OFFICIAL REPORT
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Rural Economy and Connectivity Committee

Wednesday 9 November 2016

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 9 November 2016

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RURAL ECONOMY AND CONNECTIVITY COMMITTEE
9th Meeting 2016, Session 5

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Gail Ross (Caithness, Sutherland and Ross) (SNP)

COMMITTEE MEMBERS

*Peter Chapman (North East Scotland) (Con)
*Mairi Evans (Angus North and Mearns) (SNP)
*John Finnie (Highlands and Islands) (Green)
*Rhoda Grant (Highlands and Islands) (Lab)
*Jamie Greene (West Scotland) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*John Mason (Glasgow Shettleston) (SNP)
*Mike Rumbles (North East Scotland) (LD)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sir Crispin Agnew QC
Derek Flyn
Eilidh Ross MacLellan

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Rural Economy and Connectivity Committee

Wednesday 9 November 2016

[The Convener opened the meeting at 10:00]

Crofting Law Reform

The Convener (Edward Mountain): Welcome, everyone, to the ninth meeting in 2016 of the Rural Economy and Connectivity Committee. Everyone is reminded to please switch off their mobile phones, and no apologies have been received.

Agenda item 1 is our second evidence-taking session as part of our review of legislative priorities for crofting. As I mentioned last week, we are conscious of some very contentious issues in the crofting world that are being discussed in the media and elsewhere at the moment. I stress that the committee does not want to stray into such areas, and I urge committee members and witnesses to focus on the legislative process rather than individuals.

I welcome to the meeting Sir Crispin Agnew, Eilidh Ross MacLellan and Derek Flyn. I thank you for coming and invite each of you to make a brief introductory statement. Would you like to lead off, Sir Crispin?

Sir Crispin Agnew QC: Thank you, Sir Edward.

For a number of years now, I have been making the point that the crofting legislation is not fit for purpose because it does not have an underlying policy theme that is appropriate to the present day and age. You must remember that the Crofters Holdings (Scotland) Act 1886 provided subsistence farming tenants with security of tenure, a fair rent, compensation when they gave up the land and rights of succession. That security for subsistence farmers underlies the whole act, and these days we are trying to apply that to circumstances where it is rarely appropriate.

On to the 1886 act have been tagged various different policies that have been made by Parliament at different times and, throughout the act, there are conflicts between policy regimes that are very difficult to reconcile. Equally, those conflicts make it very difficult for the Scottish Land Court to interpret the legislation against the policy background. If there is going to be any reform, someone will have to sit down and think, "What policy are we trying to achieve in the crofting context?"

The other problem is that crofting is looked at on its own. We are sitting here, talking about the reform of crofting legislation, and we have had the Shucksmith report and a whole host of other reports on the matter. However, crofting also sits within the policies that are required by the Highlands and Islands, and often they are in conflict and do not work together. If we are going to have any legislation, it should apply to the whole of the area to which it is being applied instead of having the random situation in which a croft sits next door to an identical landholding that is not a croft and the two come under totally different regimes. There needs to be policy co-ordination not just for the crofting acts but to ensure that those acts fit into the wider policy of the area.

That is the fundamental problem, and it has led to the current crofting acts becoming extremely complicated, unwieldy and difficult to interpret and apply. For example, the Crofters (Scotland) Act 1955, under which crofting was started again in the Highlands on a different basis from the small landholders acts that still apply to the rest of Scotland, had 40 sections; the Crofters (Scotland) Act 1993, which consolidated the Crofters (Scotland) Act 1961 and the Crofting Reform (Scotland) Act 1976 with the 1955 act, had 64 sections and extended to 72 pages. The 1993 act is now 125 sections, most of which are two or three times their original length, and extends to 196 pages. That represents an explosion of complexity.

Derek Flyn has worked with the crofting law group to produce the sump. However, I do not really think that we want to get into that, because it just details problems with different sections, statutory inconsistencies and all that sort of thing. That is a particular problem with the current act, but we really need to look at the matter in greater detail.

In a paper called "Crofting: A Clean Slate" that was published in the 2015 issue of "Northern Scotland", a peer-review journal published by Edinburgh University Press, I set out my views on the historical problems that have led us to where we are now and my suggestion of a clean slate. The committee might want to get a copy of that, although I point out that there are certain copyright implications as a result of its being published in a journal and my losing the copyright.

Perhaps I can give the committee a couple of examples of the complexity involved. We can have a crofter; an owner-occupier crofter, who is identified in a way that does not work; and owners who are occupying their crofts, and all of them come under different regimes. Why not have anyone who occupies a croft be governed by the rules and regulations?

In a case in which I have been involved in the Land Court, the owner-occupier of a vacant croft got planning permission for 10 houses. The proposal was consistent with the local development plan, Highland Council's policy for that area, but the Crofting Commission—quite rightly so, on its interpretation of its obligations under the crofting legislation—refused to decroft the land because four people wanted that land to grow vegetables. As a result, although the policies under the crofting legislation were being applied quite properly, they were in conflict with wider local policy considerations.

Another problem is that there is no incentive for landowners. The crofting legislation is based on the definition of a crofter as the tenant of a croft, but landlords who get £5 a year from a croft know that it costs more than that to recover that sum. In a way, they have no interest in being the landlord of a croft. That is of particular importance now that we have crofting community rights to buy and so on. What should be the proper relationship between the landowner and the crofter, particularly in that community context?

I was involved in a—

The Convener: I am sorry, but can I stop you on what is actually a pretty key point? Some of the points that you are making will form part of our questioning. It is extremely helpful to have them illustrated with cases and examples, but, without taking away from what you are saying, I think that it might be more helpful if you give us those examples in response to our questions.

I ask Derek Flyn to make a short statement. Again, I—and I am sure the committee—will want to try to develop our questions in the light of specific examples.

Sir Crispin Agnew: I would like to finish with this one last example. I was relatively recently involved in a case that dealt with the break-up of a farm in 1910. At the time, the landowner was delighted to have it broken up into three crofts, because the rent that he was going to get from them was more than the rent he was getting from the farm. Nowadays, however, agricultural rents are at a totally different level from crofting rents. That is an example of how things are moving in a way that is no longer right for this day and age.

The Convener: Thank you very much. We will now move to Derek Flyn.

Derek Flyn: I am a retired lawyer. I have been retired for eight years. I worked as a crofting lawyer. In the middle of the period in which I worked, there was a consolidation of the crofting acts, which seemed to me to be a lazy consolidation, because it just caught everything that existed and the problems remained. The problems remained until relatively recently.

The law is so complicated that the last time Sir Crispin Agnew and I sat in the Parliament, we were talking about a surprise amendment that had to be made. We were asked whether any other matters should be given attention, and from somewhere I produced the word "sump". I said that we needed to put all our problems in one place and somebody had to look at them.

That somebody turned out to be me and Keith Graham, the retired principal clerk to the Scottish Land Court. We were getting towards the end of writing a textbook on current crofting law. The sump took around a year to produce, and we were surprised by the number of responses that we received from all kinds of stakeholders. That showed that there was an interest out there in getting things right, but it was beyond most people to see how that might be done.

As I said, the sump took around a year to produce. The textbook, whose proofs I finished with Keith Graham this week, took 10 years. There will be a working paper to try to explain what the current law is, without making many complaints about it. That will be published at the turn of the year.

There is a fairly simple crofting code. I am not quite of the same mind as Crispin Agnew. I agree that it has been seen as part of agricultural law, but in fact it was a law to protect people who were immobile and who really produced for their own consumption. We have seen the law emphasise that aspect recently by saying that people must live close by or on their crofts and should look after the land. We have gone through a period in which diversification was seen to be a good thing. Agricultural production may not be the best use of the land, but the protection and the understanding of the people on the land of how the system works have been lost, as things have become very complicated.

I hear people complaining about the amount of regulation, but we really have to pin down what they are complaining about. When we talk to crofters, they quite often see no difference between the Crofting Commission, the Scottish Crofting Federation, which is the union, and the department that gets involved in their grants. It is all authority, and they do not like authority. However, someone has to keep a record of what we talk about.

We have made great strides by getting a map-based register in place. We called for that for 20 to 30 years, and we are finally getting it into place.

A complaint that is made just now is that, although crofters have to map their crofts, pay the fees and do all the work, there was a promise that the commission would deal with the common grazings but it has recently written to say that it

has no money to do that. It will not do that any more, but crofters still have to map their boundaries. Without knowing what we are talking about or the land that is involved in the system, it is very difficult to deal with that. If people argue about boundaries, they waste a lot of time and money getting a solution, because they have to go to law. However, a good register should make life easier.

The Convener: Is that an appropriate place to stop?

Derek Flyn: Yes.

