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Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 7 October 2015

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
30th 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:

Mungo Bovey QC (Faculty of Advocates)
Eleanor Deeming (Scottish Human Rights Commission)
Nick Hawthorne (Clerk)
Charles Livingstone (Brodies LLP)
Megan MacInnes (Global Witness)
Kirsteen Shields (University of Dundee)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 7 October 2015

[The Convener opened the meeting at 09:43]

Subordinate Legislation

Sea Fishing (EU Control Measures) (Scotland) Order 2015 (SSI 2015/320)

Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Amendment Order 2015 (SSI 2015/323)

Tuberculosis in Specified Animals (Scotland) Order 2015 (SSI 2015/327)

The Convener (Rob Gibson): Welcome to the 30th meeting in 2015 of the Rural Affairs, Climate Change and Environment Committee. This week, the committee continued its fact-finding visits on the Land Reform (Scotland) Bill and met the keeper of the registers of Scotland. The committee is grateful to the keeper and her colleagues for their time and the interesting and helpful views that they provided.

I remind everyone to switch off their mobile phones, as they might affect the broadcasting system. However, members of the committee often use tablets to consult digital versions of our committee papers.

Agenda item 1 is consideration of three negative instruments. I refer members to the paper and ask for comments.

Michael Russell (Argyll and Bute) (SNP): There appear to be further drafting issues in these orders. It might be worth reminding the relevant department that that delays the passage of statutory instruments; in the case of at least one of these instruments, that causes problems regarding the implementation of important changes. Bad drafting is not a victimless crime.

The Convener: Indeed, no. The Delegated Powers and Law Reform Committee noted that the Government should and will bring in amending orders soon. We should note that.

Sarah Boyack (Lothian) (Lab): Michael Russell is right to raise that issue. I have not been on the committee for the whole of this session so I do not know whether such errors occur regularly. Do they? It might be something that we should log for our legacy report for the next session of Parliament.

09:45

The Convener: That is a good question. I do not think that there has been too much of a problem recently, but it was an issue about three years ago. Perhaps we could draw the Government's attention to the *Official Report* of this meeting so that it is aware of our concerns about these things. We are often given reasons informally, relating to staffing levels and so on. We need to know about such things.

Does the committee agree that we do not wish to make any recommendations in relation to the instruments?

Members *indicated agreement.*

Land Reform (Scotland) Bill: Stage 1

09:47

The Convener: Under agenda item 2, we will take evidence on the human rights aspects of the Land Reform (Scotland) Bill. This is our final stakeholder evidence session on the bill before we hear from the Cabinet Secretary for Rural Affairs, Food and Environment and the Minister for Environment, Climate Change and Land Reform in Dumfries on 2 November. Prior to that meeting, we will host a public engagement meeting at which members of the committee will be answering questions on land reform—so do your homework, everybody. Tickets for the public question-and-answer session and the committee meeting are free. People who wish to attend can contact the clerk for details.

We are joined today by a panel of stakeholders: Eleanor Deeming, a legal officer in the Scottish Human Rights Commission; Kirsteen Shields, a lecturer at the University of Dundee; Megan MacInnes, an adviser on land with Global Witness; Charles Livingstone, a partner in Brodies LLP; and Mungo Bovey, keeper of the library in the Faculty of Advocates.

On behalf of the committee, I make a plea for the language that is used in today's discussion to be such that it is possible for laypeople such as ourselves to understand it. Legal terms are the main means of communication between many members of the panel, but they are not so in the real world.

I will start off by asking a general question. What do you see as the principal issues arising in connection with the bill from a human rights perspective? Do you think that the bill's policy memorandum is helpful in informing parliamentary and public discussion of the issues?

Kirsteen Shields (University of Dundee): The bill speaks to human rights on several levels. It is useful to consider the human rights issues in three groupings. The policy memorandum is useful in setting out the human rights issues and presents a balanced reflection of the interests. It makes interesting statements about the move towards land as a national asset, which is a human rights-based approach that is promoted by the Scottish Human Rights Commission and by United Nations agencies around the world and is well established as the appropriate method to address land.

Paragraph 35 of the policy memorandum states:

> "Scotland's desire is to lead by example to address its complex and often emotive history. In this, the Scottish Government's desire is to move from a reactive place of addressing historic issues to a proactive position where governance of land is consistent with the aspirations and outcomes desired in Scotland."

At that point, the policy memorandum is saying that we want to proactively use land and proactively address rights—a far healthier position, perhaps, than the present situation, in which rights are not respected. In the present situation, we can look at three groupings of rights. We have the landowners' rights, which we know about; we have the tenants' rights; and we have the rights of the wider public. We have not heard so much about the wider public's rights or about tenants' rights.

I will start with the wider public's rights, on the basis that that group includes the rights of the most vulnerable and the largest number. What rights does the Land Reform (Scotland) Bill address? It addresses article 11 of the International Covenant on Economic, Social and Cultural Rights, on the right to an adequate standard of life, including the right to food, water, housing and development. Under article 2.1, states are under a duty to take steps to use their resources to apply those rights to their maximum availability and under general comment 12, socially impoverished groups should be given extra support.

Article 11 sets out the right to an adequate standard of living for the wider public, particularly for impoverished groups, and from that we can draw the right to adequate housing, which is in article 11 of the covenant and also in article 25 of the Universal Declaration of Human Rights at the international level, supported by general comments 4, 7 and 16 on the International Covenant on Economic, Social and Cultural Rights. We can go into detail about that if members so wish.

However, the right to adequate housing does not exist only at the international level; there is also evidence for it at the European level. Although it is not enshrined specifically in the European convention on human rights, it is enshrined in the European Social Charter, as revised, at article 31, and the ECHR implicitly includes the right to housing, because many of the ECHR rights—such as the right to vote and the right to education—rely on housing. Obstacles to housing therefore create obstacles to rights and affect the state's positive obligation to protect those rights.

There might be someone else who wants to come in at that point.

The Convener: There might well be. Thank you for that statement as a starter.

Eleanor Deeming (Scottish Human Rights Commission): I would like to build on that. The broader human rights framework, over and above the ECHR, adds a lot to the debate on land reform

that is going on in Scotland just now. The UK is formally committed to a range of international human rights instruments in addition to the ECHR—such as the International Covenant on Economic, Social and Cultural Rights, as Kirsteen Shields mentioned. Under the Scotland Act 1998, international obligations should also be observed and implemented within devolved areas both by the Scottish Government and by the Scottish Parliament.

As Kirsteen Shields said, when land is seen as a national asset, states are under a duty to take steps to use the maximum of their available resources—and, to be clear, that includes land—and to use all appropriate means to achieve a progressive and full realisation of all the rights set out in the International Covenant on Economic, Social and Cultural Rights.

Land is seen as a national asset and part of the resources available to realise everyone's rights. That is true whether land is owned privately or in any other way. It does not mean that all responsible landowners should be dispossessed, nor does it mean that communities and the state should be powerless to act under certain circumstances. As I am sure we will hear, it is about striking a fair balance among the three groupings that Kirsteen Shields mentioned.

The wider human rights framework is very important to inform the discussion, which has largely been focused, certainly in the media, on article 1 of protocol 1 to the European convention on human rights.

The Convener: Does the policy memorandum make that clear?

Eleanor Deeming: I think that it does. As you would expect, given the ECHR's status in our domestic law, the policy memorandum focuses on ECHR rights. In the areas that Kirsteen Shields highlighted, it brings the wider human rights framework into the discussion.

The Convener: We will develop that, but I will take Charles Livingstone first.

Charles Livingstone (Brodies LLP): It is important to understand what we are talking about when we talk about rights. In particular, in what has been discussed so far and at a number of points in the policy memorandum, two different conceptions of rights are in play. One of those is the conception that is generally found in the ECHR and which might be called a negative conception of rights. Those are rights in the Anglo-American tradition, which allow the individual to prevent the state from doing things to them. Instruments such as the International Covenant on Economic, Social and Cultural Rights talk about rights more in the sense of placing an obligation on the state to do things for individuals.

Those are two different conceptions that will sometimes be in conflict, because in order for the state to do something for one person, it may need to compel another person to do something that that person would prefer not to do. It is important to keep that distinction in mind when we about human rights. It is also important to appreciate that the ECHR is incorporated into domestic law and that there are obligations on the Scottish Parliament and the Scottish Government to comply with it.

Other instruments such as the covenant are not incorporated into domestic law. Obligations under those instruments exist at an international level. The UK has obligations towards its co-signatories of such instruments to implement what the instruments want it to do, but that does not translate into any rights that are enforceable in domestic law. In terms of—

The Convener: May I stop you for a moment? I understood that paragraph 7(2)(a) of schedule 5 to the Scotland Act 1998 called on the Scottish ministers to observe and implement international obligations.

Charles Livingstone: Thank you. I was going to note that.

Paragraph 7 is on the reservation of foreign affairs to Westminster. Subparagraph 7(2) is an exemption from that, which is the implementation and observation of international obligations. That should not be read as imposing an obligation on the Scottish Parliament or Scottish Government to do anything in implement of international obligations.

Michael Russell: Why should it not be?

Charles Livingstone: It should not be because the provision is permissive. It says that, notwithstanding that foreign affairs are generally reserved to Westminster, that does not prevent the Scottish Parliament and Scottish Government from doing things that are consistent with the UK's international obligations. It does not have the effect of incorporating those obligations into domestic law such that somebody could, for example, go to court and say that the Scottish Government was not respecting their rights under the International Covenant on Economic, Social and Cultural Rights.

It is certainly legitimate for the Scottish Government and Scottish Parliament to take those things into account when formulating policy. In terms of the domestic legal environment, however, it is important to understand that those instruments do not have the same status as the ECHR. They might be relevant to arguments about whether something is in the public interest and so justifiable under the ECHR, but they should not be viewed as creating any free-standing obligations.

The Convener: This is quite near the nub of things. We will discuss in a minute or two some quite detailed issues about the United Nations voluntary guidelines on the responsible governance of tenure and so on.

As I asked Eleanor Deeming, do you consider that the policy memorandum makes its case clear about why the land reform proposals are necessary?

10:00

Charles Livingstone: The policy memorandum references a number of rights instruments and ties the proposals to those. It could be clearer on what the Scottish Government understands to be the status of instruments such as the international covenant. As we noted in our submission, there are respects in which the policy memorandum could be fuller. For example, paragraph 199 set out the test for justifying a restriction with article 1 of protocol 1 property rights but leaves out of that test the proportionality requirement.

Sarah Boyack (Lothian) (Lab): I want to ask about the policy construction. As I understand it, one of the tests is whether the development of the policy in the bill is logical and rational. The committee has visited various communities and met various witnesses, and one of the things that it has come across is the lack of alternative routes for people to pursue access to housing or their individual rights. The bill seeks to change the balance of rights and the balance of power. That is quite an important issue for us. The policy memorandum attempts to address a problem that individuals and communities have in gaining access to, for example, housing or economic activity. Would any of the witnesses like to comment on that?

Megan MacInnes (Global Witness): I echo what Kirsteen Shields and Eleanor Deeming said about the importance of the bill and the policy memorandum adequately reflecting all the Scottish Government's obligations with regard to human rights and not just those that are enshrined in domestic law. I am not sure whether we would agree with Brodies on that.

The fact that there is a legal remedy route for ECHR-based rights does not mean that other human rights obligations are somehow downgraded. They are still obligations. In other countries throughout the world, the six core conventions that are mentioned in the SHRC's submission are very much framed as international human rights law. The Scottish Government has to work towards the progressive realisation of those obligations. There is a need for clarity in how the balance of those rights is framed. We are quite comfortable about the way in which the policy memorandum frames those issues, although we think that there could be more discussion of the Scottish Government's obligations under those other core conventions. On the other hand, the analysis that Global Witness did to compare the policy memorandum with the voluntary guidelines indicates that there is enough commonality there for us to be comfortable.

For us, the question is the extent to which the language in the policy memorandum should be picked up in the bill and whether the start of the bill should refer explicitly to human rights obligations. It might be useful to use what was done with the Community Empowerment (Scotland) Act 2015 as a starting point for those discussions.

On Sarah Boyack's point about whether the policy memorandum helps to move the Scottish Government towards the progressive realisation of rights to adequate housing and food, and the other rights that are in the International Covenant on Economic, Social and Cultural Rights, it is definitely a step in the right direction. Again, this is all about the need to balance various groups of rights, and to balance the rights of the individual with the rights of the public interest. However, it is good to see language around those things that will help towards the progressive realisation of those economic, social and cultural rights.

