the point. There is a shipwreck and two people are adrift in a boat for three or four weeks. There may be some evidence that one of them has written something that suggests that they survived the other. In that case, you are uncertain as to whether there is uncertainty, whereas if there is no evidence, you are clear that there is uncertainty.

Is it fair to say that there is a distinction to be made, so that you can have an argument about whether, in law, there is uncertainty—which means that the rules about uncertainty should apply—or there can be a debate about whether uncertainty should apply?

John Kerrigan: I think that in the example that you gave, if you find both people dead in the boat with no writing—

Stewart Stevenson: You know uncertainty exists.

John Kerrigan: You know uncertainty exists. If you find writing in the boat, there may still be uncertainty about who wrote it.

Stewart Stevenson: Yes, but the uncertainty is now a practical uncertainty rather than a legal uncertainty. That is the point that I am trying to establish. All I am saying is that the use of the word "uncertain" does not necessarily create legal difficulties, because you can define the circumstances in which you are certain that there is uncertainty in law.

John Kerrigan: I think that I would say yes to that.

Stewart Stevenson: That is grand.

The Convener: We will move on to the law of forfeiture, which takes us back to Stewart Stevenson.

Stewart Stevenson: This is about being dead and undead simultaneously, which is exactly the same kind of thing. Essentially, the Scottish Law Commission has changed its position on the law of forfeiture. In 1990, the commission thought that the law should be placed in statute, and now it thinks that it is sufficient to simply abolish the Parricide Act 1594 and rely on common law. Are you content that that is sufficient?

John Kerrigan: The Parricide Act 1594 has had its day, to be frank. First, it applies only to the killing of a grandparent or a parent, so it is not like the common law—mainly English common law—of escheat and attainder, where someone is not supposed to benefit from their evil act. That could mean killing somebody else—not a grandparent or a parent—who had left you something.

There has been considerable doubt in Scotland as to whether the 1594 act applies only to heritage. It also has an unfair aspect to it because—if we apply the old Norman concept of attainder—if I killed my father, I would be deemed under the act to have predeceased him. Any benefit that he had left in his will to John Kerrigan, whom failing, to his issue, would be attainted and my issue would not be entitled to succeed, even though they were wholly innocent. That has to go. The proposals on forfeiture in the bill are good.

10:30

Stewart Stevenson: In essence, giving the courts total discretion makes more sense, because they can cover particular eventualities that have not yet been foreseen.

John Kerrigan: Yes.

Stewart Stevenson: One situation that comes to mind in the current environment is that of someone who assists a person to travel to the Dignitas clinic in Switzerland to die as a result of that person's choice and who is subsequently determined to have acted illegally. It seems reasonable that they should not necessarily be disbarred from total inheritance.

John Kerrigan: That would be my personal view.

John Scott: Does the view change over time? You have gone back to 1594, but if we go back to the Old Testament, the sins of the fathers are visited on the sons and on the next generation, which was the accepted practice then.

Do views on the matter change? As Stewart Stevenson said, the Law Commission had one view in 1990 but it has a different view today.

John Kerrigan: Everyone is entitled to change their view. To be frank, I am glad that we do not apply the lex talionis as required by the Old

Testament: an eye for an eye and a tooth for a tooth.

John Scott: I am making the point that the view seems to vary.

John Kerrigan: Again I am expressing a personal view, but I think that the Scottish Law Commission said clearly that the Parricide Act 1594 should go and that the courts should be given discretion to give 100 per cent relief from the effect of the Forfeiture Act 1982. The commission also said clearly that, when someone is guilty of murder or culpable homicide—that is manslaughter in England—and they are not given relief, they should be treated as if they had predeceased the person who was murdered or died. That is entirely correct.

One example is the case of the petitioner Hunter, who was a husband who murdered his wife. Her will provided in his favour, whom failing other beneficiaries. The court's view—it disagreed with the view that the Scottish Law Commission expressed in 1990—was that the husband could not be treated as having predeceased his wife. That meant that the beneficiaries, who were totally innocent and would have taken the inheritance had that rule applied, as is proposed in the bill, were excluded completely.

An example to the opposite effect in England is the case of Dr Crippen. He was convicted of murdering his wife and condemned to hang. He had inherited his wife's estate and, just before he was hanged, he made a will to leave his estate to his mistress. Dr Crippen's relatives successfully challenged that will on the basis of the old medieval rules of escheat and attainder. In contrast, in the case of the petitioner Hunter, the family members, who were innocent, were excluded from succession.

The Convener: We will move on to protection of trustees.

John Mason: Section 18 of the bill refers to

"protection for trustees and executors in certain circumstances",

and introduces the idea of making

"such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case".

It has been suggested that that might mean a requirement to advertise if there is uncertainty as to who the beneficiaries might be. Is that the case? If it is, will that have an impact on the efficient and timely administration of estates?

John Kerrigan: I do not think that it is the case. The Scottish Law Commission did not think that that was the case in 1990. If it became a requirement to advertise, that would interfere with the timely administration of estates.

John Mason: Is section 18 a change from the present practice?

John Kerrigan: Yes.

John Mason: You see it as a change.

John Kerrigan: Yes.

John Mason: Is there more encouragement to advertise?

John Kerrigan: No. Solicitors would advertise for a will, for example, if a client came to them and said, "My uncle has died and I know he made a will because he told me and showed me a copy of it, but we haven't been able to find it and we don't know who holds it." In those circumstances, a solicitor would advertise for somebody holding a will for—say—the late John Kerrigan of such and such an address. I do not recall seeing an advert that said, for example, "We hold a will granted by the late John Kerrigan."

John Mason: If a will was quite vague and referred just to children and stepchildren or something like that—if there was a vague suggestion that beneficiaries were out there—would an advertisement be placed?

John Kerrigan: Yes, although that would be a one-off situation. Most solicitors would deal with that by instructing genealogists.

John Mason: So you do not see any particular problem of section 18 delaying things.

John Kerrigan: I would not like it to become standard practice for a solicitor to have to advertise that they held a will by a particular deceased, because they would have to await responses to that advert.

John Mason: That is agreed. I just wonder how the courts might interpret section 18. I take your point that you would not want advertising to become standard practice, but might some of your fellow professionals take an extra-defensive position by advertising?

John Kerrigan: They might—every solicitor will follow their gut instinct in a particular case. If you are suggesting that it might be negligent of an executor not to advertise, there could be limited cases where an executor was advised to advertise, but that would not apply across the board.

The Convener: The last questions relate to whether the recommendations have been adequately implemented. In 2009, the SLC made several recommendations relating to private international law. Recommendation 50 was that the Scottish courts should have jurisdiction when the deceased died domiciled in Scotland and when he or she owned land and buildings in Scotland. Recommendation 45 was that the

capacity to make or revoke a will should be determined by the law of the testator's domicile at the time of making or revoking the will. Recommendation 50 is only partially implemented by the bill and recommendation 45 is still being consulted on.

Is it desirable that reforms to a complex subject such as private international law should be split over two pieces of legislation? How do you see the balance of all this?

John Kerrigan: It is clear that there will be two pieces of legislation. If those matters are dealt with in the second consultation, which was published in June, or as a result of further deliberations, there will be two, separate succession acts for Scotland.

The Convener: It is clear that that is not as good as having one bill.

John Kerrigan: No.

The Convener: Does that put you in any particular difficulty in practice, if we bear it in mind that most of Scots law is pretty dispersed?

John Kerrigan: My personal preference would be to have a consolidating act, which would incorporate the provisions of both acts into one, so that there was one source.

The Convener: If we did that, would we include other extant materials or would it just be a matter of running the two acts together? How much statute law on succession is there that would need to be included in a consolidating bill along with the two bills that we are discussing?

John Kerrigan: The Succession (Scotland) Act 1964 would in large measure be replaced by the second bill, which will deal with the more controversial aspects of succession. The 1964 act mostly deals with intestate succession, and the second consultation paper is largely concerned with protection from disinheritance and intestate succession. The 1964 act is likely to be largely replaced by whatever second bill is promulgated by the Scottish Government.

The Convener: That suggests that, if there were to be a consolidating bill, it should be—to invent a term—a complete consolidation, so that we would get absolutely everything into one statute.

John Kerrigan: That would be preferable.

The Convener: That is all for the moment. Thank you very much, Mr Kerrigan.

I will briefly suspend the meeting while the witnesses change over.

10:39

Meeting suspended.

10:41

On resuming—

The Convener: I welcome our witnesses from the Faculty of Advocates: Laura Dunlop QC and Wojciech Jajdelski—I think that I have pronounced that right. Thank you very much for coming along. I will open the questions; I think that you have seen the format before.

The Faculty of Advocates provided a written submission, for which we are very grateful, that indicated a high degree of satisfaction with the bill as currently drafted. On the other hand, TrustBar, a group of advocates practising in the area of disputes relating to succession and inheritance, made a number of detailed points relating to the bill's policy content and drafting. Does the Faculty of Advocates want to comment on any aspect of what TrustBar said?

Laura Dunlop QC (Faculty of Advocates): I am happy to comment on specific aspects of TrustBar's response if they arise in further questioning. At this stage, as a general comment, I should explain that I am the convener of the faculty's law reform committee and I co-ordinate which consultations we respond to and which ones we do not respond to. With the assistance of the other members of the law reform committee, I select a committee to prepare a consultation response.

The practising membership of the faculty is over 450. In recent years a number of special interest groups have been established in the faculty. In this case, the group's raison d'être is to look at matters of trust and succession. People who are interested and have expertise in those areas tend to form the membership of such groups. They take an independent look at a reform proposal such as the proposal in the bill.

The faculty's position is that when we prepare a response on behalf of the whole faculty we try to have that exercise carried out by members with experience in the relevant area of law. Sometimes that is easier than other times. In this instance we responded to the Scottish Government's consultation—I think it was last autumn—which covers most of the material that is in the current bill. The committee that prepared that response, which was a group of five people, had expertise in the area.

Once we have done something like that we try to be consistent in what we say about proposals. I suppose that that is reflected in the evidence that we submitted. It is obviously entirely a matter for TrustBar if it wants to come along and raise different points.

If the faculty takes a position on an issue that we would regard as legal policy and the

Government decides not to go with the faculty's view, we would probably regard that as a spent argument and we would move on, whereas TrustBar, for example, might want to make such a policy point again; it might want to try before this committee to make a policy point that appears to have been rejected by the Government.

The Convener: Thank you very much. That is a helpful clarification of how the process works.

John Mason: One issue that we touched on with the previous witness was the fact that we have two bills on succession. One, theoretically, deals with less controversial measures and the other one, which will come later, will deal with more substantive things. Are you comfortable with that situation? Is it just the way it is, or is it not ideal?

10:45

Laura Dunlop: To a degree we are in uncharted waters. Yesterday I tried to think of other areas of Scots law in which this kind of law reform has taken place—where there was a small act first and a bigger act coming. It is quite difficult to think of a direct parallel. I can think of areas of law reform in which one major measure has gone forward and a smaller act has come afterward that tidied up some practical questions, but it is difficult to think of a time when that has occurred the other way around.

On the other hand, I understand the thinking behind trying to extract the uncontroversial parts of the succession proposals and put them in a short, technical bill. I understand what I think is the reason for that. I accept that it has generated rather a mixed bag of proposals that have in common only the perception that they are less controversial.

Would it have been better to have put those proposals into the main consultation paper? As you probably know, the main consultation paper already has 71 questions, so it is very large and it is taking a lot of work. By choosing this kind of linear progression, we are giving up the idea of parallel working. The short bill is going forward at the same time as people are making up their minds on the longer consultation paper.

I am a former law commissioner, so I am aware of all the reasons why the procedure under which the committee is considering the bill was introduced in the first place. It is a good idea. It may be that the first bill that this committee considered under the process—the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015—will turn out to have been a more suitable measure for the use of the process because it was a discrete piece of reform, whereas this bill is not. The committee will obviously form its own view of that issue at the end of the process. It is very difficult to say that the way that the legislation is being considered is clearly wrong.

John Mason: Thank you for those helpful comments.

I would link to that issue section 25 of the bill, on ancillary provision, which gives the Scottish ministers quite wide powers to amend by regulation. It has been suggested that, in this case, primary legislation should be used again should there be any amendments. Does the Faculty of Advocates have a view on that?

Laura Dunlop: The faculty as a whole has not taken a position on that issue and would rest with the assurances given that section 25 would not be used to effect substantive change.

The Convener: That takes us to Stewart Stevenson's question.

