OFFICIAL REPORT
AITHISG OIFIGEIL

Net Zero, Energy and Transport Committee

Tuesday 17 December 2024

Session 6

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NET ZERO, ENERGY AND TRANSPORT COMMITTEE
38th Meeting 2024, Session 6

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Michael Matheson (Falkirk West) (SNP)

COMMITTEE MEMBERS

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)
*Monica Lennon (Central Scotland) (Lab)
*Douglas Lumsden (North East Scotland) (Con)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Kevin Stewart (Aberdeen Central) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lin Bunten (Scottish Environment Protection Agency)
Scott Crawford (Scottish Environment Protection Agency)
Rhoda Grant (Highlands and Islands) (Lab)
Martin Hall (Davidson & Robertson)
Hamish Lean (Shepherd and Wedderburn LLP)
Tom Oates (Oates Rural)
Wendy Thornton (Scottish Environment Protection Agency)
Andrew Wood (Bidwells)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 17 December 2024

[The Convener opened the meeting at 09:02]

Decision on Taking Business in Private

The Convener (Edward Mountain): Good morning, and welcome to the 38th meeting in 2024 of the Net Zero, Energy and Transport Committee.

Our first item of business is a decision on taking business in private. Do members agree to take in private item 4, which is consideration of the evidence that we will hear on proposed regulations on environmental authorisations; item 5, which is consideration of the evidence that we will hear on the Land Reform (Scotland) Bill; and item 6, which is consideration of the committee's work programme?

Members *indicated agreement.*

Subordinate Legislation

Environmental Authorisations (Scotland) Amendment Regulations 2025

09:02

The Convener: Our second item of business is an evidence-taking session on the proposed Environmental Authorisations (Scotland) Amendment Regulations 2025, which were laid at the end of last month. I have to say that the lack of prior notice was unfortunate; if the committee had known that the regulations were coming, and that they were unusually important, complex and long, we could have begun scrutiny and work on them much earlier.

That said, I put on record my thanks to the Acting Cabinet Secretary for Net Zero and Energy for her prompt and positive response to the committee's request to withdraw and re-lay the instrument early in the new year to allow us to carry out some additional scrutiny. That decision was also appreciated by stakeholders, who now have a more reasonable length of time to respond to the questions that we have put to them on the regulations. This evidence session is with the Scottish Environment Protection Agency, to hear its views on the regulations and the resources and skills needed to ensure that they are enforced effectively.

Before I welcome the witnesses to the meeting, I remind members that I am a farmer and a landowner. As such, I use the regulations, not only to carry out activities on the farm but in relation to watercourses that run through it.

I welcome Lin Bunten, chief operating officer, regulation, business and environment, SEPA. She is supported this morning by Scott Crawford, senior manager, compliance and beyond, permitting; and Wendy Thornton, senior manager, compliance and beyond, environmental performance. Before we move to questions from members, Lin will make a brief opening statement.

Lin Bunten (Scottish Environment Protection Agency): Good morning. As I have already been introduced, I will not repeat what has been said.

Thank you for inviting me here today to provide evidence on what are important regulations for SEPA. It is important to point out that we are responsible for their implementation, so we will focus our remarks on that and leave any policy issues for the committee to address with our Government colleagues.

The Environmental Authorisations (Scotland) Amendment Regulations 2025, which I will refer to as the amendment regulations from now on,

represent the final legislative step in a 10-year journey of significant regulatory reform and modernisation since the passing of the Regulatory Reform (Scotland) Act 2014. Throughout that time, we have worked collaboratively with colleagues in the Scottish Government to turn the concept of a truly integrated approach to environmental regulation into a reality, with the Government responsible for the legislative side and SEPA responsible for practical implementation. We welcome the amendment regulations as the final piece in the jigsaw to enable that genuinely transformative work to deliver for SEPA, for businesses and, most important of all, for communities and the environment.