Mungo Bovey QC (Faculty of Advocates): The Faculty of Advocates has considered the matter from the point of view of the European convention on human rights, which, along with European Union law, is the only instrument that constrains Parliament's competence. In legal terms, we regard the implementing of other conventions as a matter of policy, on which we would not intervene. Therefore, our concern is legislative competence.

The nature of the European convention on human rights is to protect the individual against state interference with his rights. We have identified interference with his right to possession; his right to his home, his correspondence, potentially, and his private life, including his reputation; and his right to a fair hearing in the determination of civil rights and obligations. That is the focus of our written evidence to the committee.

My only observation on the policy memorandum is that, on occasion, it is not reflected in the act. The policy memorandum's definition of sustainable development, which the committee will find at paragraph 143 of the memorandum, is not reflected in the act, which we consider to be a problem.

The Convener: Do you mean "not reflected in the bill"?

Mungo Bovey: Sorry—not reflected in the bill.

Similarly, we comment at paragraph 36 of our submission that, although the policy memorandum

> "describes the power of sale as 'the last resort', and only available where there has been 'persistent' failure to comply with the landlord's obligations, this is not reflected in the provisions of Clause 38B",

which the bill inserts into the Agricultural Holdings (Scotland) Act 2003. That is our concern about the policy memorandum.

The Convener: You cite the ECHR. Article 8 describes state intervention:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country"—

and it goes on. The economic wellbeing of the country must loom large in the way the bill is framed.

Mungo Bovey: When the state interferes in article 8 rights, it must do so with one of the objectives in the enumerated list, of which you have just read three. It is an absolute requirement that one can identify at least one of them. Certainly, the country's economic development can be a ground for article 8 interference.

The Convener: That is helpful.

Kirsteen Shields: I will respond to Sarah Boyack's point about whether what the policy memo says about community engagement is in the bill. As far as I can see, the alternative approaches to community engagement that are set out in the policy memo from paragraph 187 onwards do not transfer into binding obligations in the bill. There is no obligation to consult communities or to provide additional resources

> "to support mediation between the parties in relation to the right to buy."

Perhaps that is where alternative avenues could be strengthened.

The Convener: Those are all things for us to consider as we question the ministers. We will move on to some of the detail.

Michael Russell: Megan MacInnes used the word "progressive", and I will push that issue a little in relation to the bill. Many of us regard the bill as a good piece of legislation, some of us do not and many of us want it to go a little further. However, the submissions that the witnesses have presented collectively contain a spectrum of evidence about how that might happen. I will focus on how we could make the bill more robust to legislative challenge so that it can achieve its objectives and be improved. For example, there are measures in the original land reform review group proposals that are not in the bill and which many people believe should come back into it.

I am struck by the word "progressive" because, with the greatest respect, looking at the Brodies opinion, I suspect that if Brodies had been asked to give an opinion on the Crofters Holdings (Scotland) Act 1886—fortunately, we did not have the ECHR at that stage—it would have been quite negative about it. That act produced security of tenure, fixed rents and the ability to have a house and keep a house on land. Those were radical measures in the 19th century; we want some measures that are radical in the 21st century. How do we achieve that and ensure that the bill can deliver that?

I was particularly impressed by the submission from Global Witness, but I want to find a way of making the voluntary guidelines forceful. I accept that we cannot treat them in the same way as the European convention, but how do we underpin the Parliament's intentions, which the bill will show, so that we can move forward?

Megan MacInnes: The simple answer is to follow the recommendations in our submission.

To echo what Kirsteen Shields just said, there is a lot of progressive language in the policy memorandum that is not carried forward into the bill. Therefore, especially given that the bill relies so much on the development of further regulations, one of the fundamental questions is how the committee and the Government can ensure that the intention that is described in the policy memorandum is transferred not only into the bill but into the development of the regulations as we go through the various stages.

One way to do that is to have something at the very top of the bill that directly refers to human rights, including the broader human rights obligations that relate to land issues as well as ECHR obligations. The second way is to have language in the bill that explicitly recognises that the securing of land tenure and land rights is a fundamental prerequisite before other human rights obligations can be realised. Therefore, for the Government to be able to realise all the other human rights obligations, such as the right to food or the right to adequate housing, tenure rights have to be secured. That is a very important fundamental statement.

I do not want to go into too much detail about the specific recommendations, but having something in it that would guide the development of the rights and responsibilities statement around a human rights approach would enable the bill to have a progressive nature that would achieve the objective that you mention.

Charles Livingstone: In relation to the previous crofting reforms, it is important to note that ECHR rights are not one way. They are not enjoyed only by the owner of land; tenants also have them.

There have been cases under the ECHR in which the state was found to be in breach of its obligations because, for example, it did not provide for tenure for people who had lived and worked on a particular piece of land for many years. Certainly, if there were infringements of tenants' existing tenure rights and those were taken away, that would also engage ECHR rights. It is just that the bill places more burden, if we can call it that, on the landlord and, so, any comment on ECHR issues will tend to focus on the landlord's interests.

On the bill being robust to legal challenge, the focus should be on the ECHR rather than other instruments, because the ECHR is domestically enforceable. On that basis, the questions for the committee to ask and the Government to consider are these: is there sufficient legal certainty; will people whose property rights will be infringed be able to know exactly what they can and cannot do; and will those people be able to know what they should do to avoid, for example, having their property compulsorily purchased under part 5 of the bill?

Ensuring that terms that might be controversial are defined where possible would certainly make the bill more robust. The key point might be considering whether, in any areas in which property rights might be infringed, there might be a less restrictive approach—one that would deliver the same policy goal but interfere less with property rights. For example, with the right to buy, if a lesser remedy, such as imposing a compulsory lease on a landowner, might achieve the policy goal, without depriving the owner of their interests in their entirety, it might be the route to go down. It would better to have a menu of potential options rather than just a limited few.

10:15

Michael Russell: That is helpful, thank you.

Kirsteen Shields: If I may, I suggest that the comments by Charles Livingstone and Megan MacInnes fit together quite well. In the pursuit of greater legal certainty, a preamble that contains a mission statement for the bill would clarify the issue of legitimate aim, which is so problematic. The issue may become problematic if that is what parties want to happen, because the bill is disparate, covering such diverse areas.

The submission from Scottish Land & Estates suggests that it understands the legitimate aim of part 10 to be to encourage productive agriculture, which is quite different from my understanding of the aim of the bill and from the aim of the bill that is set out in the draft land rights and responsibilities statement. A clearer aim that relates to the wider goals of social justice and fairness should be set out at the start. The bill could follow the example of the Community Empowerment (Scotland) Act 2015, which refers to the International Covenant on Economic, Social and Cultural Rights, and that would be entirely appropriate.

Eleanor Deeming: I want to build on those comments and point out the backdrop of the recently adopted UN sustainable development goals, which were agreed at the end of September 2015 and to which Scotland has committed. The SDGs reiterate the significance of land for the overall development agenda, in particular to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; to achieve gender equality and empowerment; and to protect, restore and promote sustainable use of ecosystems and forests and reverse biodiversity loss. That might be another way to build in and frame the context of the Land Reform (Scotland) Bill.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): Good morning, panel. I want to follow up on the issue of legitimate aim, which is fundamental because any challenges will be based on what the aim is. Would it be desirable for the Government to make clear as soon as possible that part of its legitimate aim was to build the international covenant and so on into the legislation and the requirements? You mentioned a mission statement. If the Government were to spell it out clearly up front that part of the purpose of land reform is to give equal status to the international covenant and the ECHR and so on, would that help us in relation to any future challenges?

Kirsteen Shields: That would certainly fit with my understanding.

Mungo Bovey: The justifications for interference with ECHR article 8 rights are exhaustively set out in the second paragraph of article 8, which is quoted in paragraph 11 of our paper. However it is described in legal analysis, it must fall under one of those justifications. As the convener pointed out,

"the economic well-being of the country"

is one such justification, and

"the protection of health or morals, or ... the protection of the rights and freedoms of others"

are others. If the Parliament is interfering with article 8 rights, it must bring itself within one of those listed grounds. It might be that coming within an international covenant can be brought within those headings, but it must be brought within those headings

Charles Livingstone: If the intention was to give the covenant and the ECHR equal status

from a legal perspective, that would not be possible, because to have equal status with the ECHR the covenant would have to be incorporated into the Scotland Act 1998 as something that governs the legislative competence of the Scottish Parliament. Mungo Bovey described those types of instrument well when he said that they belong more in the policy sphere than in the legal sphere.

The more clarity the Scottish Government can provide on its policy aims, the better. There is nothing to prevent the Scottish Government from referring to international obligations as helping to explain, guide, shape and interpret its policy. However, it is best to think about such obligations in the policy box rather than the legal box.

Megan MacInnes: We think that it is an excellent idea, which builds on a commitment in the Community Empowerment (Scotland) Act 2015 to consider the International Covenant on Economic, Social and Cultural Rights in decisions to do with the act's implementation. That seems to offer a middle path between possible barriers to incorporating the covenant into domestic law and making a policy statement—the commitment is stronger than a policy statement, because the covenant has to be considered. It should not be too difficult to ensure compliance with article 8 of the ECHR, given that the covenant is about economic, social and cultural rights, so it is very much in line with

"the economic wellbeing of the country".

Sarah Boyack: It is useful to hear you all debate the terms. Charles Livingstone talked about terms that might be controversial. Will you say which terms might be controversial? Are you talking about terms that are used in the policy memorandum or terms in the bill?

Charles Livingstone: Can you remind me of the context in which I said that?

Sarah Boyack: You were talking about there being a greater burden on landlords because we are changing the balance of how legislation will operate, and you said that terms might be controversial. I just wondered what you meant by that.

Charles Livingstone: I think that I just meant provisions that will potentially interfere with property rights, article 8 rights or article 6 rights—and by "interfere", I mean that the rights are engaged, not necessarily that they are breached. In its letter of 10 September, I think that the Scottish Government identified provisions in part 10 of the bill that it thought are likely to engage ECHR rights. I think that I meant such provisions.

Graeme Dey (Angus South) (SNP): Another phrase that you used was "legal certainty". I wondered whether, in the current context, what you meant was "foreseeability". Legal certainty might be desirable, but it is difficult to achieve, whereas we might think that reasonable foreseeability is a perfectly acceptable aspiration.

Charles Livingstone: I think that we could use "foreseeability" as a synonym for "legal certainty". The point is that people should be able to know what their obligations are and what they need to do to comply with them. On the reverse of that, if they are doing something that is contrary to their legal obligations, they should be able to foresee the consequences.

Mungo Bovey: We addressed the matter in paragraph 17 in our paper, using the Calder case. We said:

> "The provisions of the domestic law must therefore be sufficiently precise and foreseeable in effect. There must be a measure of legal protection against arbitrary interference by public authorities with Convention rights. The scope of any discretion must be adequately defined. Measures affecting fundamental rights must be accompanied by appropriate procedural safeguards."

Those are all requirements of legality, which is at the heart of the European convention. If you do not comply with all those requirements, there is a danger of the interference by the state being deemed to be arbitrary because it is not constrained by law but gives the state the power without constraint. That is absolutely at the heart of the convention rights of the individual.

The Convener: That is helpful—thank you.

Alex Fergusson will lead questions on the structure of the bill.

Alex Fergusson (Galloway and West Dumfries) (Con): Yes, I move on to the comparatively mundane issue of the structure of the bill itself.

I have raised on a number of occasions, as have a number of witnesses, the issue of the balance, or imbalance, between primary and secondary legislation in the bill as introduced. I think that some 43 items are left to secondary legislation. Although I am told that that is a similar number to the last time that we looked at land reform, my concern is about some of the substance of what is essentially being deferred, if you like, to another session of Parliament.

Some of the items are quite major, which I find increases the difficulty of my role in trying to scrutinise the bill. My difficulties need not concern you, obviously, but do you think that an appropriate balance has been struck between primary and secondary legislation? If you think that it has not, do you believe that that has any ECHR implications, given that the bill leaves a significant number of matters to be set out in later

regulations, which are therefore in the power of future ministers?