The Convener: The registering and recording of crofts is important. I have read the sump report. It took me a fair while—although not a year—to read and understand it, but it was extremely informative. I know that the other committee members have read it too, so there will be questions on it. As Derek Flyn is happy to stop there, I invite Eilidh Ross McLennan to give a flavour of her views.

10:15

Eilidh Ross MacLellan: Good morning—I will try to keep it short. In general, I endorse what Sir Crispin Agnew and Derek Flyn have said. There is broad agreement in the crofting legal community not only that something must be done but on what that should be. We all have our own hobby-horses, as you might expect, but there seems to be general agreement, particularly on the impenetrability—as Derek Flyn described it—of the legislation. Derek Flyn and Keith Graham went into some detail in the sump report about that impenetrability, and I highlighted it in my submission to the committee, which I will not rehash now.

I have two other concerns at present. First, huge problems are being caused not just for solicitors but for crofters, and specifically for owner-occupier crofters, by the issues created by the legislation's definition of owner-occupier crofters. That will not come as a surprise to anyone, as it is a huge problem. Because it is legally complex, it ends up costing crofters an awful lot more money than it should do.

The second point, which I have been talking about for quite a while, is the question of funding, not simply for agricultural improvements or new croft houses—both of which are very welcome—but to free up the market in croft tenancies, or rather to make it fairer. At present, the person buying the croft must be a cash purchaser, which seems very unfair.

Unless you want me to go into any more detail about the specific points, I will leave it there.

The Convener: I am happy for you to leave it there, because you gave the committee a full and detailed written submission, for which I am grateful—it kept me busy for a while.

We have some questions. The first question will come from Gail Ross, who is the deputy convener of the committee.

Gail Ross (Caithness, Sutherland and Ross) (SNP): I welcome the witnesses and thank them for coming along and making three excellent introductory speeches. I feel that we have learned quite a lot about the situation before we have even reached the question session.

I will start with a couple of questions on the Crofting Commission, bearing in mind the convener's comments about not going into the specifics of what is currently happening.

The change in the 2010 act from the Crofters Commission to the Crofting Commission was obviously significant. You will be aware that we took some evidence in committee last week, in which three main points arose. Patrick Krause from the Scottish Crofting Federation argued that there needs to be a review of the Crofting Commission's functions and that the system for regulating crofting should be more devolved. Peter Peacock of Community Land Scotland stated that there is "a clear gap" in crofting development, which now rests with HIE. Other witnesses agreed that more needs to be done on development. In her written submission, Eilidh Ross MacLellan urged us to consider whether the commission should once again be appointed rather than elected, which is an interesting point.

What are your views on the changes to the commission's role and name in the 2010 act? Should there be a review of the Crofting Commission with a view to creating a more devolved system for regulation? Do you have a view on the function to develop crofting? What is your view on elected commissioners?

As a follow-up, is the current structure of the Crofting Commission the right one?

The Convener: That is a huge question, so you will need a moment to gather your brains.

If any of you would like to lead off, rather than waiting for me to point at someone to go first, I am happy to take your responses in any order. I see that Derek Flyn's hand has gone up first.

Derek Flyn: The arrival of elected commissioners came at a time when the function of the commission was to regulate. Few of the elected commissioners could have expected that what they were to do was simply to read the 2010 act, find out what it said and do it. There was very little handover in my experience—I was involved with helping the new commission to read the act

and to see what they were supposed to be doing. Things in the law had changed and we had to look very closely at the wording of the act to understand what the commission's powers and duties were. When we went through the act, we were astounded by the number of different words that were given to the commission's functions. The new commission of elected strangers had to sit down and figure out what they were to do, which meant that they got off to a slow start.

At a time when crofting was allowed to expand with new areas being taken into crofting—or with the potential for crofts in new areas, at least—there was nobody looking at the possibility of new crofts in those areas. That was because the development function, such as it was, was moved to HIE, which was looking only at existing crofting communities and only at a small proportion of them. The idea of developing crofting as something that was new and attractive fell on stony ground and those on the outside who wanted in found nobody to help them.

Sir Crispin Agnew: I was very concerned constitutionally when commissioners were first elected, because, under the current acts, the commission is a tribunal. Therefore, it is a part of the court system and, as far as I was aware, it was the first court with elected judges in Scotland. I thought that there were profound constitutional issues arising from that—we were going down the American route of electing judges. There is currently a consultation about stopping the commission being a tribunal and, if that goes through, it will take away that particular concern.

All the local authorities are elected; they make policy, they regulate and they have all sorts of enforcement powers, particularly in planning, which are taken by elected officials. We have democratically elected institutions to regulate functions so, if one takes away the fact that the commission is a tribunal, perhaps that is acceptable.

The separation of regulation and development causes me concern, because it goes back towards the overarching policy. If the policy is to achieve development, the way you develop is linked to the way that you regulate, and it is very difficult to separate the two.

That is my general view. There were various other parts of the question that I have forgotten, but that is what I particularly wanted to say.

The Convener: I feel confident that Gail Ross will come back to you if she has not got all the answers that she needs.

Eilidh Ross MacLellan: I understood the first part of the question to be about whether there should be a review of the current Crofting Commission arrangements, and I think that there should be. That is the one part of any reform of crofting legislation that should be prioritised.

Part of the problem with the previous reforms, particularly those in 2013, was that there seemed to be such a huge rush to get it done, which does not always result in the best legislation at the end. It is a good idea to take our time to reform the main body of crofting law, to work out exactly what we want to do and to do it carefully. However, the trouble is that regulations have, I think, already been put before the Parliament for the next Crofting Commission elections, which are to happen in the spring. That is all cracking on, and any new elected commission will be in place for another five years. Changing things will be tricky once the new commissioners have been elected for five years, so that will kick the issue into the long grass. However, generally, I think that there should be a review.

The second part of the question was about devolving the decision making of the commission. At last week's evidence session, there was a discussion about local bodies taking decisions locally, which the SCF is very much in favour of. The Shucksmith report looked at that back in 2008, from memory. At that time, I was of the view that more devolution of decisions was probably not favourable, and I am still of that opinion now. The Crofting Commission is all things to all crofters, if you like. It is a whole lot easier for people to direct any discomfort that they might have with a regulatory decision if that decision is made by Government officials based in Inverness whom they never have to see when they drop their kids off at school, for example. I personally would not like those decisions to be made by people who are seen in daily life in small crofting communities, where things can become politicised quite quickly.

It might be worth thinking about the system of area assessors, however. The commission has long had area assessors, who have been the commission's eyes and ears on the ground. There might be a compromise to be struck in which the area assessors have an enhanced role, with enhanced accountability that way, but the decisions are still taken by commission officials in Inverness.

The third part of the question was about having an elected commission. Obviously, I have made my position on that very clear in my written submission. It is difficult for me to give any more specific information about that, because I previously acted for the commission—in fact, I acted for the Crofters Commission before that. Therefore, I am understandably limited in what more I can say. However, generally speaking, when the law was reformed in 2010, there was dissatisfaction that the commission was not doing enough to regulate absentee crofters, for example.

It was thought generally that the commission should do more to regulate crofting and that there should be tighter regulation.

The law could have been changed to say that the commission must regulate, instead of its having a choice on whether to regulate, which was the position before 2010. However, the law was changed to say that the commission must regulate but, by the way, the commissioners should be elected. In a sense, the baby was thrown out with the bath water at that point. If we had kept the old structure of the commission but given it an enhanced push to regulate, that might have met the desire that people had expressed for tighter regulation, but without the huge upheaval that the new structure of the commission has caused.

The Convener: The committee will definitely bear in mind the point that you raised about the election of the new commissioners when the cabinet secretary comes to the committee to speak about the statutory instrument on that.

Sir Crispin wants to come back in, but Stewart Stevenson, Rhoda Grant and John Finnie are queueing up. I will let Stewart Stevenson in and then give Sir Crispin the first chance to answer, which might allow him to weave in his point.

10:30

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to pick up on what both Derek Flyn and Sir Crispin said about the elected members of the commission and their understanding of their role. Sir Crispin referred to a quasi-judicial role. I am not going to address that. I just want to be clear about whether there is a clear distinction in the witnesses' minds with regard to the need for the commission members to understand whether they are executives of the commission—in other words, they manage the day-to-day activities and take responsibility in a line management sense—or non-executives, whose role I would characterise as appointing and removing senior managers in the organisation, approving the policies of those managers and introducing policy proposals to be developed and implemented by the managers.

Is there an opportunity for those who are elected, who are not required to bring any particular experience other than the experience of being crofters, to understand that clear distinction? Is that issue part of what underlies what I think I will stretch the boundaries by describing as a rather dysfunctional board?

The Convener: That is almost stretching the boundaries. Sir Crispin will respond first.