Stewart Stevenson: I return to the issue of domicile. In our previous evidence session we heard the arguments on both sides for whether the domicile at the point of the ending of the relationship in law or the domicile at the point of decease should carry greater weight. The bill goes for the latter. How does the Faculty of Advocates see the balance of argument on that issue? Does it think that the Government has come up with a better answer?

Laura Dunlop: To reiterate the point that I made already about an attempt to be consistent, we certainly did not flag that up as a concern when we responded last year, but, in view of the fact that it obviously is of concern to others, we have revisited it to a degree.

The first point is that it is a default rule for people whose relationship has ended without their taking any action to change a will that makes provision for their ex, to put it colloquially. The solution that is in the bill of using the law of the domicile at the date of death means that at death there is a deemed predecease, so that the divorced partner is treated as already having died.

In preparation for today, I tried to think of circumstances in which that approach could produce an undesirable outcome. As far as I can calculate, the possibility of an undesirable outcome is very small. We would be talking, for example, about somebody who divorced in country X, checked that under the law of country X the provision in favour of their former spouse or partner would survive and on that basis did not make any new testamentary provision. If that person then moved to Scotland and became domiciled here, our different law—the fact that we had chosen to use the law of the testator's domicile at decease—would effect a change that they did not want.

I find that quite an implausible example. Somebody who has checked what the law is in country X is quite likely to be attentive enough when they move to Scotland to make a different testamentary provision here to protect their former partner. The class of person who wants to benefit their former partner notwithstanding a divorce or termination of a civil partnership is, I suspect, pretty small.

Stewart Stevenson: Can I challenge that slightly, if I may?

Laura Dunlop: Yes.

Stewart Stevenson: You appear to be invoking the law of assumption. Is it not the case that only a minority of people write wills in any event, and that most people's disposal of their assets at death is therefore based on people having a broad assumption that the right people will get the inheritance rather than their doing what you have described, which involves taking a systematic and rational approach to such matters?

Laura Dunlop: It is a question that is bedevilled by a lot of assumptions. There is a major assumption underlying the whole issue, which is that the majority of people would not want their ex-spouse or ex-partner to continue to benefit by means of a testamentary provision that they have forgotten about or not done anything about. If that is the general assumption, the bill is taking quite a sound route.

The downside that I thought I could see is that, if the bill made it a question dependent on the law of the domicile at the time of the divorce or the ending of a civil partnership, we would introduce into the administration of the executry a question of what we still call "foreign law". It would stimulate a factual inquiry as to what the testator's domicile had been at the time of the divorce or the ending of the civil partnership, which would be the first question. The second question would be what the law of that place is regarding the effect of divorce or dissolution of a civil partnership on testamentary provision. The downside that I see of going with that alternative is that the bill would generate a degree of uncertainty.

Stewart Stevenson: So the executors would have to establish what may have happened—I use the word "may" deliberately—in another legal jurisdiction. Not all legal jurisdictions are as accessible as others, and some will be difficult to deal with.

Laura Dunlop: Yes, that is possible, and there will have been a passage of time.

Stewart Stevenson: The provision in the bill basically plays to the common assumption that people will have that they have cut all ties with the person with whom they had previously had the relationship. Anyone who thinks that it should be otherwise has a way of making a testament that takes account of that, which the bill would not discount.

Laura Dunlop: Yes, I agree with that. The debate—it is not an argument as such—is between whether we fix it according to the law of the place where the person was domiciled when the relationship ended, or whether we just settle on the time of death, so that if the person is domiciled here we treat the former partner as if they have predeceased the person.

Stewart Stevenson: The bottom line is that, when somebody dies in Scotland, the law of Scotland cannot be removed from working through the consequences of their death in testamentary terms. To have some of that process happening somewhere else merely complicates matters.

Laura Dunlop: One could suggest that that is a greater complication, yes.

Stewart Stevenson: Right—thank you.

The Convener: Thank you—that takes us to Richard Baker's questions on rectification.

Richard Baker: Earlier, I asked John Kerrigan about the Law Society's suggestion that the scope of sections 3 and 4 of the bill, on rectification of wills, should be broadened to include wills that have been drafted by the testators themselves, such as handwritten wills or wills created using templates found online. TrustBar made that suggestion as well. I would like your opinion on that proposal.

Laura Dunlop: I have looked into the matter. First, the Faculty of Advocates, in our response a year ago, supported that narrow provision—if I can style it as such—and I would seek to be consistent in that respect.

In 1990, as Mr Kerrigan suggested, the Scottish Law Commission articulated concern about the fact that people may have made statements to relatives but not been totally frank or may have changed their mind. The time at which they make their testamentary provision is the time at which the intention matters.

The Scottish Law Commission was persuaded to restrict its recommendation to the narrow type of measure because of the difficulties of comparing what is in the will with what is supposedly other evidence about a different intention.

There is an interesting interplay in any such law between rectification and interpretation. It is sometimes said that, if there is a wide door for rectification, there is only a narrow door for interpretation. There being a narrow door for

rectification, it may be that the courts would take a more generous approach to interpretation.

I accept that this is speculation, but, if somebody has made a mess of a will that they have made themselves, the courts might be prepared to be more generous in interpretation if it was reasonably clear what the testator was trying to do.

I do not want to advance a position any different from the Law Commission's recommendation that the provision on rectification should be confined to quite a narrow scenario. I note that it appears to be the position that a fairly narrow rectification provision operates in England as well.

Richard Baker: So, like the Law Society, you do not see the danger that the broader the provisions are, the higher the risk that every disappointed beneficiary would seek to use the powers.

Laura Dunlop: It is speculation, but I would agree that it is a danger. It is very hard to limit the use that would be made of a wide provision, and the Faculty of Advocates, in its response last year, also made the point that it would be difficult to be selective about the intentions being reflected.

For example, if the testator's intentions had been to be highly tax efficient and it turned out that the will that had been made was not as tax efficient as it might be, would that be a good enough reason to open up the will? On that basis, the Faculty of Advocates supported the more narrow form of provision that we now have.

The Convener: Thank you. That takes us to John Scott's questions.

John Scott: I want to turn now to sections 9 and 10 about the time of death. In their written evidence, the Law Society and TrustBar take issue with section 10(4), which prevents section 10 from applying when the testator is one of the people who die simultaneously or in an uncertain order. Is there any comment you wish to make?

Laura Dunlop: I notice that the Law Society response said that it was slightly difficult to discern the thinking behind section 10(4) and I agree with that. What I am going to say about what may be the intention is speculation.

I wonder whether the inclusion of section 10(4) is just to reflect the policy that underlies section 9. I tried to think of an example, and I came up with this one. Let us suppose that I make a testamentary disposal of my jewellery, such as it is, and say that I am leaving it to my two cousins. If I die, and my cousins later die simultaneously, according to the first limb of section 10 the jewellery would be split between their estates. If we all perish in whatever the calamity is, the jewellery does not go anywhere near my cousins and their heirs, family or testamentary provision—they are effectively disregarded. That did not strike me as a bad result.

John Scott: I see.

Laura Dunlop: I emphasise that that is my speculation as to what the thinking may be. I am not convinced that I am right.

John Scott: In various places, sections 9 to 11 refer to people dying

"simultaneously or in circumstances in which the order of death is uncertain".

TrustBar makes the point that the word "uncertain" is likely to lead to unnecessary litigation. Do you share that view?

11:00

Laura Dunlop: I had a look at the case to which TrustBar refers—I think that it is the Lamb case. The first-instance judge in that case found it difficult, but my view, on looking at the appeal decision, is that Lord Wheatley sorted it out. He said—as was alluded to earlier when Mr Kerrigan gave evidence—that, in round 1, we decide whether there is evidence to show on the balance of probabilities who died first. If there is not, we move to whatever the statutory rules are for the situation in which it is uncertain. The use of the word is not in itself problematic.

John Scott: I see.

The Convener: That takes us on to questions from Mr Stevenson on forfeiture.

Stewart Stevenson: It is interesting that the legislation.gov.uk website says that the Parricide Act 1594 has no legal effect. Therefore, its repeal will presumably not cause any concern. The section of the bill that deals with the matter—section 17—describes what should happen and leaves quite a lot of common law in place. Is that a reasonable outcome? Basically, the courts will be able to consider the individual cases—which will be very few in number, after all—and come to conclusions on the facts of a case. Is that the right place to be?

Laura Dunlop: I looked up the Parricide Act 1594 yesterday in Westlaw, a legal research resource that almost all of us use. According to that website, the act is in force and has been since 8 June 1594. One thing about it that is particularly striking is that legislation clearly used to include some adjectives of outrage, which is a practice that has fallen into desuetude—perhaps fortunately.

I do not see a difficulty with the line that is being taken. If you repeal the Parricide Act 1594, you leave the position that the circumstances in which forfeiture will ensue are left to be dealt with by the

common law. That is consistent and allows the courts to develop the law case by case. It is not a big area of law.

Perhaps, in a perfect world, if you were trying to produce a complete statutory code for succession, you would include in it a chapter dealing with such situations, but my sense of the succession law reform is that there has to be at least a degree of triage so that, if something causes not much practical difficulty, arises quite rarely and can be left to be dealt with by the common law, it does not need to form part of the legislative reform. In itself, articulating principles on the number of issues that would need to be considered would be quite time consuming and might be disproportionate to the benefit.

Stewart Stevenson: In this case, we are using the legal mechanism of saying that the person who committed the crime that led to the death is deemed to have died before the person who physically died. Under the law of domicile, in relation to relationships that have legally ended, we also use the mechanism of deciding that the partner who is no longer a partner legally died before the person. However, in one case, we are legislating and, in the other, we are leaving it to common law. Why the difference?

Laura Dunlop: I suppose that it is because the range of factual circumstances in which one person may have some kind of connection to the death of another is potentially very broad.

Stewart Stevenson: Okay. That is fine.

The Convener: I cannot help but reflect that that is an interesting basis on which to legislate. If I took that idea to the absolute limit, we would be saying that all the standard cases are the ones that we should legislate for, and that anything that is difficult should be left to the common law on the grounds that it is far better to let the courts sort out the detail than for us to worry about it.

Stewart Stevenson: Only if the case is heard by Lord Wheatley.

The Convener: With respect, that is not fair.

John Scott: The broader point is that it is not consistent, but I believe that it was Churchill who said that consistency is the hobgoblin of small minds.

The Convener: Let us move swiftly on to the last question that I asked Mr Kerrigan. I hope that you are familiar enough with it to go through all the words. You will perhaps be aware that recommendation 50 from the Scottish Law Commission's 2009 report has not been completely implemented and that recommendation 45 is still being consulted on, and that the net result is that we will have a complicated subject of private international law across at least two pieces of legislation, some of it incomplete. Do you have any comment on how that should be addressed?

Laura Dunlop: The only comment that I can offer is that, again, there is a choice. Do you include specific PIL provision within individual sections dealing with a certain scenario, do you add at the end a subsection saying what the PIL position is to be, or do you have a chunk of your legislation that deals with private international law in a oner, as it were? There are advantages and disadvantages of each approach. I can understand why some provision for private international law is being made along the way in individual subject matter-specific sections.

The Convener: Would you agree with Mr Kerrigan's position that, once Parliament gets round to consolidating the two statutes that we are currently working on, that should be a complete consolidation of previous statutes, to the point where—at least in theory—we have everything in one document?

Laura Dunlop: I do agree with that, with perhaps the small caveat that there is a painting-the-Forth-bridge dimension to the law. One can never be totally satisfied that one has everything, and there are likely still to be measures in other statutes that bear on succession. However, I can see the need for a consolidating act at the end of the process.

The Convener: If colleagues have no more comments, we shall conclude this part of the meeting. I thank the witnesses for their helpful evidence.

11:07

Meeting suspended.

11:09

On resuming—

The Convener: It is my pleasure to welcome Eilidh Scobbie, private client partner at Burnett & Reid LLP, and Alan Barr, partner at Brodies LLP.

From a practitioner's perspective, what are your key areas of concern about the bill? Has anything been left out that you think should be in it?

Alan Barr (Brodies LLP): Obvious things have been left out, or at least deferred, notably bonds of caution, which were in the original consultation on this potential legislation and in relation to which a fair amount of possible reform is part of the subject of the second consultation. Other aspects of private international law could also have been in the bill, as was discussed in your previous evidence session.

As has been implied, we are left with a relatively random selection of relatively small points. I endorse what was said earlier about very much wanting some form of consolidation of the two new pieces of legislation that are likely to be passed in successive years. I find it very strange that, particularly after two Law Commission reports, we have moved from talk about legislation but nothing happening in the period since the Succession (Scotland) Act 1964 to having two bills.

