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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 16 September 2015

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
27th Meeting 2015, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Graeme Dey (Angus South) (SNP)

COMMITTEE MEMBERS

Claudia Beamish (South Scotland) (Lab)
*Sarah Boyack (Lothian) (Lab)
*Alex Fergusson (Galloway and West Dumfries) (Con)
*Jim Hume (South Scotland) (LD)
*Angus MacDonald (Falkirk East) (SNP)
Michael Russell (Argyll and Bute) (SNP)
*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Christian Allard (North East Scotland) (SNP) (Committee Substitute)
Mike Gascoigne (Law Society of Scotland)
Martin Hall (Scottish Agricultural Arbiters & Valuers Association)
Andrew Howard (Moray Estates)
David Johnstone (Scottish Land & Estates)
Niall Milner (Royal Institution of Chartered Surveyors)
Christopher Nicholson (Scottish Tenant Farmers Association)
Scott Walker (NFU Scotland)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 16 September 2015

[The Convener opened the meeting at 09:39]

Land Reform (Scotland) Bill: Stage 1

The Convener (Rob Gibson): Welcome to the Rural Affairs, Climate Change and Environment Committee's 27th meeting in 2015. I remind everyone to switch off their mobile phones. Some members will use tablets during the meeting, as the committee papers are provided in digital format.

We have received apologies from Claudia Beamish and Mike Russell. I welcome Christian Allard to the meeting; he is substituting for Mike Russell.

Our first item of business is to take evidence on the Land Reform (Scotland) Bill. On Monday 14 September, we undertook a fact-finding visit as part of our scrutiny of the bill. We travelled to Fife, where we visited the Falkland centre for stewardship, the National Trust for Scotland at Falkland palace and the Kinghorn Community Land Association. The visit allowed us to meet various community representatives who are actively involved in land ownership and management, and I thank everyone who took the time to meet us. During the visit we learned some key lessons about community participation in land ownership and management, which will inform both our scrutiny of the bill and the committee's stage 1 report.

Today we will take oral evidence on chapter 3 of part 2 and on part 10. I welcome to the round table our guests: Scott Walker, who is chief executive of NFU Scotland; Christopher Nicholson, who is chairman of the Scottish Tenant Farmers Association; Martin Hall, who is president of the Scottish Agricultural Arbiters & Valuers Association; Mike Gascoigne, who is convener of the Law Society of Scotland's rural affairs sub-committee; Andrew Howard, who is managing director of Moray Estates; David Johnstone, who is chairman of Scottish Land & Estates; and Niall Milner, who is from the Royal Institution of Chartered Surveyors rural and geomatics professional group board. Good morning to you all.

We will ask you questions around the table, but not everyone is required to answer each question. If you want to answer, please keep it as short and sharp as possible, as we have a lot to get through.

Does the panel agree that the two main objectives for the tenanted sector are, first, to ensure that land that is currently in tenure can be invested in, so that it is farmed productively, and, secondly, to create new tenancy opportunities for new entrants to farming and for existing farmers, to allow them to farm more flexibly? If you do not think that those are the two main objectives, you might want to say so.

David Johnstone (Scottish Land & Estates): We fundamentally support the aim that the bill is trying to achieve, which we see as the creation of a vibrant tenanted sector. That is vital as it will allow Scottish farms to restructure and be fit and competitive for the 21st century. In five years' time there will be a common agricultural policy review, which will probably result in less income coming into Scottish farming. That is when it will become vital that farms in the tenanted sector are allowed to restructure.

The Convener: I will add to the question by saying that both the objectives need to be satisfied simultaneously. Can they be satisfied simultaneously and, if not, where does the overriding public interest lie? As the bill suggests, the public interest is the main reason for what we are doing and we are keen to ensure that it is met.

Christopher Nicholson (Scottish Tenant Farmers Association): Thank you for the opportunity to give evidence to the committee. We welcome the general thrust of the bill and agree that the focus should be on creating opportunities for new entrants and ensuring continued investment in the tenanted sector.

We are aware of gaps in the bill as far as those aims are concerned, especially in terms of new entrants. The bill has limited opportunities for them, because the new types of leases that are being promoted—the modern limited duration tenancies—and the current LDTs are more appropriate as bolt-ons to existing farming businesses, rather than as the means to establish and support stand-alone family farming.

09:45

We believe that it is in the public interest to try to maintain security of tenure in the sector. Currently, around 80 per cent of the agricultural tenanted sector is under security of tenure. There is some recognition by the agricultural holdings legislation review group and in the bill that the nature of tenancies has changed a lot in the past 50 or 60 years. In the original model of tenancy the landlord provided land and fixed equipment, and the tenant provided working capital, husbandry skill and labour, but that has changed. A large number of

our members have been in secure tenancies for many generations, with very little landlord investment in fixed equipment since the leases started.

On many tenanted farms, all the modern fixed equipment is provided by the tenant. We feel that there are gaps in the bill where it does not fully recognise that and therefore does not provide the necessary security for tenants to carry on investing in their farms. We see it as clearly being in the public interest to ensure that tenants invest in the future of their farms.

The Convener: We will come back to some of the detail about fixed equipment and so on in due course, but we will explore your points about gaps in the bill now.

Scott Walker (NFU Scotland): I will deal with the general premise. Everyone who is giving evidence today would agree that we are trying to get a thriving tenant sector. I think that everyone would also agree with the two premises that we have put forward, which are that we want a bill that encourages greater investment in tenant farms and creates opportunities that allow more land to be tenanted in Scotland, and therefore provides opportunities for new entrants to come into the industry. However, we have to bear it in mind that the bill is only part of the wider picture. In NFU Scotland's view, the bill in itself cannot deliver all those things. We have to look at what else the Scottish Parliament and Scottish Government can do.

Fundamentally, we need an agricultural sector where money is made. Whether someone is a tenant, an owner-occupier or anyone connected with farming, he has to be able to make money in farming to invest in his business. For new entrants who want to come into agriculture, the situation will be different—that is about general rules and regulations, which is a discussion for another time. Of course, there are tax issues and tax implications, which I think we will talk about when we discuss the detail of the bill. Those things pull us in different directions.

Like Chris Nicholson, we think that some proposals need to be added to the bill. We will talk about those in detail later, but waygo, for example, is one issue on which a consensus is maybe forming that something can be done to benefit existing tenants and encourage them to invest, and to give greater encouragement to new entrants to come into the industry.

The Convener: I give David Johnstone a chance to come back in, because I have added to the question.

David Johnstone: The issue that you raise about confidence is one of the key issues about the bill. The public interest is in creating a vibrant tenanted sector. From our point of view, there are two aspects to the bill. There are the changes to the Agricultural Holdings (Scotland) Act 1991 style of tenancies and the creation of the modern limited duration tenancy.

Landowners are looking for the new vehicle of MLDTs to give them confidence that the agreements that they will enter into for a long period—we believe in letting for a long period—will be honoured and respected. Our problem with some of the measures proposed in the bill is that they will retrospectively amend previous agreements, which sends out a message that will lead to concerns about the agreements that will be entered into. Why would they be honoured? Why would they not be retrospectively changed, as it is proposed to make changes for the 1991 act tenants? If we are going to encourage people to let more land in the future, the land has to come from the 70 per cent of landowners around the country who are the owner-occupiers. They need to have confidence that the agreements will be honoured in future.

The Convener: I am sure that that is so. I will add to what I have asked and ask other people why there is the lack of confidence that you have brought up. We might explore that a little further, especially as the rights of tenants have been eroded considerably since the late 1940s in terms of their power to bequeath and assign. There are issues with tenants' confidence and their ability to contribute to the bipartite activity of land ownership and tenancy. We are aware of your concerns about confidence, but people may want to express other views.

Andrew Howard is next.

Andrew Howard (Moray Estates): Do I need to press the button to switch on my microphone?

The Convener: No. We are fully automated in this Parliament, unlike at Westminster.

Andrew Howard: Thank you, convener.

It is worth noting that there is investment from landlords, as there is from tenants. It would be slightly unfair to characterise the system as one in which tenants provide virtually all the fixed equipment, because I do not think that that is correct. Going forward, it is essential to have an attractive framework that encourages both parties to invest. We cannot just focus on encouraging investment from tenants. We need an agricultural holdings framework in which landlords are willingly engaging in the process as well, and in which they feel confident and happy to invest alongside the investments that tenants are making.

Alex Fergusson (Galloway and West Dumfries) (Con): I thought that Scott Walker made a really good point. I have always felt that a

measure of success of any land reform bill or agricultural holdings legislation would be an increase in the amount of land that comes on to the let market. My question is simple: does the panel think that the bill is likely to lead to that outcome?

Andrew Howard: To be succinct, no. Would you like me to expand on that?

Alex Fergusson: No—a succinct answer is good.

The Convener: That is fine. David, is your answer as monosyllabic?

David Johnstone: I will not be quite as succinct as Andrew Howard was. There is potential in the bill, depending on the measures that are brought in. A huge amount is reserved and will be coming along later, and the details are to be clarified. There is potential to provide the opportunity to create confidence, but there is also potential to go in completely the other direction. It is quite delicately balanced at the moment as to which way it is going to go.

Christopher Nicholson: The statistics that the Scottish Government has provided show that the biggest drop in tenanted area results from loss of secure tenancies, which make up about 80 per cent of the sector. The measures in the bill that make family succession slightly wider and simplify the family succession process should ensure that more of those tenancies remain tenanted in the future.

Alex Fergusson: That is not an increase in the amount of land—

Christopher Nicholson: It will reduce the current decrease.

The Convener: We need to discuss the public interest from the point of view of both the tenant and the landlord. Surely the issue is the way in which the land is used in order to produce food and other public goods. The bill's purpose is to ensure that that happens better, and the tenancy part of it is a way of helping that to happen. The responsibilities of landlords in the process of this country being able to feed itself is one of the public interests, but none of you has touched on that.

Andrew Howard: Tenancy is one option as a structure for farming land where the party who owns the land does not necessarily want to farm it himself. There are others, such as contract farming agreements and share farming agreements. The fact that land is not in a tenancy does not necessarily mean that it is not being farmed productively and delivering the other public policy objectives that the Government has set out.

What the bill needs to aspire to is ensuring that the agricultural holdings framework is seen as a perfectly viable and attractive option for someone who does not want to farm the land themselves at that time, whether they are a large landowner or someone who is currently an owner-occupier farmer. At the moment, the option of creating a tenancy is not being taken up, even if, in all other circumstances, it might suit that individual, and other structures such as contract farming or share farming are being used because of concerns over the politicisation of the agricultural holdings system.

The Convener: Well, it is politicising the agricultural holdings system to suggest that we should consider contract farming when it has been rejected as an approach in Scotland. We can use the word "politicisation" in lots of ways, and we should be careful about doing so. We have been trying to find a way through this maze and are trying not to be too partisan in our language, but the word "politicisation" is quite partisan. I can assure you that we are aware of what is being said.

Martin Hall (Scottish Agricultural Arbiters & Valuers Association): In response to Alex Fergusson's question, I think that the bill protects existing agricultural tenants, but will it increase the amount of new land coming onto the market? I do not think so.

Scott Walker: I am optimistic. We are only at the start of the bill process, and a lot of work has gone on before this. We all want more tenanted land in Scotland and more investment in it. The NFUS is partisan in that we want more food to be produced in Scotland and we want that food to be produced profitably for its producers. We have an opportunity here, and it is up to everyone giving evidence today to push the Parliament in the right direction with regard to things that we believe should be added to the bill and to encourage you to develop areas where we think that the bill is lacking or needs a little bit more direction.

For a long time now, a lot of people have been asking for the current situation to be looked at, because, for whatever reason, it has not been working satisfactorily for all parties. It is important that, at the end of the process, we have something that is satisfactory to all parties. If it works for everyone, we will get a situation in which people are encouraged to rent land to others and from others. As I have said, I am optimistic.

Christopher Nicholson: The review group's report highlighted other difficulties or obstacles to the letting of land that I think are significant in driving current landlord behaviour. The two main points are the way in which the present common agricultural policy works in terms of subsidies and the way in which current fiscal policy works to make it more attractive for landlords not to let land but instead to use vehicles such as contract

farming or farming in hand. Until those two topics are addressed, it will be difficult to encourage the uptake of new-style tenancies.

The Convener: Okay. I think that we have made a good start—let us now dig into some of the details.

Jim Hume (South Scotland) (LD): I am interested in hearing the panel's views on the Scottish Government's proposal for a single tenant farming commissioner who would be a member of the Scottish land commission but would not be a land commissioner and their ideas about what they would like a tenant farming commissioner and the land commission to do.

Scott Walker: We have always been supportive of the idea of a commissioner. The post has been talked about under various names and formats over the years, but we see the role as being hugely important in ensuring that the legislation operates correctly and that we achieve a better operating environment.

It is important that the commissioner is proactive. The interim commissioner is already looking at different codes, statutes and best practices that operate in the sector, and we think that the commissioner needs to actively promote and, I would say, police those practices to see that they are being adhered to.

10:00

We also feel that the commissioner should have adequate power to intervene and take action. People have asked where the roles of the Scottish Land Court and the commissioner start and stop, and there is a fear that there might be an overlap. From our point of view, and from speaking to our members across the country, everyone, wherever possible, wants to avoid going to court. It is a costly process and, even if there is a good relationship between a tenant and a landlord, it can lead to the breakdown of that relationship, to future disadvantage.