Sir Crispin Agnew: The Crofting Commission now regulates and the decisions have to be made by the commissioners. At present, they act as a tribunal—that is, in the nature of a court. If that role is taken away, they will have to act quasi-judicially, rather like an elected local authority, making decisions about various aspects. They are not in a sort of non-executive role. They have to make the decisions, and in some cases those decisions are about whether A can take over a croft. Other decisions are at the policy level, but the policies have to relate to the commissioners' regulatory function. For example, they might have a broad policy as to the sort of person they will accept as a new tenant of a croft.

The chief executive is probably there to manage the staff, but the staff are there to serve the commissioners, provide them with the necessary information and so on. The commissioners are not there in a non-executive role. Every important decision has to be made by them. They might delegate some of the more minor decisions to the officials, but they are their decisions. Sometimes they will delegate to one commissioner and sometimes they will take a matter to the whole board. I think that you have to be very careful.

Stewart Stevenson: I spent 30 years working for the Bank of Scotland, where I was not on the board but I was often present at board meetings. The board, which was wholly non-executive, had final approval of major lending decisions, but it had no role in developing them or writing the material. The decision was for the members of the board, who were non-executives. Is that not the parallel that we should see for the way the commission works? Although taking responsibility for the detailed proposals that are put before the decision makers and ensuring that they are legally compliant is a management role, the decision can properly be made by people who have no management function. They carry responsibility for their decisions, but they are not executives. Am I missing the point on the way that this does or should—I make that distinction—work?

Sir Crispin Agnew: Let us say that somebody decides to assign his croft to somebody else. He has to get the commission's consent. It has to be advertised and, if there are objections, there is a hearing, which is conducted by one commissioner with staff. The commissioner then reports back to the board. It is the one commissioner who reports back and takes on that function. It is not the case that a member of staff is sent out to hear the evidence and then make a recommendation to the board, which will rubber stamp it.

A regulatory function must be held by those who are the regulators, whether they delegate it to one person or three persons or the whole board considers the matter.

If the body was about development and was running things more as a local authority, doing

development policy and all the rest, it might have more of what you describe as the non-executives rubber stamping the policy that was being implemented at the local level.

Part of the clash of policies is between the drive for local ownership and centralised regulation. Take South Uist, which is now a community company with I forget how many crofting townships in it—probably about five or six. It might have an overall policy that it would like to apply within its area but it is all being dealt with in Inverness. That is why I said that one needs to think about what the relationship is to be between the landowner and the commission.

The Convener: Derek, do you want to briefly add something to that? I am always conscious of the time—we are just on question 1 but we are a quarter of the way through the session.

Derek Flyn: I make the point—briefly, I hope—that the staff always look to the commissioners. The commissioners are making the decision. However, this commission has the same personnel as the previous commission, which the Shucksmith report sought to disband.

The Convener: I want to be careful that we are not going to drift into personalities—

Derek Flyn: No, no. The committee of inquiry on crofting recommended the disbanding of the Crofters Commission. What that did to the staff of the Crofters Commission, one can only imagine. However, after a long period, the new commission was given completely new commissioners and they are in control. As I said before, they had to sit down and look at the acts to find out what they had to do. There was very little handover, probably partly because the previous commission expected that it would be defunct.

Rhoda Grant (Highlands and Islands) (Lab): I have a small point about the conflict between the tribunal function and the elected function. Sir Crispin Agnew said that the tribunal function could be removed from the commission, which would make it more compliant with our understanding of how such things work. Where would that function then lie? Would we end up with a commission on the commission? Would the tribunal function lie with the Land Court?

The Convener: I will let Sir Crispin come back in because I thought that he said that it would not be appropriate to separate the development function from the regulatory function.

Sir Crispin Agnew: My point was a technical, constitutional point. Under the present law, the commission is defined as a tribunal under the Tribunal and Inquiries Act 1992. We will be electing tribunal judges. I thought that it was a constitutional problem because we are going down the American route of electing judges.

There is currently a consultation about taking the commission out of the 1992 act so that it will merely be an elected body that will carry out regulatory functions, subject to appeal on most points to the Land Court or judicial review by the Court of Session. That is constitutionally acceptable. It would be like a local authority licensing committee that has regulatory functions, either granting licences or taking them away and so on.

I was making a technical point. I am not saying that the regulatory function should be taken away. I am quite happy that the commission should carry that out. Whether it should be devolved to meet local needs is a different matter, as is how it should operate.

My view is that the commission should be more like a local authority. It has a development function, with the local policy functions on housing, population retention and what planning and development should take place, and it has a regulatory function. If somebody puts up a building in breach of the planning regulations, the local authority regulates it and enforces it. However, the two functions are very difficult to separate.

Rhoda Grant: That is my point—if you separate the functions, more things might end up in court than at present.

The Convener: I am mindful of the time. I noticed that Derek Flyn raised his finger, but John Mason wants to ask a question. Derek Flyn may be able to add the specific point that he wants to raise in response to that. I am sure that Eilidh Ross MacLellan will do the same.

John Mason (Glasgow Shettleston) (SNP): I have a more general point. I am a city person and am fairly new to the issue of crofting. I realise that some of my colleagues have a lot more experience of it.

The name Shucksmith has come up a number of times this week and last week. As somebody who is new to all this, I can, obviously, look at the legislation and see where we are, but is considering what the Shucksmith report says also a good place to start? Is it still relevant? Is there stuff in it that would be useful to us?

The Convener: Answers should be very short.

Derek Flyn: Yes. We must use the Shucksmith report. It was the biggest investigation of what crofters wanted since the Napier commission in 1883. It is very valuable, and I cannot imagine that we would want to go off and do all that again.

John Mason: Was there respect and buy-in for it? Was there general acceptance of it?

Sir Crispin Agnew: No.

Derek Flyn: We are talking about a small world in which there are opposing voices. Not everything pleased everybody. Even the Government's response to the Shucksmith report about the formation of the commission agreed that there would be area bodies, and we did not get near doing that. We just moved the Crofters Commission into the Crofting Commission and gave it all the different things to do, such as the annual return and the introduction of a map-based register. That is a colossal task, for both the commission and Registers of Scotland.

Eilidh Ross MacLellan: It might be worth distinguishing between the research that Shucksmith and his team did and the recommendations and the implementation that followed it. I did not agree with everything that the Shucksmith report recommended, but I support the research that was done. I certainly do not think that there is much of an appetite for repeating that exercise and having evidence sessions in the crofting counties, for example. We might be able to make use of the investment that Shucksmith and his team made, even if that means changing some of the recommendations that were made. Perhaps we can pick and choose.

Sir Crispin Agnew: If somebody does not know much about crofting, they should read the Shucksmith report, which is useful and very good background material. I said right at the outset that my complaint about it is that it looked at crofting in a bubble and at what crofters wanted out of it. It was not an investigation into what was needed in the wider Highland area and how crofting fitted into that. Its failure was that it looked at crofting narrowly. However, qua investigation, it is well worth reading. All the different views can be seen, and they are probably just as relevant today as they were then.

The Convener: I am delighted that we have now got off the first question. I think that Peter Chapman's questions will be quite targeted, so quick answers, not politicians' answers, would be much appreciated.

Peter Chapman (North East Scotland) (Con): My questions are quite targeted. They are about the 2010 act and the introduction of a register of crofts.

As we know, that register is moving on. As crofts are assigned and decrofted, they appear on the register. I want to ask three specific questions about that process.

Last week, we heard that the cost to crofters of public notification was quite high. Could we do something about that?

We also heard that the mapping of grazings was seen to be a very important part of that exercise, but has almost ground to a halt. What are your thoughts on that?

What do you think about appealing to the Scottish Land Court being the only way to resolve a dispute in the area?

10:45

Sir Crispin Agnew: I have one general point to make about the registration, which is a very good thing. However, there is no end date. At the time of the 2007 act, if you could prove that a croft was on the register in error, you had proved that it was no longer a croft. They put that right in 2010 by saying that, if a croft had been on the register for 20 years, the situation was unchallengeable. However, everybody had asked that the converse should apply: that if a croft had not been on the register for 20 years, you could not apply to get it put on.

You have probably heard of the Dornoch golf club case at the Land Court in which a crofter came along and said that the Royal Dornoch Golf Club is on a common grazing, even though the evidence shows that it has not been used for grazing since the 1930s. I have been involved in a lot of cases in which people have come out of the woodwork and said, "This is a croft." We need an end point. Once the register is—apparently—full, there should be perhaps five years for anybody who claims that a piece of land should be on it to get that land on the register. If it is not on after that point, the register should be closed so that nothing else can come out of the woodwork. That is quite important, otherwise it is not a definitive register and solicitors will always have to say that, because a piece of land is next door to the common grazings or to a township, it has to go on the register.