Mungo Bovey: The issue does concern the faculty. Indeed, we commented on that adversely in relation to sections 35 and 36. They are essentially devoid of content, which is left entirely to secondary legislation, albeit by the affirmative resolution procedure rather than the negative resolution procedure.

Mike Russell asked how you could make your legislation robust. You can make it robust by not making late changes to it or consigning to secondary legislation rules that then do not have the full scrutiny that the Parliament gives to primary legislation. If that happens, it puts your robustness very much in danger. In so far as secondary legislation does not get the same scrutiny as primary legislation—you will know that better than I do—there is a danger to the robustness of the legislation and therefore a danger to its convention compatibility because problems may be overlooked and the quality of the legislation may be poorer.

Charles Livingstone: In section 3 of our written submission we identified a number of areas where we thought that secondary legislation powers could better appear in the primary legislation itself.

I very much echo what Mungo Bovey said: the Scottish Government is as obliged to comply with the ECHR as the Scottish Parliament is. When you are looking at secondary legislation, you are looking at the same questions: is there sufficient certainty over what it says; is it in the public interest; is it proportionate? Where that becomes particularly relevant is in the degree of discretion that the courts will give to primary legislation as opposed to secondary legislation. Essentially, the more democratic the decision-making body, the greater degree of deference the courts will tend to extend to it. They will tend to give more deference to acts of a legislature than to decisions of a Government.

Therefore, even though the issues are the same—this connects with Michael Russell's question—the court might be more willing to take an adverse view of something that the Government does than something that the Parliament does.

10:30

Kirsteen Shields: I agree with both the points that have been made. I noted that the Government's response said that the delegated powers had been reduced quite considerably. However, the point is about the substance of the delegated powers, and the more that can be done now to describe those powers in detail, the better.

Graeme Dey: If sufficient clarity on where the secondary legislation was going to take the bill was available before the passing of the primary legislation, would that address the concerns, especially if that secondary legislation was going to be dealt with under the affirmative procedure or the super-affirmative procedure?

Mungo Bovey: It would address them but it would not resolve them, because the devil is in the detail of the terms in which you pass the legislation, and your intentions are secondary at best.

Graeme Dey: But many pieces of legislation require secondary legislation. Does that suggest that every piece of legislation might have an ECHR problem?

Mungo Bovey: It does. The more that you do by secondary legislation, the greater that problem. The point that I am making with regard to sections 35 and 36 of your bill, which concern information, is that there is really nothing in them. They are just a skeleton by which the secondary legislation will be guided. There is no Henry VIII clause, whereby the whole discretion is given to the executive, but it is reminiscent of that concept. It is not the worst that you could do, but it is not good.

Megan MacInnes: We would agree that there are certain elements in the policy memorandum that should be clarified further in the bill. However, the issue is not just about ECHR compliance; it is also about ensuring that the intention as described in the policy memorandum is carried through to the bill.

I will give two examples. Sections 35 and 36 concern improving information on who owns land. At the moment, the bill uses the term "controlling interest" but does not define what that means. It is important that the bill defines the fact that the term "controlling interest" means something that is equivalent to what is used in other jurisdictions—where it relates to the beneficial ownership of the land—rather than something that is equivalent to the use of the term in a company law context, where it can just mean the majority shareholder, because that would not help us get to the actual person who owns the land rather than just to a structure of shell companies.

The second example is in part 4 and concerns the issue of whether the guideline on engagement with communities is a duty to engage or just a guideline that can be ignored if someone does not feel like engaging. In the policy memorandum, there are examples of sanctions that could come into play if the engagement is not undertaken or the results of the engagement are ignored by the landowner. It is important that clarity is given in the bill about whether there is a duty to engage and what sanctions might be brought into force. That

would give the landowner the foreseeability that would make the legislation ECHR-compliant and would ensure that communities know what they should expect from the engagement.

Michael Russell: I will follow up that point specifically—this refers to Charles Livingstone's comments, too. I questioned the civil servants on this point during the first evidence session, and I would like to hear whether this is the case from somebody else. If the bill did not specify whether there is a duty to engage and what the sanctions are, I presume that a challenge to the bill would be more likely to succeed because the detail of what the Parliament wished to happen would be entirely missing: there would be a general provision about consultation with communities, but there would be nothing to say how that should happen or what would happen if the consultation did not happen. Would that be a fair interpretation?

Megan MacInnes: Yes, that is my understanding. There is no clarity about how the particular regulation will be implemented.

Michael Russell: Therefore, a challenge to that would be more likely to succeed.

I do not know whether Kirsteen Shields, Charles Livingstone or Mungo Bovey want to say something about that.

Charles Livingstone: It is difficult to predict in the abstract. We are more likely to have concerns about a challenge to a decision made under the legislation than a challenge to the legislation itself. The point is about paying greater deference to primary legislation than secondary legislation.

Michael Russell: I am not asking for a free opinion on a specific case; I was trying to make a point. Let us assume that part 4 is largely targeted at charitable organisations—although even that is not terribly clear. Officials said, and the policy memorandum implies, that cross-compliance could be used to enforce a charitable organisation to engage. If that is not on the face of the bill, could a challenge to that be more likely to proceed? I am trying to be as cautious as you might be.

Charles Livingstone: It is fair to say that it could.

Kirsteen Shields: We must bear it in mind that the property right under ECHR is a special right that is given an especially wide margin of appreciation. According to some readings by some key authorities on ECHR, all that is needed to satisfy the test is appropriate safeguards against arbitrary decision making and the establishment of a scheme for compensation. The aim can be wide under the margin of appreciation.

Michael Russell: The aim can be wide, but the means by which the aim is achieved—if you take the point that Mungo Bovey made, which is crucial—need to be expressed as specifically as possible by the Parliament. Would it be more helpful if the aims and the means were expressed specifically by the Parliament?

Kirsteen Shields: It would be, and not just for the sake of ECHR defence. It would be great to have in the bill an obligation to consult communities in order to strengthen participation and engagement. For the other very legitimate human rights concerns beyond the—

Michael Russell: I entirely agree with that and I hope that the bill will include that obligation, but I want to be absolutely clear. If the bill specifies the aim and specifies what will happen if an organisation does not meet the obligation, the bill is more likely to be robust. Is that a fair way of putting it?

Mungo Bovey: That is probably right.

It is correct that article 1 of protocol 1 is a less powerful protection than article 8, which is why in my answers I have focused on article 8, where it applies. I am not meaning to disregard article 1 of protocol 1, but, for example, it does not have a numerated list of justifications. It just has a general public interest justification. One need not identify one of the listed justifications, which is one of the aspects that makes article 1 of protocol 1 less powerful than article 8 and some of the other articles. Article 1 of protocol 1 and article 8 are the two parts of the ECHR that are principally in play. I have focused on article 8 because, to my mind, that is where the bill is most at risk.

Eleanor Deeming: I echo what Charles Livingstone said. Under article 1 of protocol 1, questions of compliance come down to consideration of individual facts, which is why it is quite difficult to generalise about what could happen for particular circumstances. Two circumstances might seem quite similar, but when we delve into the details we may get different results when trying to strike a fair balance.

Sarah Boyack: It has been very useful for us to hear you debating exactly what is and what is not in the bill. Ministers will likely read the *Official Report* of today's meeting, and it feels to me that there are a variety of ways that they could provide more clarity. There could be detailed amendments to take points in the policy memorandum and make them more explicit and included on the face of the bill—you have highlighted sections 35 and 36 in relation to that. When the ministers come before the committee, they could bring a statement on the detailed policy issues of what they intend to put in the statutory instruments. Finally, ministers could also give us a general statement of what they intend.

It would be useful for us to reflect on that when we write our committee report. There is a range of views and we cannot make the bill perfect, but having listened to the views across the panel it is obvious that we need a bit more clarity than we have at the moment. Perhaps Kirsteen Shields wants to come back on that.

Kirsteen Shields: It would be good not just to include the provisions in section 35 and 36 at the start of the bill but also to make direct reference to the International Covenant on Economic, Social and Cultural Rights.

Sarah Boyack: That is helpful clarification—thank you.

Dave Thompson: I want to be absolutely clear and I think that I am getting there. Is it important not only that there is a very robust legitimate aim at the start but also that the aims are spelled out in the guts of the bill, so that there is clarity? Are you proposing secondary legitimate aims in relation to certain sections, or is that not right?

Kirsteen Shields: My point was that having different aims for different parts of the bill is quite problematic. I would not recommend that approach; I would have a central aim and then have descriptions of how each part serves that aim.

Mungo Bovey: The issue that you are addressing, Mr Thompson, is what we call proportionality. If you want to open a nut you can use a nutcracker or you can use a sledgehammer, but if you could use a nutcracker it would be disproportionate to use a sledgehammer, which would probably destroy the nut and so defeat the purpose.

Proportionality means that you have identified the aim in respect of which you are interfering with a right of an individual and you have an aim for each right. If you are compulsorily purchasing someone's house—that is the interference—you need to know which aim is being pursued in doing that and you need to ascertain whether the action that you are taking in buying the house is rationally linked to the aim that you have set out and is also no more than is necessary to accomplish it.

Therefore, if a landlord is in breach of his obligations, you must ask whether the only way in which you can enforce those obligations is to buy his property compulsorily or whether it would be possible to enforce them by, for example, allowing the tenant to withhold his rent and to use that money to repair the breaches of which the landlord is guilty. In those circumstances, the question is whether your interference strikes a fair balance between the rights of the individual and the interests of the community.

That is the exercise that needs to be done in relation to each interference with the individual. Although it is perfectly legitimate to set out that the legislation is made to be in compliance with an international instrument or a policy objective, you still need to address each interference, because if it is my farm or house that you are buying, I will not be much interested in defending my position in relation to what your aims are for the rest of the bill.

10:45

Charles Livingstone: My opinion may differ slightly from Kirsteen Shields on whether you want to have aims for the different parts of your legislation. It is fine, and probably advisable, to set out what your overarching aims are, but when you are getting into different parts of the bill that have different policy aims or do very different things, it is important to be clear about what aim is being pursued by each part.

One example that I have seen is that in part 10 the assignation and succession provisions have often been discussed as though they pursue the same policy. I have seen references to the tenant being able to retire with dignity as applying to both assignation and succession. However, that can only be relevant to assignation because succession logically means that the tenant has died and so they are not retiring.

Having that clarity on aims when different things are being pursued is important.

The Convener: We will be coming to succession and assignation later on.

Claudia Beamish (South Scotland) (Lab): I seek clarification from Mungo Bovey. Am I right in thinking that you talked about buying "people's houses"?

Mungo Bovey: Yes—that is right.

Claudia Beamish: I want to understand where you are coming from on that. My understanding is that the bill is about the land, not people's homes, if we are going to be accurate about it.

Mungo Bovey: The concern that I have about homes is that "homes" has been given an extended meaning by the European Court of Human Rights, which extends it to company offices of the business. It includes:

"the registered office of a company run by a private individual, as well as a juristic person's registered office, branches and other business premises."

There is the possibility, notwithstanding that, on occasion, homes have been excluded from what is happening in the bill, that "home" may occur in criticism of the legislation.

Claudia Beamish: Perhaps the intention needs to be clarified—that it is not about taking over people's homes but about the right to land, and that is different.

Mungo Bovey: That is a difficulty, because of the width of the definition. It does not seem inconceivable that a farm office could be somebody's home under the terms of article 8. I have addressed the matter at paragraphs 12 and 13 of the Faculty of Advocates submission. It is an issue. Perhaps, at worst, the example that I chose in my answer to Dave Thompson was not a good one, but I chose it because of the kind of concerns that the faculty has expressed.

Kirsteen Shields: Without having that section to hand, do I understand that landowners' homes are an exception already, under the bill?

Mungo Bovey: Yes.

Claudia Beamish: I have a further question relating to the least intrusive measure. Mungo Bovey gave the example of whether it would be possible to have a compulsory lease rather than the purchase—

Mungo Bovey: I think that somebody else said that.

Claudia Beamish: I apologise.

Mungo Bovey: That is okay. It is correct.

Claudia Beamish: The point that I want to make is that you gave the example that someone could go back—or could they? You did not say that they could. Could they go back and get the landowner to repair the land?

The committee has seen an enormous amount of evidence of land use not being sustainable. With someone who, over a certain period, has not maintained the land sustainably, to get them to do that would seem to me to be quite a difficult way forward. You are talking about the least interference, but surely there is a balance in that with what I would see as a right—which we are trying to define—of the community to have the possibility of using the land for sustainable development. There is a balance that comes into play there as well.