Eilidh Scobbie (Burnett & Reid LLP): I very much agree with Alan Barr. We have been having a little problem in Aberdeen, where, some 50 years after the 1964 act, the sheriff has suddenly started taking a different interpretation of the people who can be appointed executors. Although it would be justifiable to do so, nobody has had the guts to go and debate the matter with him, and it would be nice if it was set out somewhere in the forthcoming legislation who could be appointed executor and in what order. Currently, if there is no will, it is primarily those who have a beneficial interest, but it would be nice to have that set out as a priority.

The Convener: I am well aware of that point and, indeed, have had personal correspondence about it; I think that I have suggested to members of the faculty in Aberdeen that they write to the Government about that. Although the matter is not appropriate for this bill, it could surely be included in the second one if it is brought to the Government's attention.

John Mason: Do the witnesses think that it would have been preferable to have delayed this bill and included its proposals in the bill that will be introduced in due course?

Alan Barr: I do, but the danger in doing so is that the second bill will, I imagine, concentrate on stuff like protection from disinheritance and the intestacy rule, which means that things that are in essence technical, rather than policy issues, and which frankly do not commonly arise, would not get the kind of attention that they will get as a result of being in a separate bill. That would be a loss. For that reason alone, it is good to have this consideration, but in terms of sheer efficiency and what we end up with, we would be better with a consolidated bill.

We can still get there if we take the results of this consideration and slot them wholesale into a second bill. That said, I am well aware that I am assuming that we could just slot the provisions neatly into another bill; I can well believe that parliamentary draftsmen would tear their hair out at that and say, "It's not as bloody easy as you think." However, I hope that new legislation might translate into a new bill fairly readily.

John Mason: Another point that has been raised is that section 25 gives the Scottish ministers quite wide powers to amend and so on. However, the Government has said that it would use the powers only for "fine-tuning". Do you find that satisfactory?

Alan Barr: I prefer things of substance to be done by primary legislation to ensure that they get this kind of attention. If one accepts what is said about fine tuning, and if that provides a more efficient parliamentary process and more likelihood of getting things changed that need to be changed, that is acceptable. However, things of substance should come before the whole Parliament rather than just ministers.

The Convener: That brings us to John Scott, who has a question on section 1 on the effect of divorce.

John Scott: Indeed, although the question is about guardianship thereafter. Do provisions in a will appointing a spouse as a guardian of a child fall within the scope of section 1? Should that be the case and are you in favour of such a move?

11:15

Alan Barr: A spouse who is also the parent of the child in question would continue as guardian, so the issue relates to situations in which a more or less formal step-parent is appointed as guardian. As was mentioned to the committee last week, the danger is that such an appointment could fall if the legislation were enacted.

Again, we are making an assumption about what people would like to happen. There is a decent case to be made that someone who has been in a quasi-parental relationship with a child, regardless of the break-up of their own relationship, might be happy for that parental relationship to continue. It is, as it were, a question of one assumption over the other. There is scope for the divorcing parent to do something about this, but they have to remember to do so; otherwise this provision will take the step-parent guardian out of the picture. I endorse earlier comments about the timescale and costs of applying for guardianship, if that is what is required. That is very unlikely to cost less than thousands of pounds, which, I think, would be wasteful, if it could be avoided.

John Scott: Thank you.

Richard Baker: What is your view on my earlier question about the Law Society's suggestion that the scope of sections 3 and 4, on the rectification of wills, be broadened to include wills drafted by the testator, such as handwritten wills or wills made using templates that are found online?

Eilidh Scobbie: I have seen a case in which a husband paid for a will on the internet and then, because he was a bit of a cheapskate, used the same will for his wife. He changed the first line and got her name right, but then immediately appointed her as her own beneficiary. To me, that is a classic case of where this sort of remedy could be useful, because one is able to see what happened—although spending another £15 would probably have resolved the problem.

We could permit wills that are created other than by a lawyer to be changed through this route, but that does not mean that they would be changed, and, again, it would be up to the court to decide. In my experience, costs are a real deterrent for someone who has to litigate to change a will, unless the family is largely in agreement that the change is correct. Of course, you cannot get proper agreement if one of the affected beneficiaries is under age or incapax for some other reason. In that respect, I think that it would be useful to widen the scope.

Richard Baker: Are you saying that because of the impediments that exist in practice, which mean that the provision is unlikely to lead to an explosion of beneficiaries challenging wills? Are there already enough impediments to prevent people from making spurious claims?

Eilidh Scobbie: That would be my thinking in relation to an average estate. The risk would be different for a megamillionaire.

Richard Baker: So the process exists to safeguard the integrity of the intention.

Eilidh Scobbie: Yes.

Alan Barr: I would make two points about that. First, the provision would provide a remedy that currently exists in a different form. If there is a serious allegation or evidence that a will has not been prepared in accordance with instructions, it is possible to sue the person who prepared it—albeit with some difficulty. It is an expansion of a litigation in England—White v Jones—that spread to Scotland. Because that remedy is already in place, the new provision would be an alternative, particularly if everyone agreed that the intention of the will had not been fully carried forward. In a sense, it would replace one fairly unlikely litigation process with a different and again—one would hope—fairly unlikely litigation process.

In the world in which we live, wills off the internet are very common. I would not know—and I would not know from the legislation—whether such a will had been prepared by the testator directly or at the testator's direction. In other words, if the website in question is an interactive one and a person fills in some of the bits—indeed, it does not matter whether some of that is done by a human being or by software—what comes back is not only what the person in question has typed in. Is that their will or has it been put together on someone else's instructions? I do not know the answer. That area should perhaps be covered one way or the other, either by exclusion or by inclusion. It should be made clear which applies.

Richard Baker: Should that be set out in the legislation instead of being left to the courts to interpret?

Alan Barr: I think that it has to be; otherwise the courts will have to decide whether such a will has been professionally or personally prepared. I genuinely do not know the answer to that. However, the question could be answered by saying what the position is one way or the other.

The Convener: We certainly would not want to end up in court in order to find out.

Alan Barr: That would be a bit of a waste.

John Scott: Is court not the only way of deciding whether such a will has been professionally prepared?

Eilidh Scobbie: If you took this opportunity to include rules on wills that had been expressly prepared over the internet, you would not need to look at how that had been done. You would still have complainants arguing about what the man in question wanted, but that is a different problem. This move would bring wills automatically into the category of cases that could be reviewed.

The Convener: Thank you.

I took a false step earlier—I think that Stewart Stevenson would like to go back to section 1.

Stewart Stevenson: Indeed, convener. I want to exercise my privilege.

At what age can someone make a decision as a beneficiary?

Eilidh Scobbie: Happily—for the lawyers who have to deal with such matters—a person can do so at 18. In theory, they could do so at 16, but that would be vulnerable to the challenge that they had been taken advantage of.

Stewart Stevenson: I do not want to make a meal of the issue. I just happen to know that my mother was an executor at the age of three.

Eilidh Scobbie: Wasn't she lucky? She must have been precocious and reading and writing by then.

Stewart Stevenson: I think that she probably was—but let us not go there, because I cannot know. I merely know that her father acted in her stead.

I want to explore the much more substantial issue of domicile, which is covered in section

1(1)(d). Is the arrangement that relates to the domicile at the time of death preferable to that relating to the domicile when a relationship legally ends? Certainly what has emerged, particularly from the Faculty of Advocates, would lead us to the conclusion that what the bill says is preferable.

Alan Barr: I think that what you must go for here is certainty one way or the other—this is not a case of things being 100 per cent one way and zero per cent the other way. I am slightly more—only slightly more—in favour of the domicile being that at the time of the divorce, because you are likely to know the domicile at that time. All that Scots law can direct then is what happens at that time. If you take the domicile on the date of death, you might be moving into the realms of private international law. That said, you might be getting into the realms of private international law with one of those dates anyway. I do not think that it makes very much difference—in that way, the issue is certain.

If you went for the domicile at the date of annulment, what you would be saying is that a will would come to an end if there were a divorce or annulment under Scots law. If the person was domiciled elsewhere on the date of death, people would look to Scots law either at that time or possibly on the date of death. As a result, you would still have that confusion about which one governed at that particular time.

Stewart Stevenson: Please forgive me, but can you tell me whether there are jurisdictions where unilateral divorce is possible or where, in the case of a person who has died, there might be uncertainty about when, how and where the divorce took place? In other words, is there any jurisdiction where a person could die without knowing that a divorce had taken place?

Eilidh Scobbie: It could happen in Scotland, if you had disappeared.

Alan Barr: Yes, it could happen.

Stewart Stevenson: Indeed. So determining the law that applies at the point of death gives a degree of absolute certainty.

Eilidh Scobbie: Yes.

Alan Barr: It is more certain than divorce, that is for sure.

Stewart Stevenson: Indeed—if not necessarily more inevitable in this modern world.

The Convener: Forgive me for interrupting, but on this particular issue, how clear and certain is the concept of domicile?

Alan Barr: Not very, I am afraid to say. It is scattered throughout our law for various purposes, and it is by no means 100 per cent certain. In the tax world, they are looking at trying to tie it down. Although there is an element of statutory definition of domicile in some aspects of UK tax, it is, even in the tax world, overlain by the common law of where somebody is domiciled. It is not certain, and it is very hard to make it so. In order to change that, you would have to move to a different kind of test, such as length of time of residence. Residence itself is a bit more certain, whereas domicile is pretty uncertain.

The Convener: On that basis, might it not be more sensible to use domicile at the time of death, as it might be slightly more certain—not least because it would be later—than domicile at the time of an annulment, which, given some people's lifestyles in the modern world, might be very uncertain?

Alan Barr: Given that the ball stops moving at the time of death, you will able to take that snapshot, as it were. The reason why in most cases the issue is likely to have arisen at the time of divorce is that that would affect the question of where the divorce itself is likely to have taken place—standing those situations that I would describe as informal divorces. You are likely to have to address that issue or similar ones if there is an international dimension to when the divorce took place.

The Convener: Thank you.

Eilidh Scobbie: Can I come in on one aspect of domicile?

The Convener: Of course.

Eilidh Scobbie: When you get confirmation, which is the lead from the executors to get access to the deceased's money, you make an averment of domicile, without doing very much to substantiate it. In practice, if you have residence in Scotland, nobody queries it. That might be an issue here—debate and discuss.

The Convener: Indeed. I return to the issue of rectification and the time within which that might occur. There has been some discussion in our evidence as to whether that should be from when confirmation is granted or from the date of death and, if it is to be from the date of death, whether the period might be longer or shorter. Do you as practitioners have a view on where that might sensibly lie?

Eilidh Scobbie: I very much favour the retention of the period from the date of confirmation, because until confirmation is granted, the will is not a public record document. Most solicitors handling an estate where there is contention will not release the will until they have to—in other words, at the point of confirmation. To give a time limit within which the will must be rectified means that those who are executors have control on the timing of getting confirmation and

therefore would delay that if it was in their personal interests. In any case, it is very easy to make it more than six months.

The Convener: Thank you. You have given us a very practical reason for finding a way forward. I am very grateful.

Alan Barr: It has been done as a kind of dual system. If there is confirmation, it is six months from that date; otherwise, the period runs from the time of death. There is then the follow-up that you can go outwith those six months on cause shown and for good reason. The kind of deliberate delay that Eilidh Scobbie is talking about would be a good reason to go outwith that period if that became relevant.

The Convener: Is it fair to say that the courts in general have discretion to deal with time limits on cause shown? No?

Alan Barr: No, unless something specific comes up. One is often told that they do not have discretion and that is the end of it.

The Convener: Is that something that in general we should change by statute? After all, this is an extension that we have got here.

Eilidh Scobbie: I think that you are working towards it.

Alan Barr: That is a very big question.

The Convener: I know that it is a big question, but you are here and I have asked it. Is it worth considering?

Alan Barr: I would say so.

The Convener: I am sorry—you do not have to give me an answer beyond saying that it is worth considering. Thank you.

I went well off-piste there. I now turn to John Scott for question 14. Is that right? Is that where we have got to?

John Scott: Yes, convener. In their written evidence, the Law Society and TrustBar take issue with section 10(4), which prevents section 10 from applying when the testator is one of the people who die simultaneously or in an uncertain order. Do you wish to make any comment on that?

Alan Barr: I am pleased to say that, when the bill was published and I saw that provision, I thought, "How often does such a situation arise?"—and I can tell you that fortunately it occurs very seldom. I can think of one occasion in my 25 years of practice on which, under the predecessor law, I have had to consider that issue. The occasion actually related much more to the point raised in evidence regarding uncertainty about what had happened and what had to be done to produce evidence for a more likely order of deaths.