On your last point about appeal to the Land Court, I am a qualified mediator and I am a great fan of mediation. These days, the Scottish Government puts options to mediate into various pieces of legislation. If there could be a mediation service funded by the Scottish Government—or funded or supported by the commission—a mediator might be able to resolve boundary disputes and things like that in a cheaper way than going to the Land Court.

The other two witnesses are better placed to comment on the other things.

The Convener: Do you agree with the end point, Eilidh Ross MacLellan?

Eilidh Ross MacLellan: Yes, I do. That is a rule of the Crofting Commission from when it was the

Crofters Commission and it still had a development role.

I worked as a student in the commission before the development function was given to Highlands and Islands Enterprise and I remember that it was a very common occurrence for senior commission officials—not just commissioners, but senior officials—to go out to hotspots in the crofting counties where people were unable to make any progress in their various disputes. The officials were often able to make progress, so it is a real shame that that is no longer as common as it once was. The hearings system goes some way towards doing that. However, the problem with a hearing is that, because it is a tribunal, it feels like a very formal environment to people. Informal meetings with everyone sitting around a table trying to work things out worked better—that is mediation by another name. I agree with that.

The cost of public notification is good for local newspapers—there is no question about that—but that is its only benefit. It strikes me that there is no reason nowadays why you could not have a web-based notification system, which would be cost neutral once established.

You asked about the mapping of the common grazings. In general, the crofting register has been hard work at times. There are boundary disputes, although not as many as I had feared. It happens but, by and large, people manage to sort things out between themselves before it gets to that point. If it gets to the Land Court, even then people can take legal advice and work out whether they have a case or whether there has just been misunderstanding. Just because you apply to the Land Court, it does not necessarily mean that you will end up in a village hall in Durness having a Land Court hearing, although that does happen sometimes.

By and large, the crofting register has been a great thing. It is a shame that the mapping of the common grazings has ended, but that was because of the withdrawal of funding. The commission is really well placed to carry out the registration of common grazings.

Peter Chapman: You agree that the mapping of the common grazings has ground to a halt. Should that change? Should the process continue?

Eilidh Ross MacLellan: In an ideal world, I would like it to continue, but I am aware that that depends largely on funding being made available to the commission for that to happen.

The Convener: Derek, do you want to add your agreement, I hope, or a short response?

Derek Flyn: I see the common grazings as a land asset. At a time when we are talking about land reform, it is land that is already in the hands of local people. The mapping of the grazings is one way that we can focus on that asset. It is unfortunate that they are called "common grazings". Even in the commission, I recently found an understanding that that land could be used only for grazing—well, no.

It is one of the difficulties of crofting that we started off with common grazings. Registers of Scotland initially wanted to call the register a register of common land, but that means nothing, and would just be bringing in another term. We now have a register of

"common grazings and land held runrig".

I have been involved in crofting for a long time and I have only once had a client who claimed to be involved in a runrig system. Terms such as "runrig" and "cottars" were used in the 2010 act without anybody looking to see whether we really have those things. The Government department's regulations mention "Kyles Crofters". I do not know what they are, and I keep asking people about that. The best answer that I have got is that, if you were a Kyles crofter, you would know you were. I am writing a textbook and I cannot find the answers.

The Convener: I hope that the textbook will still be relevant after our inquiry.

Stewart Stevenson has a question on regulation.

Stewart Stevenson: The 2010 act made provisions in relation to absentee crofters and neglected crofts. Can you briefly comment on whether that has had beneficial or deleterious effects?

Derek Flyn: I will express a personal view. We are talking about a law that protects the people who are on the land. I believe that the law should do that—it should be for the people who are living on the land and who are looking after it.

Sir Crispin Agnew: In principle, I agree with Derek Flyn, but where there are not enough jobs to allow people to work in an area, should people be able to go away, work and then come back? There is a strong emotional connection with the land. The issue of absenteeism has to be linked to whether there are job opportunities in an area. Otherwise, we are forcing people to come back when the wherewithal for them to live there does not exist. If jobs and all the rest of it are available in an area, we can force people to live there, but there has to be some amount of sensitivity. A person might go to Glasgow to work because there is no work locally, and might come back to help with the gathering and at weekends to work. Flexibility is needed.

Stewart Stevenson: It is, of course, possible for people to be legally resident in two places at once. I got a nod there, so I see that I am correct.

The Convener: Yes—people can do that provided that they do not stray too far from the croft, according to the legislation.

Eilidh Ross MacLellan: I am somewhere in between Derek Flyn and Sir Crispin on the issue. I am well aware of how painful it can be for people who are forced to give up their croft because, for various reasons, they are unable to return there. The threat that the commission might regulate and terminate their tenancy can haunt people for decades.

The tightness of regulation, in particular with regard to absenteeism, is at the root of the question of what you want crofting to achieve. It is about population retention? Is it about agricultural activity? Is it about protecting people's rights to their family heritage? My recollection of the Shucksmith report is that the aim was, to a great extent, population retention, which was why the priority at that time was to regulate people who were not ordinarily resident on or near their croft.

There is, by the way, absolutely no question in my mind but that tightening of regulation on that freed up crofts. I have acted for a huge number of people who were being pursued by the commission and people who were receiving crofts from people who were being pursued by the commission. That happened, and I dare say that that is what the legislation was intended to achieve.

Of course, no sooner had the commission regulated on the basis of residency than people started to say that the issue was not actually to do with residency but was more to do with what was being done with the croft. At this point in time, it is more important that a person is working their croft than that they are resident there. That comes down to policy priorities, what the commission wants to do and what guidance the commission is given by Government and Parliament.

The situation is difficult for people who are being regulated, but that is always going to be the case—it is the nature of regulation. However, if the desired effect was to free up crofts to enable new people to move on to them, that objective was met.

Richard Lyle (Uddingston and Bellshill) (SNP): I think that the last time I met Sir Crispin Agnew and Derek Flyn was in the previous parliamentary session, when the then Rural Affairs, Climate Change and Environment Committee was discussing crofting. It is nice to welcome you back.

Derek Flyn: It is déjà vu.

Richard Lyle: Yes.

I am a lowlander. Crofting has been a tradition in Scotland for hundreds of years. Landowners gave their local population land to live on and to earn a living from, for which they paid rent. Crofters worked the land, and the land still belonged to the landowners. I do not think that I am wrong in that summation. However, we now have a situation in which some crofters own the land.

We heard earlier that, in 1976, when crofters were given the right to acquire their crofts, crofters who bought their crofts were called "owner-occupiers" for want of a better label, but that the term was never defined in law, and that the legal reality for crofters who purchased their crofts was that they were considered to be "landlord of a vacant croft", which meant that they could, as landlords, turn around and give their crofts to someone else to work. Do you agree with Murray McCheyne, who told us last week that there is "no good reason" why owner-occupiers should be subject to the same rights and obligations as crofters who have remained tenants? Is that one way in which crofting law should be simplified?

Derek Flyn: I agree. "Crofter" should be the name that is given to the person who properly occupies the land. The terms that we are using are unfortunate, but if a croft is mapped and registered, it should be possible to record who should be occupying that land and has the right to be occupying that land.

We cannot control ownership of land—anyone can buy bits and pieces of land. That is one of the difficulties of crofting. If the system is not understood or is not transparent, and there is nowhere to go to look at maps to see what is a croft and what is not, people just buy pieces of land.

Some people have built houses on land that is in crofting tenure, and it is virtually impossible to unravel that in some situations. There is a suggestion in the sump that the commission should have a right to go and look at the reality of the situation and find a solution, but some people have no way out of the difficulty that has been created by previous confusion in the law.

11:00

Now, it is possible to register pieces of land that are identified as crofts, and there is a place where we can put the name of the occupier who has been approved either through succession or by the commission. That will bring some simplification to a system that has become terribly complicated since 1976, when title deeds were made available to tenant crofters. With the rule that a person should reside on or near their croft, it has become

more important that we identify who that person is. The law has changed to allow that an annual notice be sent to the occupier, to find out whether the occupier on the register is living there and looking after the croft. Those changes have come in recently, and I applaud them.

The Convener: I would like clarification on that, because I am not sure that everyone on the committee has understood it. I certainly have not. Last week, Murray McCheyne said to us that owner-occupiers should no longer be regarded as crofters. Are you agreeing or disagreeing with him?

Derek Flyn: I am sorry. Who said that?

The Convener: Murray McCheyne said that to the committee last week. There is nothing wrong with disagreeing with him.

Derek Flyn: We have an act that introduced owner-occupier crofters.

The Convener: Murray McCheyne was suggesting a way forward for the future—that is the point that Richard Lyle was making.