Mungo Bovey: If you are satisfied that alternatives will not serve the aim that you have identified, that points to the need for the interference that you are proposing. I was trying to point out the exercise that needs to be gone through. If it is believed that a landlord is in breach of his obligations and that those obligations could be implemented by allowing the tenant to withhold his rent—as in the example that I gave—so that the saved rent could be put towards repairing the landlord's breaches, it would arguably be disproportionate to take the landlord's farm from him, because the usefulness of the farm could be restored by a less intrusive measure. If, however, the evidence and belief is that it cannot be done by that means, that lesser measure falls out of consideration and other lesser measures require to be considered, and once they are dismissed the way is clear to take a measure that interferes with the rights of the landowner under article 8 or article 1 of protocol 1 of the ECHR.

Claudia Beamish: I realise that you have given us that example as a way of taking us through the steps, and that is helpful, but I think that the withholding of rent in such circumstances might be a pretty complex legal issue as well.

The Convener: We have to be careful about getting into the detail of hypothetical cases.

Charles Livingstone: That illustrates the point that I mentioned earlier about wanting to have a menu of options rather than only one option to which people can resort. I expect that there will be cases in which the ultimate fallback option of changing the ownership of land would be appropriate because nothing less would work. Where you would get into difficulty is in cases that do not reach as far as that, where some lesser interference might achieve the policy outcome that you want to achieve. In such circumstances, it would not be a defence, from an ECHR perspective, for someone to say, "But the bill only gives me one option." If a lesser option would achieve what they want to achieve, the courts would say that, even if only one tool is available to them, using that tool would nevertheless be disproportionate.

Kirsteen Shields: I want to explore the issue a bit further. That is where the sliding aim is significant. According to the farm owner's interference, and the sledgehammer-and-nut analogy, that comes into play because, if an interference is to be justified, it must be no more than is necessary to achieve the aim. If the aim is to encourage productive agriculture, there are alternative ways to do that. If the aim is a higher aim that is set out in the policy memorandum and in the land rights statement, such as the aim of diversifying ownership and serving social justice, it may be the case that there are not any easier ways to achieve those aims. If the question is whether there are easier ways to achieve productive agriculture, the answer is yes. That provides an example of what we are disputing when we dispute the aim.

In response to Charles Livingstone's point about it being desirable to have different aims for different parts of the bill, I have to say that you will not encounter too many difficulties with the ECHR if the aim is sufficiently wide at the outset. The problem with creating more specific aims is that it

gives more opportunities to challenge the measures.

The Convener: That has given us lots of food for thought. I see that Michael Russell wants a further meal.

Michael Russell: In a previous evidence-taking session, I pointed out that, in relation to tenancies, there are two conflicting aims, one of which is to produce more efficient agriculture and the other, which has been referred to on several occasions, is to give confidence to the land-letting sector so that it will continue to let land. I put this on the record because I think that it is important and I would be interested to hear people's views on it. Presumably, if a piece of legislation has conflicting aims, it becomes easier for it to be successfully challenged.

Mungo Bovey: If you have a lack of clarity about your aims, that is so. It is conceivable that different parts of a bill might have different aims and, therefore—

Michael Russell: So we are looking for clarity in aims.

Mungo Bovey: I certainly think that you are looking for clarity in aims. Kirsteen Shields's example of how one aim might justify a certain type of interference but another might not is useful and quite persuasive.

Michael Russell: The issue is important, because the bill is balancing two conflicting aims: increasing the rights of tenants and protecting the rights of landlords. It might be impossible to do both of those things.

Megan MacInnes: I can suggest one possible solution. Clearly, there needs to be one overarching aim that the bill intends to achieve. That aim needs to clearly point towards a vision of sustainable development and equitable social justice. How, within that overall aim, you balance the rights of individuals with the public interest should be what the overarching aim seeks to address.

If the aims of further sections of the bill need clarification, those sub-aims still need to be written clearly and to be compliant, in a way that does not contradict the overarching aim.

Michael Russell: It needs to be complementary rather than contradictory.

Megan MacInnes: The aims in the hierarchy of aims need to be complementary in order to avoid the possibility of challenges.

Michael Russell: That is useful—thank you.

The Convener: So the statement at the start of the bill is an important place to set out those broad aims. We keep coming back to that.

Jim Hume has questions on section 35 issues.

Jim Hume (South Scotland) (LD): Article 8 has been touched on, and Megan MacInnes has talked about the issue of who owns the land. There has been some discussion about the possibility that people who own land could engage article 8 rights, as article 8 provides a right to protection for a person's private and family life, their home and their correspondence. The courts have accepted that article 8 also protects an individual's business environment. Of course, part 3 of the bill confers powers on the Scottish ministers to make regulations enabling persons who are affected by land to access information about persons who are in control of that land.

Does the panel consider that any issues regarding ECHR compatibility arise in relation to the power in section 35 regarding disclosure of information about individuals? If the bill is not sufficiently competent at the moment, does it need amending in order to address that?

Charles Livingstone: In the absence of the regulations, we cannot really say, because it is the regulations that will put forward the substance. In the absence of the substance, we cannot scrutinise things to the extent that we would want to.

Certainly, if the regulations were drafted in an extremely broad way so that all information had to be published proactively, regardless of whether anybody wanted it or had a justifiable reason for wanting it, that might be too broad, and there might be article 8 issues. By contrast, with regard to a narrowly tailored requirement for someone to disclose information only in circumstances where to do so will pursue one of the aims that are set out in article 8, we would expect that to be fine. However, in the absence of the substance, it is quite hard to say what we would be looking at.

Jim Hume: That leads on to the second part of my question. You talked about the absence of substance. Could the bill be amended to put that substance in?

Charles Livingstone: Yes, I would have thought so. If the Government were to bring forward amendments at stage 2 there is no reason why the substance could not be put in the primary legislation rather than being left to secondary legislation. Of course, there may be technical issues about establishing the mechanism by which information is transferred that are better left for secondary legislation. However, it is generally preferable to see the substance of the matter in primary legislation.

11:00

Megan MacInnes: On the conflict with article 8 of ECHR, I draw the committee's attention to two parallel processes that are currently under way at UK level, in which registries that have been set up that disclose information on company ownership have had to go through the process of ensuring that they are compatible with article 8 and the protection of private information. The first is the persons of significant control register, which is the UK-wide register of beneficial ownership of companies, which is part of the transposition of the fourth Europe-wide anti-money laundering directive in the UK Small Business, Enterprise and Employment Act 2015. That register will include information about the beneficial ownership, the persons of significant control and the named natural person who is at the end of the complicated structure of shell companies. It does not cover trusts, but it at least gives the name and those details. That is an example where we have had a clear agreement that disclosing such information is compatible with article 8.

The second example gives more detail and is the transposition of the EU transparency directive into UK law, which relates to the reporting requirements for extractive industry companies—oil, gas and mining companies—on the revenue payments that they make to the Government. A registry has to be set up in order to transpose that EU directive into UK law and it has been agreed and finalised, as far as we understand. In that registry, the UK companies that are involved in the oil, gas and mining industries have to disclose the name of the directors of the company, the dates of birth and service addresses of the owners of the company and their means of exerting control over the company. That has been agreed at UK level and considerations of article 8 of ECHR have been addressed in that agreement. I offer those examples to demonstrate to the committee that there is significant space within what companies and individuals can be asked to disclose while remaining compliant with article 8.

On whether section 35 is currently adequate, as we said in our first written submission, we do not think that it is strong enough yet. At the moment, there is a language issue around the disclosure of the controlling interest or the persons in control of the land. As that is currently defined, it will not necessarily mean that the natural persons controlling the entity that owns the land will be disclosed—we might end up with the name of a shell company, which is owned by another shell company, which ends up in the British Virgin Islands or somewhere. In sections 35 and 36, we would like to see a clearer definition of what the controlling interest is and we would like the definition of the term "persons of significant control" to be in line with the one that is used at European level in relation to money laundering. We have included that definition in some of our various submissions to the committee.

It is very important that sections 35 and 36 are given greater clarity to ensure that we end up with the disclosure of the natural persons, rather than the legal persons. Ultimately, that is what the section on improving information on who owns land is trying to achieve.

Mungo Bovey: That illustrates the weakness of the position in which the legislative process now finds itself. If there is an amendment to the bill or if it is passed as it is and secondary legislation follows, I do not think that the committee will reinstate or repeat the evidence-gathering procedures or this evidence session, which is focusing on the convention, and therefore there is a danger inherent in where we already are. Perhaps I am wrong.

The Convener: You may be slightly wrong, because we can take evidence at stage 2 and, if we do not, we can take evidence at the affirmative or super-affirmative stage of secondary legislation. I suspect that the committee will make a strong recommendation that such options are available to us. There are mechanisms available now.

Mungo Bovey: I do not doubt that. The legislative scrutiny to which I refer is dependent on you doing that, and that is the weakness, as it were. Now that I have made the point, you may take steps to do it, but the structural weakness in the position is still present because it requires the committee to take those steps that I am sure are within your power.

The Convener: I ask Megan MacInnes to come back in on those points. You said that private trusts are excluded from the registry. Did the EU have the aim of identifying who the beneficial owners of private trusts were when it started the process? What happened in Britain that resulted in that not being taken forward?

Megan MacInnes: The fourth EU money laundering directive requires disclosure of the beneficial owners of trusts, but that information is not public. If all the member states of the EU implement the money laundering directive at the minimum level as agreed, that would include non-publicly accessible registers of beneficial owners of trusts and companies. The information is there but the problem is that only enforcement agencies working on money laundering and terrorism have access to that database.

The UK Government has decided to go further in transposing the directive, but the information that will be made public is only that on the beneficial owners of companies, not those of the trusts. Global Witness is working on the amendments to the directive at the European level

as well as how it is being transposed at the UK level. We are not privy to the reason why the UK Government decided not to include trusts in the public registry. Global Witness and a number of other organisations were asking for that, because the issue of lack of knowledge of who is behind the trusts is of critical importance across the UK. We understand that David Cameron's office was not willing to consider that at the time.

The Convener: The Scottish Affairs Committee said in its final report on land reform in Scotland in March 2015 that it would take

"a fundamental change in UK law"

to reveal who the beneficial owners of private trusts were. Are you saying that that information will be available to enforcement agencies? If so, that information must be available somehow.

Megan MacInnes: It is available, but it is not made public.

On the trust issue, I understand that the Scottish Law Commission is looking at trusts in Scotland. That is a devolved matter, so there is space for the Scottish Government to consider the disclosure of the beneficial ownership of trusts through that parallel process, which is happening separately from the bill.

The Convener: Do you think that there is a significant amount of Scottish land that is actually tied up in private trusts of which we do not know who the beneficial owners are?

Megan MacInnes: The understanding of Global Witness, based mainly on research done by Andy Wightman, is that the issue of trusts is of less significance than the use of companies as corporate vehicles to hide the ownership of land. Companies are the main vehicle being used to do that at the moment. That is why we agree with the focus in sections 35 and 36 of the bill on the owners of companies rather than trusts.

The Convener: Thank you for that. As there are no other points on that matter, we move to Angus MacDonald.

Angus MacDonald (Falkirk East) (SNP): Continuing on a similar theme, I want to explore non-EU entities further, which Megan MacInnes touched on earlier when she mentioned shell companies and beneficial ownership. There has been quite a bit of debate outwith Parliament, not least on social media, about non-EU entities owning land in Scotland. We know that the land reform review group recommended that the bill should include a provision to limit to entities that are registered within the EU the legal entities that can register title to land. Would such a provision raise difficulties in respect of compatibility with the ECHR?

Kirsteen Shields: It will not do so directly, to my knowledge. Mungo Bovey may disagree.

Mungo Bovey: I do not think that such a provision would raise difficulties. There might be difficulty with EU law at some stage, but we will not know until we see the provision. When we were asked about that in the consultation, our view was that it is not inconceivable that third-country individuals and entities would simply set up companies in the EU with which to own land or to do whatever, so it is not perfectly clear that the proposal would be effective in seeking the disclosure or transparency that is wanted. However, we do not know.

Kirsteen Shields: Nor would it be rational or justifiable to discriminate on the basis of nationality, in that context. Another way to discriminate would be on the basis of the size rather than the nationality of the entity. That would be far more rational way in which to achieve the aim.