On the other hand, an active commissioner who could intervene, rule on certain points and encourage the parties to reach agreement would be seen as beneficial. At this stage, I suggest that we ensure that adequate resources and funds are available to the commissioner to allow them to take an active role in the sector.

Niall Milner (Royal Institution of Chartered Surveyors): It is very important that the commissioner is an independent and relatively impartial appointment. The selection process must be robust to ensure that the person who does the job is as fair as possible with both parties.

David Johnstone: Scottish Land & Estates supports the introduction of a tenant farming commissioner. It is a good thing; indeed, the interim commissioner has hit the ground running and is working to promote good practice and guidance to help the industry find better ways of avoiding disputes.

In the bill, the balance of the commissioner's rights and responsibilities versus those of the Land Court is about right. For anything to do with legal disputes, the final arbiter should be the Land Court, but the interim commissioner should be able to provide guidance, of which the Land Court can take cognisance in passing judgment.

Christopher Nicholson: The STFA is very supportive of the establishment of a tenant farming commissioner. Much of his role has been debated and is now quite clear.

In common with others, we think that more thought could be given to the tenant farming commissioner's role in dispute resolution. I think that RICS mentioned in its submission that the Land Court should be the last resort and that arbitration or expert determination should be encouraged prior to that. We see the tenant farming commissioner as having a potential role as a bridge in that process.

David Johnstone: We definitely support mediation and arbitration. It is far better than going to the Land Court.

The Convener: We might well look at that.

Jim Hume: That was all quite interesting. Should there be a formal link between the Scottish land commission and the tenant farming commissioner? Perhaps the tenant farming commissioner could be a land commissioner. Does that proposal interest anyone?

Christopher Nicholson: We think that it is very sensible for the tenant farming commissioner to be a member of the Scottish land commission. Tenancies should not be considered in isolation from other land reform issues.

Jim Hume: I think that Niall Milner mentioned the commissioner's independence. What form of accountability would be appropriate?

Niall Milner: With regard to whom he or she answers to?

Jim Hume: Yes.

Niall Milner: Ultimately, he or she would be accountable to the Government that appoints him or her. I suppose that some of the groups here that represent the industry as a whole should also be involved in that.

Jim Hume: I think that that is what I was looking for. I was wondering whether there was any mechanism that the panel thought might be appropriate.

David Johnstone: At the moment, the interim commissioner is working with the three bodies: the NFUS, SLE and the STFA. That would be a good way for the tenant farming commissioner to go. As for the commissioner's independence, ensuring that the role is independent and is seen to be independent is what will give it its credibility, and that is something that the Government can sort out.

The Convener: Do you all agree with the STFA that the commissioner should have powers to enforce codes of good practice? Certainly that would be how his or her independence would be measured.

Scott Walker: Having debated this for a long time, we think it important that, once we have codes of practice, those codes are adhered to. It all comes down to how we enforce them, and an independent commissioner would seem to us an appropriate way of ensuring that that happens.

That brings us to the role of sanctions. What would be the sanctions if those codes were not adhered to? This is where a progressive list of sanctions should be considered. In the first instance, people would get what would amount to almost a yellow card, as if to say, "You've not adhered to the codes of practice. You've got this timeframe in which to do so." That would be the first stage; thereafter, things would escalate.

David Johnstone: We do not think that the codes of practice should be statutory; instead, they should encourage best practice. However, if anyone who has not followed the codes of good practice ends up in the Land Court, which has a legal and statutory framework, it will take their behaviour into account in its judgment. In effect, it gives the same result.

The Convener: I understand that.

Andrew Howard: David Johnstone has really made the point. You are at risk of blurring the edges between a legal and judicial process and one that is about guiding the parties to do the right thing, and we need to understand how you would prevent that blurring from becoming messy.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): I have a fair bit of experience of codes of practice through trading standards, consumer protection and so on, and that experience tells me that with a purely voluntary code of practice, even one that a court can take into account at a later date, the good people follow it and the crooks—the bad people—ignore it. That has been shown to be the case in many different spheres.

Everyone seems to be in agreement about arbitration and mediation, which have been mentioned. Instead of being statutory in the legal sense, the codes of practice could be built in to ensure that, in a mediation process, they carried almost statutory weight. Would a form of words allowing us to embed the codes of practice in the mediation and arbitration process be a good halfway house?

The Convener: I am sure that Dave Thompson was talking about his previous job when he referred to crooks.

Dave Thompson: I was indeed.

Martin Hall: Dave Thompson raises a good point. The way to do this would be to give the Land Court powers to appoint arbitrators, mediators or independent experts—I think that such an approach would work.

Dave Thompson: Is there not a danger, though? David Johnstone talked about making the codes statutory and the Land Court taking them into account. We could build the codes into the legal process but such processes can, by their very nature, be lengthy, time-consuming and expensive. If we build them into a mediation and arbitration process, that might make things much more fast and efficient. We could give them legal status in both the mediation process and the Land Court, but I would not want them to be left to the end of the line. They need to be brought in earlier.

Martin Hall: The opportunity to be able to refer should always be available, so it could be brought in as part of the code. However, where I was coming from is that even if the code is ignored at that stage and you end up in a legal process, the issue should not simply end up at the Land Court. The Land Court should be able to resolve this particular matter quickly, and if it is proportionate to the dispute in hand and it is practical to do so, the issue should be referred to arbitration or mediation for resolution instead of its having to go through the lengthy and expensive Land Court process. It is almost a second back-stop, but it is a quicker and cheaper way of getting the matter resolved.

The Convener: That issue might come up as we go along.

Niall, should land agents be part of the process with regard to the commissioner's powers of enforcing codes of good practice?

Niall Milner: Absolutely. Our members represent tenants and landlords as well as sometimes managing the properties in hand. Given that we are already involved in every stage of the process and stages through the industry, we would welcome being part of that.

The Convener: Thank you. We will move on to MLDTs.

Angus MacDonald (Falkirk East) (SNP): Good morning. The objective of the MLDT is to replace LDTs

"with a more appropriate balance of obligations and discretions on the parties than the current LDT ... provides."

We have heard from SLE, which stated in its submission that

"the differences between current LDTs and the proposed MLDTs appear minimal".

SLE goes on to state that it is

"a missed opportunity to develop a truly modern vehicle."

We have also heard from the STFA, which stated that the MLDT provides "few tangible changes." I am interested to hear the panel's views on the proposed MLDTs. Are you all satisfied with the Scottish Government's explanation of the differences between LDTs and MLDTs?

Christopher Nicholson: You are right that we see few tangible differences. We have some concerns about calls for more flexibility, which would result in us going down the road that we have seen developing over the past 20 years in England, where the average length of a farm business tenancy, as far as I know, is now around three and a half years. I do not believe that that is in the public interest for the long-term maintenance of land and farm infrastructure.

There is one recommendation of the review group concerning LDTs or MLDTs that has not been brought forward—the recommendation for a 35-year repairing lease for land that requires improvement. We saw that as a genuine opportunity for new entrants, but it is not in the bill. I do not know whether there is an intention to bring it forward at a later stage. However, that recommendation of the review group, which would have created an opportunity for new entrants, has been missed out.

The Convener: We do not know about that, but we will ask that question.

Scott Walker: I support what Chris Nicholson said about the repairing lease. We are very supportive of the idea of the repairing lease. It could be a useful vehicle to encourage new people into farming and to encourage some land to be let that otherwise would not have been let, so we would like to see that recommendation come forward in an amendment.

The issue with MLDTs is not substantially different from what we currently have with SLDTs and LDTs. The MLDT is fundamentally the same vehicle. The issue for us comes back partly to what we have discussed before about confidence and getting people to let land for a longer period of time.

As a rough rule of thumb—and it is a very rough rule of thumb—if you are cropping land, you can survive with a shorter lease period. If you have livestock, you need a longer lease period. That is the general rule. In a sense, the nature of the current system encourages shorter-term leases to be given. We are trying to get away from that. Under the auspices of the bill and MLDTs, we hope to create a system that encourages people to give longer leases, particularly in the case of livestock farming, where they are necessary for the nature of the farming. The basic MLDT proposal is fine as it stands, but it would be good to get the repairing lease incorporated into it.

10:15

Andrew Howard: I concur with Chris Nicholson and Scott Walker that there are no substantive differences. The increased flexibility over fixed equipment responsibility is welcome, because it probably recognises the diverse use of LDTs and MLDTs, in that some are for blocks of land that are additional to units that already have infrastructure, and therefore there is no need to provide above-ground fixed equipment.

Chris Nicholson mentioned flexibility. One of the challenges that we face now in framing agreements for farms is that a greater number of farms have farm diversifications—other businesses that are being run on that farm that do not really fall into the realm of agricultural activity, or are an adjunct to it. How the parties might agree how that diversification is undertaken and how the rewards from it might be split do not always sit well within the framework of an agricultural lease.

At the moment, the enterprise is usually taken out of the agricultural lease and a separate commercial lease will be agreed for it. The bill might have been an opportunity to provide flexibility that would have allowed the two to be encompassed within one agreement. That would not always be easy, because sometimes the two things do not sit well together, but that is probably what was being referred to in the comments on the opportunity to get flexibility into new lease structures.

David Johnstone: We agree with pretty much everything that has been said so far. SLE thinks that the bill is a slightly missed opportunity to allow the flexibility that Andrew Howard talks about. We have seen changes and people are thinking of doing stuff that we have not even dreamed of, so we need to allow flexibility to do that.

Another missed opportunity relates to the rollover point, where a lease automatically goes from 10 years into another 10 years. At the moment, a lease goes from 10 years to three years, to three years and then back to 10, I think.

That is accepted and people are reasonably comfortable with it, so we see no reason why it needs to be changed.

On the period between zero and 10 years, the review group originally recommended that SLDTs should go, but I understand that SLDTs are now back in. Therefore, the proposal for a break clause at five years probably will not amount to much, because most people use an SLDT if they want to do that.

Greater flexibility would encourage more people to let.

Alex Fergusson: I ask Chris Nicholson where he got the figure of three and a half years for the average length of tenancy down south. The committee heard evidence previously that suggested that the figure was in excess of double that.

Christopher Nicholson: The figure might be higher where entire holdings are let with an FBT, but many FBTs are just for small blocks of land that are bolt-ons to bigger holdings. My evidence would have come from the English Tenant Farmers Association.

David Johnstone: When we are talking about whole livestock units being let, the figure for the initial term for a farm business tenancy is nearer nine to 10 years, which mirrors the situation with our MLDT.

Alex Fergusson: Okay—I just wanted to clarify that.

The Convener: We can check that out, I guess.

We will move on to the conversion from 1991 tenancies. Alex Fergusson has questions on that.

Alex Fergusson: I have to say that I am a fan of trying to bring a bit of flexibility to the sector, and I see conversion as a means of doing that. As I am sure everybody is aware, the original recommendation of the review group was that there should be an ability to convert to a 35-year lease, which could be assigned for value. The bill will introduce the potential to convert a 1991 act tenancy to an MLDT, but it gives the minister a power to determine the length of that limited duration tenancy.

The NFUS submission specifically raised concerns over "legal uncertainties". To start the conversation, I ask the NFUS to expand a little on those perceived uncertainties. Has clarity been achieved, or do you still have concerns over that element of the proposal?

Scott Walker: That issue has generated a lot of debate in our membership across the country. When the Government introduced the bill, we sought clarity on the parameters that were to be discussed, because there was no point in discussing potential outcomes that would not make their way into the bill because of issues to do with compliance with the European convention on human rights.

Some of our members would like a conversion from a secure tenancy to a secure tenancy that can be passed on to others. Other members want the conversion of a secure tenancy to a fixed-term tenancy, and there is an issue about what the length of that should be. In our discussions with the bill team, it has been flagged up to us that there is an issue still to be resolved as to what can be done that would be within the powers of the Parliament and therefore not challengeable in law. Therefore, we felt that it was inappropriate to come to a definite solution on the issue, given that, whatever we may or may not like, it might not be possible to introduce.

It would therefore be useful if the Government set out the parameters. Once the Government has established the parameters, I am sure that the NFUS and other organisations can go to our lawyers and ask them what is or is not possible. At the moment, when we ask people, they say a huge range of stuff—it is a very grey area.

Alex Fergusson: To follow that up, you are saying that you would prefer to have more detail at this stage, rather than leaving the matter to secondary legislation.

Scott Walker: Yes. We would like more detail at this stage so that we can have an informed discussion and debate on the subject. The basic principle for the NFUS goes back to what we perceive to be the problem, which is that some tenants are sitting with a tenancy and do not have somebody to inherit it, and they therefore continue in that tenancy for longer than is in their interest as an individual, in the interest of the landowner or, we believe, in the interest of Scottish agriculture, because such tenants will not be as productive as others would be. Therefore, it would be useful to have some form of vehicle that allows such individuals to pass on and sell their tenancy. That is where we came from originally and why we originally talked about a 25-year term, which the review group suggested should be a 35-year term.

Alex Fergusson: I open up the question to the other witnesses, to get their views on the issue.

Andrew Howard: I share Scott Walker's view that the principle that is being proposed could achieve the objective that the Government wishes to achieve, which is to encourage retirement. However, it is important to have the detail in the bill, because it is a big step. In effect, the measure will allow the change and sale of a tenancy, which has not been permitted previously, other than with a limited duration vehicle. That would be very helpful.

It would also be helpful to understand what motivates tenants who are sitting where they are. Sometimes, it might be need, because they cannot afford to retire, in which case the measure will be helpful. Sometimes, it might be their tax status. Someone might be sitting with a favourable trading tax status as a tenant, and there might be little incentive for them to give up that status at that point. It could also be that the housing and lifestyle that are being provided by the farm are better than would be available elsewhere. It is always important to understand what motivates people if we are to design a policy that achieves the aim.