Richard Lyle: With the greatest respect, convener, Murray McCheyne was suggesting that a crofter who worked on the land and who then bought the croft should no longer be considered to be a crofter. Do you agree or disagree with that, Mr Flyn?

Derek Flyn: I do not agree with that.

Richard Lyle: Thank you. I did not want to interrupt you.

Sir Crispin Agnew: A crofter is defined as

"the tenant of a croft".

Section 19B of the Crofters (Scotland) Act 1993 defines "owner-occupier crofter"; it is a highly technical definition. A person who owns their croft but does not come within the technical definition in section 19B is an "owner-occupier" or a

"landlord of a vacant croft".

Although they might be exactly the same as a section 19B person, they will be subject to the Crofting Commission coming along and ordering them to re-let their croft.

There are three different types of occupier under different regimes, so the matter is highly technical. I think that what a croft is should be defined. That will, ultimately, be in the register and whoever is the occupier of the croft would be subject to the rules and regulations that apply to crofts. It should not matter whether that person is the owner, a crofter or whatever. If they are occupying the croft under a sublease, or as the owner or as the full tenant, the rules that govern the use of the land should apply equally. Parliament should do away with all the different definitions.

Richard Lyle: I do not want to interfere with a Scottish tradition that goes back 200 years or more. I am proud to be Scottish, and I am proud of what we are doing. However, you have just told me that the situation is bordering on farcical. I was a council tenant: I bought my council house and now own it. If I go and work in Australia for six months, I will still own that house. What you have laid out over the past hour, is a situation in which a person can buy a croft, but if they do not work it, someone else can snitch on them and—I apologise for the language—all hell breaks loose. Is that where we are?

The Convener: I invite Sir Crispin to respond to that. I know that Eilidh Ross MacLellan is itching to answer—we have all read her submission and know that she has strong views on the matter—but I will let Sir Crispin answer briefly before I call her to respond.

Sir Crispin Agnew: It is a matter of policy. At the moment, crofts are regulated, but we also have the odd situation in which different people are regulated in different ways. If you want to get rid of the regulation, to stop crofting and to have free use of property, I am not against that. However, if the policy decision is that use of certain land should be regulated in a particular way, regardless of the basis on which that land is occupied, people should be subject to the same regulation. I hope that that answers your question.

You must remember that there are quite a number of small landholdings in the lowlands under the Small Landholders (Scotland) Act 1911. I was looking at one at Damhead only yesterday.

Eilidh Ross MacLellan: The point is a fair one: why should crofters be answerable to the commission? In general terms, I see the crofting system as being like most things in that it involves both rights and responsibilities. A crofter has strong rights of security of tenure, succession and compensation for permanent improvements. They get public money over and above the agricultural support that other farmers get. Some people would say that they get a pretty good deal.

The flip side of that is that they have to comply with certain regulations and they have to be there to help with population retention. They have to do something with their croft to facilitate landscape management and agricultural production in whatever small way it can happen in outlying areas. In my mind, that is the justification.

However, there is no doubt that the current situation is farcical because it covers three groups of people. The point of defining owner-occupier crofter was to sweep up landlords of vacant crofts so that they could be regulated in the same way

as tenant crofters. The problem is that the definition was not drafted in a way that did that, so it was unsuccessful. That is why we have that group of people—although, to my mind, the greatest danger to them is not really the commission forcing a tenancy let on them. The commission has had a policy since 1976 not to do that as long as crofting legislation is being complied with. However, people are at the mercy of the commission on that point; if somebody wanted to make something of the matter, I am sure that they could.

From the commission's point of view, the situation is difficult to regulate. It has become well known over the past 20 to 30 years that someone who wants to escape commission regulation can buy their croft and become an owner-occupier or landlord of a vacant croft. Although the commission can regulate those people, it is much more difficult than regulating tenant crofters because the procedure for regulating tenant crofters is in the legislation and everyone knows what they are doing.

At the time of passage of the legislation, that is what we were seeking to achieve, but it was not achieved. I will not go into the various problems now—they are in my written submission. However, the various problems that befall that group are really quite serious. It can cost them a fair bit to go through all the legal processes to get themselves sorted. It is not always possible but sometimes they can get out of the "neither fish nor fowl" category and go back to being an owner-occupier crofter, or enter a tenancy arrangement again. It is a huge problem and it is not always possible to rectify it.

Derek Flyn has been recommending the concept of "proper occupier" for as long as I have known him—which is a long time—as has Sir Crispin. There is no doubt that such a definition would make life an awful lot easier. If we are beginning with a clean slate, we should perhaps not be trying to cater for two different groups of people. In the fullness of time and over several generations, all crofts will be purchased. Everybody will eventually get to that point: for various reasons, that is the direction in which we are going. I think that 5,000 crofts so far have been purchased, but it could be far more than that because lots of people do not tell the commission when they buy their crofts even though they should. There is no penalty for that.

Derek Flyn: I like Mr Lyle's use of the council house analogy. Given that public moneys and support have been involved, it does not seem unreasonable to me to say that former council houses should be kept occupied and in good order. For council house stock moving into private ownership, there should be a rule that the houses are kept occupied and in good order—that would parallel what I am suggesting about crofting.

Richard Lyle: Yes—but unlike you, I do not have the Crofting Commission coming after me.

The Convener: We might see a split in the committee if we discuss council house purchasing, although I like the analogy and I take the point.

Richard Lyle: I know that other people have questions, but I might come back in later, if there is time.

The Convener: I will move from what I thought was not going to be a contentious issue to one that perhaps is. I advise everyone again to concentrate on the issues rather than the personalities. John Mason is going to lead on this question.

John Mason: I am not even aware of what stories are going around.

We have spoken about common grazings, but I am particularly interested in the grazings committees. Are grazings committees working, on the whole? Is the legislation fit for purpose? Do grazings committees need to be looked at again?

Sir Crispin Agnew: Broadly, they do not. I will not address personalities or current issues, but will simply point out the very narrow role that grazings committees have under the 2010 act, which is basically to manage the common grazings and maintain or replace fixed equipment. Given the subsidy regime, all the environmental regulations and all the other agricultural obligations that are floating around under totally different legislation, the common grazings committee is not the appropriate mechanism for managing all those other functions because the 2010 act does not allow that. Grazings committees have sometimes tried to expand their role to deal with other legislative requirements, but anyone who does not want them to do that can frustrate them because the legislation does not give them such powers. That goes back to the underlying policy aims. We need to look again at what role the grazings committee should or should not have.

John Mason: One specific point that was raised with us was that nowadays grazings could be used for a lot more than just grazing. There is also a question around how income is handled.

Sir Crispin Agnew: That is because the committees do not have other functions under the 2010 act. They were given a function under the Crofting Reform etc Act 2007 by which they could borrow money and so on, but that was removed by the 2010 act. That is why the role of the grazings committees needs to be looked at again. The subsidy money that comes in is technically due to each of the graziers under the rights that they have, and should not go to the central body.

Sheep stock clubs are often run on common grazings, but that is not a grazings committee function. It should be a function under the lease that sets out how the sheep stock should be grazed. I can go into that in great detail, but you will not want me to do that now.

11:15

John Mason: No, that has clarified it.

Sir Crispin Agnew: The powers of grazings committees are very narrow under the 2010 act and are not fit for purpose in the modern day and age, when there are all sorts of other legislative and European factors.

John Mason: Mr Flyn, do you want to—

The Convener: Hold on, John. I was going to bring in Eilidh Ross MacLellan first and Derek Flyn afterwards.

Eilidh Ross MacLellan: The question was whether grazings committees are working. I suppose that, in the majority of cases, they are just about working. My experience of being a solicitor has led me to believe that there is quite widespread concern, not just among shareholders but inside grazings committees, about whether grazings committees are doing what they are supposed to be doing. A lot of people who run grazings committees do it on their own time and put a lot of effort into it. They do it entirely in good faith but entirely without training and support. It is a lot to expect of people.

We are in a different world now, and the law relating to common grazings has changed quite a bit over the past 20-odd years. There is crofter forestry now, and other developments on croft land. You can have new common grazings and do things with common grazings other than just graze. It is a different environment. I think, however, that the grazings regulations from the Crofters Commission in standardised format have not changed in a generation. Bits have been added on to them for crofter forestry and other things, but basically it is the same set of regulations.

Sir Crispin Agnew: That is because of the 2010 act.

Eilidh Ross MacLellan: That is right: I agree with Crispin Agnew's point about grazings committees. We need increased training and support, if not a wholesale look at what grazings committees exist to do. At the moment, we have an unfortunate situation generally—it is not about specifics, at all. Many clerks of common grazings committees feel exposed because of increased duties on them to prepare reports on all the crofts in their township. That is a big ask. Also, many shareholders in common grazings are wondering what exactly is going on and what is happening to the money—the resumption money, this money and that money. There is not enough clarity. All of that is ripe for improvement.