The Convener: Andy Wightman said that it does not matter where somebody is; the aim is not to say that somebody from America could not buy a house or land here, but that the person who is in charge of making decisions about that land is available in the EU jurisdiction.

Mungo Bovey: We have suggested that there should just be an obligation on landowners to have in the jurisdiction an address at which they could be served: more than that need not to be done. That would put the obligation on them to check their mail to see whether somebody is suing them, making an application or whatever. Something relatively simple might make the difference. If members are concerned about people who are far away and uncontactable, they could be made more contactable by—

The Convener: The issue may be more than that.

Mungo Bovey: That may be so, but that suggestion might address some of the concerns that the committee is expressing.

Angus MacDonald: We have already heard in evidence that entities that have addresses are not responding to letters, so that would not solve the problem.

Megan MacInnes: Global Witness would very much like the bar on non-EU companies to be reintroduced to the bill. It would serve an important purpose in improving accountability of landowners to the local communities—which is the ultimate objective of finding out who owns the land—and in relation to other objectives including tax transparency, which is still a consideration for the Scottish Government, even though that is a reserved issue.

We are happy with the way in which compatibility with the ECHR provisions was described in the policy memorandum and with the way in which the land reform review group described that in its original recommendation.

The other thing, of course, is that it is not just about ensuring compatibility with the ECHR; there is also a human rights issue for communities that are not able to contact the person who owns and makes decisions about land and natural resources, which has an impact on the community, on tenants and on crofters. Enabling transparency by means of a bar such that companies must be registered in the European Union would be a very useful step towards helping the Scottish Government to meet its broader human rights obligations separate from the ECHR.

11:15

That said, Global Witness is concerned about the loopholes that the Government said are the rationale for why it did not suggest the approach and include it in the bill. We suggest that, in order to close the potential loophole of disclosure of one European company just taking you to another European company or a company that is registered in a secrecy jurisdiction, the bill should go back to registering not just the company name but the names of the beneficial owners—the persons who are in significant control of the company. The problem with the powers in sections 35 and 36 is that they are powers only of request for the keepers; they are not powers to require that such information be included in the land register.

The solution, therefore, is to look at the conditions of application under the Land Registration etc (Scotland) Act 2012 and to consider whether two additional questions should be asked on application. The first would require a company to be registered in Europe; the second would require the ultimate beneficial owners—the persons in significant control of the company—to be named. If both those pieces of information were added to the conditions of application at the point of registering the title in the land register, that would close a number of the loopholes that we are discussing.

The Convener: That is good to know.

Charles Livingstone: Going back to the original question about whether any ECHR provisions could be engaged, I see the possibility—in theory, at least—of article 1 of protocol 1 being engaged if the bar was expressed in a way that meant that existing owners of property would be deprived of that property. That is theoretical, in the absence of any such language in the bill, but I see that it might be engaged. That would lead to questions about having to have a legitimate aim and matters being in the public interest, being proportionate and so on.

The Convener: Thank you.

Let us move on to "Right to buy land to further sustainable development", on which Graeme Dey will lead.

Graeme Dey: We touched on some of this earlier. I want to explore whether we require to define terms such as "sustainable development", "significant benefit" and "significant harm" more clearly. The risk, if we do not do that, is that problems may arise concerning interference with the property rights of landowners.

Mungo Bovey: The Faculty of Advocates has probably been at the forefront of the criticism of not defining "sustainable development". "Sustainable development" is the aim that is being pursued but it is not an established legal term to which the court will be able to refer in respect of its meaning. It might therefore place the legislation at hazard if the bill were to fail to identify what its aim is. Putting it in the explanatory statement is not a satisfactory way of legislating, because the court does not know what to make of the explanatory statement—whether or not it is endorsed by the Parliament.

The other terms that you mention do not necessarily need further interpretation.

Graeme Dey: That, of course, is an opinion.

Mungo Bovey: Yes—of course it is. That is why I am here.

Graeme Dey: Thank you. Does anybody have an alternative viewpoint?

Kirsteen Shields: The Scottish Parliament information centre briefing states that there is an agreed definition of "sustainable development", but I do not think that it is strong enough. I think that there is an opportunity to clarify the phrase in the bill or to use an alternative phrase. At the moment, all sorts of things can qualify as "sustainable development" that do not necessarily serve social justice.

The Convener: You will recall that Lord Gill stated, in his judgment on the Pairc case, that everybody knows what "sustainable development" means.

Kirsteen Shields: Exactly—but it is a term of art that can be misinterpreted.

Megan MacInnes: We are with Lord Gill on that. It is not the first time that the phrase "sustainable development" has been used in Scottish legislation, and it is relatively well defined both in the public perception and in existing law. We do not think that it needs to be defined further than it is at the moment.

Charles Livingstone: The term “sustainable development” is well understood in certain circles—in policy-making circles and among stakeholders in policy making. From an ECHR perspective, the question needs to be whether it is sufficiently well understood by everybody who might be affected by the provision. I am conscious of the Pairc case, but I am not sure that I would be comfortable about applying that to all definitions of sustainable development. In that case, a challenge arose that suggested that there was no possibility of an independent adjudication on the Scottish Government decision about sustainable development. The court decided that it was a term that was capable of being defined, and that a court was therefore capable of dealing with it and a party to a dispute was capable of answering any claims that might be made in respect of it.

The problem is not that the term cannot be defined: it is that it can be defined in a number of different ways. Ultimately, if it came before a court, a court might be able to define “sustainable development” as meaning whatever, but the difficulty for a landowner or for somebody looking to buy land is that they may not be clear about what it is until they get to the stage of having the question before the court and being told what “sustainable development” means in the circumstances of the individual case.

At worst, it could not hurt to define “sustainable development”. Leaving it open leaves room for misunderstanding and for dispute in a way that a more defined term would not.

Alex Fergusson: Would your comments equally apply to the terms “significant harm” and “significant benefit”, whose definitions have also been questioned?

Charles Livingstone: No. Sustainable development, as Kirsteen Shields said, is more of a term of art that is used in certain circles. “Significant benefit” and “significant harm” are really just ordinary language, and the courts and anybody who would be affected by the bill would be more than capable of understanding, or at least estimating, what those might mean in a particular case. I agree with Mungo Bovey on that point.

Alex Fergusson: That is useful. Thank you.

Sarah Boyack: You said that you would expect some people not to have come across that term before, but it is in common use in legislation in Scotland and in quite a number of acts of Parliament that have been supported. The most obvious one that impacts on property rights and on landowners’ rights is the Planning etc (Scotland) Act 2006, which requires a presumption in favour of development that contributes to sustainable development. Are you aware of circumstances in which landowners have objected to the use of the term in the context of the Planning etc (Scotland) Act 2006, which is also about development of land?

Charles Livingstone: No, but the references to “sustainable development” in that act are giving policy makers and decision makers a steer as to the things that they should be taking into consideration. That would fall in with what I said earlier about the term being fairly well understood in policy-making circles, but once you get outside those circles the question is whether ordinary landowners and communities would benefit from further definition of the term for clarity, and to have foresight of what they would be required to do and the circumstances in which an application might be likely to succeed.

Sarah Boyack: We might just have to disagree on that, because the Planning etc (Scotland) Act 2006 has been in place for nine years now, and I am not aware that there is a huge pressure from landowners about sustainable development in planning. It is an objective of the act, but when decisions are taken, as they would be under the bill that we are considering now, there is a framework that gives people the chance to make representations—both from the community and from the landowner’s side—on whether sustainable development is being delivered in relation to either current or future use of the land. I see a parallel there—maybe that is something that we can reflect on, convener.

Kirsteen Shields: Perhaps we should not look at “sustainable development” as a term that can be challenged by landowners, and instead we should ask whether it is the best term to use and whether there is a term that might raise the bar as to what the outcome should be. I would say that “sustainable development” is akin to “corporate social responsibility” in use and misinterpretation. We need to ask whether there is a way to raise the bar on the term.

Sarah Boyack: What would your alternative phrase be? [*Laughter.*]

I am making a serious point. If you are suggesting that the term is not good enough, what would be a better phrase?

Kirsteen Shields: You could use the “significant harm” and “significant benefit” framework, and you could look particularly at significant benefits that are non-economic. The definition of “sustainable development” requires an integrated approach to socioeconomic and environmental outcomes, so why not just use that phrase, rather than sustainable development?

Sarah Boyack: That is how we see “sustainable development”—it has not been a problem before.

Kirsteen Shields: I know. I am just suggesting it.

The Convener: We used the term "economic harm" in the Community Empowerment (Scotland) Act 2015. Since the environment is all-encompassing and since we are fauna in the environment, the term "economic harm" provides an encompassing definition, because there has got to be an environmental element.

Thank you for the hint in that direction. Once again, you are leaving us with the joy of having to find some way to define the term in more detail—raising the bar, as you put it.

11:26

Meeting suspended.

11:34

On resuming—

The Convener: We will restart with a question from Claudia Beamish.

Claudia Beamish: My question continues with part 5 of the bill. My colleague Sarah Boyack and I want to tease out some of the other issues. Do panel members consider that the tests to be satisfied by a part 5 community body wishing to exercise its right to buy give appropriate weight to the rights of landowners whose property may be the subject of a part 5 application? Should there be a specific requirement on the Scottish ministers to consider the likely effect on the landowner of the transfer of land? We are looking for as much clarity as possible in the bill on these issues, and this question perhaps goes to the heart of the matter.

Kirsteen Shields: As I understand it, the threshold is significantly high. It requires the identification of significant harm and significant benefit. In that respect, the right to buy is considered to be a power of last resort.

Megan MacInnes: I agree with Kirsteen Shields on that. The other thing that would help the bill and its defence if questions were to be raised about that would be to recognise the other human rights obligations of the Scottish Government, such as its obligations with regard to economic, social and cultural rights, in the overarching aim of the bill. That would counterbalance any efforts to say that the contents of part 5 of the bill are not in compliance with the ECHR. Recognising that part 5 is intended to achieve other human rights obligations that are not necessarily in the ECHR but are still obligations that the Government has can help to clarify the correct balance between the rights of individuals and the rights of communities and the public interest.

Charles Livingstone: On the second part of the question about including a requirement to take account of the effect on the landowner, the Scottish Government is obliged to do that anyway, under its ECHR obligations. Having a specific obligation in the bill would not necessarily strengthen the position from an ECHR perspective, but it might assist the decision-making process, which can be important in ensuring that you have taken into account all the relevant issues and have discarded any irrelevant ones. Such a requirement might be a procedural improvement without necessarily being a substantive one.

Alex Fergusson: On that specific point, when the committee met in Skye—it seems a long time ago, but I think that it was just a month ago—I was discussing issues with Peter Peacock of Community Land Scotland. I put it to him that where the community tests had been met and the landowner who was likely to be affected had made his case, or appealed against the right to buy—whatever the correct terminology is—so that it became a 50:50 decision, the community right would predominate. Does any of you believe that there may be ECHR implications in such circumstances in respect of the individual whose property will be affected?

Claudia Beamish: I would appreciate it if we could hear from Eleanor Deeming, who was going to respond to my question before we move on to that.

The Convener: By all means, yes.

Eleanor Deeming: I was going to echo what Kirsteen Shields was saying. There is already quite a high hurdle and there are other safeguards built in, such as the right to make representations—the landowner would be involved in the process all the way through—fair compensation and the right to appeal. All those things strengthen the position that a fair balance is struck.

The Convener: Does anyone want to respond to Alex Fergusson's question about a 50:50 situation and the rights of the community being uppermost?

Mungo Bovey: I am not clear how that comes to be when the sustainable development conditions are met only if not granting the consent to the transfer of land is likely to result in significant harm to the community. It seems that section 47(2) and the preceding section say that the transfer needs to be the only practicable way of achieving the significant benefit to the relevant community. It does not seem that there would be a 50:50 presumption in favour of the application. The circumstances in which that can arise seem to be quite constrained.

Alex Fergusson: So you are saying that a 50:50 scenario is not going to happen.

Mungo Bovey: That is my reading. I think that quite a high test needs to be met on the merits, according to section 47(2), which I hope sets out where we are.

Kirsteen Shields: In my understanding, if that scenario happened, and the community trumped the landowner's rights, there would be a question about whether that was justified interference with article 1 of additional protocol 1, which concerns the right to property. What would then have to be established is whether the decision was not an arbitrary one and whether an appropriate scheme for compensation had been established. Those are the tests that have to be met.