If the Government gets the balance right, however, the measure might achieve its aim. When I talk about balance, I mean that the bill must provide for the outgoing tenant, and the approach needs to be sensible and affordable for the incoming tenant, particularly if we want to encourage younger and new entrants, because the longer the term and the less restrictive the policy is, the less likely it will be that such people will be able to compete with larger established farmers, who will simply outbid them. The landlord probably needs to get something out of it, too.

The obvious advantage to the landlord is that they will have seen a conversion from a tenancy vehicle on whose end they have no certainty to one that has a defined term. Making the period of that term too long is likely to lead to more owners interjecting and buying out at that stage, which will not achieve the objective of opening up tenancy opportunities and will probably increase the risk that somebody will feel that their rights have been contravened. They might therefore feel that they want to challenge the policy.

The principle is probably very helpful, but getting the balance right will be important to whether it works or is almost counterproductive.

Christopher Nicholson: During the review group's work, assignation for value outside family members was a key part of the debate. Members may remember the time last year when the review group produced its interim report, which had a discussion about giving tenants the opportunity to assign their lease to continue as a secure tenancy. The assignation provisions were steadily watered down from the interim report to the final report, and there is now uncertainty about whether the 35-year conversion is possible. We think that, as that has happened, it has left gaps in the bill that assignation was meant to address.

Some people have covered those gaps, but one of the key gaps is waygo. Many tenancies now have tenant investment that goes back almost a century. In some cases, half of the open market value of the holding is down to tenant improvements. There needs to be a fair way of tenants realising their property right in their lease and their improvements. Open assignation was one method of doing that.

With the long-term nature of investment in holdings and the duration of farm improvements, a period of anything less than 35 years is unlikely to allow a tenant with significant improvements fair value for his improvements. The uncertainty about where assignation is going is cause for concern, because as the assignation provisions have been watered down, gaps have been left that need to be addressed from other angles.

Alex Fergusson: We will come to assignation and succession later on.

Christopher Nicholson: Yes. I was referring to non-family assignation.

Alex Fergusson: I am sorry. That is understood.

The Convener: The point is taken on board.

David Johnstone: I think that Scott Walker and Andrew Howard highlighted the problems with tenants trying to come out of farms, and Chris Nicholson touched on the very important issue of waygoing. It seems that the core issue is trying to establish fair waygoing for the tenants who are coming out. That is the problem that assignation is seeking to address. Therefore, you should sort the problem out by dealing with waygoings; you should not expand it into other areas.

Scottish Land & Estates would love to see more detail on conversion. The details are very light, and it is quite difficult to make a detailed judgment call on how things would work in practice, as we do not yet have those details. However, we can see the principle of what conversion is trying to do, which is to encourage the churn in the sector, and we can see merits in what it is trying to achieve.

The term is key—that has been alluded to. If there is a longer term, obviously there is more risk of a challenge. There is less risk with a shorter term, but it is about allowing the right term to strike the balance. We already have the principle that an MLDT should be for a minimum of 10 years. There is perhaps something in there to guide us in the direction that we should be looking to go in.

The matter cannot be looked at in isolation away from succession and assignation. The two go hand in hand.

The Convener: We will deal with that in some detail.

Martin Hall: I support Christopher Nicholson's point. A gap in the current legislation is how to deal with waygo in conversion from an existing full tenancy to an LDT. The same gap is in the proposal, and we need to address that. That is fundamental if the conversion is to happen.

10:30

Dave Thompson: I will touch later on the broad issue of assignations. I was intrigued by something that Andrew Howard said. He said that, for a landowner, one of the advantages of conversion is that, at the moment, there is no certainty of the end of tenancy—I think that that is the phrase that he used. Will he, or anyone else, comment on whether ending tenancies is desirable? Is it an objective to which landlords aspire? If it is desirable in terms of conversion, is it desirable in the broader sense?

Andrew Howard: One of the difficulties of the current secure tenancies is that, as long as the tenant continues to have an eligible successor or assignee, the landlord has no control over when the end of the term will be. One of the fundamental tenets of a lease is usually that it is for a term and we know how many years that term is for but, with an agricultural tenancy, that tenet has been broken and the tenancy just keeps going and going. The landlord is unable to manage their affairs in the way that they would with any other tenancy because they cannot plan to a certain date as they do not know when the end of the tenancy will be.

The fact that nobody offers any secure tenancies any more or has offered them for a long time probably indicates what the marketplace—the people who might offer land for tenancies—thinks of granting such a tenancy. I am not in any way suggesting that we should try to construct something that starts to whittle away at existing secure tenancies against the wishes of the tenants. One of the positives of the conversion route is that the tenant makes that call: they decide to terminate the tenancy and receive a payment of money because somebody is buying the new vehicle that has been created on the back of the conversion.

Dave Thompson: You said that the landlord had lost control. Why is that a problem? If the landlord has a secure tenant, they can plan into the future on that basis. They get a fair rent and that is their income. They know where they stand. Exactly the same argument would apply to the situation under the Crofters Holdings (Scotland) Act 1886. Why do you want to get that control unless you want to change what happens and have your own way totally? Landlords have certainty because they know what the rent will be into the future for evermore.

Andrew Howard: The owner's circumstances might change. At some point, they may wish to farm the land themselves, add it to their existing farming business or restructure the holdings that they have on the rest of the estate because individual units might, in current terms, be too small. The landlord might be responsible for maintaining the fixed equipment on a unit into which it does not make economic sense to continue to plough investment when it might be better conjoined to another unit.

The issue is inflexibility in reacting to changing circumstances because everything has been locked into the current position. The bulk of our farms are secure tenancies. It is a comfortable relationship in a number of cases, but there are other areas where, over time, we might be able to reorganise the nature and structure of the farms to be more effective. At the wide scale, that might be more effective for Scottish agriculture, but we do not have any control over that ability.

David Johnstone: I support everything that Andrew Howard says and will pick up on how it relates to wider confidence. Conversion from a 1991 act tenancy to a fixed-term tenancy would give landowners the confidence that, when they enter into an MLDT for an agreed length of time—whether 10, 15, 20 years or more—it will be honoured.

The conversion may increase people's confidence in using the new vehicles in the future. Going the other way runs the risk of undermining confidence. That is not relevant to existing 1991 act tenancies; they are not changed in any shape or form. In that case it is for a tenant to choose whether to convert.

Dave Thompson: I understand what David Johnstone is saying, but the broader point appears to me to indicate that some landlords—maybe all—would like to roll things right back to how they were prior to 1948 when secure tenancies were created. Would landlords like all tenancies ultimately to be converted to MLDTs and landlords to have full control over everything?

David Johnstone: We are not talking about altering the existing 1991 act tenancies. They are in place, and it is for the tenants to decide whether they wish to convert, have a notice to quit or whatever else.

Dave Thompson: The point that Andrew Howard made about control, and some of the other things that he said, indicates a desire and an objective to go back to the pre-1948 situation.

David Johnstone: No, there is an acceptance that we are in the situation that we are in. We have very good relationships with 1991 act tenancies going into the future. The proposals are about creating the right set of principles and environment to encourage more land to come on to the market, and also to encourage the churn away from fixed-term, never-ending tenancies to those of a more flexible nature that is more fit for the future of Scottish agriculture.

The Convener: Before we continue, I think that we have got to the point in the conversation where the point has been made on both sides. Alex Fergusson, you wanted to finish off.

Alex Fergusson: I just want to round up this section. Did somebody else want to come in before that?

The Convener: No, you round it up.

Alex Fergusson: There is clearly more discussion to be had about this part of the bill. We hear the call that most parties would like to see more detail at this stage of the legislation.

Flexibility will help to restore the confidence that everybody agrees has been lost to a large degree. If a reasonable degree of security is given to a tenant who chooses to convert and assign that conversion, that might encourage flexibility. Perhaps he could clarify it, but I think that David Johnstone hinted that if a 10-year period is deemed to be suitable for a modern limited duration tenancy, there is a logic to saying that a minimum period should also be suitable for a conversion?

David Johnstone: There is a consistency in what the legislation proposes. We have done a bit of background work on how to value a hypothetical tenancy for conversion and found that there is an increase in the value to an incoming tenant in moving from 10 years to 15 years, but going out further than that there is not necessarily an increase that an incoming tenant would be prepared to pay to an outgoing tenant. It is done on a discounted cash-flow basis. The risk is that the longer the period, the more it starts to infringe the property rights of the landlord and to strike an unfair balance. The key is to try to find the middle ground that is suitable and fair for both parties.

Niall Milner: Returning to the issue of why a fixed term might be desirable, it provides a natural point for review between the two parties. I have examples in which SLDTs have become 15-year LDTs. That has been a 20-year term in total, because everyone has been happy with how they are getting on.

Fixed terms allow people to sit together and decide on the next step for the business. It might, for example, be to add more land for the next 10-year or 15-year round or whatever is agreed. The fixed term also effectively increases the capital value of the land for someone wanting to secure borrowing against it, which is important if people are looking to bring money into the sector for investment.

The Convener: That is helpful.

Christopher Nicholson: There is a balance here. One of the key considerations is that you have to make it attractive for the tenant to go down this route. Bearing in mind that modern farm buildings have a life expectancy of 70 years or more, that tenants build houses or cottages with a design life of more than 70 years and that some of the improvements to land are permanent, it is highly unlikely that a tenant will receive fair value for such improvements if they are subject to a lease that is only 35 years in duration. You only have to go across the border to England to compare the value of a house that is subject to a 35-year lease to one that is subject to a 70-year lease.

I cannot see fixed-term tenancies being used by tenants if the lease is less than 35 years, especially for tenants who have made significant improvements. Nobody will be prepared to offer a tenant fair value for their improvements if they are subject to a lease that is less than half the life expectancy of those improvements.

David Johnstone: This is where things are starting to get a bit blurred. We are talking about waygoings for improvements, but my understanding of converting the lease is that what the tenant is buying is the ability to carry on a business on that ground, therefore the way in which it will be valued will be based on the profitability of the business that is being carried out on that land—how much profit can be made from the holding—rather than on how many houses there are. There is a blurring of the lines going on between those two different things.

Christopher Nicholson: I do not think so. The Agricultural Holdings (Scotland) Act 1883 brought in compensation for improvements for tenants because it was recognised that tenants require more than the resulting profitability for their improvements—they need fair compensation for the capital value of the improvements, too. A tenant cannot justify building a grain store purely on profitability alone; the tenant needs to know that he will receive fair compensation at the end of his lease and he does not know when he will have to give up that lease—he may have security of tenure but there may be other circumstances that force the lease to come to an end in 10 years' time or less. Capital compensation for the capital value of improvements is vital for tenants' ability to invest.

The Convener: We hear what you are saying and we take it on board. We will want to come to a view ourselves and we have heard quite a lot from both sides. I will allow Andrew Howard to finish up the topic.

Andrew Howard: Sorry, I thought that you had closed the discussion on that.

The Convener: I had not closed the topic, but I had ended the discussion between Chris Nicholson and David Johnstone.

Andrew Howard: The conversion would have to work by taking on the terms, responsibilities and benefits of the tenancy that was being converted. For example, the improvements that had been made by the tenant who was converting to the MLDT should carry on into the new tenancy so that the landlord of the MLDT would continue to have a compensation liability to the incoming tenant, who would be able to value that when making an assessment of what bid they would be prepared to put to the outgoing tenant.

That is the only straightforward legal way that it could be done; it is open and transparent and everyone can make a reasoned financial judgment. The compensation would not disappear, but that benefit would carry on to the new tenant, who would have to factor that into their bid.

Christopher Nicholson: But in that situation we are still reliant on waygo. Currently, the bill does not address the changes to waygo that we consider to be necessary.

The Convener: We will come on to tenants' improvements, so let us encapsulate all that when we reach those arguments. I thank Alex Fergusson for not winding it up, but winding it on.

Sarah Boyack (Lothian) (Lab): I want to move on to the removal of the requirement to register for the pre-emptive right to buy. I just want to test out the panel's views on that. The Law Society submission suggests that there may be uncertainties about the tenancies and that there might be an impact on land sales, depending on how it works. I want to explore the kinds of tenancy that a tenant might have and what impact the removal of the pre-emptive right to buy will have. I am keen to hear from all the different experience in the panel.

I will ask my question in three parts, convener, so that we can get through all the issues.

The Convener: Would the Law Society like to respond at this point?

10:45

Mike Gascoigne (Law Society of Scotland): The current arrangement has a flexibility, largely supervised by the keeper of the registers, to establish that what is on the register is the whole farm, nothing but the farm and nothing left out. That has worked quite well. The Law Society is very cognisant of the difficulties that some tenant farmers have in reaching for the pen and applying to have a right to buy in their name. However, we do not feel that simply knocking off the two issues that appeared in the 2003 act will do the job. That leaves a huge amount of guddle, which could ultimately be resolved only through the Land Court.

David Johnstone: We can see what the provision is trying to accomplish, but we think that it will raise a few problems. On the practical side, when registrations come through there are sometimes questions about the type of lease and whether it can be registered, and about the area that is covered by the lease. There can also be disputes about what was originally in the lease. The very act of registration helps to clarify the existing arrangement between the landlord and the tenant, so the process is a good thing.

We are quite happy to do away with the need to reregister after five years, so once something is registered, it is always registered. However, the process is of great importance.