11:30

Such a situation does not happen very often, and what we want from the bill is certainty on the very few occasions when it does. To be somewhat blunt, I think that it almost does not matter what that certainty is as long as it is there. Such a provision is a blunt instrument at best, because one is making assumptions as to what somebody might have wanted in circumstances that they would not, even in their worst dreams, have contemplated. Certainty is really all that is wanted.

I think that the Law Society made its comment about section 10(4), which excludes the operation of section 10 in certain circumstances and thus throws one back to section 9, on the following basis: given that there is no particular reason for that particular certainty to be preferable to any other certainty, it would not matter whether section 10 was excluded if the testator was one of the people who died.

John Scott: In light of your comments, what do you make of TrustBar's point that the word "uncertain" is likely to lead to unnecessary litigation? I am presuming that you do not necessarily agree.

Alan Barr: I do not think that I would agree with that comment. As has been well set out in the bill, there is a two-stage process. First, there is the question whether the matter is uncertain at all, and the rules kick in only after that hurdle has been got over. I think that "uncertain" is certain enough, in the Rumsfeldian or any other sense.

The Convener: Clearly Lord Wheatley wins the day. That is good—thank you.

That takes us to forfeiture, and questions from Stewart Stevenson.

Stewart Stevenson: I want to give the witnesses the opportunity to agree that allowing the courts to have full discretion is the best outcome in the very small number of cases in which the forfeiture provision will apply where someone has, by a criminal act, caused the death of the person from whom they would have otherwise have inherited.

Eilidh Scobbie: That is a fair approach—I have no problem with it. It leaves the court to exercise its discretion with regard to the myriad facts that will come before it.

Alan Barr: I entirely endorse that view. The situation is very rare, and rarer still—although such circumstances will exist—is an act that the criminal law quite rightly recognises as criminal but in which it will be entirely reasonable for the full

effects of forfeiture not to take effect. This is an area in which one cannot anticipate all the circumstances that might arise and try to legislate for them. Indeed, it would be ambitious in the extreme to try to do so.

The Convener: Thank you. That brings us to the protection of trustees and executors, and questions from John Mason.

John Mason: As the convener has said, section 18 refers to the protection of trustees and executors. Specifically, we have been pointed towards the provision that trustees are

"not personally liable"

if

"the distribution takes place—

(i) in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case".

Is that wording reasonable? Are you happy with it? In particular, does it suggest that more advertising might have to take place than has been the case in the past?

Alan Barr: I very much hope not. In theory, the provision envisages that every estate might have in it unknown beneficiaries who come out of the woodwork afterwards, and that trustees could find themselves liable unless they have advertised in relation to every estate. I think that that is—and I hope that it will remain—a nonsense; it is simply last-century or previous-century stuff.

Nowadays, if there is reason to suspect that there is an unknown sibling who had existed at one time but who has disappeared, trustees or executors will at that stage make "reasonable and prudent" inquiries through professional genealogists and the internet. That is where you go looking in circumstances where it is reasonable to do so. In the vast majority of circumstances, it is not reasonable to do so and if, on the one occasion when people came out of the woodwork, trustees were to find themselves liable simply because they had not advertised in the other 100 situations where the matter had arisen, that would be entirely unreasonable.

I think that the wording is fine. I hope that people do not say, "We have to be just and reasonable now," and think that being just and reasonable should involve expensive and unnecessary effort in a very large number of cases for the sake of the very few cases where it might be relevant.

John Mason: Is that very different from where we are already, or does it just put into words what has already been happening in practice?

Alan Barr: It gives a degree more certain protection if what I have just said represents "reasonable and prudent" trustee inquiries. I think that it does.

Eilidh Scobbie: I agree. I have never advertised for beneficiaries. Between the private detective and the local tick man, you can do amazing things in Scotland. Of course, with people who have gone abroad—or people who have come from abroad, which is even more interesting—you get into a different ball game. I am thinking, for example, of the Polish people who have settled in Scotland recently or, indeed, settled here after the second world war.

The Convener: It is very helpful that have that evidence on record, and it is very good to hear about how you actually operate. It is hugely useful, because it is relevant—it is what practitioners do.

Finally, on private international law, which you will have heard me ask your colleagues about earlier—and I am grateful to you for being in the room to hear the question—bits and pieces of it have been adopted, while some bits have not. Do you have any thoughts on how we, as a Parliament, should handle all that?

Alan Barr: Private international law is difficult. In fact, it is one of the most difficult areas to deal with, because often you are not just going back to another system but going back and forth between another system and the Scottish system. All we can do is try to make our law as clear as possible so that when someone from another system looks at situations in relation to either Scottish heritage or Scottish-domiciled death—which brings us back to what we were saying earlier about domicile—they find that Scots law is clear on the matter. We should be legislating for that and its effects as much as we possibly can to ensure that other systems know what our system is and, indeed, that we know what it is when we need to apply it in situations with a foreign involvement.

I am all for trying to include private international law in the legislation. Instead of a bits-and-pieces approach, I would, as has been mentioned in at least one of the SLC reports, try to include a section on private international law covering as many rules as are up for consideration. I do not think that there is sufficient time to create such an option, even with the second consultation that is currently going on. It might be—dare I say it—another project that needs to be considered. However, we should get in what we can and legislate on it where we possibly can.

The Convener: Thank you. That brings us to the end of our questions. Do you wish to add anything?

Alan Barr: I simply reiterate that, after what has been a very long lead-in, it is a very good thing that succession is being considered by the Parliament. There are things that need to be

changed and tidied up, and there is no doubt that the major substantive things require serious consideration.

As we have said, it would be better if these pieces of legislation were to be consolidated into a single succession act. If the Parliament could see its way through to that—in other words, of combining what is happening now with what is likely to happen, presumably in the next session—that would be good.

The Convener: Indeed. I thank Ms Scobbie and Mr Barr very much for coming along, and I also thank our previous witnesses. If any of them would like to add anything, we would be very happy to receive written submissions on any issue at all. That would be greatly appreciated.

With that, I suspend the meeting.

11:40

Meeting suspended.

11:47

On resuming—

Land Reform (Scotland) Bill: Stage 1

The Convener: I welcome everyone back. We move to item 10, and we will return to the other items on the agenda.

Under item 10, we are seeking information from the Scottish Government on the delegated powers contained in the Land Reform (Scotland) Bill. The committee has seen the delegated powers memorandum and the written responses received on the topic, and we have decided that oral evidence is required to scrutinise the delegated powers provisions.

I welcome Rob Gibson MSP, convener of the Rural Affairs, Climate Change and Environment Committee, who is attending this part of the meeting and will no doubt have questions to ask. I also welcome, from the Scottish Government, Steve Sadler, head of the land reform and tenancy unit, Kate Thomson-McDermott, head of the land reform policy team, Billy McKenzie, head of agricultural holdings and the Scotland rural development programme, Fiona Leslie, agricultural holdings policy officer, and Andrew Campbell, who is a solicitor in the Scottish Government's legal directorate. Good morning, one and all.

I invite questions from members, starting with John Scott.

John Scott: I should first declare an interest as a farmer; I refer members to my entry in the register of members' interests.

My first question has a bit of a preamble, so please bear with me. In the Scottish Government's written response, in relation to section 25, you cite as an example of a code not subject to parliamentary procedure the code of practice under section 48 of the Adult Support and Protection (Scotland) Act 2007. That code applies to local authority officials and health professionals when carrying out their duties. What, if any, are the consequences of failure to comply with the Adult Support and Protection (Scotland) Act 2007 code of practice and why is it considered that the procedure appropriate for that code is equally appropriate for the code of practice on agricultural holdings, given the clear effects and consequences of that code, which are that the Scottish Land Court must take into account relevant provisions of the code, and reports of the tenant farming commissioner regarding breaches of the code, in determining questions relating to agricultural holdings?

Billy McKenzie (Scottish Government): On the comparison between codes, we believe that each code of practice has to be determined on its own basis; each one is unique. We put down those examples to show that some codes have statutory scrutiny and some do not. It was just an example, rather than an exact comparison. Each code has to be decided on its own merits.

Within the bill we have taken the approach that the list of codes for the tenant farming commissioner is, first, a non-exhaustive list. The tenant farming commissioner can decide to expand that list and tackle other issues. Also, the tenant farming commissioner and the commission will be at arm's length from Government. The commission will be an independent body that will have its own powers. We believe that it is appropriate for the tenant farming commissioner to have time to develop the codes in full consultation with the industry.

That is why we took the approach that we have taken in the bill. It is for that range of reasons that the bill has the provisions that it has. We know that the issue is not settled. We will listen to Parliament on this throughout the process.

John Scott: The codes of practice that are provided for by sections 15 and 27 of the Wildlife and Natural Environment (Scotland) Act 2011—on non-native species and deer management respectively—are subject to the affirmative procedure for the first and replacement codes, and to the negative procedure otherwise. Both codes are capable of having significant effects on individuals: in the first case, because failure to comply with the code may be taken into account in determining any question in judicial proceedings, and in the second, because Scottish Natural Heritage must have regard to the code in exercising its functions in relation to deer control agreements and deer control schemes.

Why does the Scottish Government consider that the approach to parliamentary scrutiny of the code of practice on agricultural holdings merits a different approach from that which is taken under the Wildlife and Natural Environment (Scotland) Act 2011?

Billy McKenzie: The key difference is that the codes relating to the 2011 act require ministerial approval or oversight of some sort. Ministers either develop the codes or have powers of approval for the codes. The second set of codes is for the tenant farming commissioner and the industry to develop in consultation. That is the difference, in terms of parliamentary scrutiny. One set of codes requires the approval of the Scottish ministers, whereas the other is for the industry to shape with the tenant farming commissioner.

The Convener: I note that section 25(8) of the bill says

"the Land Court must take that provision of the code into account in determining that question".

Does that not put the code of practice in a slightly different place? It is being required that the law of the land takes that into account. It has the force of law.

Billy McKenzie: We believe that it is appropriate that the court takes account of the tenant farming commissioner's codes. The court is not bound by the code of practice, but it must consider the code and exercise its own judgment, based on the law. We believe that there are aspects that are appropriate for primary legislation, others that are appropriate for secondary legislation and aspects that are best left to codes of practice that the industry shapes itself. The Land Court is the ultimate decision maker, taking account of all that information, and it exercises its own judgment.

The Convener: I will put the counter-argument, as an MSP and parliamentarian. If I have read that aright, Mr McKenzie is suggesting that it is for the court to decide what it wants the law to be and whether it happens to like the guidance. I would argue as a parliamentarian that it is our job as a Parliament to decide what the law is, and for the court to implement that.

Billy McKenzie: I accept that. We believe that we have got the balance right here between the different levels and the parliamentary process. We know that we are not at the end point. We will listen to Parliament on the matter. The Scottish Government will consider all the points that committees and the Parliament make. We believe that we have the balance right in relation to where the regulations, guidance and so on should be pitched.

Stewart Stevenson: I have a wee technical point. While codes clearly do not have the force of law, equally it is clear that they have force in law. They can become a material consideration in what a court may decide in relation to some particular action. That being the case—in other words, that the existence of the court has an effect on legal outcomes, albeit not the effect that the primary or even secondary legislation would have—it is important that such codes are considered at a parliamentary level so that they are given the necessary scrutiny, as they are matters that will affect legal outcomes.

Billy McKenzie: As I said, we believe that the structure that we have put down provides the appropriate balance and that parliamentary scrutiny is not required in this specific instance for this specific subject, for the reasons that I have outlined. However, this is not the end of the

process. We will consider all the points that have been made.

Stewart Stevenson: Forgive me. Are you agreeing or disagreeing with my fundamental point that the existence of the code will, and is intended to, have an effect on legal outcomes?

Andrew Campbell (Scottish Government): I can assist the committee on that point. Some of the provisions in section 25 provide for the court to take the code into account in determining questions. Obviously that is different from the court having to take its decisions always in relation to what the code says. The code is something that the court can take into account; that does not mean that the court must always follow what the code says. As policy colleagues have said, it is for the court to weigh up the relevance of a code to the particular question that a court is facing.

In some situations, the code could well be a material consideration for the court, but in other cases it may well not be.

Stewart Stevenson: Fundamentally, you are agreeing with my core point that the code can affect legal outcomes.

Andrew Campbell: It is certainly something that the court can take into account when it comes to its decisions.

Stewart Stevenson: Are you agreeing with me?

Andrew Campbell: It can affect outcomes, yes.

Stewart Stevenson: I think that that point is what might underlie this committee's expressing the view—if it chooses to do so—that the codes should be subject to parliamentary scrutiny. The codes have a legal consequence. That is a matter for the committee to consider, not necessarily now.