John Mason: We have highlighted the problem today, which is helpful.

Derek Flyn: In short terms, I would say that common grazings management is in need of a new business model. Too many functions are available to them now.

Retreating from that, though, I would say that, in any walk of life, it seems to be more and more difficult to form committees, because of the responsibility. In the last round of reforms, common grazings committees were given the function of reporting on what all their tenants were doing with their crofts. Although the commission itself has sought to water that down, that is not what the 2010 act says. It says that the committee should report on all the crofts, but the commission has backtracked because it knows that it made a lot of committees unhappy that they would be policing their neighbours in some way. A new business model to cope with modern times is a must. That is not even somewhere that the sump went—the matter got far too complicated.

The Convener: I have a couple of questions on grazings, if I may. I have been waiting patiently. I note Derek Flyn's point that the commission turned a blind eye to the reports. When I asked the commission how many reports it had received, it would not tell me, but it said that it was no more than a couple of hands' worth.

Some grazings committees are in receipt of a huge amount of funds. My first question is this: should they be treated differently from the grazings committees that have less funds?

My second question is almost unrelated. Do you think that it is appropriate for shares in the common grazings to be separated from the croft? We heard last week that that is an obstacle to new crofters and young crofters coming in. Who would like to tackle those two questions?

Derek Flyn: Those are two big different questions. Could you give me the first one again?

The Convener: Should there be different business models depending on the size of turnover of the common grazings cash wise? Is it appropriate to separate shares in common grazings from the croft?

Derek Flyn: The commission should make a range of business models available.

The Convener: What about separating common grazings shares from the croft?

Derek Flyn: That problem was foreseen in 1976, when crofters were given the right to buy

their croft land but not the share in their tenancy. It was only really recognised when the commission had to catch the shares that had not pursued the ownership of crofts and were separated from them. The 1976 act said that they would be deemed to be held in tenancy and that they would be deemed to be crofts. There was almost an outcry that that should happen. However, the law has been in place and subject to criticism but there has been no activity since 1976.

There is a trend that the shares get separated because not everybody wants to work their share in the grazings. One of the difficulties has been that people hold shares in the grazings that they never use. The difficulty of common grazings is that some people want to use 100 per cent and should be entitled to 100 per cent of the value of what they do but they only get their own little share of the value of what they do, so fewer people get involved.

Sir Crispin Agnew: If you separate the share from the croft, you basically make the croft unviable agriculturally. People are very keen to separate the share if there is a wind farm in prospect because they can get money for their share from exploiting the common grazings, whether the landlord is doing it or somebody else. You then end up with a whole group of people who have a share in the common grazings but no land nearby. They have to live within—what is it now?

Derek Flyn: It is 32 kilometres—20 miles.

Sir Crispin Agnew: It used to be 16 miles. If they have to live within 20 miles of their share and the common grazing is 10 miles wide, where does the 20 miles start from? This end or that end? I personally think that the shares and the crofts should not have been separated but they are.

A recent Land Court case said that you can assign the share separately, so you can separate it off. When you buy your croft, you are not entitled to buy your share in it because it makes it a separate croft. I would like all the shares to be reattached if crofts are to keep an agricultural content. That answers your question about the separation of the shares.

Under the 1993 act, the common grazings committee should not hold any money except money that it has recovered from shareholders for works that it has done to maintain the common grazings or put in or improve fixed equipment. The money from a resumption can also be given to the grazings committee for it to distribute to the shareholders who are entitled to it, although I believe that it is sometimes kept by the committee to be used in the future for maintenance and so on. Maybe everybody has agreed to that, but the grazings committee is not entitled to do that under the 1993 act.

That is why we need to look at the powers of the grazings committees. They get environmental money because, in a way, they are the only body that manages the area, but they do not have any right to manage it for environmental reasons. They have the right to manage it only for grazings. That is why the whole thing needs to be looked at in detail again. The committee's duty is

"to maintain the common grazing and to provide, maintain and, if necessary, replace the fixed equipment required in connection"

therewith. Part of the problem is that the legislation is not fit for purpose.

The Convener: Eilidh, do you want to add to that?

Eilidh Ross MacLellan: Yes. I will be brief. The first question was whether there should be different business models for different types of common grazings operations. I have never thought of that before, but it strikes me as a really good idea given that there is such a breadth of grazings committees. Some are not even regulated, so it is difficult to establish who holds a share; it is possible, but it can get difficult. Some common grazings have two or three active shareholders. Maybe they have a sheep stock club and maybe they do not. Some have substantial sheep stock clubs that have large amounts of funds coming in and going out. Others have large renewables developments, with an entirely different class of funding coming in from that. The idea of different business models is a good one.

The second question was whether shares should be separated from crofts. I think that we are all thinking back to the reference that the Crofting Commission made to the Scottish Land Court a few years ago. Sir Crispin has just mentioned that. In that case, the court said that, when someone sells their croft, it is separated and they are left with the grazings share. Detaching the grazings share from the croft can be an issue not just in everyday life but, in particular, at succession.

When a crofter with an owner-occupied croft dies, we often find that no mention is made of the grazings share because the crofter never used it and it is never mentioned as far as the executor is concerned. The executor may or may not have knowledge of the crofter's working. If the grazings share is not mentioned on the confirmation, its succession may never be attended to. In 20 years, when somebody decides to ask the commission who shares in the common grazings, it is found to be somebody who died 20 years ago.

There are remedies to that. The commission can terminate the tenancy, as can the landlord of the grazings, or it may be that somebody in the

township wants to be an active crofter but they need more of a share in common grazings than they have. If their souming is for four cows but they could really do with another four for whatever reason, they can go to the grazings committee and ask whether they can use so-and-so's share. That happens quite frequently and it is a cobbled-together solution that might work in the short term but it gets messy when crofts are separated in that way.

Mike Rumbles (North East Scotland) (LD): I have a technical question for my own advisement. Obviously, grazings committees will be of different sizes but, on average, how many crofts are involved in a grazings committee? Will you give us an idea of the scale?

Eilidh Ross MacLellan: I do not think that there is an average, to be honest.

Mike Rumbles: They are all different.

Eilidh Ross MacLellan: Yes. In Lewis, where there are thousands of crofts, some crofts have shares in local common grazings as well as shares in, for example, the Stornoway common grazings—they have two grazings shares. Our township on Skye has 12 or 13 crofts and 12 or 13 shares in the common grazings, which is fine. In some crofting townships, there are two crofts and two shares in the common grazings, whereas in other townships there are hundreds. I am afraid, therefore, that I have to dodge your question as I cannot give you an average—I am sorry.

11:30

Sir Crispin Agnew: The 1993 act states that crofters may

"appoint a grazings committee of such number as the meeting shall decide",

so the number can be whatever they choose.

I will go back to the sheep stock clubs. Under the act, managing a sheep stock club is not the function of the grazings committee. Before the second world war, all sheep stock clubs operated under the industrial and provident society acts, which set out obligations relating to financial regulation. There is an argument that any sheep stock club ought still to be regulated under those acts although most of them are no longer regulated. In a way, they still come under those acts and ought to be registered and regulated. That would be terribly complicated, and it would be more sensible to have them regulated by the grazings committees, but that cannot happen under the Crofters (Scotland) Act 1993. That is an issue for the future, which is why it all needs to be sorted out.

Eilidh Ross MacLellan: I am sorry, Mr Rumbles, but I misunderstood your question. I thought that you were asking about the average size of a township rather than a grazings committee.

Mike Rumbles: That is also interesting. Grazings committees are all different and there was a previous question about what types of committees there should be. I am trying to find out and understand how we should handle the different types of grazings committees.

Eilidh Ross MacLellan: It is not always the biggest committees that have the most activity. Sometimes much smaller townships will have a lot more going on.

The Convener: Richard Lyle, do you want to come in briefly now, or at the end?

Richard Lyle: At the end.

The Convener: Okay. We have navigated those rough waters quite well. Mairi Evans has a question.

Mairi Evans (Angus North and Mearns) (SNP): In her written submission, Eilidh Ross MacLellan mentioned funding in quite a lot of detail, and she spoke about the need for people to have the cash to buy a croft. Are there other ways in which young people and those who live locally can purchase a croft? What suggestions do you have? How can we move forward and make some changes to enable that to happen?

Eilidh Ross MacLellan: It is a huge problem for people. Unless they can borrow from family or friends, or they have equity in a home that they can remortgage and use, they cannot buy a croft. The majority of young people have only just got a mortgage and it could be 10 years or so before they have sufficient equity to think about doing that, so it is a problem.

By and large, there is no way around it. Even personal loans from banks usually come with the caveat that they must be used for a certain purpose. If someone is truthful and tells the bank that they are going to buy land with the money, the bank will not lend, and certainly not on a mortgage. It is a huge problem.