In relation to the review group recommendation on the inclusion of safeguards to clarify what constitutes discussions with developers and outside third parties and where the right to buy gets triggered—or not—the situation is very unclear. At the moment, the daft situation can arise whereby someone can ask about the possible development of land—for example, the community can ask about taking on land on a tenanted farm—but the landlord cannot afford to risk that discussion in case the right to buy is triggered. That needs to be clarified.

If the provision is brought in automatically, without any registration, and people already have options in place across the country with developers, where will the conflict between those interests be resolved? I do not know how that will be done.

Sarah Boyack: My second question is on that point about the retrospective impact of the legislation. I would like to hear more from the Law Society on that issue.

Mike Gascoigne: What I said earlier basically answers your question. The proposal does not help in situations in which legally agreed options that are competently set out are already in place. The 2003 act includes a provision for such options to hold sway if there is a right-to-buy issue.

Sarah Boyack: From a landowning perspective, is the concern about the potential of a community group getting access to right to buy or is it about a tenant getting access to right to buy?

David Johnstone: The concern is about what takes precedence. At the moment, someone can have options that are in place with a developer, but if the bill is introduced as proposed, there will be something that will supersede that. Which one will take precedence? There is also a question about what triggers the right to buy. If it is an automatic right to buy and the community comes in and asks for a conversation about taking on a particular field, will it be possible to have a conversation with the community without triggering

the right to buy, so that the tenant takes precedence? It is unclear.

Sarah Boyack: You made the point about registration of the land being good because it clarifies things. Why would that not be clear enough in terms of the lease or the tenancy that the tenant had entered into?

David Johnstone: We have seen examples around the country in which the document that is registered in the land registry is different from what is on the lease. At that point, we are able to sit down and work out the correct area that should be in the land registry. Also, people sometimes have different ideas as to whether it is an SLDT, an MLDT or a 1991 act lease, and registration enables that to be clarified as well.

Sarah Boyack: So you see it as clarifying both the land and the tenancy.

David Johnstone: Yes. It means that there is no dispute later on.

Sarah Boyack: From the perspective of the tenant and the farming interest, you support the removal of the requirement. I want to test out the other side, or the other perspective on the subject.

Christopher Nicholson: The recommendation to remove the requirement for tenants to register the pre-emptive right to buy was made by both the land reform review group and the agricultural holdings legislation review group. I would have thought that, on any reasonably well-managed estate, it will be pretty clear who has which type of lease and what area the lease extends to. The type of lease and the area are already defined, so we do not see why the requirement to register is necessary for an agricultural lease—a secure tenancy.

As far as I know, only just over 1,000 tenants have registered their pre-emptive right. That is a very small proportion of the total number of secured tenancies in Scotland. It is clear that the requirement to register is deterring tenants. We know tenants on many estates who have been told that, if they register, the estate will not look at that in a favourable light, even to the extent that the tenants will not have non-secure leases renewed.

Sarah Boyack: It is rocking the boat.

Christopher Nicholson: Yes.

Sarah Boyack: Does the NFUS have a view?

The Convener: I will bring in Niall Milner first, as he has been waiting. We will then get the NFUS's view.

Niall Milner: The other issue is that, although the bill mentions existing 1991 act tenancies, there are a number of what I call grey tenancies out there, where the landowner is perhaps not an estate with a good terrier and records going back decades. An owner-occupier farmer might, for ill health or other reasons, let ground seasonally to a neighbour, and because they know each other and are good friends, they might have no paperwork between them. The agreement might continue amicably until such time as there is a commercial advantage for the tenant to change their occupation arrangement. If rent has been paid for years on end and there is no proof of gap periods, the occupier can argue that they have a 1991 act tenancy.

The Convener: With respect, I suspect that those are minority situations. They will inevitably crop up, but we are talking about dealing with the mainstream situation. We would expect that people have acted professionally and made correct rent agreements that are registered in such a fashion that people can understand them. There is special pleading on a number of things, but we need to pin them down to see whether they materially alter the reasonable suggestion that tenants do not need to register a right to buy.

Niall Milner: Indeed, but there is a risk in those scenarios. Those people are in limbo. At present, they might not publicly tell their landlord—whoever that might be—that they have a 1991 act tenancy by virtue of which they have an automatic registration under the right to buy. In that situation, is the landowner potentially prejudiced in the decisions that they make about the land because they will make them on the assumption that they have a grazing tenant when, actually, the tenant will use legislation to change that scenario at a later date?

The Convener: How many of those cases do you think that there are?

Niall Milner: There are more than you would think. Professionally, I have probably dealt with three or four cases of that nature in the past three years or so.

The Convener: So it is penny numbers. We had better hear the NFUS respond to Sarah Boyack's question, but thank you for that elucidation.

Scott Walker: The general principle is simple. When the land is going to be sold, the tenant should have first refusal. That is what we want to get to, and we want to remove obstacles that might prevent that from happening. At present, one obstacle that may stop that happening is the need to register. I would have thought that every tenant would have registered, but that is not the case, for a number of reasons. In our view, removing the requirement to register would be a step forward. We think that that would help with the general feeling that exists in the industry.

However, I recognise that there are problems. Many tenancies go back over a huge period of

time. One would have thought that it would be very clear what pieces of land were involved, but that is not always the case. That should not be insurmountable—it should be possible for such issues to be dealt with. As we try to modernise the relationship that exists, clarity on the leases that are available, their application and what land is covered by a lease would generally be useful.

To pick up on what Niall Milner, David Johnstone and Andrew Howard have said—if I misinterpret what they said, they might wish to come back—an issue that can often arise is that the tenant will have multiple leases of different types that cover their farming enterprise, so confusion could reign over what was covered by the right to buy. Again, I do not see that as an insurmountable problem. It is partly a question of education. Perhaps the new commissioner could have a role in providing clarity and guidance to people on how all the new arrangements would operate in the future.

The Convener: Those were wise words. I do not think that anyone needs to come back on that. Sarah Boyack is trying to address the issue of the requirement for tenants to register for the pre-emptive right to buy.

Andrew Howard: I would like to make a suggestion that might help to quantify the number of problem leases. I do not know all the various categories off by heart, but I understand that the agricultural census collects information about tenancies and that a certain percentage of tenants report that they do not know what type of tenancy they have. Therefore, the Government might already hold information that gives a clue to the number of grey areas that exist.

The Convener: I do not see that information on the table in front of me, but I suppose that we can ask the Government about that.

Martin Hall: Most of what I was going to say has been covered but, at a practical level—that is the level at which I am involved—the act of registration is very helpful. It provides absolute transparency on what the position is. The issue of hierarchy, which David Johnstone raised, is valid, particularly in relation to the community right to buy and possible developer options, and which has precedence and priority.

Sarah Boyack: The Law Society indicated that the removal of the requirement to register would create a raft of problems, one of which was that land sales could be affected in circumstances in which an option was agreed before the bill came into force—that is the issue of retrospection.

The Law Society also made the interesting point that, if land was being sold for development, the tenant might be able to step in and buy the land at agricultural value. However, in relation to another part of the bill, people say that they are worried that land will be taken out of agricultural use because of the right to buy. There are two balances to weigh up in two different parts of the bill. It is important that we get the right solution.

Having heard what both sides have said, that is less of a question and more of a comment. We will have to reflect on that.

David Johnstone: I support the idea that we need to get the balance absolutely spot on, because we do not want to reach a position in which we start to stifle development in the countryside because nobody quite knows where their legal footing is. I think that recommendation 18 in the agricultural holdings review group's report was about clarifying the trigger points. That has not been brought forward into the bill. That is something that is missing.

The Convener: As people have no further points to make at the moment, we will have a comfort break, after which we will proceed with the next set of questions.

10:59

Meeting suspended.

11:05

On resuming—

The Convener: We move on to chapter 3 of part 10, "Sale where landlord in breach".

Graeme Dey (Angus South) (SNP): In its submission, Scottish Land & Estates expressed the view that forced sale and a landlord's right to obtain a certificate of bad husbandry that results in the removal of the tenant are not reciprocal. It said:

> "Being forced to give up a tenancy does not equate to being forced to give up ownership. The tenant loses a right of occupation; the landowner would lose a right of ownership."

I would welcome the witnesses' views on that and I would be interested to hear how the certificate of bad husbandry system is working in practice.

Christopher Nicholson: The provisions in chapter 3, "Sale where landlord in breach", are a countermeasure to the landlord's ability to issue a certificate of bad husbandry and dispossess a tenant. I have a couple of points to make. First, although sale where a landlord is in breach might result in a landlord losing part of his holding, a tenant who is dispossessed through a certificate of bad husbandry loses his interest in his lease, his livelihood and his home, so the consequences are far more draconian than the consequences of a landlord losing, say, part of one holding on an estate.

Secondly, the measures in the bill on sale where the landlord is in breach ensure that the landlord is fully compensated for his losses, in stark contrast to the tenant who is dispossessed through a certificate of bad husbandry, who leaves without compensation for his interest in his lease, although he is eligible for compensation for his improvements. There seems to be strong recognition of the landlord's property rights but little recognition of the tenant's property rights, in relation to his interest in his lease. In reality, we do not expect tenants to go through the whole process in chapter 3.

Some stakeholders have asked for a strengthening of the certificate of bad husbandry system and for measures to ensure that tenants farm properly, maintain their farm and carry out repairs. As far as we are concerned, all those tools are already there. It is common for tenants to be given notices to carry out repairs or do maintenance and, if such notices accumulate without being acted on, the landlord is entitled to go to the Scottish Land Court for a certificate of bad husbandry, which results in the tenant losing his interest in his lease.

Andrew Howard: I agree with Chris Nicholson that both sets of provisions—those on bad husbandry and those on sale where the landlord is in breach—are draconian. They are supposed to be draconian; they are a last resort.

I have no difficulty in principle with the proposal. If a landlord has got himself into such a position, the procedure will have been quite long and robust, so it is his look-out, really. What is important is that the processes and rules for breach by a tenant and breach by a landlord are appropriate and up to date.

I looked at the bad husbandry provisions a few years ago, and my only observation is that they have not been updated or reviewed for a long time. They appear to relate to the technical aspects of farming; that might have felt more appropriate a few decades ago. I am not suggesting for one minute that they should be strengthened, but perhaps they ought to be reviewed to make sure that they remain relevant. They are certainly not used very often.

David Johnstone: It is a draconian step to remove land from someone, but the process in the bill is robust. It offers enough protections to give the landowner confidence and to give them the chance to remedy any breach, because we are not at all here to condone poor land ownership. It also recognises that, ultimately, the person who will benefit from the process will be the tenant—all the safeguards are there to take fair recognition of that.

I have looked at the bad husbandry system personally, as well as for my organisation. Generally, people say that they do not use the system because it is not fit for purpose. Therefore, it is not a matter of strengthening it; they feel that doing so would not get anywhere. I think that there have been five bad husbandry cases in the past 50 years, which suggests that the system does not operate in the way that it was intended to, because I do not believe that that is the number of cases to which it would apply. There are technical issues—there is no record of condition for comparison and so on. Looking at that at the same time would send out a clear, balanced and fair message.

Graeme Dey: Let us look at this from a slightly different direction. We are all in the business of ensuring that land is utilised in all our best interests. If the provisions were changed to be fit for purpose, would the panel accept that, because we are trying to protect tenancies, we should build in a safeguard to ensure that if the landowner were able to reclaim the land it should be with a view not to bringing it back in hand but to passing it on to a new entrant or splitting it between other tenancies? We often hear that a lot of unviable units are out there. If the land were shared with other tenancies, perhaps on an estate, that would safeguard the future of those tenancies, secure employment and so on.

David Johnstone: Off the top of my head, I think that that would have a lot of merit. I can see the logic of ensuring that land stays in the tenanted sector and moves on to a new entrant or different farms. There would be practical issues to resolve. If a person got land following the issue of a certificate of bad husbandry, that would probably mean that the farm was in pretty poor order and required a large amount of capital investment to get it back up to good order. The question is how we do that, not whether we should do it. The measure has a good deal of merit in it.

Scott Walker: We have not discussed such an idea with our members at any of our meetings so, in responding, I will make an assumption about what they might think. I think that they would see it is a good and credible concept that should be explored and which they would generally support in principle.

We have discussed sale where the landlord is in breach with our members. The general view is that people do not believe that the sale power would be used; rather, they believe that it is a hugely important tool to strengthen the armoury when something is not going right, because people know that that is the ultimate sanction. That would encourage landlords to put things into practice. It is an important lever to have, albeit that we would

not judge its success on whether it delivers any enforced sales.

Christopher Nicholson: To return to Graeme Dey's point about what happens to land when a tenant is removed through a certificate of bad husbandry, I would have thought that it is clearly in the public interest to ensure that such land is re-let. It would have to be re-let on the same terms, because it would be rather meaningless to re-let it on a five-year SLDT and then, at the end of those five years, take it out of the tenanted sector. The certificates are more likely to be used in situations in which there is security of tenure, and we feel that there is a strong public interest argument to continue that security of tenure.

11:15

Graeme Dey: I will move on to some of the evidence that the committee has taken. The STFA has claimed that proposed new section 38N of the Agricultural Holdings (Scotland) Act 2003 would significantly impact on the tenant's ability to borrow in order to facilitate the purchase of the holding, because of concerns about the size of the possible clawback. The STFA stated that the clawback should be limited to the landlord's original interest in the lease and should not include improvements that the tenant made under the tenancy. Are those concerns valid?