Charles Livingstone: It might be worth noting that, if the ministers, as the primary decision makers, are in a 50:50 situation and the decision could go either way, the courts that decide on ECHR issues will tend to offer a degree of discretion to decision makers in those circumstances. The courts would not look at the situation and say, "We agree that it is a 50:50 situation and think that it should go in the other direction"; they would tend to say that, in a 50:50 situation, it is not their role to second-guess the decision maker.

Alex Fergusson: That is useful. Thank you.

Sarah Boyack: I want to discuss the issue of proportionality. Are the measures in part 5 proportionate to the stated aims of furthering sustainable development, avoiding significant harm and delivering significant benefit to communities? Does the right to buy go further than is necessary to achieve those aims? I would like to explore the issue of alternative approaches to achieving those aims that would be less intrusive in their impact on landowners' rights.

The Convener: We touched on some of that before, but let us try to be more specific, if we can.

Charles Livingstone: We have covered this, and I mentioned the possibility of having some less restrictive policies that would fulfil the same aim. In a situation in which the only possible remedy to the mischief that you are trying to tackle is to change the owner of the land, it would be proportionate, because no less restrictive alternative would do what you want to do. However, there are likely to be cases that do not get that far. In those cases, you might be able to achieve the sustainable development and the benefit to the community that you want to achieve without having to deprive the owner of their rights.

In our submission, we flagged up quite a specific way of dealing with the issue. In some circumstances, the community might want to undertake sustainable development that will benefit the community and the landowner might agree that that should be done but it might be a tenant's interest that is preventing the work from going forward. At the moment, the bill says that a tenant's interest can be acquired by the community, but only if it has already made an application to acquire the owner's interest. Separating those two elements out and having a procedure by which the community might be able to take over the tenant interest without depriving the owner of their rights or putting the owner through the process of a part 5 application would, from the owner's perspective, be a more proportionate way of achieving the desired outcome. I hope that that is a concrete example of where a more proportionate approach might be possible, if the legislation allowed for it.

11:45

Sarah Boyack: If the bill is passed, I presume that one of the tests that the ministers would make would be to see whether a better alternative remedy had been suggested. It is not an automatic right to buy; it is an automatic right to pursue the right to buy, which is decided on by ministers. For example, a community might be keen to invest in renewable energy or community housing to generate income for the community. A lease that was controlled by a landowner might not give them that, because the community might need a certain period for the lease or other certainty to secure investment.

As it stands, the bill gives communities a series of choices as to how it might pursue the right to buy. We have discussed the possibility that the very existence of the bill could bring some landowners to the table. Your argument does not automatically rule out the measure in the bill; it just flags the fact that there will be a menu of choices that landowners and communities will be able to pursue.

Charles Livingstone: That is true, but I would qualify it by saying that the possibility of doing something less restrictive of property rights might be sufficient to prevent the use of the right to buy, which could result in the ministers not being able to approve an application in a way that is compliant with landowners' convention rights, even though that less restrictive option would not actually be available to them under the bill. I hope that that makes sense. If a less restrictive option were available in the bill, proportionality would say that the ministers should take that option. However, if it is not available in the bill, that does not mean that the ministers can proceed to the most restrictive option just because it is the only one available.

Sarah Boyack: Is there a distinction between what is in the bill and what is available? A whole raft of things are available but will not all be in the bill.

Charles Livingstone: You are likely to get into ECHR territory only where there is an element of compulsion to what is being done. Certainly, all sorts of things can be done voluntarily, and the ECHR will not be engaged on those unless the state is involved in a way that pressures parties to do something that otherwise they would not do. From an ECHR perspective, we are thinking about whether something that the Scottish Government does under the bill could be challenged. The fact that things could be done voluntarily does not necessarily assist in making things done on a compulsory basis proportionate. I hope that that is not too unclear.

Sarah Boyack: However, ministers will have the capacity to test that proportionality when applications are made, and they have the choice to approve or not approve an application.

Charles Livingstone: Yes. The point is that those are the only two options that are available to them. The bill does not give them any lesser option. It is either the right-to-buy option or nothing; the bill does not provide for anything in-between.

Sarah Boyack: Do witnesses have any other views?

Eleanor Deeming: I am in danger of repeating myself, but this conversation highlights that each application will turn on its own specific set of facts. Taking into account proportionality, each application will have to go through the test that we have been discussing. It is important to remember that that cannot be generalised in any way. Each application will have to be looked at on its own merits from the start.

Megan MacInnes: We are relatively happy with part 5 as it stands. The analysis that we did between part 5 and the Government's voluntary guidelines for selling land showed that they are relatively compliant. In many ways, what is included in the broader community right to buy in the bill as a whole goes well beyond what is in the voluntary guidelines. We are also happy with the way the impact assessment is considered in the policy memorandum with regard to ECHR compliance.

I think that there is a risk of confusion between the underlying objective of the community right to buy as it exists in all the regulations in Scotland that refer to it, which is securing the ownership of land for the community, and the objective of securing long-term leases, which is very different. I think that we should not get confused by considering long-term leases as an alternative route when, if the objective is the right to buy, there is no alternative route to that unless a separate procedural route to purchasing land is considered. If, on the other hand, we are thinking about leases—that is, lease rights and the community's right to lease land or natural resources associated with it—that is a completely different policy objective, which should be considered under a completely different route.

Sarah Boyack: I want to follow that up by asking what the alternatives would be that would enable a community to exercise a right to buy. There are no other legal opportunities, are there? We have compulsory purchase legislation, which can be exercised by local authorities, but that is not something that communities have the right to access.

Megan MacInnes: Yes. Our thoughts are that the existing provisions—what is in the Land Reform (Scotland) Act 2003 and the amendments that were introduced in the Community Empowerment (Scotland) Act 2015—are already complicated enough. What is needed is simplification rather than greater diversification of the legal routes to achieving this single objective.

Mungo Bovey: Section 47(2) says that the sustainable development conditions are met only if the transfer of land

"is likely to result in significant benefit to the relevant community ... to which the application relates, and ... is the only practicable way of achieving that significant benefit".

That is, as it were, an enactment of the proportionality principle and is welcome. I think that it is one of the reasons why nobody is expressing convention concerns in relation to the provision. I read it as meaning that the significant benefit to the community is not the benefit of ownership but the benefits that come with ownership—in other words, those of control, accountability and suchlike.

As I understand it, the issue for the ministers in addressing the aim of the provision is whether there are other ways in which the community might benefit that are analogous to the way in which it would benefit from taking ownership. For example, it might be suggested that another body buying the land—for instance, a local authority buying it in a compulsory purchase—would have the same benefits. That would be an alternative, but because we are weighing the issue of whether the owner should be deprived of his property, albeit not without compensation, the question is what benefits could be achieved by something less than taking the property from him. That would be the issue that the ministers would require to address in making their decision.

Charles Livingstone: There is a risk of putting the cart before the horse and thinking about things

only in terms of ownership. If the mischief that is being targeted is that there is a block on a particular piece of land being used in a way that will further the achievement of sustainable development and be in the public interest et cetera, proportionality would say that the focus should be on coming up with some means that allows the use of the land to be changed. If we went directly to changing ownership, we would potentially be shutting off the possibility of anything less than a change of ownership. That is the difficulty. If we think about things only in terms of ownership, the solutions will be about ownership. There is an expression, “If all you have is a hammer, everything looks like a nail.” That is the difficulty that needs to be avoided.

Sarah Boyack: I will follow up on what Charles Livingstone said about the mischief that the bill is targeting. What is the bill trying to address? If one issue that the bill aims to address is empowering local communities, ownership is a way of doing that, because it ensures that they do not have to rely on the say-so of somebody else.

Mungo Bovey: But is it the only way of empowering them? The question that the provision asks is whether there is a way of empowering them short of ownership. The provision requires ministers to address that question in each case. Charles Livingstone’s point reinforces the fact that convention rights are case sensitive—they are entirely focused on the factual circumstances of the individual. If the benefit from a proposed purchase is—to use his example—to free up particular land from disuse and put it into constructive use, the issue that ministers need to address is whether something less than transfer of ownership can achieve the aim.

The Convener: But paragraph 5 of the policy memorandum says that, among other things, the aims of land reform are

“to change patterns of ownership in Scotland to ensure a greater diversity of ownership, greater diversity of investment and greater sustainable development.”

Those are fundamental to the bill, so looking for lesser solutions will not meet the aims of that part of the bill.

Michael Russell: To what degree does Occam’s razor apply to this? What is the easiest and most practical solution for achieving change? It seems to me that looking for alternatives might mean looking for things that, although admittedly alternatives, are harder to achieve.

If I may, I give as an example Charles Livingstone’s previous evidence about a tenant being able to take action against a landlord. That is actually a very difficult thing for a tenant to do in a rural community; indeed, we saw that very dramatically on a visit to Islay some time ago. To what extent would the ease or practicality of action apply as well as the existence of alternatives?

The Convener: Perhaps Megan MacInnes will include in her response the comments that she was about to make.

Megan MacInnes: I will answer Mike Russell’s question shortly, but first of all, on the question of ownership versus leases, it is not only paragraph 5 of the policy memorandum but part 5 of the bill that is framed in terms of a right-to-buy provision. All the references in it are to right-to-buy provisions in existing acts in Scotland. That does not mean that there is no useful alternative route through the use of land and leaseholds to meet sustainable development objectives, but that would require a new section to be included in the bill that is not framed under the current instrument of right to buy. As far as we understand it, the objective was for the land to be claimed under the right-to-buy provisions. There seems to be no alternative to the right to buy other than enabling communities to buy land.

Mr Russell’s question is about who—the communities, the local authorities or the landowner—should bear the burden of these kinds of procedures. Given that the bill and the policy memorandum intend to ensure greater diversity of land ownership, greater diversity of investment, social justice and more fair and equitable use of land to meet sustainable development objectives, it seems unfair that, as a result of the provisions, the local communities, the tenants and the crofters rather than local authorities or other landowners will bear the burden of that from an administrative perspective. At the end of the day, we have to consider the fact that there is very different and unequal access to power, information and resources, and that must be taken into consideration when deciding the most appropriate procedure for achieving the policy objectives.

Mungo Bovey: The provision refers to

“the only practicable way of achieving that significant benefit”.

The phrase “that significant benefit” is very precise, because we are talking about the same benefit that you would get from purchase. It is not just a benefit—it is that particular benefit—and the transfer of land needs to be

“the only practicable way of achieving”

it, not a more convenient way of doing so.

The test is whether the alternative that is being urged upon ministers or that they are finding for themselves is “the only practicable way”. It might be argued that, because of the cost and the element of social ostracism, it is not practicable for a tenant to sue his landlord or whatever, and ministers might be satisfied with that. That

relatively high test has persuaded us that the bill is ECHR-compliant; in that case, the argument that a particular route was convenient and that ministers just did not want to use another would not satisfy.

12:00

Michael Russell: But the issue would not be that they did not want to use another route. It would be that the other route was not, in those terms, practicable.

Mungo Bovey: That is right.

Michael Russell: That is not about convenience. There is a difference between convenience and practicality.

Mungo Bovey: Indeed—and that is the difference that I am drawing out.

Kirsteen Shields: We need to bear in mind the difference between being convention-compliant and being safeguarded against landowners' A1P1 rights. As the bill is currently drafted, the threshold is very high. It is clearly intended as a power of last resort, and it is clearly the shadow—and not the execution—of the law that is intended to make a difference. Is the provision going to free up sufficient land in order to address other rights such as adequate housing, bearing in mind that adequate housing is not covered directly by the ECHR? In my view, the other side of the question is whether the threshold itself is too high.

Michael Russell: Could the threshold be reduced practically?

Kirsteen Shields: It could, but perhaps not to the betterment of the community. As it is, the provision will serve as a deterrence against mischief. Will it act as a radical force of empowerment? No.

Michael Russell: How can we produce a radical force for empowerment that would be convention-compliant?

Kirsteen Shields: You will have to invite someone else to the committee if you want that question to be answered.

Michael Russell: But you are here now. Please feel free to give us your thoughts. [*Laughter*.]

Kirsteen Shields: No.

The Convener: Okay. We hear what is being said.