Moving forward, using existing commercial mortgages to buy crofts is not an option. Nothing is impossible, but there is a huge gap between where we are now and what would need to happen. Lenders would need an awful lot of persuading, and they would need to know that their rights were going to be secure. Part of the theory behind the crofting register was to give everybody certainty over their rights, particularly in the longer term so that lenders would know exactly what their security was.

Unfortunately, there is no ready-made answer—I do not have one for the committee or for anybody

else. It strikes me that there is a problem, which is something that I hear. I do some teaching of new and incoming crofters for the Scottish Crofting Federation.

It is a cause of huge frustration, because they wonder how they are ever going to do it if they do not have a family croft, do not inherit a croft or do not have a sum of money. All the while, of course, the value of crofts is going up. On the west side of Lewis, you might well be able to get a croft for £15,000, but on the Black Isle, the price is going to be at least tens of thousands of pounds. Not many young people can buy a house for that amount of money without getting a mortgage. It is a huge problem.

Derek Flyn: It comes back to the problem of putting a value on a croft and of there being or not being a market for crofts. I do not have to go very far back in my memory to a time when the commission refused to accept that a croft had a value of more than the permanent improvements to it and that there was no additional value from people wanting a specific location or whatever.

We had to confront that, so we held a seminar in Plockton and invited speakers to talk about the value of crofts. Of course, crofting has a social value, but you cannot put a pound sign on that. However, we got the district valuer along, and he said, "The Government will look at the value of crofts in terms of their open market value."

There is still resistance out there to accepting that a croft has an open market value, and that will pose difficulties if, for instance, the children of a deceased crofter are entitled to a share of the value of the croft, because it will mean that the crofts will be marketed to get their highest value. That has caused problems in the past, but in reality we have a system that has resisted the marketplace. In future, it will be dragged into the marketplace—if it is not already there.

The other people in the marketplace—the lenders—do not like that. They will really lend only on decrofted houses, which are easily marketable. Until the marketplace is set up to sell crofts in tenancy, for example, no one is going to lend on them. After all, if things go belly up, it is very difficult to get the funding back again.

To me, the proposal that tenancies be registered in order to make them available for lending on, which came out of the committee of inquiry on crofting, seemed to fail to catch the requirement in the present law for the money to come from the landlord if the lending goes belly up and the crofter goes bankrupt. The landlords' representation did not quite understand that the easiest way to get the money out of a croft that has been vacated by someone who has gone bankrupt is to get the Land Court to fix a valuation, and for the payment to be made from the landlord's resources. If the landlord is a limited company in Andorra or Liechtenstein, as some of them are, you will not get that money, and any lender who has had their fingers burned on that is just going to pull out of the lending place.

Sir Crispin Agnew: A commercial lease of 20 years or more can be recorded in the land register. Once that happens, you can record a standard security against the lease, and the standard security holder can take possession of it, market it and so on. Because a crofting lease runs from year to year, it cannot be registered in the land register and, as a result, you cannot have a standard security over it. One of the Shucksmith recommendations was that the law should be changed to allow lenders to take a standard security over a crofting lease and register it in the land register, and the creation of the crofting register was partly to facilitate that.

There was a lot of resistance to the proposal from the crofting community, who saw lenders coming in, foreclosing on the crofting lease and then selling it on the open market. You would need to set up the legal system so that that could be done if you are going to provide for that through the commercial sector.

I was on the agricultural holdings legislation review group. We had various meetings with bankers about lending to agricultural tenants and related security issues. It might be worth looking at the group's report, because there was discussion among lenders about the circumstances in which they would lend to agricultural tenants and so on.

The position was not very positive for crofting. As Eilidh Ross MacLellan said, the only way to get a mortgage is to buy your croft house, decroft it, divide the croft and make it smaller and less economic and so on. You then end up with a house that is sold separately and you have bare land. My interpretation of the 2010 act is that you cannot then apply to put another house on the land unless the landlord agrees. Some people disagree with me on that. If you can put another house on it, you can decroft it and buy the land.

There is a theme—it is part of the conflict—to encourage crofts to be divided and made smaller and smaller until all that you end up with is a whole bundle of house sites.

The Convener: Stewart Stevenson has a quick question, and then I want to look more generally at the future of crofting.

Stewart Stevenson: I preface my question by saying that if it cannot be answered in two sentences, please do not answer it. Although there cannot be standard securities unless the lease is for 20 years, is it possible to get the same certainty for the lender through adopting a process

of real burdens instead? I ask that as a non-lawyer?

Sir Crispin Agnew: I think that the answer is no. You need to have a standard security, and in order to have that you would need to change the legislation. Perhaps you could have a standard security registered in the land register.

The Convener: I do not notice any disagreement, so I will move on.

John Finnie (Highlands and Islands) (Green): Good morning, panel. I want to talk about the future. You may be aware that the programme for government 2016-17 commits to beginning work this year on a national development plan for crofting. If I noted you correctly, Sir Crispin, you questioned whether there was an underlying policy theme connected with crofting and said that it could not be viewed in a bubble. Eilidh Ross MacLellan mentioned population retention and agriculture, and Derek Flyn talked about land use.

The development function has moved to HIE. What are your views on the policy changes that are likely to result from a national development plan for crofting? That has nothing to do with the technical or legal issues that we have identified; rather, I want you to focus on policy changes. Will you speculate on what should be part of the plan, please?

The Convener: That is a difficult one. Derek Flyn is avoiding the question, so Sir Crispin will have a go.

Sir Crispin Agnew: I must confess that I have not thought about that at all. I think that, from a legal point of view, trying to have a policy on development would be a problem, given the limitations in the 2010 act. It would be good to have a discussion about development, which might then lead to a discussion about what the underlying policy for crofting is and what you want to end up with in the new and simplified legislation.

The issue is the development of crofting, but in the context of the development of the Highlands and Islands. I do not think that you should separate the two, as has been done. I would like to see a policy for the development of crofting in the wider context of the requirements of the crofting areas.

Eilidh Ross MacLellan: I suppose that the question illustrates to me how odd it is to have that function with Highlands and Islands Enterprise, rather than with the Crofting Commission, which is where it should be, in my view. Policy consultation is going on at the same time as possible legislative changes. Surely the two have to be done in tandem.

For my money, the starting point is that the development function should be with the commission. Following on from that, as part of the exercise that allows us to think about what we want crofting legislation to do, we need to think about what we want the crofting system itself to do. If we want the crofting system to do something entirely different, the legislative system around crofting should provide the legal framework for that.

11:45

John Finnie: With respect, do you have a view on what should be in that? Quite technical issues have been raised about housing, but population retention in many remote and rural areas is absolutely dependent on housing, and there are issues around a dearth of housing associated with land.

Eilidh Ross MacLellan: Absolutely. Having lived on Skye for the past three years, I am aware that there is simply no private rental market between March and October. A great number of people are obliged to move out of accommodation in March, whether they want to or not, in order to make way for tourists. You just assume that people do that, unless they own the property. It is a huge problem there, and I am aware that it is a huge problem in other parts of the crofting counties, too. Population retention is an important issue.

Another important issue is the agricultural element of crofting. I am no agriculturalist but I have day-to-day dealings with agriculture, and it seems to me that it is an important part of the culture of these places. The amount of money that is generated by the agricultural economy in the crofting counties is probably not going to change anyone's life, but going to the market and the cultural aspect and so on are important.

The Convener: I think that Derek Flyn has been deliberately trying to avoid my gaze, but it would be fair to give him a chance to answer that question before I bring in Sir Crispin. We have a few more questions to ask, and time is not waiting for us. Would you like to add something briefly, Derek?

Derek Flyn: I am of the mind that crofting is not an industry. Most of the people out there are not participating in the crofting industry. We have moved towards protecting the system with an eye to the sustainability of the population. I see that as something that enables the people who work on the land to do what they will with the land that they control. The annual returns, the map-based register and the clear statutory duty for a crofter to live on the croft or beside it or to look after it have brought about a big movement towards that state.

There has been a tendency to see crofting as part of the agricultural law of the land, and we

have separated it from that. There is an argument to be made about whether that is a good thing or not, but we now have different titles. We persuaded the "Stair Memorial Encyclopaedia", which covers Scots law, to move crofting out of its agricultural law section and to create a separate entry concerning crofting law. That is because the systems are different—they have different histories and they each have a different feel.

At a time of land reform, it seems to me that a system that allows individuals to hold small areas of land under a settled system is extremely valuable.

The Convener: Sir Crispin, do you want to add something briefly?