David Johnstone: It is correct that there should be a clawback within a reasonable period when there has been a massive uplift in value as a result of a forced sale. However, as Chris Nicholson said, there should not be any clawback in relation to the tenant's improvements within the lease. That seems to be fair and reasonable.

Andrew Howard: Clawback has been used previously when farms have been sold from estates to tenants; I assume that those tenants used bank finance to support the purchases. I imagine that, as long as the clawback provisions are clear, the banks will have to live with them and take them into account in pulling together a finance package.

An interesting question that arises from the provisions is about who acquires the farm if the tenant does not acquire it. The market for the acquisition of farms with a tenant in place in Scotland—certainly as stand-alone units—has virtually evaporated. That calls into question whether one could sell a unit at all in certain circumstances, particularly if there was a history of litigation with the tenant or problems with fixed equipment or something else on the holding.

Graeme Dey: That raises the question of what happens if there is no buyer.

Andrew Howard: Maybe the Scottish Government would like to buy the land.

The Convener: Or the local council.

Andrew Howard: Or the local authority—yes.

David Johnstone: Or the Crown Estate.

Andrew Howard: That idea was mooted when the proposal was first kicked around. The idea was that rather than the tenant being the purchaser—that would perhaps produce a small incentive to create a problem, because the tenant would get to acquire the farm, although that would be highly unlikely, because the provisions are robust—the new owner would be an arm of Government or local government, which would assume the role of landlord, although it might not wish to do so.

Scott Walker: Again, I will give a personal view rather than a view that has been tested with our membership as a whole. We discussed the possibility of the local authority being the purchaser. There are mixed views on that among our members in different areas of the country. The Crown Estate has traditionally been felt to be a better landlord, as a body that has invested in farms. It might generally be seen as a more favourable owner should such a provision be used.

Christopher Nicholson: We are talking about a hypothetical situation—I doubt that many cases will get to such a stage. If a tenant did not wish to purchase their holding in that situation, it would make sense for the Government to take the opportunity to purchase it and create opportunities for new entrants.

In the past, there has been a clear public interest argument for small landholdings, such as the smallholdings that were created after the war. Across the border, councils in England own 3,000 starter units. Scotland is missing something similar.

The Convener: Indeed.

Christian Allard (North East Scotland) (SNP): I am quite interested in what happens to land when there is no buyer. The Scottish Government as a buyer is one idea that has been put forward. Another solution is that part of the Crown, such as the Crown Estate, would take over the land. However, the legislation is about the public good and the public interest, so the concept of common good land could maybe come into the equation.

The Convener: The suggestion that the land should become common good land has been put on the table. I see that people do not wish to comment on that at the moment, but I thank Christian Allard for raising the point.

We will move on to rent reviews and the change to the basis for setting rents for 1991 tenancies.

First, what is your understanding of what the change means, if we look broadly at productive capacity? Will rents go up or down? What would that mean for investment in the holding?

Andrew Howard: We do not know at present. Rents could go up and down, quite violently, over a period.

I understand that one of the policy objectives behind changing the way in which rents are reviewed to include productive capacity is to increase the transparency and clarity of the process and to reduce conflict. I have two concerns. First, we do not have the detail in the bill on how the new system will work, largely because that is still being worked up in the background between the various representative bodies. Given that the change represents a major transformation, it would have been extremely helpful to see that detail in the bill.

Secondly, I am pretty clear that the change will not achieve the objective of reducing conflict over rents. Certain aspects, such as agreeing on the farm's productive capacity, the nature of the farm and the fixed equipment, are not particularly problematic. In many respects, those elements align in practice with our current process, because there must be agreement on which farm the rent is being agreed for.

However, everyone then has to agree what the farming system would be on the farm, because we will be looking at the hypothetical farming of the farm for a hypothetical tenant. That farming system could be substantially different from the one that the tenant is employing, which could create issues or raise eyebrows.

The next step is to work out the output from the farm, which could be a source of discussion and disagreement. One might be looking at a hypothetical output for the area that has been derived from wider figures and substantially exceeds the output on which the tenant has agreed.

One then has to agree on the pricing. The original intention was that the pricing could be based on actual figures that have been published, but the difficulty in the modern world is that prices are volatile. If figures were produced on the basis of prices from three years ago, that would result in rent determinations that were most unwelcome because they were inappropriate for the circumstances.

Up-to-date data would need to be used. For certain products, that would be easy to get hold of, whereas for others, that would be a bit more complicated. One would also have to consider what weight to give to projections of where prices are expected to go, as one would be about to set a rent for the next three years. If it was known that prices were about to fall off a cliff, all parties—and certainly one party—would want to take that into account. That needs to be clear.

The financial output from that hypothetical model could be substantially in excess of the financial output that the farmer is obtaining. The farmer is probably feeling quite concerned about output already.

There is then the thorny business of defining the profit. I understand why the Government has given no guidance on that, but the parties then have to decide how they will divvy up the profit. Of course, that hypothetical profit might be substantially in excess of the profit that the tenant actually generates.

The idea that the proposal will lead to less conflict between the parties is false. I can see it leading only to greater complexity and a situation in which, instead of having only one area over which people might disagree—the interpretation of comparable evidence—there is a series of points in the calculation over which the parties can take issue with each other, should they wish to. Some of those points concern quite fundamental and personal things, such as how the profit on the farm is to be divided up. I foresee trouble ahead, which concerns me a lot.

The Convener: There is trouble behind us, as well. Trouble is everywhere.

Scott Walker: Among our tenant members, there remains widespread support for the idea: any time we speak to members, they tell us that they like what is being proposed. To pick up on the two points that Andrew Howard touched on, they see the proposals as providing greater transparency and reducing conflict. That is how they will judge the success of the proposals.

However, I would have hoped that we would, by this time, have been much further on with the background work that is going on; a lot of detailed background work is going on and people are spending a lot of time on it. I had hoped that we would have fleshed out the proposals so that we could have detailed and informed discussions with farmers across the country about the process that they are going to have to go through, and about how the proposals will apply in their scenario, which would enable us to get better feedback. It is important that that work be done as quickly as possible and then road tested with people. If we do not achieve greater transparency and a reduction in conflicts, we will have failed.

Just now, we cannot say how things will turn out. However, I can say that everyone who is participating in the work is doing so in the right manner and is trying to get a productive outcome. However, it is a detailed and complex area.

Christopher Nicholson: The key part of the measure, for tenants, is the move away from the open-market test. In the past three years, the Land Court and other stakeholders have recognised that the open-market test can result in rent levels that are more than is viable. It is wholly unfair for long-term tenants to be in a situation in which their rent is based on what someone else in the marketplace is prepared to pay for a short-term lease.

We welcome the move away from the open market. We believe that going down the road of assessing productive capacity should ensure that rents for secure tenants and other long-term tenancies that use that test will be set at a viable level. We believe that that will be much more transparent, because most farmers are pretty familiar with budgets and many organisations publish standard budgets for the following year at this time of year. That means that the evidence that is required is in place. We also think that that system will deliver much greater transparency than the current attempts by the industry to come up with mechanisms that deal with scarcity and marriage value. The industry has struggled to do that so the review group has sensibly recommended that we move away from a test that involves such grey areas.

As Scott Walker said, there is concern that the modelling is not taking place early enough in the process. However, I believe that we will get there. There is nothing new about the concept of rent being based on the hypothetical tenant using the fixed equipment that is provided by the landlord, and we think that that key principle, which has been the principle of rents ever since rent provisions came in, should be stated in the bill, because it is currently conveniently forgotten in many rent reviews.

The Convener: You are saying that you want to see the modelling early, if at all possible.

11:30

Christopher Nicholson: That is to ensure that it takes place and is road tested.

The Convener: I guess you are talking about phasing in, once we have seen what is happening with the provisions in the bill.

Christopher Nicholson: In principle, we are heading in the right direction, we believe.

David Johnstone: The key is to try and get a fair rent for both the tenant and the landlord. That is the aim, as is minimising potential conflict in arriving at fair rents under the new process. We feel strongly that that should be clearly stated in the eventual legislation: it will be fundamental to relationships in the future. The fact that we do not have much to look at at the moment is deeply concerning. As Scott Walker suggested, we are working very hard with civil servants behind the scenes to road test the modelling, but we have great concerns that it will not result in the simplification that people are expecting, and that it could create more conflict unless it is brought in and road tested absolutely to the n^{th} degree.

There are also concerns to do with housing and how housing rents are going to be calculated, as was mentioned at the agricultural holdings review group. It appears that the housing element has been removed so that, in theory, two 200-acre farms, one with a house and one without a house, could attract exactly the same rent, despite there being obligations on one landlord to maintain a house. That begs questions about fairness.

As was alluded to in the NFUS evidence, people do not have to reside on the holding any more, in theory; the tenant could let the house which would, in many instances, generate an income greater than the rent for the farm in its own right. That, too, strikes at the heart of fairness and balance. There is a huge amount of work to be done on that to get us to a situation where we can comment further and be comfortable.

The Convener: If not this, then what?

David Johnstone: If not this?

The Convener: I mean if not the system that has been proposed.

David Johnstone: The review group from the tenant farming forum—TFF—considered the old way of doing the rents and said that the system is not perfect and that greater clarity is required around marriage value and scarcity, to which Chris Nicholson alluded, in order to take away the greyness from the system. In a way, the greyness is coming back in with the divisible surpluses, which will be split we know not how.

I would like the productive capacity element to be brought into section 13, so that it is given weight as part of the evidential process in a rent review; that would become a sense check. At the moment, it is not included, as far as I am aware, so we cannot use it as a measure. Section 13 would be a simple way of bringing it in for all parties to work towards.

The Convener: That still does not rule out problems with disputes about the previous parts of the formula to which you refer.

David Johnstone: Many disputes have related very much to clarification of the process of what the previous legislation was meant to do. People end up going back through the Land Court, which clarifies the matter and provides case evidence for the future. When we start doing the process again, we will take it back to the year dot, so we will probably end up back in the Land Court seeking to

clarify exactly what is meant and how we interpret it. There is a risk of greater conflict.

The Convener: I am interested to know whether that productive capacity approach will allow rents to become more transparent.

David Johnstone: I do not know—I do not have the details that I need to enable me to comment on that. That applies to half the problems that we have.

The Convener: We have accepted that there is a modelling process and you are all involved in it. The bill will have to take that on-going issue into account right through to stage 3. This process is an attempt to make progress. The approach is slightly different to what we have had previously; we definitely need an approach that makes progress.

David Johnstone: Yes. On a practical level, issues for rent will be sent out ahead of 20 November this year for 20 November next year. We do not know exactly what the methodology will be. That uncertainty is not helping.

The Convener: I am sure that civil servants are listening to this.

Andrew Howard: I accept Chris Nicholson's point that, in theory, under the current system—I think that it would apply under the new system, as well—we could end up with a rent that is beyond the viable level, but there is no practical evidence that that is what is happening. When the agricultural holdings review group toured the country, it came out in the discussions that there is no evidence that rents are unreasonable. The concerns tended to point to lack of clarity about how certain adjustments were made, and there were concerns that some agents were not adjusting enough in comparing evidence from LDTs to 1991 act tendencies.

If we look at graphs of the rent pattern under the existing system, we see that rents are stable. Increases have tended to be steady and have not reacted to the volatility in the commodities market or to changes in other influencing factors such as the common agricultural policy. Therefore, they provide a pretty steady basis on which both partners in the business can make their decisions.

The system that we are moving to might well be transparent in that everybody can see, and argue about, how the rent has been calculated. However—SAAVA can perhaps comment if I have misunderstood what was said at one of the review sessions—some calculations have been done of potential rents that could have been paid under that system between 2006 and 2012, based on one of the farms in a recent rent review case, and the figures varied from £8,000 to £80,000 or thereabouts. Martin Hall is nodding, which is encouraging. That is not a solid basis on which to create a rent review system that will lead to happy relationships and a solid and stable basis for businesses to carry on.

Christopher Nicholson: If we look at the average rent levels in Scotland over 10 years, we find that there is stability, but when we start to look at settled rents or at rents that have been agreed since the Moonzie decision, we add a huge element of uncertainty and see rents that are clearly not viable. In the arable sector around here, we have rents approaching £100 an acre, but the basic arithmetic of land that grows spring barley with average yields and average prices means that, in the long term, a farmer cannot pay a rent of £100 an acre.

The Convener: So that is where the nub of the argument is about phasing in the new approach that the bill suggests. We talk about rents for the following year in November, but we could well suggest spending more time before the rents in the new system are brought in. We hear what you say about the difficulties of moving from one system to the other.

Sarah Boyack: I have a point of clarification. It is right that we expect that there will be more clarity on the matter by the end of October, is it not? That is one issue. The new system has not been agreed yet. We have the general idea that is being floated and we can come back to it once we can see what it will actually look like. That will be at least a month before the stage 1 debate on the bill.

The Convener: Indeed. Those points have been made. We will now move on to assignation and succession.

Dave Thompson: The proposals in the bill will widen considerably the classes of family members to whom tendencies can be assigned. The policy memorandum states that the measure

"is to encourage tenants to retire or move on … with dignity and confidence".

It would also help to maintain the number of tenancies. What do the witnesses feel about widening the classes, as is proposed in the bill?

Christopher Nicholson: Over the past 60 years, the ability of a tenant to pass on the interest in his lease through family succession, assignation or bequest has been steadily narrowed down. Prior to 1958, a tenant could bequeath his lease to any person, then it became the case that they could bequeath it to any family member, then it was narrowed down to near relatives. The measure is partly to set the balance back where it was before.