The Convener: I will pursue that point. Surely, if a code of practice lays down a procedure for doing something—no matter what it is—and there is no other chapter and verse anywhere on what the right way of doing that might be, the court is absolutely bound to take the view that that code of practice lays out the right thing for the parties to have done. The court cannot find any other answer if a code of practice has come forward from the industry. If there is no other word out and around, and no other significant history—or if the code of practice manifestly overrules history—surely that code of practice becomes what the court regards as good practice and the law.

Andrew Campbell: It is certainly good practice, yes. Where I would differ is in the interpretation that it binds the court in any sense. It is a code of practice; it is guidance. It is one of the things that the court would take into account along with many other factors in deciding on a particular case.

There may well be reasons why following the code is not appropriate for the parties in a particular case. One would expect the court to take into account the content of the code, as it is under that obligation, but in such a situation it may well say, "We are bound to take the code into account, but we are not giving it much weight."

The Convener: This issue is absolutely fundamental, which is why we want to tease it out. I would turn that around and say that courts are used to distinguishing between the law as it used to be—or as they see it in generality—and the particular case in front of them. I would expect the Land Court to be no different from that.

However, I am still stuck with the general principle that, if there is nothing to distinguish it, the code of practice effectively tells the court what is normal practice and what is expected. It is, in a sense, the written-down common law on that subject at that time, except that a commissioner has written it down rather than it being a work of antiquity that says what the common law is. Why is it different from that in its effect in court?

Andrew Campbell: There is a fundamental distinction between something that is law and something that is guidance. The code is a strong form of guidance. That is the distinction.

Ultimately the court remains the arbiter in the decision that it wants to make in a given case. The court is the forum to which parties bring together all the considerations of the case. The code is one of those considerations and the court must take it into account, but it does not necessarily follow that what is in the code must always be followed by the court.

The Convener: I think that we would accept that.

12:00

John Scott: If providing codes of practice is good practice, as you say, why does the Scottish Government consider that it would be unduly burdensome for the Parliament to scrutinise a package of up to eight codes of practice covering different aspects of the tenant farming commissioner's remit? We scrutinise many more instruments than that every week.

Billy McKenzie: There could be more than eight. It would depend on what the commissioner and the tenant farming community thought was needed.

On the appropriateness of scrutiny, we believe that the information in the bill allows Parliament to give the proper scrutiny to the overall issue and leaves other aspects to the industry and the commissioner to sort out, because of the level of technical detail that is involved and the need for

stakeholder consultation. Certain aspects are in the bill in order to ensure scrutiny of the overall principles and approach. Sometimes we leave that to regulations, because we believe that there is still room for parliamentary scrutiny of the detail. Other aspects are left out of legislation altogether, because we believe that it is for the stakeholders, the commissioner and the industry to shape them.

John Scott: As a member of a committee that scrutinises the fine print of the way in which our systems work, I sense that there is a reluctance to subject yourself to scrutiny in this regard. The examples that you cite do not appear to us to be entirely relevant.

As I said, we scrutinise eight or 10 instruments a week, regularly. Why would we not be allowed to do that?

Billy McKenzie: I am not sure that I can add anything on the issue of what you are allowed to do. That is for the Parliament to decide. You have asked a reasonable question and we have given our response. It is not that there is a reluctance to allow Parliament to scrutinise anything. We will consider the points that have been made. Steve Sadler might want to say something.

Steve Sadler (Scottish Government): All that I would say is that, across the bill, we have tried to take a balanced approach to various degrees of scrutiny. I understand the points that you are making and I agree with the points that Billy McKenzie has made in response. Across the legislation, ministers have taken decisions up to a point on the type of scrutiny that they consider to be appropriate, and those decisions are reflected in the bill.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Is there a reason why the Parliament cannot seek to scrutinise any particular set of guidance it so chooses, if there is concern that the tenant farming commissioner requires that further scrutiny?

Andrew Campbell: If Parliament wishes to subject codes of practice to scrutiny, that is its choice.

The Convener: Yes. In other words, there is a choice about whether the bill says that something will be laid or not or will be scrutinised or not.

Rob Gibson: But there is a possibility that, when the tenant farming commissioner is in place, given that he or she will have the ability to develop the codes, it will be incumbent on Parliament to be able to call in any of the decisions to debate and scrutinise them.

The Convener: I am sure that that is the case, but we are trying to establish what should be in the bill and the Government officials have plainly given their view about the balance. Our job is to question that and we will see what the evidence looks like as a totality.

Stewart Stevenson: There is a question about whether Parliament's involvement should be ad hoc or post hoc. In other words, should Parliament be involved before the code has force, or should it review the operation of a code that is in force? I am not taking a view on that, but I would be interested to know what practical effect ad hoc consideration might have on the ability, in particular of the commissioner, to respond rapidly. I am almost leading you to an answer, but I am not trying to do so. Do the arrangements that are proposed enable the commissioner to act rapidly in circumstances in which prior approval from Parliament might inhibit them? If that is the case, can you give us an example?

Billy McKenzie: That is one of the reasons why one would want certain aspects to be developed after the parliamentary process. There are some codes, for example around rental negotiations or how to take account of tenants' improvements, that are very complex, technical and need heavy input from assessors and people working in the industry. Those might need to be tweaked because we may get it wrong. It is a very uncertain area; some people say that is one of the reasons why we are legislating on it. With the best will in the world, and all the engagement in the world, we could still get it wrong and we would have to take rapid action to correct that.

Stewart Stevenson: Are you suggesting that the potential for urgency could underlie the justification for Parliament not having the right to scrutinise a code before it is brought in?

Billy McKenzie: In every legislative process there is a decision to be made about what needs to go in primary or secondary legislation and what is left for this type of situation—guidance, codes of practice and so on.

Stewart Stevenson: Forgive me: although I accept the generality, we are dealing with the specifics of this environment. It would be mildly helpful if you could identify even one scenario in which you think that urgency might justify the commissioner acting in advance of parliamentary scrutiny and/or approval.

Billy McKenzie: Rental situations would fall under that category. Rental situations are on-going; rent negotiations can be spread across the year, so rapid action when something needs to be done quickly in such situations would prevent potential adverse effects. If it takes three months before a change can happen, all the people who want to be involved in a positive change would still have to go through the old system, or be delayed until the new system is in place. That would create uncomfortable and uncertain territory. Another

example would be tenants' improvements, because the codes could be used every day across the country. They are very technical and could have a significant effect.

Fiona Leslie (Scottish Government): The game management codes are another example; if there were an animal health problem or disease outbreak among game birds there would need to be a rapid response—potentially in hours and days, rather than in weeks. If there were another bird flu epidemic, the codes of practice between the two parties might need to be significantly altered during that time in order to protect the interests of both and to deal with the accompanying disease risk.

Stewart Stevenson: The response that we are getting now is much more helpful to my understanding of your reasoning. I am not necessarily pre-empting the committee's view on the matter, but I can say that I begin to see the justification. That was helpful.

John Scott: I will move on to rights of access to information on persons in control of land. We are unclear as to what the policy objectives are behind the need for such disclosure. We are also concerned, in the context of article 8 of the European convention on human rights, in respect of a legitimate and proportionate aim. Your written response to the committee states that the purpose in taking the power is to enable information about individuals who are making decisions about land to be made available

"where this information is needed to address particular practical difficulties by persons including the owners of adjoining or related land."

Would it not be possible to frame the power with reference to access to information for a general purpose of resolving practical difficulties in relation to land? If that is the policy intention, why take such a broad power?

Kate Thomson-McDermott (Scottish Government): I will respond to that question, if I may.

The direct response to the question is that the power that is set out in section 35(1) could be framed in the manner that has been suggested, although that is not the option that the Scottish ministers chose to go for. Section 35(1) is framed in such a way as to make it clear that the power relates to access to a limited set of information by a limited class of persons. Given the wide range of circumstances in which practical difficulties may arise, and the high likelihood that there will be broad differences between situations, depending on the case, it was considered preferable to limit the scope of the provision to persons affected by the land rather than to particular circumstances that caused the effect.

By limiting the scope of the provision to persons affected by the land, we are limiting it to circumstances in which it has been shown that those persons have been affected by the difficulty in question. We have attempted to narrow the scope of the provision in the way that has been suggested by using a slightly different formulation, because we think that that is, in practice, the preferable route to go down. It will be necessary to have either a detailed definition of "persons affected by land" or of what would be meant by "practical difficulties" in the circumstances, and this is the route that we propose to go down.

The Scottish Government considers that the provision as it stands adequately defines the scope of the power, but we would be open to considering the committee's views, if it thought that alternative wording would be more appropriate.

John Scott: Elsewhere in your response, you suggest that the purpose in taking the power is

"to increase transparency and accountability of land ownership."

Is that additional to the purpose of enabling practical difficulties with land to be resolved? I think, going by what you have said, that it probably is.

Kate Thomson-McDermott: That could be the other side of the same coin. The purpose of the regulations that are to be made under section 35 is to provide greater transparency and greater accountability of landowners in specific cases in which the provisions would apply, so that practical difficulties can be better addressed.

John Scott: I take your point, but we understand that the vast majority of information about land ownership in Scotland is already in the public domain and may be accessed through the land register, the register of sasines or Companies House, so why is a power to access information about persons in control of land considered to be necessary? Why is it considered necessary to enable individuals within a legal entity that owns land to be contacted, rather than the legal entity itself?

Kate Thomson-McDermott: I certainly agree that some information is already in the public domain and that some information can be accessed through various public registers. However, there is not a comprehensive accessible source of information on land ownership in Scotland. That was highlighted as a real concern by the land reform review group. Although it is possible for people—if they go to a lot of effort—to look through what is in the land register, the register of sasines and Companies House, and thereby eventually to piece together a picture of the ownership of a specific piece of land, that is

quite a complicated process for which a broad basic understanding of company law and charity law is needed in order to access all the different information and pull it together in a way that can be readily understood.

On why it is necessary to look behind the legal entity, the right of ownership of land can be held by natural persons and non-natural persons. In cases in which the owner is an individual, it is generally very clear who owns the land and who should be contacted—it is the person who is named in the proprietorship section in the title sheet.

It can be more difficult to establish who is making decisions about the land and who is in control of it when the legal right of ownership is held in the name of a company or a trust. Most company ownership structures are simple, but there are examples of companies in which the structures are far more complex.

There are cases in which shares in companies are owned by other companies or trusts, which might be in offshore jurisdictions where no information is required to be disclosed. In such cases, trying to establish who actually controls the land and makes decisions on it can be very difficult, if not impossible. Although the legal ownership of land might be clear, the owner might be a company that is registered in an offshore jurisdiction where there is no requirement to make any disclosure, or it might even be a company that is registered in the United Kingdom or the European Union, but which has such a complex structure that it is not possible to get much further than the first two or three layers or to have any luck in trying to get a response from anybody on the issues that are causing the problem. We argue that in such circumstances it is very important to be able to look behind the legal owner to find information about who actually controls the land.

12:15

John Scott: We have just been dealing with the laws of succession and one of the things that we talked about was the scale of the problem. How big is the problem that you have outlined—that there is a need to know who the owners are for reasons such as, let us say, mending a fence?

Kate Thomson-McDermott: That is one of the issues that was strongly emphasised in the land reform review group's report. The group was certainly convinced that there was a sufficient amount of information to indicate that the problem needed to be addressed. Evidence from a number of stakeholders, such as Community Land Scotland and the Development Trusts Association Scotland, points to the problems that communities face in trying to address such situations. We have heard from stakeholders involved in wildlife crime issues that they find it difficult to work with, or make contact with, landowners to try to address issues that may be affecting wildlife or the environment. There seems to be a spectrum of evidence from a broad range of stakeholders that such issues are significant.

John Scott: Who does the Scottish Government intend should exercise the functions of the request authority?

Kate Thomson-McDermott: The options for who will exercise the functions of the request authority are still to be assessed and no decision has been taken at this stage. As the role is new, it will be necessary to consider which public body or organisation would be best placed to take it on, and whoever does so will be set out in the regulations. It is the Scottish Government's policy to minimise the establishment of public bodies as much as possible, so the Scottish ministers would attempt to find the best and most appropriate place for that function to be exercised within an existing body or department.

John Scott: I return to the policy that, where there is a legitimate privacy reason, such as concerns over personal safety, the persons in control of land will not have to supply information about themselves. Why does that restriction not appear in the bill?