Sir Crispin Agnew: I agree with what has been said about population retention, housing sites and so on. However, we should ask why croft land should provide house sites. There is an issue about the convenience of regulation, and people can buy land, decroft land and so on. If you want housing, you need a wider policy. Why should there not be compulsory purchase powers relating to land elsewhere? The Land Reform (Scotland) Act 2016 has given communities greater rights to acquire land. That is why I say that we do not want to consider the issue in a bubble.

If we believe that crofting and croft land make an important contribution to development overall, why should croft land be used to provide house sites, with the result that that land is decrofted, which reduces the amount of croft land, which is a decreasing asset? That goes back to my point about the bubble.

The Convener: Are you happy with that, John?

John Finnie: Yes, and I am conscious of time.

The Convener: Jamie Greene has a question on landholdings.

Jamie Greene (West Scotland) (Con): My initial question is specific, so I will ask it quickly; perhaps the witnesses will have a short view on it. It is about the simplification of crofting law. Should the current legislation on small landholders be brought together with crofting law? Is there any merit in consolidation?

There is a wider overarching theme about how the committee considers the future of crofting law. I will quote from a written submission by Eilidh Ross MacLellan—I am sorry that it is not dated—which says:

"Whether you believe the solution lies in fresh legislation, or redrafting, or consolidation, or restating; the one point on which most now agree, is that crofting law needs to be improved."

What one piece of advice does each of the witnesses have for the committee as we think about the structure of any future legislation?

The Convener: That is two questions.

Jamie Greene: It is two questions. Indulge me, convener—I have been quiet all morning.

The Convener: You have been very good.

Should smallholders be brought into the law, and what advice would the witnesses give?

Sir Crispin Agnew: If you ask any of the small landholders, you will find that they do not want to come under crofting regulation. That was offered to Arran, which has been made one of the areas where it would be possible but, as far as I am aware, nobody from Arran has applied to become a crofter because of all the regulatory difficulties. Unless you are going to apply crofting to the whole of Scotland again, as happened in 1911, the answer is no; we need to do something different with the small landholdings.

One bit of advice that I will give is that you should go back to think about what your underlying policy objectives are before you start doing anything with the 2010 act.

The Convener: That is succinct.

Derek Flyn: I am for dealing with small landholders and crofters under the same or similar legislation because new crofts do not have to bring with them the right to buy, which was an important part of traditional crofting. If we create new crofts, we do not have to give people that right and can resist the right of assignation—choosing who the next crofter is going to be. Therefore, new crofts are a different breed from old crofts.

Some people have a suspicion that new crofts will never be created but I find that, on community-owned land, there is a desire to create more crofts because that is viewed as a way of retaining population. Therefore, I see nothing wrong with smallholdings elsewhere having a clear code and having their land registered. After all, the new crofting register is a map of the whole of Scotland with crofts placed on it, so there is no reason why smallholdings should not be recorded on the same register.

Eilidh Ross MacLellan: I clarify to Mr Greene that those comments were made in a paper to the crofting law group conference in 2013.

I do not have a view on landholders, so I will not make one up here.

I echo what Sir Crispin said about making sure that the legislation does what you want it to do. I also made a point about not rushing it—or not rushing the bulk of it, certainly. It would be lovely to think that, within the next few years, we would

have a crofting act that did what the consensus seems to want it to do, and to be able to get used to and work with it. It is hugely labour intensive to come to terms with new legislation that you are not familiar with, so it would be lovely to get to grips with something properly, get used to working with it and have it for the foreseeable future.

The Convener: The penultimate question is from Rhoda Grant. I am looking at the clock and time is tight, so I am afraid that I can give you only a short time, Rhoda.

Rhoda Grant: My question follows on from Eilidh Ross MacLellan's last comment. The Government has said that it will bring forward new crofting legislation at the end of this session of Parliament, which is why we are having the inquiry. There is pressure to deal with some or all of the issues in the sump and, given recent events, maybe other issues along with that. Should we deal with the sump as a matter of urgency and then consolidate, or should we do things in a different order by consolidating first and then looking at the sump? Alternatively, should we start with a clean slate? What are people's thoughts on that?

The Convener: That is a short question that is easily answered. Sir Crispin wants to go first.

Sir Crispin Agnew: I think that there is a section in the 2010 act that says that, if the Government brings forward a bill to consolidate crofting legislation, prior to that bill being passed, it may bring in a statutory instrument amending the legislation so that in fact it would be amending the consolidation bill. That strikes me as very convoluted and difficult. I cannot find the provision immediately, but it is somewhere in the 2010 act—or perhaps it was introduced into the 1993 act by the 2010 act. It says that, if the Government brings forward a consolidation bill, before that bill is passed, it can amend anything that it wants to amend. As I said, that seems rather convoluted. If you want to do a consolidation and have a corrective to try to put right the things in the sump, that is one way to approach it, but I think that a much more radical approach is needed. Why not apply it to every landholding in the Highlands?

Derek Flyn: I have been at many stakeholder groups and I do not hear an awful lot of suggestions coming through about changes to what I call the code for what we are about. There is a lot of unhappiness out there, but as yet I do not hear any new ideas to change things, for instance in the way that Sir Crispin has suggested. There is a lot of discussion. I have been to 10 stakeholder meetings and there is a crofting stakeholders group, although it has had fewer meetings because we are waiting for something to happen. However, I do not see a lot of changes coming forward.

Sir Crispin Agnew: The provision I referred to is in section 52 of the 2010 act.

The Convener: Thank you.

Eilidh Ross MacLellan: My view on that is on the final page of my submission, before all the annexes. As I have said, I do not think that the Shucksmith report needs to be revisited, but the entire act needs to be rewritten—we need to start with a blank sheet of paper, without going back to work out exactly what the priorities are. Use the Shucksmith report as is and the evidence that the committee gathers, take a decision on what you want to achieve and then sit down with a fresh bit of paper and try to avoid the layering and impenetrability in the sump that Derek Flyn has talked about and that we are all too familiar with.

Rhoda Grant: I heard Eilidh's thoughts there; the others gave ideas that are out there, but not their thoughts on how we should proceed. I would welcome those.

The Convener: Do you mean their thoughts on whether there should be consolidation or a new act?

Rhoda Grant: Or whether we should deal with the sump.

Derek Flyn: You have to take what we have and do something with it. We have security of tenure, compensation for improvements and fair rents—are we going to change that? That is what talking about a blank sheet seems to say. Unless we have a basis for changing, the crofting code should remain the same. The general policy on whether we are sustaining a population or creating an industry that produces agricultural goods is a different debate. Are we attacking, expecting someone else to attack or expecting changes to the actual workings of the system on issues such as people's control over land and their rights in relation to that land? To me, we do not need a consolidation, but we certainly need a simplification of what we have.

12:00

The Convener: How do you view simplification, Sir Crispin?

Sir Crispin Agnew: As a matter of urgency, the legislation needs to be consolidated and, during that process, simplified in some of the ways that we have suggested, which could be done under section 52 of the 2010 act. The matter of urgency is to put right the various issues in the sump. In the longer term, somebody needs to look at wider policy for the crofting counties.

The Convener: I have not chaired the meeting very well, because I had a question to ask at the end, but I seem to have eliminated myself

because of the time. Richard Lyle has a question but, as I have eliminated myself, I am afraid that I have to ask him to hold on to his question. We can submit our questions in writing.

Sir Crispin Agnew: We can stay on, if you want.

Richard Lyle: It is just a simple question.

The Convener: Okay—if it is a very simple.

Richard Lyle: I will not go over all that the witnesses have said, but do we honestly need the Crofting Commission—yes or no?

Sir Crispin Agnew: If we are going to have crofting that is subject to rules and regulations, we need a regulator.

Derek Flyn: Yes.

Eilidh Ross MacLellan: We need a regulator to implement the system of regulation.

The Convener: Thank you for your offer to stay on and for letting Richard Lyle ask his question—I am glad that you answered it so succinctly.

I can give each of you a minute if there is something that you would like to leave us with before you go. Your evidence has been extremely good and helpful, but if you feel that you have missed something out, I am happy to give you a chance to say it.

Sir Crispin Agnew: It is important to consider the role of the landlord, particularly where there is community ownership, and how that links with the regulatory role of the commission. Whether that consideration should also be applied to private landlords is perhaps a matter of policy. There are conflicts with community ownership and community objectives and aims when there is separate regulation by the commission.

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

Eilidh Ross MacLellan: I have nothing further to add, thank you.

The Convener: Derek?

Derek Flyn: I echo what Sir Crispin said, but I have nothing else to add.

The Convener: That concludes our formal business. I thank the witnesses for coming. The session has been extremely informative to all of us. Thank you very much for sticking to clear and concise answers. If we need clarity on any matters, I am sure that you will not mind if we come back to you with written questions.

Meeting closed at 12:03.

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