There are other reasons for looking at the matter. There are differences in family structures,

and it is now common for the successor of a farmer—his son or daughter—to pursue employment elsewhere, and there might be a nephew or a niece who is interested in taking over the lease. Families have changed and the job market is more fluid.

Combined with tenants' ever-increasing interest through their investment in their holdings and improvements, it seems to be only fair and sensible—and in the public interest—that the very narrow definition of "near relative" be widened to include nephews and nieces.

In a number of cases, we find cousins farming in partnership because they are descended from a grandfather who held the tenancy. Our suggestion is that where you find cousins in a farming business and that connection exists, one cousin should be able to leave his lease to the other cousin. Cousins are not included in the current measure in the bill.

Scott Walker: As NFUS has gone around the country speaking to members, we have heard hugely polarised views about assignation and succession. I will deal, to begin with, with the many relatively simple situations in which somebody who has been actively involved in a farm business finds, because of how the law is written, that they are not entitled to have the tenancy passed on to them, and so an arrangement comes into play between that potential future tenant and the existing landlord such that the situation is sorted out.

However, in recent years one or two situations have been highlighted in which that has not happened and there have, as a consequence, been disputes. We have been clear in such situations that we want to find a way of accommodating those individuals. We would like to resolve situations in which a person who has clearly been involved in a farm tenancy—perhaps, as Christopher Nicholson said, they have, in essence, been a partner in the business—finds that they cannot continue the business in the current form.

As the definition gets wider and wider in relation to assignation and succession, there is then a balance to be struck in respect of what you are actually trying to sort out. What are you trying to achieve? What are the objectives of the bill? For us, the vast majority of individuals have somebody who will succeed to the tenancy and so will be covered by the bill. We are then looking at a small number of individuals who do not have somebody to succeed to the tenancy, which brings us back to our earlier conversation about secure tenancies and conversion to fixed-term tenancies. There is a tool available that we have to bear in mind. There is a whole set of circumstances that we have to think about.

Another matter that we would raise—which has been removed—is to do with the viable unit test. Again, depending on how wide you wish to take assignation and succession, there may be a role for the viable unit test to be brought into play so that individuals cannot simply stack up tenancies. We need to consider that if what we are trying to achieve is the perpetuation of tenancies and making them as widespread as possible.

There are a number of factors at play that I will perhaps let others speak about and then come back in, if I may.

11:45

David Johnstone: Like Scott Walker, I think assignation and succession is probably one of the biggest issues that have concerned the membership of my organisation. The proposals for widening of assignation and succession as they stand are so broad that perpetuation of tenancies for evermore will be created, in effect. It would be highly unlikely that a person would ever be unable to find somebody to whom to assign the tenancy, or to succeed to it, under that breadth. As Chris Nicholson said, we are talking about going far wider than nephews or nieces; we are talking about going out as far as step-grandchildren. That provides fundamental concerns for us and our membership, and it strikes at the very heart of confidence in letting in the sector, because that is a major retrospective change to the existing agreement between tenants and landlords.

I totally take on board what Scott Walker said about the hardship cases and where people have genuinely been working on farms for a period of time, deriving a livelihood, and to all intents and purposes the arrangement and the on-going daily contact between the estate and the farm is with that person. That seems to me to be a sensible way of trying to get them into that tenancy.

We should try to understand the public benefit of perpetuating tenancies. The public benefit is in ensuring that farms are farmed well. If succession is widened, nothing will happen until a person dies—the person will be in the farm right up until that point. As I see assignation as it stands, a relatively small farm with a big farmhouse could be assigned to somebody who does not particularly wish to farm the farm well. They might have a few horses and a nice way to live, but that does not necessarily mean that the productive capability of that farm will be used in the public interest.

The issue goes hand in hand with sorting out the waygoing provisions to ensure that they are fair for tenants and with conversion, which we see as a much better way of ensuring churn and flexibility in the sector to allow farms to be farmed well.

Andrew Howard: Like David Johnstone, I am extremely concerned. It appears that the provision tries to force land to stay in the tenanted sector, rather than trying to create a positive framework that encourages anybody who has land, but who does not want to farm it at that particular point, to include it in the tenanted sector. That is not a very helpful way to try to guide people's decision making.

I think that the approach will be counterproductive because for the roughly 20 per cent of tenancies in which there does not appear to be an identifiable successor—that is the Scottish Government's rough figure—those landlords will feel that they have been deprived immediately of an opportunity to restructure their affairs and to consider what they will do with that farm, having had legitimate expectations that a tenancy would end.

That will increase the chance that the policy will be challenged at some point, because such landlords' property rights will have been infringed, but there seems in the bill to be no provision for recognising that their rights have been infringed, which will increase the chance of landlord intervention. Landlords will take the view that, if the lease is being assigned to somebody, they will try to do a deal with the tenant so that they can buy it out, and it will probably be lost to the tenanted sector. It is unlikely that, having had to go through that process, a landlord would let that land again.

Unless the approach is seriously constrained in some way, it will not help new entrants and aspiring farmers at all—tenancies will go straight to larger established farms, which will pay the substantial price that people would pay to get hold of a secure tenancy. When a conversion is being valued, it is really the cash flow of future profits that is being valued, because that is what the tenant will get. Those tenancies would go for substantially more because the acquirer would also think that they have other rights, such as a pre-emptive right to buy; the landlord would be likely to have more stringent liabilities in respect of the fixed equipment on the farm; rent may well be a little bit less; and acquirers may think that they will be granted rights granted to secure tenants in the future. I therefore think that those tenancies would trade for substantial sums.

If the objective is to provide people with an outlet to retire, that is exactly what conversion provides. I am not sure why the policy is necessary, particularly if more surgical changes could be made to deal with the small number of cases in which hardship to the aspiring tenant would be evident—whether they be a nephew or cousin or something like that—because they had been involved in the business for a substantial time.

The Convener: Graeme Dey has a supplementary question on that. We will then come back to Dave Thompson.

Graeme Dey: I am looking for clarity. We use the phrase "viable unit" all the time, but what do we actually mean by it? The formal definition of a viable unit is:

"an agricultural unit which in the opinion of the Land Court is capable of providing an individual occupying it with full-time employment and the means to pay (a) the rent payable in respect of the unit; and (b) for adequate maintenance of the unit."

Is that viability in its true sense for a business?

I looked at figures in the 2014 Scottish Government survey of tenant farms. One third of tenant farmers said that their total turnover in 2013 was more than £100,000; 10 per cent said that their turnover was £50,000 to £100,000; 19 per cent said that their turnover was below £50,000; and, interestingly, one third said that they did not know what their turnover was for the previous year.

What is actually happening out there in the tenant sector? Do we have a large number of viable units, or are people struggling?

Christopher Nicholson: I will link the viable unit test to succession. The process of succession is probably the riskiest period that any family tenancy goes through. At present, following the succession of a tenant, the landlord has up to two years to object to the successor on the basis of the viable unit rule. It is an incredibly risky process and a worry for all family tenant farms. We welcome the agricultural holdings legislation review group's proposals, because they remove that risk and simplify the succession process.

The viable unit test is judgmental; it is a moving target. We see it as being unnecessary because it adds too much risk to the succession problem. Interestingly, the Department for Environment, Food and Rural Affairs report "The Future of Food and Farming", which applies to England, recommends that the equivalent test in England, which is called the commercial unit test, should be removed, and that family succession should be widened for tenancies. South of the border, DEFRA is looking at the same measures that the agricultural holdings legislation review group has recommended in Scotland. There is a lot of sense in removing the unnecessary complexities that add a huge element of risk to succession.

Graeme Dey: David Johnstone made the point that one danger of the proposals is that we lock in existing tenancy patterns. If the proposals happen, what are we actually locking in? Are we locking in

tenancy patterns in which farms are not functioning successfully? That is what I am trying to get at.

Christopher Nicholson: When a tenancy becomes so small that it is not viable, the next generation of tenants will not wish to farm it. That happens all the time.

Graeme Dey: Is that a significant issue at the moment?

David Johnstone: I think that you have hit the nail on the head, because it is a fundamental problem. There is a raft of different farming sizes across both the owner-occupied and tenanted sectors. In the tenanted sector, there are farms that are more than two or three-man units, but some are now no longer viable. They were created 10, 20, 30 or 40 years ago, and the viable unit and the cost per unit of production have gone up. They are no longer able to support the tenant as described in the definition of a viable unit in the 1991 act. We are not seeing them come back when they become available. If you widen succession in the way we have been discussing, although the farm becomes a very nice place to have a house and a few fields and horses, you will not get to the heart of allowing farms to restructure.

We are facing a period of lower commodity prices with increased input prices. The single farm payment will go down, probably in 2020, as a result of the CAP review. We have to allow the farming industry to restructure during this period to make it competitive for the 21st century. This is all part of it, but it locks patterns in and does not allow that competitive restructuring to take place.

Christopher Nicholson: The agricultural holdings legislation review group identified the smaller units that in the past were considered to be non-viable as being suitable for starter farms, which by definition are often part-time holdings. That was the argument for removing that side of the viable unit test. The idea was that some small units should remain, as opportunities for new entrants.

The other side of the viable unit test allows a landlord to object to the succession of a tenant if he is already in possession of a viable unit. Although we can see some of the arguments for that approach, we think that it adds a huge amount of uncertainty to the process of succession for tenants. We welcome the fact that the bill does not contain that provision.

The Convener: We can come back to Dave Thompson's thread in a minute, but Jim Hume wants to comment first.

Jim Hume: I am looking for a little more detail, given that we are talking about one of the more controversial aspects of the bill. The NFUS said that there are polarised views among its members but thought that some sort of compromise could be reached—such as in the example of the cousins who had been working in tandem for some time—and I think that Scottish Land & Estates agreed. Does the STFA think that succession of and assignation to extended family members will extend to people who have not worked on the farm, or will it apply only to people who have had some involvement in the holding?

Christopher Nicholson: It is dangerous to say that succession must be limited to people who have had involvement in the holding. In many cases, a holding is not sufficient to support two generations of one family. The next generation might well intend to farm but choose not to do so while the previous generation is still there. They might make that choice for a number of reasons. For example, the holding might not provide for two families. In addition, any young farmer is probably better advised to gain experience of farm management further afield, rather than staying on the family holding where he or she was raised. There are many tenant successors who have every intention of returning to farm on the tenanted holding, but not until there is a place for them. Therefore, the review group's proposals and the measures in the bill are correct. Succession and assignation should not be restricted to people who currently have involvement.

Andrew Howard: Chris Nicholson mentioned provisions south of the border, and I think that the viability test would be of less concern if we had some of the other provisions that exist there. In England, secure tenancies come to an end after three generations, so although the landlord does not have a precise date he knows that he will have an opportunity to take stock and make the changes that Niall Milner referred to. We do not have that opportunity. It has always seemed to me that if we are going to have security of tenure, a reasonable quid pro quo would be that the landlord should be able to expect at least some opportunity for the farm to come back in hand. One way of achieving that would be to have a relatively narrow definition of "near relative", so that the farm could stay in the immediate family but could not go out into what would be quite a wide class of successors and assignees.

As David Johnstone said, in effect the proposed approach creates perpetual tenancies, with the owner of the property having virtually no expectation of ever being able to reorganise their affairs. That is a sufficiently large impact on a person's ability to manage their assets that it will almost certainly be challenged by someone at some point, which runs the risk of putting the industry in limbo while the issue is resolved.

The Convener: Does Mike Gascoigne want to comment on that issue of the proposal being open to challenge?

Mike Gascoigne: I find it difficult to repeat myself in this context. The Law Society does not bother itself with Government policy. We are here to establish whether the law that is proposed works; we do not comment on Government policy.

12:00

The Convener: Okay.

Christopher Nicholson: It is clear that some stakeholders want landlords to have a greater opportunity to terminate security of tenure. I understand that there is a belief that, in some cases, the widening of family succession will deny people the opportunity to break that security of tenure but, certainly among our membership, the vast majority of leases pre-date the narrowing of family succession, so we are now in a position in which family succession is more favourable from the perspective of a landlord than it was when the majority of leases started.

David Johnstone: We can go back to 1991 act tenancies, which were created as fixed-term vehicles and were then altered to become perpetual tenancies. We can go back as far as we like to provide different viewpoints.

The Convener: It could also be suggested, as I once did, that landlords ought to change every two generations, but that is a debate for another day.

David Johnstone: Landlords and the pattern of land ownership have changed dramatically over the past 50 years.

We have been trying to understand the details of the proposals that have emerged. As Scott Walker indicated, we know that there are various concerns about how conversion fits in with the balancing of the interests of tenants and landlords. We note with interest the statement that has been made on the assignation/succession provisions in the bill, which are deemed to represent a fair balance between the interests of tenants and landlords. To be honest, we are a little baffled by that, because if the ability to convert to a fixed-term vehicle creates problems for landlords' interests, we are not sure how what, in effect, amounts to the creation of perpetual tenancies, with no means of bringing them to an end, does not compromise landlords' interests quite severely. We have tried to get a better understanding of what is proposed from Scottish Government civil servants, but we do not yet have an answer that we can understand, so we want to explore that further.

The Convener: We take that point.

Does anyone have a final point to make, to wrap things up?

Dave Thompson: I just want to tease out one or two other things.

The Convener: Could you put them in one question?

Dave Thompson: This has been a fascinating exchange. If I have understood what has been said, it strikes me that SLE has a fundamental objection to secure tenancies going on ad infinitum. In relation to the viable unit discussion, the point was made that a smaller farm would be a nice place for a house and a horse. That is a bit of a red herring, because there are cases in my constituency in which whole estates have been purchased and turned into nice places for a house and a horse, with the result that the current tenants are being pushed off the estate.