Charles Livingstone: On the point about ease of action, a prohibitively complex alternative would be discounted from the proportionality test, but an alternative that might just be a little more administratively burdensome would nevertheless still be a valid alternative from the proportionality perspective. You would have to get to the point at which an alternative was, in reality, not going to be workable before you would completely discount it from the test.

As for patterns of ownership with regard to paragraph 5 of the policy memorandum, I have to query whether a change in patterns of ownership for its own sake would be regarded as a legitimate aim under the ECHR. I say that, because the fundamental principle that underpins article 1 of protocol 1 is the principle of private property and that people should not be deprived of their property or have their property rights restricted unless a wider public benefit would be served by doing so. There is a risk in saying that one is entitled to change the ownership of property because that is what one wants to do.

Michael Russell: Nobody is saying that. What we are saying is that we want to produce greater equity by changing the pattern of ownership. Presumably that is a different purpose.

Charles Livingstone: Yes, and in that case, you would have to look past the changing of ownership to some other purpose that would be achieved by that change of ownership.

Michael Russell: That has been the conversation that we have been having all along.

Charles Livingstone: Indeed, and it comes back my point about the risk of the only tool in your toolkit being one that relates to ownership when there might be other ways of achieving the aim that you are pursuing.

Eleanor Deeming: I echo Mr Russell's comments. I do not think that anyone has ever said that land reform is about changing ownership for the sake of it. Paragraph 5 of the policy memorandum makes it quite clear that the aim of land reform is to ensure diversity of investment and greater sustainability, and with that comes empowerment for communities. Having a community change ownership just for the sake of it would be very different from what the bill aims to do.

The Convener: We could have a long debate about that particular point, but the discussion that we have had gives us sufficient background and depth to go on with.

We still have to deal with agricultural holdings. Dave Thompson will lead the questioning on modern limited duration tenancies.

Dave Thompson: As the witnesses know, part 10 of the bill deals with the conversion of secure 1991 act tenancies to MLDTs. Apparently some landlords are operating on the expectation that they will recover their holding in the near future; I am not quite sure where such an expectation comes from, but it is something that we have

picked up from the evidence that we have received.

The evidence shows that the number of 1991 act tenancies is reducing inexorably. Last week, we were given a clear example of how that is happening in the Borders, where one estate has reduced the number of such tenancies from 37 to 27 over a 35-year period. It strikes me that the expectation of landowners might be warranted in the sense that, historically, that recovery has been happening. A war of attrition that seems to be taking place against 1991 act tenants is forcing more and more of them out, and it strikes me that the MLDT provision in the bill will lead to more of that.

I would be interested in hearing some general comments on that issue and the expectation that I have described, because it links in with the issue of the potential loss that landlords might claim that they would experience. It also relates to the length of the MLDT, because there have been claims that a lengthy MLDT duration—the land reform review group recommended 35 years—will be greatly detrimental to landowners.

There is also one aspect that I cannot get my head around. At present, there are secure tenants in place, which, as I understand it, means that the value of the land to landowners is probably less than it would be if there were no secure tenants. However, that in itself is no reason to get rid of secure tenants, and nor is it a reason for landlords to think that a lengthy MLDT would be detrimental to them. Even the lengthiest MLDT will still be an awful lot shorter than a secure tenancy, which could go on for hundreds—if not thousands—of years.

In short, I would like comments from the panel on the ECHR aspects of MLDTs and the issues that I have raised.

Kirsteen Shields: I wonder whether the concern that has been expressed relates to long leases being established as possessions, which comes from ECHR case law. It was established in James v UK that long leases qualify as possessions and therefore have certain rights attached. In Stretch v UK, it was established that a tenant with a 22-year lease had a legitimate expectation that the lease would be renewed and that not renewing it would therefore constitute an interference with their possession. Perhaps the concerns that you have described are a response to the protection of leases under the ECHR.

Charles Livingstone: The ECHR includes within the concept of possession the legitimate expectation of acquiring a particular possession or a particular right at some point in the future, and article 1 of protocol 1 of the ECHR is engaged if any legitimate expectation of recovering possession at some point in the future is either frustrated completely or pushed back to a much later date than would otherwise be the case.

Again, there might well be cases in which conversion to an MLDT would result in the likelihood of possession being recovered sooner than would have been the case under the pre-existing relationship. However, there will also be cases in which the situation will be the other way round. That brings us back to the point that these things have to be looked at on a case-by-case basis, as ECHR rights might be engaged more in some cases than in others.

In the abstract, it is difficult to say exactly where the line should be drawn on, for example, the length of an MLDT. The longer the duration, the greater the restriction on the landlord's ability to recover possession and the higher the bar for establishing that something is justified for ECHR purposes.

Dave Thompson: Am I right in thinking that tenants with secure 1991 act tenancies at present would not be very wise to agree to such a change, especially if the length of the MLDT was 10 or 15 years? In that case, the expectation that the lease would be renewed would not be there; the tenant, who currently has a security that can run on through assignation, succession and so on, would basically be giving that away. I also do not know what sort of compensation they might get for losing that security.

With regard to the point that you made, would a landowner in all reasonableness have any legal expectation of getting a secure 1991 act tenancy back in hand? Given that those tenancies are permanent, why would there be any such expectation in a legal sense? Surely such an expectation would just not be there.

Charles Livingstone: The expectation comes in to the extent that, when the landlord entered into the agreement, he would have known the circumstances in which he could regain possession. He would not necessarily have known if or when any of those circumstances might be triggered, but he would have known that in circumstances X, Y and Z he would recover possession. He might not have had a fixed point in time at which he expected to recover possession, and if the bill were to narrow the circumstances in which he could recover possession, that would reduce the prospect of his being able to do so.

Dave Thompson: Would the situation be different for current 1991 act tenants whose leases go way back to 1948, when the landlord's ability to get the land back in hand was much restricted? Assignation, for example, was a much wider practice then but, over the years, it has been reduced by acts of Parliament. Would someone

whose lease was based back in 1948 now be in a stronger position than someone who had entered into a 1991 act tenancy five or six years ago?

Charles Livingstone: I am afraid that we are straying outside my area of expertise into details of agricultural tenancies. I can say from an ECHR perspective that in some cases a tenant might be better off staying put with the arrangement that they have and that in others it will be in the tenant's interests to convert their tenancy. I would expect tenants to be very alive to the pros and cons of exercising that ability in any individual case from an ECHR perspective.

It is to a certain extent a zero-sum game: the more options the tenant is given by legislation, the fewer options the landlord has. That transfer of the power relationship is the reason why ECHR rights would be engaged. I say "engaged" rather than necessarily infringed, because one can justify infringement.

Dave Thompson: Does anyone else have a comment on that point?

12:15

Kirsteen Shields: My understanding is that it would be the landowner's responsibility to establish a legitimate expectation of receiving the property in that situation, but Mungo Bovey might be able to confirm that.

Mungo Bovey: The party who asserts a legitimate expectation has the burden of showing it. If a person does not have a right to something, he or she can claim the lesser right of legitimate expectation. That comes in varying forms, depending on whether the expectation is procedural, by which I mean that someone has an expectation of being heard before a decision adverse to that person is made, or substantive, by which I mean that someone would retain a particular tenancy or get rid of a particular tenant or type of lease. Substantive legitimate expectation is extremely difficult to establish.

Dave Thompson: Just for clarification, someone with a 1991 tenancy at present has permanency—as far as permanency can ever be the case—except in certain circumstances, but if he or she were to convert to a tenancy of under 23 years or thereby, he or she would lose that permanency. With a tenancy of more than 23 years, some expectation of permanency would at least be retained. Therefore, a tenancy of under 23 years would be of much less value to the tenant, because it would finish and permanency would not be assured. The value of a tenancy of more than 23 years would be much the same as the value of a present 1991 tenancy. Would there be an expectation of compensation being built in for 1991 tenants if they agreed to, say, a 10 or 15-year MLDT, given that the value of what they have now would be reduced?

Mungo Bovey: Our understanding is that there will be no compulsion to convert. Therefore, if the tenant agrees to convert, the terms of the agreement will be a matter between the landlord and the tenant. If a tenant gives up a long-term security in favour of a more short-term arrangement, that tenant might want compensation and the landlord might be willing to buy that tenant out. Unless and until the legislation forces or otherwise pressures the tenant to convert from a favourable to a less favourable situation, it does not raise convention issues.

Dave Thompson: There might be no legal pressure, but there might be other pressures on people to convert, just as there are currently pressures on them to give up their tenancies altogether. Life is not as simple as the law—it is far more complex than that.

The existence of MLDT tenancies might work against tenant farmers. We have already discussed Mr Russell's point about equality of arms, if that is the term in legal circles, and the fact is that tenants in general are in a much weaker position than landowners. In fact, I am beginning to wonder whether this is a sensible way forward at all, given that it opens up the possibility of pressure being put on people to convert. When they convert to a 15-year MLDT, they give away everything that they had and are not even in a position to negotiate decent compensation from the landowner, who will be put in a very powerful position.

Mungo Bovey: The issue of pressure on tenants is, to some extent, addressed in domestic legislation and it would be possible for you to address it in relation to commercial or farming property if you so chose.

Charles Livingstone: There might well be policy considerations that would lead you to want to put in place compensation provisions for tenants who convert, but I think that those would be policy considerations and would not be driven by the need to comply with ECHR. As I said at the outset, the convention is very much about governing the relationship between the state and the individual and things that the state requires the individual to do, rather than necessarily requiring a particular intervention in any relationship between individuals.

The Convener: The practicalities of the matter are as follows. If we think about the minimum term for converted tenancies that has been suggested by Brodies, Scottish Land & Estates and others, we are talking about a five-to-10 year timeframe. However, from any tenant's point of view—particularly if they are going to develop livestock—

it is going to take a lot longer than that to achieve the benefits. That is one aspect. If the aim is to go into diversification—for example, into wind—it will take more than 10 years to realise the asset. Why is there a move by SLE and Charles Livingstone's firm, Brodies, to try to have a minimum period for MLDTs to cover?

Charles Livingstone: The driver for having a minimum period is to reflect that there will be circumstances—not those that you outlined, but others—where the landlord and tenant may want to enter into a lease only for between 5 and 10 years. As I understand it, with the way that the statutory framework works now, that would not be possible—the lease would have to be shorter or longer than that. The driver for the suggested period is about offering both parties flexibility. There may be policy considerations that point to not doing that, but flexibility is the driver for that submission on our part—I cannot speak for SLE.

The Convener: Of course.

Kirsteen Shields: I want to rewind a bit. On compensation for the change of lease, there is potential. If we consider what has been established already about a landlord's property right being interfered with, we can see that compensation can be justified so long as there is no arbitrary decision making and an adequate scheme of compensation is generated. If we take from the established ECHR case law that leases have some proprietorial interests or qualities, we can see that an interference with a lease is an interference with the right to property. It again boils down to the same things: an interference with a lease may be justified so long as there are sufficient safeguards to avoid arbitrary decision making and a sufficient scheme of compensation. I would not wipe that idea away completely.

The Convener: Okay. We will move on to the wonderful subject of assignation and succession, on which Mr Russell has a question.

Michael Russell: My view is that we are almost complete in relation to what we have heard on the previous issue. In the final point that she made, Kirsteen Shields appears to confirm what we have been discussing all along. Provided that the legislation is sufficiently clear, is sufficiently straightforward in terms of what the expectations are and has within it an adequate scheme of compensation, and that the overall intention of the legislation is not misunderstood, the policy objectives that exist in the bill are reasonable and could be taken forward. However, there is work to do to make everything fit into place. Is that correct?

Kirsteen Shields: Yes.

Michael Russell: You could also say that, without those changes in the bill, it will still be biased towards the rights of property and particularly towards those who have land to lease, which is not fair to some people whom we have seen are not having their leases honoured but are unable to pursue that in law.

Kirsteen Shields: Yes.

Michael Russell: Good—I am happy.

Megan MacInnes: That is not an area of the bill that we have looked at and it is not my area of expertise, but if there are concerns about unanticipated or perverse impacts of the bill's implementation, one solution might to give the role of monitoring such impacts and suggesting future amendments greater emphasis in the role of the Scottish land commission, and in particular that of the land commissioners and the tenant farmer commissioner.

At the moment, on the function of the land commissioners, the bill says that the commissioners are expected

"to review the impact and effectiveness of any law or policy".