Kate Thomson-McDermott: In drafting the provision, the Scottish ministers did not consider it necessary to provide for the detail of that to be set out in the bill. Rather, the regulation-making power makes specific reference to the need to address those issues, in sections 35(2)(g), (h) and (i). It would be the Scottish ministers' intention to consult on the privacy exemptions that would be required and on how a person who needs a privacy exemption can ensure that it applies to them. The Scottish ministers were also of the view that it is essential to retain a degree of flexibility to ensure that those exemptions can be updated to react to changing circumstances, so that sufficient protection is always provided for persons with article 8 interests and rights.

John Scott: We will come to article 8 later.

Stewart Stevenson: I find myself quite baffled by the whole concealment issue. The valuation roll shows the owner, the resident and the tenant. The voters' roll is publicly accessible, even if you are excluded from the published part of it. The owners of ships and aircraft have their details published, as do company directors, and for the payment of a small fee I can go into Register House in Edinburgh and look at records of births, deaths, marriages, divorces and wills right up to 12 months ago. Given all that, why in particular are we concealing the beneficial ownership—I am

asking in technical terms, not about a policy issue—when in many other areas of public life no such protection from identification is provided, although the effect on public policy operation is likely to be substantially less in those other areas for which that information is provided?

Kate Thomson-McDermott: To clarify, are you asking why we are not going further in requiring the disclosure of beneficial ownership?

Stewart Stevenson: That is correct. Given that your name and address has to be provided on the valuation roll, the voters' roll, lists of owners of aircraft and ships and lists of company directors, and that very personal information about your antecedents and so forth is available to anybody who walks in and pays a modest fee, why is this category of information different?

Kate Thomson-McDermott: It is a finely balanced argument. Many aspects need to be taken into consideration and the Scottish ministers have had to weigh up the interests and rights of all parties who are involved in the matter. I note that the committee papers referred to the "corporate veil" on our current structures and understanding of company law. At the moment, there is no concept of beneficial ownership in Scots law and, although we can start to consider looking further than legal entities, we need to ensure that there is a clear evidence base for why we are doing that and the circumstances in which we do it.

The Scottish ministers have considered the range of evidence on why it is important to look beyond legal ownership and consider concepts such as beneficial ownership and controlling interests. They have tried to bring together a range of provisions—sections 35 and 36, completion of the land register and a land and property information task force—to consider exactly how we can get better-quality information in cases in which the interests of all parties remain balanced and there is a good evidence base to establish why it is necessary to look beyond legal ownership.

John Scott: I am interested in the concept of beneficial ownership. Why is it important for the Government to break new ground and establish that concept? Do I understand what you just said correctly?

Kate Thomson-McDermott: Yes. I was just reflecting that it is not a general concept in Scots law at the moment. It is a concept in English law, as I understand it, although I am not a lawyer. The EU fourth anti-money laundering directive and the UK Small Business, Enterprise and Employment Act 2015 include concepts of beneficial ownership for other purposes, such as the prevention of money laundering and tax evasion. Therefore, the concept is generally well understood and legislated for but, at present, in areas where there are different policy aims and objectives from the transparency and accountability of land ownership.

John Scott: All right. To take it back to the potential for further disclosure of information, you state:

> "there may be circumstances where the information may have to be shared with third parties in order to resolve the practical difficulties."

Why is there no provision in the bill limiting the disclosure of information to third parties to circumstances in which such disclosure is necessary to resolve practical difficulties?

Kate Thomson-McDermott: The Scottish ministers took a slightly different approach to when it was most appropriate to apply that test. They did not consider it necessary to limit the disclosure of the information about persons with control to the third parties once that information had already been provided to the person affected by land.

There is a broad range of reasons why and ways in which, once the information has been provided to the person affected by land, they may need to use that information to address the practical difficulties that are being caused. As such, the Scottish ministers considered it preferable that the test to ensure that the interests of third parties are protected be brought back a stage and taken before, or as part of, the decision about whether to release the information to the person affected by land at all.

It would be difficult to set up a system in which we could protect the information from becoming wider, more public knowledge once it was released. Therefore, we felt that, to protect the interests of third parties, it was better to bring the test back to part of the decision about whether to disclose the information in the first place.

The Convener: I will put that as I have understood it. Ministers may, by regulations, introduce a basis on which information about, in essence, neighbours can be disclosed on the basis that it will help to resolve some kind of issue to do with those neighbours and, thereafter, it will be public knowledge, in effect.

Kate Thomson-McDermott: There would not be an automatic assumption that the information would become public knowledge but it would be difficult to control or contain that information once it had been provided.

The Convener: There is no expectation that it could be contained and, therefore, it becomes public knowledge—potentially, at least.

Kate Thomson-McDermott: Yes.

John Scott: Your written response confirms that significant aspects of the policy on the

disclosure of information—including, crucially, the meaning of "persons affected by land" and the criteria for requiring the disclosure of information—are still under development in consultation with stakeholders. Why should the Scottish Parliament confer power on the Scottish ministers to legislate for that matter when its purpose and parameters are not yet clear?

Kate Thomson-McDermott: The Scottish ministers take the view that the purpose and the overall parameters of the regulation-making power are set out clearly in the bill. The purpose of the regulations is to provide that, where a person, an individual or a community is being affected by issues connected to the land, and there is a person who has control of the land, those parties should be able to obtain information about that person.

In addition to the clarity that the drafting of the regulation-making power provides, there is further information in the policy memorandum, the delegated powers memorandum and the response from officials to the committee's written questions, which—we hope—will provide sufficient additional background information on the purpose and scope of the proposed regulation-making power.

The Scottish ministers consider it appropriate to carry out further consultation with targeted stakeholders on the detail of the provisions and the way in which the process will work in practice. We have drafted the provision in the way that we have in order to carry out that further consultation.

Ultimately, of course, it is for the Scottish Parliament to decide whether section 35 should be implemented as currently drafted. The Scottish ministers will be happy to consider the views of the committee, and of Parliament and stakeholders, during the process.

John Scott: Finally, has the Government given any consideration to making provision for the power to be subject to an enhanced form of parliamentary procedure?

Kate Thomson-McDermott: As with all the provisions in the bill, the Scottish Government considered the two standard procedures—affirmative and negative—for subordinate legislation. Negative procedure was not considered to be appropriate for the regulations, given that there is a significant level of detail to be set out in them, and we have therefore adopted the affirmative procedure.

In addition, we have stated quite clearly that we intend to consult further with targeted stakeholders on the detail that is to be set out in the regulations. There is a requirement on the Scottish ministers to do so, which is set out in section 35(6). We consider that the affirmative procedure and the requirement to consult provide a sufficient level of scrutiny for the exercise of the power.

John Scott: Thank you. That is all that I have to say for the time being.

The Convener: Thank you, John. I think that Stewart Stevenson wants to continue on the detail.

Stewart Stevenson: My interest in asking these questions is in the keeper of the land register. In your response to the committee, you state:

> "It is anticipated that information about an individual with a controlling interest will only be disclosed to the Keeper with the consent of that individual."

How can the keeper ask for that consent when the keeper is not permitted to know who the person is of whom they may ask consent?

Kate Thomson-McDermott: That is one of the areas in which the Scottish ministers will want to consult at a significant level of detail with legal representatives and various stakeholders. A number of options are being considered, from requiring the person who is making the application to confirm by ticking a box or signing a statement that they have obtained the permission of a third party, to requiring the keeper to write to the third party to inform them and give them a chance to object before the information appears on the register.

There are a number of ways in which that aspect could be affected, and Scottish ministers intend to work with stakeholders and those who interact regularly with the register to ensure that the most appropriate and least onerous procedure is used while still ensuring that the interests of the parties involved are protected.

Stewart Stevenson: I understand the issue of consent being withheld for the publication of the register, but in your response you spoke about the issue of disclosing information to the keeper in the first place. If the information cannot be disclosed to the keeper in the first place, how can the keeper ask for and obtain—or be refused—consent?

Kate Thomson-McDermott: Sorry, I am not quite clear—

Stewart Stevenson: I am referring to the Government's response to the committee, in which you said:

> "It is anticipated that information about an individual with a controlling interest will only be disclosed to the Keeper with the consent of that individual."

The keeper cannot initiate an inquiry; a third party must do so. Is that the implication?

12:30

Kate Thomson-McDermott: Yes. It is the intention that the applicant would be required to

disclose the information, so it would be for the applicant to ensure that they had the necessary consent to release information to the keeper. I was talking about the potential need for additional protections, if they were required to ensure that interests were protected.

Stewart Stevenson: Do you really think that, in the circumstances that we are talking about, anyone would give consent when they were not legally required to do so?

Kate Thomson-McDermott: We think that there will be a strong positive response in providing the information. Certainly in our engagement with stakeholders such as Scottish Land & Estates, we found stakeholders to be committed to greater transparency on land ownership, and we anticipate that a number of applicants will voluntarily provide the information. In requesting it—sorry, I will finish there.

Stewart Stevenson: That might be wise.

Under proposed new section 48A(2) of the Land Registration etc (Scotland) Act 2012, the Scottish Government may provide

"for the information to relate to the category of person or body into which a proprietor falls,"

and

"for the information to relate to individuals having a controlling interest in proprietors of plots of land and leases,"

but the list of matters about which the keeper may ask is far from exhaustive. When might the list be exhausting, rather than not exhaustive?

Kate Thomson-McDermott: There is probably a range of information about which we would love to ask the people who interact with the land register. Ideally, we would ask them to fill in numerous boxes and give us a huge amount of information, because information helps to build evidence, which helps to assess policies. There is a broad range of areas in which information can be useful.

However, we need to ensure that what we ask of those who interact with the land register is proportionate and reasonable and does not place an undue burden on applicants. The point of registration with the land registry is obviously to obtain one's real right, which needs to be factored in.

On the basis of the work of the land reform review group, the responses to the Scottish Government's consultation and the Scottish ministers' consideration of the information that would help them, two specific areas—categories of landowner and information on controlling interest—are considered to be most significant and important in helping to generate transparency on land ownership in Scotland.

As time moves on, policies and law on land and even objectives on land reform will develop, and we thought that it was important that ministers should have the scope to add new categories in future if necessary and to remove categories that might no longer be considered relevant or helpful. It is not anticipated that the categories will grow exponentially, but we thought it important to have the flexibility to be able to address future needs and to keep what we are asking under review, to ensure that it remains proportionate and useful.

Stewart Stevenson: Your response to the committee suggests that quite a lot of the information that the keeper might seek will already be in the public domain. Will the keeper have the power simply to incorporate such information into the register without reference to anyone else? More to the point, will anyone have the right to veto the information being put in the register even when it is in the public domain?

Kate Thomson-McDermott: The provisions are very much based on voluntary disclosure—the provision of information by the applicant on interaction with the land register. That was considered to be the most proportionate approach at this stage. There would be significant burdens on the keeper if they started to try to include information that is available externally. Where something is fundamentally clear from the information that has been provided to the keeper, there may be scope to consider that, but the Scottish ministers certainly do not intend to place the sort of burden on the keeper that would involve them in any investigatory work to try to gather that information.

Stewart Stevenson: Finally, when we are setting the regulations initially about what the keeper's request could be, that will be an affirmative instrument. The plan is that subsequent regulations would be negative instruments.

Given the uncertainty around this, the clear steer that we are getting as a committee that, over the long term, there might be significant changes to the regulations, the point that subsequent instruments could entirely supplant the original, and the significance of what they might cover, would it not be more appropriate that the procedure should be affirmative throughout its life?

Kate Thomson-McDermott: We acknowledge that subsequent regulations could alter the regulations substantially, although they could not make any changes to primary legislation without being subject to the affirmative procedure.

As noted in the delegated powers memorandum, the Scottish ministers consider that any subsequent exercise of the power to be

inserted into the Land Registration etc (Scotland) Act 2012 is more likely to make amendments to the definitions contained in section 36 or even additions to the category of information on proprietors that may be collected. It should not bring in a change in the overall policy of providing regulations that allow the keeper to request additional information but will involve refinements to the definitions used in the regulations.

The Scottish ministers therefore considered that the negative procedure would be more appropriate. The Scottish Government would, of course, be willing to consider the views of the committee and Parliament on this issue, should the committee take a different view from the Scottish ministers.

The Convener: Can I reflect on the difference between sections 35 and 36 and see whether I understand it correctly? Maybe I do not.

I get the impression that section 36 is to give the keeper a power to ask questions, which over time might cover all the land in Scotland in a comprehensive way. Clearly they would not ask everybody the same question at the same time, because that would be too much information.

In contrast, it would appear that section 35 gives the requesting authority, whoever that might be, the power to ask questions in very particular cases for particular purposes.