I want to extend that discussion. In its submission, the STFA mentions that there has been an annual loss of 120 secure tenancies over recent years. Landlord representatives say that extending the range of family assignations that are possible would really damage confidence. What I am about to say might damage confidence even more. Perhaps we should extend the range of assignations that are possible even further by adding a couple of categories. The STFA has argued for totally open, non-family assignations to be possible. We could consider the possibility of assignations being made to new entrants and to one or two other categories of people, with the detail dealt with through regulation. People who are currently in limited partnerships who are having their partnership stopped could also be eligible to have such tenancies assigned to them.

Would adding to the existing proposals in the bill two or three categories of people—new entrants and people who are going to lose their farms because of limited partnerships coming to an end—help us to maintain tenancies? If we do not do that, we will see a continuing loss of secure tenancies, and they will disappear in time. What do the panellists think about extending the list to cover those two or three other categories?

The Convener: In order to put that in perspective, we also have to ask whether the grounds for objection to a new tenant are adequate. Do they go too far or not far enough?

Dave Thompson: Indeed. We have touched on that already, and it is a fair point.

The Convener: Let us see what answers we get to your question.

Andrew Howard: Mr Thompson has touched on something that concerns me about the confidence issue. There seems to be a lack of acceptance that any tenancy—or, in the case of

limited partnerships, agreement—can come to an end when a tenant does not want it to.

Dave Thompson: That is not what I am suggesting. I am suggesting that people in limited partnerships that have come to an end are good examples of people who should be allowed to bid for an assignation of a tenancy.

Andrew Howard: Okay, sorry—I misinterpreted what was said. However, the point remains valid. I sense that there will be a problem if we do not have an acceptance that any agreement for a fixed term can come to an end at that term date. If we do not have a general acceptance of that fact, we will all be back here in 10 or 15 years' time because of political pressure to not let those tenancies come to an end. That will impact on the desire of owners of property to grant long-term agreements and will mean that they will always try to keep the agreements within the scope of the next parliamentary or review cycle, so that they minimise the apparent risk as a result of political change.

Dave Thompson: To be clear, I am talking only about secure tenancies under the 1991 act and extending the list of people who can have them assigned to them.

Andrew Howard: Yes, I misunderstood that point.

David Johnstone: That comes back to the point that you cannot separate what is done with 1991 act tenancies from what is done with MLDTs in the future.

We accept that 1991 act tenancies continue from generation to generation. We have no problem with that and are not seeking to bring those to an end. In a situation in which there is no successor or heir, we want to ensure that there is a natural chance to restructure the business of the running of the estate and to amalgamate the land with other farms to ensure that those farms are viable. You are talking about removing landlords' ability to do that. Effectively, those tenancies would continue for ever. That sends out a clear message that the terms of the tenancies are being retrospectively altered by a third party to the benefit of the tenants. That gives people little confidence when it comes to using MLDTs or anything else.

For me, the public interest lies in having a viable tenanted sector. We have to be careful that we do not kill off the next bit in order to benefit only certain people.

Dave Thompson: You raised an issue that Mr Nicholson also mentioned. You are talking about things being changed retrospectively. However, a lot of the tenancies of people who hold 1991 act tenancies go right back to 1948. Their tenancies were changed retrospectively to their detriment, in terms of who they could be assigned to. All that we are doing now is looking back and perhaps correcting a wrong that happened 40 or 50 years ago.

David Johnstone: We have tenancies that were issued in, I think, 1994. They are not part of the retrospectivity that you are talking about. There is a whole swathe of them. How would you differentiate between those individual tenancies?

The Convener: We cannot possibly go into the detail of that, but the point is well made and is understood by everyone here.

We want to complete this session within the hour, and we have six more questions to ask. First, however, Martin Hall and Scott Walker want to comment on the issue that we are discussing.

Martin Hall: I want to touch on the question that you asked, convener, about the tests that could apply. One of our concerns is about the test under which someone need only commence on a training course. The suggestion is that we need a professional farmer test, which would address David Johnstone's point about the lifestyle tenant—someone who keeps horses in the field. We are asking the committee to look at that element again.

Scott Walker: The committee now has a feel for some of the polarised views that can be expressed on the subject. However, it is worth dealing with some of the points of consensus in the industry. Generally, most people want to sort out the situation whereby, when people die out of turn, others are not allowed to succeed to the tenancy. Another issue on which there is consensus is where an existing family member is actively farming on a farm but is not entitled to succeed. That is a surgical type of area that can be dealt with.

There is some consensus, even among the strongly polarised views that are represented here. I hope that, as the bill progresses, those points of consensus are captured, dealt with and sorted out.

The Convener: We will move on to compensation for tenants' improvements. Christian Allard has questions on that.

Christian Allard: My first question is about the amnesty period of two years. The amnesty principle is agreed by everybody round the table, but NFU Scotland's written evidence suggested that the period might be two or three years. The agricultural holdings legislation review group proposed a period of three years, to coincide with the three-year rent cycle. NFU Scotland tells us that the idea behind having a period of only two years might be to ensure that improvement disputes could be settled within the three-year

period. What are the witnesses' views on that? Would you like the bill to set a period of two years, to give a year for settlement, or should the period be three years, as indicated by the review group?

Christopher Nicholson: Like the NFUS, we believe that the period should be three years, which matches the rent review cycle. The main reason for that is that it will be quite a big effort to ensure that all tenants in the country are aware of the amnesty provisions in the bill. The only time that many tenants get in touch with professional advisers about tenancies is during a rent review. Therefore, we feel that, if the period is extended to three years, there is a greater chance that everyone will find out about the measures in the bill.

David Johnstone: SLE sees the logic of having a three-year window to match the rent review cycle. When we proposed the amnesty, we originally proposed that it should be for one year but, for the sake of agreement, three years is perfectly reasonable.

The Convener: Excellent. In that case, we will move on to the next question, which is from Jim Hume.

Jim Hume: It follows on from that line of questioning and is to do with waygo. It has been argued that waygo can be a disincentive for a tenant farmer to retire. Of course, if a tenant farmer retires, that gives a new entrant at least a chance to enter into the farming world. What are the panel's views on the thoughts from some sectors that waygo should be agreed before the tenant gives his notice to quit?

Scott Walker: Waygo is hugely important for the tenant. It is a reflection of the work and investment that they have put in to the business. Another way to view it is that it is probably their pension, for their lifestyle afterwards. It is one of those things in which people do not have individual experience, as they negotiate waygo probably only once in their lifetime.

We think that it would be helpful to have a two-stage process. To be honest, the two-stage process that we have talked about is the best practice that operates in some situations just now, and we are looking to formalise that best practice.

The tenant should be able to indicate to the landlord that he wishes to discuss waygo and that he may wish to give up the tenancy. That would allow the two to sort out any disputes that may happen over waygo and to agree what the figure for waygo should be. If an agreement is reached, the tenant would then serve his notice to quit and, on that basis, the sum of money at waygo that had been agreed or discussed would be ratified and filed through.

We generally get the feeling from members that, if someone serves their notice to quit and has not agreed on waygo, they are giving up a strong negotiating position and almost entering into the unknown. Therefore, that sort of two-stage process would be helpful for all parties.

12:15

Christian Allard: The written submission from the Royal Institution of Chartered Surveyors suggests that there should be a backstop for claims for compensation, and that the period for that should be 30 years. It gives as the reason for that suggestion the idea that some improvements should be written off. Does anybody want to comment on that? Should all improvements be written off after 30 years? Is there a good reason to have a backstop for a claim?

Niall Milner: The reasoning behind that is to recognise the fact that some improvements that were made many decades ago will potentially have exceeded their economic life and there is a question about the worth that they bring.

Christopher Nicholson: On the question of the value of improvements, age is not relevant; the relevant point is the value of the improvements at waygo. Some improvements, such as the removal of obstacles to cultivation and other land improvements, are permanent, and they should not be excluded from the amnesty simply because they are more than 30 years old. Even modern farm buildings have a life expectancy of more than 70 years, so they should not be excluded simply because they are more than halfway through their life expectancy.

I agree that some improvements will be worthless to an incoming tenant, but the amnesty is not about the valuation; it is about establishing which improvements are eligible. Some of the improvements might be eligible, but if they have no capital value at the end of the lease or no value to an incoming tenant, no compensation will be paid for them.

David Johnstone: I will pick up on two points. The first is Scott Walker's point about having to issue a notice to quit before entering into a negotiation for the waygoing. Scott Walker's proposal that there should be a discussion about the waygoings ahead of serving that notice is sensible. That would be helpful and would put less of a burden on tenants, so it seems to me to be practical and reasonable.

Waygoings seem to be at the heart of many of the concerns that exist between the landlord and the tenant. If we can sort out the issues surrounding waygoings and get fair waygoings, the driver behind many of the issues surrounding

succession, assignation and conversion will be less critical.

I agree entirely with Chris Nicholson that the point of the amnesty is to list all the improvements and not to value the improvements in any shape or form. Personally, I do not think that there should be a time limit of 30 years, because the value is what the value is to the incoming tenant. Some improvements might have no value and others might have qualitative value and be older than 30 years. That has to be considered on an individual and case-by-case basis.

Jim Hume: It is good to hear agreement on both the points that Christian Allard and I asked about.

The STFA written submission talked about the list of improvements that are eligible for compensation and said that it needs to be brought up to date because it was drafted in the 1940s. Do the other witnesses think that the improvements that are eligible for compensation should be brought up to date?

David Johnstone: The short answer is yes.

The Convener: I think that the Government is in the process of trying to work that out at the moment.

David Johnstone: Yes, there are anachronisms in it that desperately need updating.

Jim Hume: Good.

The Convener: Excellent. Let us move on. Alex Fergusson has a question on improvements by the landlord.

Alex Fergusson: I do not think that this needs to take a huge amount of time. As I am sure everybody is aware, section 96 of the bill inserts into the 1991 act new sections that require landlords to give tenants notice of certain improvements, that give the tenant a right to object and that refer any disputes to the Scottish Land Court. I wonder what any panel members who have a comment to make about that feel about it.

The Convener: There appear to be no comments.

Alex Fergusson: There has been a huge outbreak of consensus, convener, which is welcome.

The Convener: We will move on. Sarah Boyack has a question on resolving disputes.

Sarah Boyack: It is important to have clarity on the different processes for resolving disputes and when the Scottish Land Court should be engaged. The bill extends the role of the court in resolving disputes that arise from the amnesty on improvements, in deciding on applications from the tenant for an enforced sale and in ruling where a tenant has objected to a proposed improvement by a landlord. The court will still have a role in ruling on rent review disputes using the revised rules for calculating rent.

I want to test the written evidence that we received from SAAVA and RICS, which claims that the Scottish Land Court is not a suitable forum for rent review disputes and that a rent assessment panel or arbitration process would be more appropriate.

Martin Hall: We are saying not that the role of the Scottish Land Court should be taken away altogether but that there is a more appropriate and proportionate way of resolving many disputes before they get to the court, and that it should be a higher priority.

In particular, the Arbitration (Scotland) Act 2010, which the Scottish Government is promoting heavily and which is key to its policy, should be brought into the agricultural tenancy world. Given that arbitration is available, let us make the 2010 act fit agricultural circumstances. Other mediation and expert determination are important as well, but that approach would resolve a lot of the angst in the sector. The need to refer and revert to the Scottish Land Court to resolve disputes is causing a lot of problems.

Sarah Boyack: I think that we have a sense of that from our previous discussions on agricultural holdings. Going to the Scottish Land Court is a lengthy, time-consuming and expensive process, and once people get into that position it is also, I presume, incredibly confrontational and difficult to pull back from. Arbitration is important, so how can we ensure that it is included in the process and that people have access to it? It is possible that, if one side does not want to go to arbitration, nothing will happen. In effect, that is a way to veto anything happening.

Martin Hall: There are a couple of ways to do that. One is by making it possible for people to go to arbitration through referral by one of the parties. That would avoid the need for agreement between them about going to arbitration.

Sorry—I lost my train of thought. I was going to comment on mediation. That has been underplayed, particularly in the agricultural sector, and I think that it has a greater role to play in avoiding confrontation and encouraging parties to come to agreement between themselves.

Perhaps it is the commissioner's job to bring in a mediator to resolve disputes, or perhaps the Scottish Land Court should not entertain cases that have not been to another forum first. There are a raft of possibilities that would take away a lot of angst.

Sarah Boyack: You see the Scottish Land Court as a last resort rather than as a first port of call.

Martin Hall: Definitely—yes.

Sarah Boyack: I suppose that the tenant farming commissioner's involvement in the process could be to determine what is reasonable and how quickly people should go to mediation or arbitration. One way to drag out a dispute could be simply by not resolving it.

Martin Hall: I think that that would be quite important.

Sarah Boyack: Okay. Thank you.

David Johnstone: With regard to trying to encourage people, we think that the Scottish Land Court should be the backstop for disputes should they have to go that far, but we thoroughly support mediation and arbitration before that.

I wonder whether we should say something simple along the lines that, if people end up going to the court, the fact that they had not gone through arbitration or mediation would be a factor in the awarding of the costs, so it may count against them if they do not take part in arbitration or mediation.

The Convener: I think that that is fair.