That could be extended to include "and monitor perverse outcomes", or "negative and unanticipated outcomes". Giving the SLC a formal role to ensure that amendments are made in the future would be a way of making sure that changes to lease terms and concerns about tenant farmers being forced against their will, because of the local political situation—for lack of a better description—could be captured, monitored and addressed.

Michael Russell: We really want to reach some conclusions on the matter, rather than go ahead with further legislation. One thing on which both Alex Fergusson and I have agreed throughout this process is that we should have some definitive statement from the lawyers on how matters will stand as a result of the bill, rather than wait, yet again, for the introduction of a future bill.

The Convener: In the previous discussion about MLDTs and so on, it was suggested that if someone had a lease of 20-odd years, there would be an expectation that they would be able to have the lease renewed—it would be interesting to see the case law on that. In terms of assignation, would the family of a farmer have an expectation that they would be able to continue the lease in the family? That is an area of contention in relation to the scope of the list of people to whom a tenancy can be assigned. To what degree can a family expect to continue in a tenancy?

Charles Livingstone: That question would apply more if you were reducing the ability of family members to succeed—or reducing the list of those family members who are able to succeed. If your question is whether there would be a

frustration of legitimate expectation if the bill did not proceed and therefore those who would have been added to the list were not added, the argument could not be made from an ECHR perspective, because until the legislation is in place, it would be difficult to justify having any expectation of succession in the first place.

Mungo Bovey: A contingent right to succeed is neither a very strong nor a very promising basis for litigation. If there was someone whose right to succeed had crystallised and then, by legislation, you took that away, that would be a good example of circumstances in which their rights under the ECHR might be prejudiced. However, in this case, you are extending the right, so there is not an issue.

In the example of someone who is on the list and might expect to succeed, it is not clear to me why they would not succeed if you legislate in the terms that you propose in section 84.

Our concern was that the result of section 84 would be that a landlord who had reasonable grounds to believe that the assignee would not farm with reasonable efficiency would still be obliged to assign because that was not added as a reason for refusal to new section 10A(3A) of the 1991 act.

12:30

In other words, the grounds for refusal of an assignee in section 84(5) are their being "not of good character", not having "sufficient resources" and not having "sufficient training", and it seemed to us that establishing those grounds might be unduly burdensome on a landlord who had good reason to think that the assignee would not, in fact, for any multitude of reasons, farm the land with reasonable efficiency. Given that it is an exception that would be for the landlord to establish, we suggest at paragraph 41 of the faculty's submission that an additional ground for refusal might prevent any danger of forcing a landlord to assign a lease in circumstances that were perhaps blatantly unsatisfactory.

The Convener: Yes. We will make a note of that.

Charles Livingstone: I have a small supplementary point on tenants' interests, which I should perhaps have mentioned earlier. It is possible that there might currently be people within the group of people to whom a tenancy can be assigned who are, for example, already working on the farm and have an expectation that they will succeed to it in the event that the existing tenant dies. I suppose that this probably would not rise to the level of infringement of the ECHR, but their interests might be prejudiced if, because of the expansion of the list of people to whom the tenancy can be bequeathed, the tenant suddenly decided to give it to somebody else to whom they previously could not have given it.

I am not sure that that situation will arise in too many cases but, purely as a hypothetical, it might be an example of where interests could be engaged. Certainly, being established on the land and working in partnership with the tenant might give somebody a degree of legitimate expectation that legislation should support their taking the succession to the tenancy rather than opening up avenues for somebody else to get it instead.

Kirsteen Shields: As Mungo Bovey just made clear, there is a difference between an expectation to receive a lease and an expectation to renew a lease. It is unlikely that the ECHR would consider the expectation to receive a lease as a right-to-property issue.

The Convener: Okay. I think that we got that point.

Dave Thompson: I have a final question. Is it the case that the ECHR cannot be used retrospectively and that it would not be possible for people to use convention rights to reclaim rights that they had in, say, 1948?

Kirsteen Shields: There is a time limit on admissibility claims.

Michael Russell: I cannot remember who said that law is the handmaid of politics, but politically I think that there would be at least a question mark over why the right to inherit property is greater than the right to inherit a tenancy. If there is an absolute right to inherit property and to have that property protected, one should at least consider whether families who might have tenanted a farm for 100 or more years—as some have—should not also have an equivalent degree of protection and respect for their rights.

Mungo Bovey: It is because there are two parties involved: there is the landlord as well, so the ownership of the land or property is not in this respect comparable with the contractual relationship that is being transferred. The general rule is that one's contractual relationships end with one's death, so the provision that we are discussing is a halfway house, as it were, because it is a contractual relationship that need not end at death, as most contractual relationships do. However, I do not think that we would have any difficulty in seeing that there was a difference between the ability to pass on property and the ability to pass on a lease.

Michael Russell: Some of my constituents who have a 100-year tenancy might ask why the landowner should be able to pass on the land when they cannot pass on the land that they have

worked for all that time. However, that is a political issue, not a legal one.

The Convener: I think that we have reached the point at which we are saturated with information on the issues. It has been a highly interesting discussion that has provided us with a much better focus. It has been an excellent evidence session, and you have all contributed to our knowledge of the issues—and, I hope, to the improvement of the bill in due course.

I thank our witnesses and ask them to leave the table while we move on to other items of business.

Petition

Control of Wild Geese (PE1490)

12:36

The Convener: Agenda item 3 is consideration of petition PE1490, by Patrick Krause on behalf of the Scottish Crofting Federation, on the control of wild geese numbers. The committee last considered the petition at its meeting on 24 June and agreed to write to the minister to outline our views on the need for an independent inquiry. On 1 September, we received a response from the minister. I refer members to the letter and the committee papers, and I invite comments from members.

Michael Russell: I suggest that we find a bit of time in our crowded schedule to take evidence on the issue and see whether we can move it on. We are in a game of ping-pong between the minister and Patrick Krause, which is not getting us far.

Last night, I received an email from the Islay branch of NFU Scotland, which is getting more and more concerned about the matter. It states that the national goose management scheme is creaking at the seams and that, at the most recent meeting on the issue, the Scottish Government asserted that it did not yet know whether the scheme is state-aid compliant. That means that the new scheme might not be able to pay out money in December, which would be serious given the damage that is being done on Islay. The NFU quoted extensively.

RSPB Scotland has lodged a complaint about the national goose management scheme and is refusing to take part in it, which is putting the whole scheme in jeopardy. Some of the assertions that the RSPB is making are highly questionable—I have seen emails and other material that need to be challenged. It also says that no research has been done. However, over the past three decades, oodles of research has been done—people have even got PhDs from researching the issue.

We need to bring the facts into the open and have an open discussion in which we hear from farmers and crofters in the affected areas as well as from the RSPB and the Scottish Government, to try to move the issue on in a constructive way. It is a running sore at present, and people's livelihoods are suffering.

The Convener: We are talking about both resident and migratory geese, which cause two slightly different problems. The proposal is there for members to comment on.

Sarah Boyack: Mike Russell's take on the issue is important, as he represents a lot of affected

communities. However, we need to look at the recommendations that are in front of us, which present a choice between seeking the petitioner's views on the minister's proposals and accepting the minister's proposals, as far as they go.

The point about needing proper research was made previously. I know that the minister is not keen on commissioning a £100,000 piece of external research, but I do not see what is wrong with her proposal of getting Scottish Natural Heritage to do work to bring the matter up to speed. Crofting and farming communities, and the interests that Mike Russell talked about, could be on a panel to consider the matter. We should keep a watching brief on this.

I suppose that the issue is whether we should stop now or keep the petition open. At what point will we make progress? We can do nothing about any legal challenges. When we were in Islay and Jura two weeks ago, we saw fields that were totally flattened. There is clearly an issue.

Rather than spending £100,000 on an external review, should the focus be on what is happening to the goose management scheme? That is the main issue. Mike Russell wondered whether the scheme is legally competent and in line with EU requirements. What we did not get in the minister's response is more about what is happening in other European countries. That is important, and not just in relation to whether the scheme is legitimate. What other approaches are being taken that we could learn from in Scotland? It is disappointing that we do not have feedback on that. Rather than going through the minister, can the committee go directly to Europe and ask for proper information? We have previously had Commissioner Phil Hogan before the committee. We need more information on the situation in the rest of Europe.

Michael Russell: Getting a bit of research done would help—what is happening on that is a defect.

My point is that we need to make progress. A review that involved stakeholders would—no doubt—be interesting, but it would simply continue the matter through this winter, whereas people feel that we must begin to get a serious resolution. Resources are reducing all the time. If no money is paid to farmers and crofters on Islay and elsewhere, they will suffer hardship.

I suggest that more research should be done, and I am happy with Sarah Boyack's suggestion. The committee should certainly get information. However, we should hear from the affected parties and help to take the issue forward. Nothing else is making any difference. If another group is formed, it will make no difference—we will be here again this time next year and the problem will still be as bad.

The Convener: At our next meeting, we will have a work programme discussion, at which the clerks could suggest options for us to handle evidence sessions and so on. At the moment, it appears that we should continue the petition with a view to finding out what the situation is, as Sarah Boyack suggested. We can then decide on a way forward.

It has been suggested that we go to Europe. That might be a massive maze, which might not help us much. If we have an evidence session in which we are updated about the situation, we can make decisions on that basis.

Jim Hume: You are right, convener. The committee has taken evidence on the issue, possibly before Mike Russell became a committee member. I do not think that much progress is being made. In the meantime, before we look at the work programme at the next meeting, we could seek the petitioner's view on the minister's letter. That would be quite easily done.

The Convener: We are doing that and we will bring any information to the next meeting.

Claudia Beamish: We should certainly consider the issue in discussing our work programme. If the committee agrees, I would like the clerks to include in the work programme the possibility of considering where an independent review might go. We have taken a lot of evidence on the issue. In the end, the approach will be up to the Scottish Government. We could write to it to suggest that there should be not only an independent review but actions coming from that review.

Let us face it: we have seen the evidence and we know what the problem is, SNH knows what the problem is and the Scottish Government knows what the problem is. It is time for the Scottish Government to act. I would like that other possible workstream to be considered, rather than the option of taking more evidence in committee.

12:45

Graeme Dey: I note the disappointment that has been expressed about the fact that the relevant authorities in Norway and the Netherlands have not responded to requests for information sharing. It strikes me that the committee, in seeking to increase our understanding of the issues and develop solutions, might write to the relevant parliamentary committees in those countries to ask about any work that they and the authorities in their countries have done on the issue. Nothing ventured, nothing gained.

The Convener: I guess that we can take a number of actions.

Sarah Boyack: A lot of the suggestions sound sensible. The committee paper notes that the

minister said in her letter that she would rather spend money on goose management schemes than on an external review. It would be good to find out what is being spent on goose management schemes and whether that £100,000 would be spent on those schemes.

The Convener: I think that we have enough information to say that, as I said earlier, we should continue the petition. We will find out the petitioner's views. We will pursue the workstream with regard to committees in other countries and we will also pursue Claudia Beamish's point about the review and so on. We have a good sense of what the clerks should be doing for us before the next meeting.

At our next meeting, which will be after the recess, we will consider an affirmative instrument, before taking evidence from the Crown Estate on its annual Scotland report and getting an update on the devolution of the Crown Estate in Scotland. In addition, the committee will consider its work programme.

Before the committee goes into private session, Graeme Dey wants to say something.

Graeme Dey: If memory serves, we asked the Government for an update on the Salvesen v Riddell situation by today. Can the clerks advise us what has happened with that?

Nick Hawthorne (Clerk): Mr Dey is right: the deadline was today. We have been in touch with Government officials, who were confident that the deadline will be met, and we will follow that up after today's meeting.

Michael Russell: It is three weeks before we meet again. It is quite important that we get urgent information. The information that we received from tenant farmers today says that they have received no communication from the Scottish Government. If that is true, it is extremely worrying.

Nick Hawthorne: As soon as we get the Government's response, we will circulate it to members. We will also include the issue in the work programme paper that we will deal with on 28 October.

Claudia Beamish: We will meet on 28 October and the deadline in relation to the order is 28 November. I have serious concerns that we will leave the issue for three weeks. I appreciate that we do not have a meeting scheduled but, depending on what the letter from the Scottish Government says, I would want us to seek further reassurance about the action that is being taken.

The Convener: We are in agreement, but we need to see the letter from the Government. We will keep the issue very much in focus to ensure that progress is made as soon as possible.

12:49

Meeting continued in private until 12:59.

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