If I am right in that, and nodding heads suggest that I am, how would we expect Scottish ministers to be able to draw up regulations under section 35 that meet all those circumstances, if by definition we are dealing with particular cases? As a new case arises, it might sometimes be necessary to bring forward a new regulation to cover a piece of information that had not been required for the first set.

Am I right in painting that picture, and, if so, how comprehensive do you think the first set of regulations under section 35 might be so that we do not have to revisit them every time a case comes up?

Kate Thomson-McDermott: That general description of the different aims of the provisions is correct. They are aiming to achieve different outcomes. Both relate to improving transparency and accountability of land ownership. Section 35 is focused on the compulsory disclosure of information in specific cases where there is a harm that needs to be addressed. Section 36 is much broader. It is about the voluntary disclosure of information across the broad range of land ownership in Scotland and is intended to develop a better evidence base of official statistics on patterns of land ownership throughout Scotland.

The reason why section 35 has been drafted in the way that it has, and the reason why Scottish ministers have not focused on limiting the wording of section 35(1) to particular or practical difficulties, is to try to ensure that any situations in which there is a justifiable reason to require the disclosure of information going beyond legal entities will be encompassed by the regulations.

Should in practice that turn out not to be the case, it is hoped that, through making amendments to the regulations using the affirmative procedure, we can react quickly and ensure that they continue to function. The intention would be that, as first drafted, they should be sufficiently broad, while respecting the rights of parties, to cover the vast majority of cases in which it could be justifiable to require the compulsory disclosure of that information.

The Convener: If I have understood you correctly, you would expect those powers to be very widely drawn but the purpose to be very narrow.

Kate Thomson-McDermott: Yes.

The Convener: Thank you.

John Mason: I want to touch on section 79 and the conversion of tenancies under the Agricultural Holdings (Scotland) Act 1991 into modern limited duration tenancies. I have a series of questions. First, can you explain why it is considered necessary to have this power to permit conversion from the one to the other? Linked to that, is there an underlying policy justification for it?

Billy McKenzie: You asked why we believe that it is appropriate to legislate to allow conversion. We had a review group that explored the overall issue of the tenanted sector, what we needed to do to make sure that it continued to be vibrant and how to continue to get new entrants entering the sector and people progressing up the farming ladder. Conversion is part of the box of solutions for the overall agricultural sector in the rural economy. It is an important aspect of it.

John Mason: Sorry, but what is the problem at the moment? I am not from a rural background.

Billy McKenzie: Sorry, that was the overall intro to the situation—maybe it was too much.

The review group found that the current situation is not satisfactory in that it does not allow people an effective exit out of the sector. There are people sitting with 1991 act tenancies who are going to remain sitting there while the farm is run down. The opportunity for them to exit is not attractive enough to give them a dignified retirement, and that blocks people from coming into the sector as well. It is a static situation that is getting worse.

The solution proposed was to give the tenant an opportunity to convert a tenancy, sell it on the open market and get some financial reward. That would give new entrants and those progressing up the farming ladder an opportunity as well. It was about expanding the diversity and resilience of the agricultural sector.

The group proposed conversion and proposed a minimum term. It recognised that there are issues with that recommendation that the Scottish Government will have to resolve, particularly with regard to article 1 of protocol 1 of the European convention on human rights—the balance of responsibilities and rights et cetera. That is what we have been doing. We will be getting into detailed consultation with stakeholders once we have worked out the pros and cons of all the solutions.

That is why we believe that it is appropriate to take action. Now we are working out the precise detail of that action.

John Mason: Okay. The power comes across as quite wide. Will it be the case that all 1991 act tenancies could be converted?

Billy McKenzie: It is the intention that 1991 act tenancies could be converted, depending on the exact solution that we end up developing with stakeholders. I could not say what the full range of circumstances would be—there are options.

John Scott: Did I hear you say that, if the tenants undergo such a conversion, the tenancies could be sold on the open market? I think that those were your words.

Billy McKenzie: That is the intention. We are still exploring detail, but that is the intention, yes.

John Scott: That is a new concept—to be able to sell a tenancy on the open market.

Billy McKenzie: Yes, because the problem that has been identified with the 1991 act tenancies is that, for some, there is not an attractive exit out of the sector. They remain within their tenancy, the farm gets run down, the farmer is in a situation that they do not want to be in and there are other people who cannot get into the sector because those tenancies are tied up. It is one of the issues with the sector.

John Mason: Just to clarify, it is because of this overall logjam that there is this whole concept of converting the tenancies. Therefore, you would not have to have a specific reason why some of the tenancies could be converted and some could not, because it potentially affects all tenancies. Is that right?

Billy McKenzie: It is an overall desire to have that flow within the system.

The Convener: I want to explore that. I have a constituent who is in precisely the position that you have just outlined. There probably are not a huge number of such tenants, but the situation has to be dealt with. Are we looking at a situation in which all 1991 act tenancies can be converted and the condition is essentially about who decides that they want to convert? Alternatively, are we in a position where, in principle they could all be converted but it will be subject to conditions, which are not the choice of one or the other party but might relate to the current state of the lease and to the successors?

Billy McKenzie: Both of those are possible directions. The second one—having certain conditions that have to be met—is possibly a more valid option to address the policy issue. However, I stress that we are still working through the pros and cons of the policy options to ensure that we get the balance right in relation to A1P1 of ECHR. I could not land on exactly where we are going to go at this point, and nor should I.

12:45

Andrew Campbell: I have two comments to add to that. First, on the concept of selling the tenancy, we are really talking about allowing the tenancy to be assigned to another person—it is assignation rather than sale of the tenancy.

John Scott: That is a completely different concept.

Andrew Campbell: Yes. Talking about sale of the tenancy is just the kind of accessible language that we have got used to using in the bill team to describe that but, ultimately, it is assignation that would be permitted.

Secondly, on the regulations, as Billy McKenzie mentioned, we are in a sense getting into hypotheticals. Until the consultation has been done, it is difficult to know where to draw the lines or what conditions might be added and which might not be necessary. Ultimately, article 1 of protocol 1 requires an evidence base for what is done in policy. For something to be A1P1 compatible, we need an evidence base. Therefore, until that is there, it is difficult to give a view—even in the abstract, unfortunately—that the power might say this or that or might be used in a particular way. I appreciate that the power is widely framed—nobody disputes that at all.

The Convener: If you are so far back in the consultation process, I cannot help but wonder why the power is even in the bill at this stage. The Rural Affairs, Climate Change and Environment Committee will worry more about that than I do, but this committee has to worry about human rights issues. Those are definitely within our remit.

If you cannot establish that the power is ECHR compliant before it is in front of us—

Andrew Campbell: To be clear, that is exactly not what I am saying. The power is capable of being exercised compatibly; otherwise, it would not be in the bill. That is not only the view of the Scottish ministers; it is the view of the Presiding Officer, who has issued a certificate of competence.

The reason why we have a long list of things in section 79 that the regulations can cover is to try to give some flesh on the bones. Clearly, we still need to pull together an evidence base on targeting the power. It is difficult to put the cart before the horse and say, "We know what we want to do, but we have not finalised the evidence base." Until that evidence base is finalised and is clear and robust, it is difficult to know what the regulations might say.

As I said, that is why we have taken the power. The Government has to have the flexibility so that the bill has the headline policy in it but we can expand on that through regulations.

John Scott: I want to go back to the difference between assigning a tenancy and selling it. I want to be clear about the issue. How will assigning a tenancy relieve the problem with the 1991 act, which Mr McKenzie defined as a matter of people not being able to get adequate compensation when moving out of a tenancy? How will assigning a tenancy help? I want to be clear: are you talking about assigning or selling? Which is it, and why?

Andrew Campbell: My colleague will expand on the policy but, with assignation, the assignor would approach an assignee and, in return for money—the value of the tenancy to an incoming tenant, whatever that may be—the assignee would step into the shoes of the former tenant. That would allow the former tenant to leave with the money, and the new tenant would come in. That is essentially how the process is expected to work.

The Convener: So it is not selling the land in the normal sense of the word. The land still belongs to the original owner.

Andrew Campbell: Absolutely—this is assignation of tenancy.

The Convener: No land changes hands; it is merely the right to be there as a tenant that can be passed on.

Andrew Campbell: It is the tenant's interest that is passed on. It is nothing to do with land ownership.

The Convener: I make the point for the record that a tenancy under the 1991 act cannot be assigned.

Andrew Campbell: There is limited assignation.

The Convener: There is limited assignation and therefore there are tenants who do not want to be there but who cannot do anything in a practical, commercial sense.

Billy McKenzie: That is why we are allowing conversion into a term and for the tenancy then to be offered on the open market under certain conditions. There is a value to be had for the existing tenant from the incoming tenant.

John Scott: To me, offering it on the open market would suggest that it is being sold.

Billy McKenzie: The tenancy is being sold, rather than the farm.

John Scott: Yes, I understand that, but is all this happening—and forgive me for not being more up to speed on this—without the consent of the landlord?

Billy McKenzie: We are still looking through the options on that. There are landlord's rights that we have to balance against the rights of the tenant. They have to be finely balanced. That is important, not just for A1P1, but for the policy intention. We need to create some measure of confidence in the sector among both tenants and landlords so that tenancy land can continue to be made available. We need to get that balance right but we cannot say in fine detail where it will go.

John Scott: That is clear. Thank you.

The Convener: Okay, I think that we have explored that issue. There may be a policy issue for another committee further down that route. I return to John Mason, who was following a line of inquiry.

John Mason: If I understand this correctly, all tenants would have the power to convert their tenancy, so the current consultation and discussions are primarily about the conversion process, rather than whether there could be a conversion. Is that correct?

Billy McKenzie: The consultation is on the detail of the term of the tenancy that is being converted, the detail of how it is targeted, to whom it is available and how we ensure that we address the rights of the landlord appropriately. All of that is being considered.

The review group and stakeholders made a convincing case for the overarching goal of conversion, so we believe that doing this is absolutely appropriate. However, we need to take the time to get the detail right. That is why we have put a broad power in the bill. It is the right thing to do, but we need to take time to explore the fine detail.

John Mason: You must understand that the committee is a little bit concerned about broad powers, not just on this issue, but on any issue.

I want to dig down into a couple of things that you said. You mentioned the length of the tenancy and in another answer it was suggested that tenancies could be from 25 to 99 years.

Billy McKenzie: There is a range of suggestions: some people have suggested 15 years, while others have suggested 25, 35 or 99 years. Some people wanted us to go the full way in terms of assigning the tenancy as a 1991 act tenancy and maintaining it as such. We did not believe that that struck the right balance, which is why we have conversion in the bill.

John Mason: The answer that we got from the Scottish Government was 25 to 99 years. Are you saying it is wider than that, and is 15 to 99 years?

Billy McKenzie: No, I am just putting forward the range of views that we have heard. The range is 25 years to—

John Mason: So are we any closer to knowing the figure? Will the figure not be the same for everybody?

Billy McKenzie: That it is not for me to decide. We are considering a range of figures.

John Mason: You mentioned striking the balance between the tenant and the landlord. As a lay person reading this, it appears that the advantage is swinging towards the tenant. That is a policy decision. However, that is not my question, although it might appear to be. Are landlords being safeguarded in the process and is there a balance?

Billy McKenzie: Yes, that is why we have taken the time to go through the process and ensure that we get the balance right. It is important that we try to maintain some confidence in the sector among landlords, but it is also important that we address the problem. Some people would say that the current balance is too much in favour of the landlord and not enough in favour of the tenant. We have to look at the whole situation, including the overall agricultural sector, and get that balance right for both sides.

John Mason: As well as getting the balance right from our perspective, are you comfortable that the balance is right for the purposes of ECHR?

Billy McKenzie: We are comfortable that conversion is capable of being legislated for within the competence of the Parliament, addressing A1P1.

John Mason: My final point is that, given the significance of the power and the fact that the policy has not been developed, is it sufficient that we are looking at using a normal affirmative procedure, or should we be using a stronger mechanism?

Billy McKenzie: We believe that we have the structure right. The overarching bill contains conversion, so there is debate within the Parliament right now on whether conversion in itself is appropriate. We believe that we have the regulations appropriately focused on the affirmative procedure. That level of scrutiny is needed because of the contention that lies below even conversion: there is contention about whether we should allow conversion, and there is contention on what we should do in terms of targeting the lengths of term and so on. We believe that the affirmative procedure is appropriate for those reasons. As with any area in the bill, we are open to considering that if the Parliament raises points.

John Mason: Okay, thanks.

John Scott: This is probably a daft-laddie question. This is an area of law where the Parliament has been found not to be ECHR compliant, and you tell us that you are absolutely confident that the power is A1P1 compliant. Can you show the committee your workings, as it were—the absolute thought process and the legal process—that take us to that conclusion?