Christopher Nicholson: I have a quick observation. The Land Court may well be an appropriate place to go for a question on a point of law, but many of the disputes that end up there are about valuations, which is the role of an expert valuer. It would make sense—through mediation, expert determination or arbitration—to ensure that there are attempts to address such questions before the Land Court stage.

The Convener: I think that we have general agreement on that point.

I will move on to the human rights aspects of the bill. People have raised issues about the proposal for the conversion of 1991 act tenancies, which might affect both parties. Another issue is the widening of the successors and assignees categories, which could also alter the balance. Part 10 of the bill seeks to strike a fair and proportionate balance between the rights of the landlord and the tenant. The Government is considering how that will all work in the light of case law and so on. I am concerned to get the panel's view about the relative impact of the proposals in the round on the rights of both parties. In light of our discussions, are the proposals proportionate?

Christopher Nicholson: The review group has attempted to address the balance between the property rights of tenants and landlords. At this stage, there is a lot of uncertainty over the legal implications of human rights—and human rights is the framework to give the balance.

Bearing in mind the changing nature of tenancies—tenants are putting more fixed capital into holdings—the bill does not go far enough to address the balance. The European convention on human rights implications have caused a great deal of caution and concern. The issue has certainly overshadowed the whole process.

Andrew Howard: I should qualify my remarks by saying that I am in no way an ECHR expert.

In looking at the two main provisions that could engage the ECHR, and looking at it from our business's point of view, it seems to me that, if the balance was right, conversion could find or deliver a proportionate response to the policy objective, which is to encourage retirement and perhaps allow greater flexibility in the system. We could envisage that the outgoing tenant would feel that something had been obtained. Conversion might introduce an opportunity for an incoming tenant, and the landlord may feel that their circumstances in some cases—for example, where they thought that they had a line of succession ahead of them—were also improved, because they would have a fixed-term tenancy. We might therefore find a balance; that is my view as a layman.

I find it more difficult to see how the balance will be found not only in the provisions for assignation and succession but in the ideas that have been raised here today about open assignation of 1991 act tenancies where the property owner is deprived of all legitimate expectation of having the property back at any point. In effect, they have had that property placed permanently in the secure tenancy sector, with no hope of getting it back.

I am not clear what the public policy objective is in doing that and I am not clear—despite some of the suggestions that have been made today—that there are not more proportionate responses that could be adopted. For example, on assignation and succession, you could target the provisions at the people who are actually affected, who might be those non-near-relative successors who are actively engaged in the business and who would suffer hardship if they could not continue.

I am not quite clear what the public interest is in a tenant being able to assign a tenancy to a heart surgeon niece who lives in London. That is not a proportionate response to the stated objective, which is a risk in relation to ECHR.

12:30

David Johnstone: Andrew Howard has eloquently laid out most of what I was going to say. There are some sections in the bill that have struck a fair balance between the rights of tenants

and landlords. For example, where the landlord is in breach of his obligations, there are plenty of safeguards to give the landlord the chance to rectify the position before the draconian measure of losing the property is brought into place.

Conversion is the next step on from that. If it is for a measured term, there is the probability that it will do what is required for the public interest argument and allow churn, enabling people to retire with dignity and move on. Landlords themselves will benefit from the point of view that a perpetual tenancy has now turned into a fixed-term tenancy, albeit we do not know the duration of the term.

Succession and assignation—and some of the further thoughts that we have heard—would basically create a perpetual tenancy. You are asking the landlord to take a disproportionate burden for the delivery of the public policy. As Andrew Howard suggests, I am not entirely sure what it is trying to achieve. We do not believe that a fair balance has been struck in that measure in the bill. Furthermore, it looks like it would struggle to be compatible with ECHR.

The Convener: Does the Law Society have a view about those discussions?

Mike Gascoigne: I echo what has just been said. Succession and assignation is the issue that sticks out—as it stands at the moment, landlords would probably have a claim under ECHR. However, your advisers will be able to get a better handle on that.

The Convener: Okay, I will put this in another way. There are always political, economic and social issues to be taken into account, and in a democratic society, the mandate of a Government and the support that it gains in the Parliament could be said to be the public interest. If the public interest as expressed by the mandate for the Government is to make changes that will rebalance rights, can we see a means whereby, under ECHR, Europe will see that as the wish of a particular nation, so trumping any particular issues related to landlords and tenants?

Mike Gascoigne: It is for the Parliament to judge whether any bill will give rise to such issues. At the back of a bill, there is always a note as to the presumed outcome. If you change the text of the bill—as it will be changed and developed before it becomes an act—that process will continue. However, it is not for me, but for your advisers in the Parliament to tell you where you are getting too close to the wind. It is a continual process rather than a snapshot. The issue can fall in and out, even on the strength of two sentences.

David Johnstone: I express the caveat that I am no expert on ECHR, but my understanding is that there are two aspects. The first is the public interest argument that you are making, convener, which is about doing what you wish to do within the public interest. That comes down to the elected Government's mandate from the people.

The second aspect is that, if you decide to do something that will have a material impact on one section of society, that has to be recognised in carrying out the public interest argument. Under the bill, especially on succession and assignation, there does not appear to be any recognition that landlords are taking on a burden with regard to that change.

Scott Walker: The ECHR issue has certainly clouded some of the discussions with our members about certain aspects of the bill. In layman's terms, we would be looking at going back to the principles that were outlined right at the beginning. Will the proposal generate greater investment? Will it encourage new entrants to the industry? Will it make businesses more viable? Also, from the NFUS's perspective, will it increase food production on the land? That is a key issue for us. Clarity on the parameters of the discussion of those issues would be helpful for the industry.

At the end of the process, we would like to avoid legal disputes, which could arise when individuals want to challenge the bill. Ultimately, the courts will decide what is right or wrong. The more legal disputes or legal opportunities that arise at the end of the process, the more damaging it will be to confidence and to achieving what we believe is one of the key objectives—encouraging people to let land, and so increasing the amount of let land.

On ECHR, I have sat down with lawyers, but whenever I meet them, I become more confused than ever. I would like the issues to be set out in layman's terms so that the industry can discuss them. That would be helpful.

The Convener: Europe looks at proportionality and fair balance in the decisions that are taken. The question is whether that fair balance fits with people's legal advice about whether ECHR is affected. I am not trying to open up a wide-ranging discussion about the law, but I raise that point because it is germane to what we are talking about.

Christopher Nicholson: So far, the discussions about the proposals in the bill that focus attention on ECHR have involved proposals on which there is not consensus among all stakeholders. However, the review group made some significant proposals that had the consensus of all stakeholders—as far as I know—but have been prevented from appearing in the bill due to ECHR.

One proposal in particular concerns the amnesty, which was intended to allow compensation for any improvements that were appropriate to the holding. However, the proposals

in the bill suggest that that is not possible where a landlord has objected to an improvement, even though it might be appropriate to the holding. Our suggestion is that, in situations where a landlord has objected to an improvement, it should go through the same test that the Land Court would apply, which is whether it is appropriate to the holding. Seemingly, however, that is not possible due to the restrictions of ECHR. That is quite a big hole in the amnesty.

Andrew Howard: That seems curious. I was not aware that that proposal had been removed for ECHR reasons. However, as Scott Walker said, if you ask three ECHR lawyers the same question, you will get three different opinions. What is needed is a clear statement of the objectives and then a proportionate response—you should use the least impactful policy response to the objective in hand.

As I said, what concerns me about assignation and succession is that the objective seems somewhat confused. There are almost certainly other ways of doing this that would have less impact on a certain class of property rights in Scotland but still achieve the policy objective.

The Convener: I think that we want to go to a catch-all question now—or do you have another question, Dave Thompson?

Dave Thompson: Yes.

The Convener: Please be very brief.

Dave Thompson: We still have 20 minutes, convener.

The Convener: No, we do not. We have as much time as I decide we have, and I am deciding now that we will have a short question because we want to move on to a final question.

Dave Thompson: You did say 1 o'clock earlier, but never mind.

On the point about the impact on a certain class of owner, it depends on how far back we want to go. We can go back to 1948, or 1886, although some landlords will go back much further. We can go right back to the start, to Adam, when God gave the earth to all of us. It is all relative.

Where I struggle with ECHR is in understanding why continuing tenancies—even perpetual ones—would put any sort of burden on a landlord, given that they are getting rent for them. They are a burden only if the landlord wants to get rid of the tenants and do something different. We have to look at everyone's rights here, and at the common good. Land is not something that we can create more of; it is a fundamental thing that is given to us all, and that has to be the overriding factor at the end of the day.

The Convener: It may well be. The point is well made.

Sarah Boyack: I want to follow up on the STFA's point about significant measures that had the support of all the stakeholders but have not appeared in the bill. Is the amnesty issue the only one or did the agricultural holdings legislation review group report come up with measures on which there was broad agreement but that are not in the bill? Should such measures be in the bill?

Christopher Nicholson: Quite a few recommendations of the review group have not made it into the bill. I do not know whether the intention is to bring them forward at stage 2 or in another session of Parliament. A key one is the 35-year repairing lease, which we saw as an important recommendation that would be to the benefit of new entrants. That is not in the bill.

The Convener: There may be one or two other catch-all issues that we can pick up on.

Sarah Boyack: I asked the question because I saw one or two comments in the submissions that express concern that things might be added later that would change the balance. I want to flush out the issues on which we have general agreement so that we have clarity on them when we get to the stage 1 debate.

The Convener: With the evidence that we have received, I think that we know where there is agreement and where there are still disagreements. That will be quite clear in the *Official Report*.

Graeme Dey: It is the nature of these sessions that members raise questions on areas of the bill that they think are appropriate. I wonder, looking round the witnesses, whether there is anything significant in the bill that we have not touched on, or any issues on which the witnesses still have a significant point to make. I want to give them that opportunity.

Christopher Nicholson: A key element of waygo that we think is missing from the bill is not only the proposal for a two-stage waygo process, which has been discussed today, but the way in which improvements are valued. At present, the value is to the incoming tenant, given the increase in productivity that results from the improvement. However, in this day and age, tenants make all sorts of improvements that are required for modern farming and living standards and so on that do not result in increases in the productivity of the farm.

For example, improvements to meet modern housing standards and improvements in amenity value—for example, the planting of hedges and other environmental improvements—do not result in increased productivity of the holding in

agricultural terms. Improvements to do with animal welfare, health and safety and the working environment also do not necessarily result in increases in the productivity of the holding, but they should be eligible for compensation if they result in increases in the holding's capital value. A farm with good hedges is possibly worth more, due to amenity value, than a farm without hedges. If the hedges were put there by the tenant, they should be eligible for compensation, but that will require a change to the way in which improvements are valued at waygo.

12:45

Andrew Howard: I understand what Chris Nicholson is getting at, although a number of the examples that were listed would probably be included in any valuation at waygo as things stand. Having a better house or meeting modern animal welfare standards would improve the farmability and the productive ability of the farm, so I would be surprised if such aspects were not picked up.

However, it raises a difficult question if we are to start trying to compensate for things from which no occupier of the farm—whether it is the owner or a future tenant—can derive any value. A hedge is one such example, unless it replaces fencing, which would perhaps make the husbandry element cheaper.

The question is difficult to deal with. The measure of the value to the incoming tenant seems by far the most appropriate tool even if there are a couple of difficulties round the edges, because it reflects what the future occupier of the farm can do with it.

Christopher Nicholson: We are not saying that any improvement should be eligible for a valuation. We are saying that valuation should not be restricted to improvements that add value for the incoming tenant. We should also include improvements that add capital value to the holding.

Graeme Dey: Could a tenant have received CAP money to put the hedges in?

Christopher Nicholson: In some cases, yes, but we already have methods of dealing with support payments. Government support will have been received for a lot of improvements. That is not a new issue to be resolved.

The Convener: The catch-all question has been answered, as far as I am concerned. If anyone has any other points to make, they can follow them up with us in writing. I thank all our witnesses for what has been a thorough session, which is part of a wider process. We have received a lot of written evidence, but it is helpful to hear your views as well.

We will move on to our further public business straight away, because we also have an item to get through in private session before 1 o'clock.

Subordinate Legislation

South Arran Marine Conservation Order 2014 (Urgent Continuation) Order 2015 (SSI 2015/303)

Wester Ross Marine Conservation Order 2015 (SSI 2015/302)

12:47

The Convener: Item 2 is consideration of two negative instruments. I refer members to the papers. Does anyone wish to comment?

Graeme Dey: With regard to the Wester Ross instrument, I note how deeply disappointing it is that the Government has had to step in and take such action.

The Convener: We should perhaps explore that a bit further to find out why that was necessary. We can ask the Government about it, but I understand that dredging took place on a site that is designated for a marine protected area and the Government had to take urgent action. It would be interesting to know if that is happening in other places, too.

Sarah Boyack: We should welcome the fact that these pieces of secondary legislation will be put in place to protect our marine environment. As you said, convener, and as Graeme Dey mentioned, there are concerns about dredging in that case and it has been necessary to bring in a continuation order to protect the area. We should ensure that the orders go through the Parliament with all due speed and are in place as soon as is appropriate.

The Convener: It sounds to me as if no member objects to that. Does the committee agree that it does not wish to make any recommendations in relation to the orders?

Members *indicated agreement.*

The Convener: At the committee's next meeting on 23 September, we will consider one negative instrument and—possibly based on our discussions today—take evidence from the Cabinet Secretary for Rural Affairs, Food and Environment on the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. We will also take evidence from stakeholders on marine protected areas, which might begin to answer some of the questions that were raised during item 2 today.

As previously agreed, the committee will now move into private session.

12:50

Meeting continued in private until 13:02.

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