I may be asking an unreasonable question—I do not know. However, given that this is an area where the Parliament has already got into trouble and been rebuked, I would be grateful if that could be done.

Andrew Campbell: The simple answer is that, yes, we can give an assurance that the power is within competence. The question is how the power is exercised. When the affirmative regulations come before Parliament, members will have the opportunity to scrutinise them. As the power stands on the face of the bill, it is ECHR compatible—we are confident of that. Beyond that, I am not free to divulge the Scottish Government's legal advice because of the ministerial code, as you will understand.

John Scott: It was quite possibly naive of me not to realise that, but thank you nonetheless.

Billy McKenzie: In addition to that, we provided information to the Rural Affairs, Climate Change and Environment Committee on the consideration of A1P1 and the ECHR issue across the agricultural holdings provisions, which would be useful information for you as well. It was either in an annex to a letter that we sent to that committee or it was within the body of the letter. However, we provided pretty comprehensive information on what we need to consider to ensure that we get the balance right, so that may help you.

The Convener: If that information is not already in the possession of this committee, it would be helpful to get it because the issue is one of our concerns.

Andrew Campbell: I think that it is available on the Rural Affairs, Climate Change and Environment Committee's web page at the moment. It was submitted as written evidence last week. It is just a note of the Scottish Government's approach to article 1 of protocol 1.

The Convener: That is fine, thank you. We know where to find it now.

I move on to section 81, on "Sale to a tenant or third party where landlord is in breach of order or award". When it is a sale to a tenant, the procedural rules are on the face of the bill, whereas when it is a sale to a third party, it is subject to regulations. Can somebody explain to me the nature of that procedural difference?

Fiona Leslie: The tenant provisions within the bill mirror the relevant sections in part 2 of the Agricultural Holdings (Scotland) Act 2003—they mirror what is there already. The new affirmative regulations that will be prepared using the regulation-making power will set out the procedural aspects for the Land Court, valuers, auctioneers and other relevant parties involved in the sale to a third party.

The regulations will be quite technical in terms of the actual process that all the relevant parties will be required to follow because we need to ensure that the process is fair and transparent for everyone involved. That will then ensure that the court is comfortable that the whole of the industry is behind the procedures that are brought forward and that there is a level playing field.

The regulations will be primarily technical in terms of the process that will be applied and how that will work. They will contain information on who can and cannot buy the land and on a range of other elements that are set out in proposed new section 38M of the 2003 act, which sets the framework for what will be in the regulations. However, there will be much more detail.

The regulations will also help to manage the situation when land prices fluctuate, perhaps within a regional area or even across the country. They will help to manage that process and ensure that it works fairly for the landlord and for the tenant.

13:00

The Convener: Thank you for that comprehensive answer—it is helpful.

The Government's written response states that the power in section 38M deals with the procedural aspects of the sale of the holding in the circumstances in which the Land Court has varied an order for sale under new section 38L. It appears, however, that some of the matters listed in new section 38M(2) cannot be described as purely procedural.

For example, new section 38M(2)(e) provides that the regulations may include provision about the persons to whom the land cannot be sold, and new section 38M(2)(m) provides that the regulations may make provision about what is to happen where the land is not sold within the specified period.

I appreciate that you may not have such detail at your fingertips, but those matters in particular appear to be significant and are not related purely to the sale process. Why is it appropriate to leave them to regulations?

Fiona Leslie: With regard to the persons to whom the land cannot be sold, we need to ensure that we are ECHR compliant on the provisions in the regulations, so that it is clear to both parties that the provisions cannot be used as a tool or mechanism to allow them to wait until the sale to the third party to try to regain either their family's interest in the land or the tenancy.

Where the tenant has decided that they do not want to take on the tenancy and they have notified the court, and it has agreed to an order to enable the land to be sold to a third party, our approach ensures that the tenant does not use the provision as a way to come back in later and try to get a knock-down price on the land when it goes on sale on the open market. Any agricultural tenancy that is sold on the open market with a sitting tenant on it will have a different price value from that which it would have had without a tenant on it.

The approach also ensures that the landlord's family or business interests do not try to use the provision as a mechanism to try to secure the land back into the family business. That is the reason for new section 38M(2)(e).

On new section 38M(2)(m), we think that the likelihood of the land never being sold is quite slim because the demand for land is so high. Regardless of whether a tenant is in place, demand is so great—and the prices for which land is going are significantly higher at present than they might be at some point in the future—that we need to ensure that we allow enough flex to manage the process.

If, in the future, land prices drop or the situation with the management of land changes significantly across the country, we will be able to manage that process; the Land Court will have a process to follow with which it is comfortable; and the auctioneers and the professionals in the industry will feel that the approach is fair and appropriate.

The Convener: So you see that as a fallback position for some point in the future, as you

genuinely do not know what the circumstances may look like.

Fiona Leslie: Yes.

The Convener: On that point, we move to Richard Baker, who has questions on rent reviews.

Richard Baker: The delegated powers memorandum and the Scottish Government's written response explain that the policy on the new system of rent review is subject to an on-going modelling process and to further consultation with stakeholders. For that reason, provision about significant aspects of the policy—in particular, provision about the productive capacity and the standard labour requirement of agricultural holdings—is held over for regulations.

Why should the Scottish Parliament confer power on the Scottish ministers to legislate for that matter when the policy on significant aspects of it is still not yet clear?

Billy McKenzie: The response is similar to our response on conversion, but it applies even more in this respect. There is some contention over whether to move to productive capacity, and we believe that it is appropriate to put that provision in primary legislation so that there is appropriate scrutiny of it from Parliament and stakeholders.

Underneath that, there is a much lesser degree of contention on what needs to be done to define productive capacity and the factors that need to be taken into account. The meetings that are exploring the issue are bringing us closer and closer to a solution on which all in the sector—landlords, tenants and valuers—agree.

We believe that it is appropriate that the debate on the primary legislation should focus on the most contentious point, which is whether or not we should move to productive capacity. We also believe that it is appropriate that the other aspects underneath are dealt with in regulations under negative procedure because there is a much lesser degree of contention. The things that we need to take account of in reaching appropriate rental levels are very technical.

That is where we are at just now. We are sharing work with the RACCE Committee—and we are willing to share it with Parliament overall—regarding the detail of those meetings. We have suggested that we provide that material around the end of October in order to allow the work to settle to a point at which we can get a very good idea of where it is heading. We are happy to supply material at any point, but that would be the most appropriate way to give you a useful idea of where things are without giving you too much information that is still in the course of being agreed.

Richard Baker: So you think that you will be a lot further down the line at the end of October towards reaching a conclusion.

Billy McKenzie: Yes. In defining productive capacity and other factors that need to be taken account of when rent is determined, we are very close to broad agreement on certain aspects, and we should have made progress on more of the technical detail by the end of October.

Richard Baker: Earlier, you mentioned the nature of the scrutiny that there should be of the regulations, and that is the subject of my next question.

In the new process for rent review that the bill provides for, the productive capacity of an agricultural holding is a highly significant factor in the determination of a fair rent for that holding. The delegated powers memorandum lists a number of elements of productive capacity that the Scottish ministers may ultimately decide should or should not be relevant to the rent review process, so it appears that there may be a range of policy choices on how productive capacity should be determined. Parliament might expect to have a greater role in scrutinising those substantive choices, regardless of the stakeholder engagement that has taken place. Why does the Scottish Government consider that the negative parliamentary procedure provides a sufficient level of parliamentary scrutiny?

Billy McKenzie: I would compare the situation on productive capacity with that on conversion. On conversion, underneath what it is in the bill, there is still a lot of contention on where we should go and a variety of options are still available. On productive capacity, underneath what is in the bill, there is a lot less contention on what we need to do to make sure that a fair rent is assessed and about the technical details that form part of the process. That is why I believe that, for conversion, it is appropriate to have regulations that are subject to the affirmative procedure. On productive capacity, we believe that there is much less contention. The issue is much more to do with the technical detail, which will be based on the advice that we get from the industry. The industry will shape that to ensure that we get the detail right.

The Convener: That brings us to the end of our questions. Does Rob Gibson have anything else that he would like to ask?

Rob Gibson: No, I do not, but thank you—this discussion will be very helpful to the Rural Affairs, Climate Change and Environment Committee in our deliberations on these matters. I am sure that we will come back to the issues that have been raised.

The Convener: I want to return to the issue of timing. You mentioned the end of October. It is

quite important that the Scottish Government ensures that the Parliament is on a timetable that is consistent with some of these things being nailed down. I do not know where on earth we are on timetables, although that will be known. If good information were to arrive shortly after we have gone through stage 1, that would be unfortunate. It might be rather better if the stage 1 debate were to take place once we have a lot more detail.

Rob Gibson: As I understand the timetable, it will be December before my committee writes its stage 1 report, so it should be possible for us to review anything that we get from the Government on this matter in good time.

The Convener: It might be that we try to relax what we say on the same timetable, but we will talk about that separately.

I thank the witnesses very much for their evidence.

13:07

Meeting suspended.

13:09

On resuming—

Instruments subject to Affirmative Procedure

Qualifying Civil Partnership Modification (Scotland) Order 2015 [Draft]

The Convener: No points have been raised by our legal advisers on the order, but the committee may wish to note that it was withdrawn and relaid in order to make a clarification that arose from a query from our legal advisers. Is the committee content with the order?

Members *indicated agreement.*

Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Education (Assisted Places) (Scotland) Revocation Regulations 2015 (SSI 2015/318)

13:09

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Self-directed Support (Direct Payments) (Scotland) Amendment Regulations 2015 (SSI 2015/319)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Bodies (Joint Working) (Integration Joint Board Establishment) (Scotland) Amendment (No 3) Order 2015 (SSI 2015/321)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Discontinuance of Legalised Police Cells (Scotland) Rules 2015 (SSI 2015/324)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Child Welfare Reporters) (SSI 2015/312)

13:10

The Convener: This instrument amends the procedural rules of the Court of Session and the sheriff court. Article 2 inserts new rule 49.22 into the rules of the Court of Session 1994. Article 4 inserts new rule 33.21 into the ordinary cause rules 1993. Paragraph (11) of each new rule provides that when a child welfare reporter

"acts as referred to in paragraph (10)"

the court or sheriff

"may, having heard the parties, make any order or direction that could competently have been made under paragraph (6)."

Paragraph (10) in each rule is composed of subparagraphs (10)(a) and (10)(b). The policy intention is that the phrase

"acts as referred to in paragraph (10)"

means that the child welfare reporter has acted as referred to in subparagraph (10)(a) or subparagraph (10)(b). The drafting of paragraph (11) does not make that policy intention clear, and the rule is capable of being interpreted as meaning that the child welfare reporter must have done the things mentioned in subparagraphs (10)(a) and (10)(b) in order to have acted

"as referred to in paragraph (10)".

Does the committee agree to draw the instrument to the Parliament's attention under reporting ground (h), as the meaning of articles 2 and 4 could be clearer in that respect?

Members *indicated agreement.*

The Convener: Does the committee agree to call on the Lord President's private office to amend paragraph (11) in both new rules to make clear the intended effect of those paragraphs?

Members *indicated agreement.*

Marriage (Prescription of Forms) (Scotland) Amendment Regulations 2015 (SSI 2015/313)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Children and Young People (Scotland) Act 2014 (Commencement No 9 and Saving Provision) Order 2015 (SSI 2015/317)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Pentland Hills Regional Park Boundary Bill: Stage 1

13:12

The Convener: Under agenda item 7, members are invited to consider the delegated powers contained in the Pentland Hills Regional Park Boundary Bill. The bill contains two delegated powers.

Does the committee agree to report that it is content with both the delegated powers provisions in the bill?

Members *indicated agreement.*

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill: Stage 1

13:12

The Convener: The purpose of agenda item 8 is for the committee to consider the response of the member in charge of the Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill to the committee's stage 1 report. Do members have any comments? Or are we content to note the response and, if necessary, to reconsider the bill after stage 2?

Members *indicated agreement.*

Interests of Members of the Scottish Parliament (Amendment) Bill: Stage 1

13:12

The Convener: The purpose of agenda item 9 is for the committee to consider the response from the Standards, Procedures and Public Appointments Committee to its stage 1 report. Do members have any comments?

Stewart Stevenson: I merely draw the committee's attention to the fact that I am the convener who wrote to it.

The Convener: Are we content to note the response and, if necessary, to reconsider the bill after stage 2?

Members *indicated agreement.*

The Convener: That completes the public items, so I move the meeting into private.

13:13

Meeting continued in private until 13:30.

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