The regulations bring all four of our main regulatory regimes—for water, waste, industrial pollution control and radioactive substances—into a single regulatory framework with common processes and timescales, common tiers of authorisation and common ways of engaging. The framework will simplify and modernise regimes that are in many cases old, complex and bureaucratic and which are spread across many different pieces of legislation, and it will give clarity about the type of authorisation that is needed, why it is needed, and what is required to comply, making it much easier to use and more cost effective for SEPA and regulated businesses. One of those regimes—radioactive substances—has been in the framework for a few years now, and we are applying our experiences from that phased approach to make sure that we are ready to migrate the other three regimes for November 2025, subject to the laying of the regulations.

The regulations significantly simplify the landscape. It is worth understanding that, with this piece of work, we are taking in all or part of 70 pieces of legislation dealing with waste, water and industrial pollution control and retransposing the requirements of all or part of 14 directives. It is all about consolidating and updating processes, and that is what accounts for much of the considerable volume of the draft regulations.

The amendment regulations also take the opportunity to bring into the framework new activities that were previously out of scope, where there are good environmental or business reasons for doing so. In our written evidence, we provided some examples of the work that we are doing to prepare for implementation and the engagement work that we are and have been conducting with our stakeholders. I welcome the opportunity to talk about those in a bit more detail.

I am joined by Wendy Thornton and Scott Crawford, both of whom are involved in various elements of the implementation of the regulations. Thank you for giving me the opportunity to make an opening statement.

The Convener: Thank you, Lin. In the past, I have come across controlled activities regulations when, for example, I have been cleaning ditches on the farm. That sort of work requires authorisations if the ditch is over a certain level, and it is not just SEPA that is involved; other agencies, such as NatureScot, can be involved, too. Will you talk me through how the regulations will simplify the tortuous process of writing in for consent, waiting for ages and paying for other consents that you might need under CAR? I am unclear as to how the regulations will benefit that situation, and I would like to know what that benefit is, please.

Lin Bunten: The requirements in the controlled activities regulations are being assimilated into the new framework, with the benefit that the processes that sit behind the decision making will be harmonised across all four regimes. The process that will be gone through for the kind of activity that you are talking about will remain largely unchanged.

As we bring in the regulations, we are looking at our wider transformative approach to regulation, which brings digital experiences to customers. I can talk a bit about what we have already brought in for private sewage treatment works that significantly speeds up the decision-making process; that is the approach that we plan to take across the board, with, over time, all the permissions that will, where possible, enable that decision making to happen more swiftly. As I am sure that you understand, the conditions and considerations that we have to apply to ensure that we protect the environment remain unchanged by the introduction of this regulatory framework.

The Convener: You are setting yourself timescales, but do they also apply to the other agencies that are involved?

Lin Bunten: Where other agencies are involved, they will continue to have the same timeframe to respond. I am talking about where we have been able to bring forward a much speedier process, which does not involve that consultation step with any other agencies.

The Convener: Okay. So, basically, there is no change.

Lin Bunten: We are harmonising the processes across four big regulatory regimes, which form the majority of the regulatory framework that applies to protecting Scotland's environment. At the CAR—or controlled activities regulations—level, which is the example that you have given me, we are bringing across the requirements as they are, and implementing them through the new framework.

The Convener: I am not sure that I am any clearer, but perhaps I am being difficult this morning—I hope not.

You talked about private sewage and septic tanks. I seem to remember that the septic tank registration process was probably the most tortuous thing that I have ever done in my life. Will that be simplified, too, or will it be the basis of the new system?

Lin Bunten: The septic tank registration process is relatively straightforward, and digitising it makes the customer experience much faster. We will take the human processing element out of a lot of the decision making as we anticipate bringing our digital tools forward. The example that I gave was about the registration process for small-scale private sewage treatment systems, which are slightly bigger than a septic tank.

The Convener: So, one process will become easier, and one is already easy. Is that what you are saying?

Lin Bunten: The intention is that, as we bring forward our improved customer experience, everything will become easier and much more straightforward. We have operated paper-based systems, which we have moved into an electronic environment. We are now talking about taking that digital step, which is a much bigger step into the future, to speed up our decision making in relation to the majority of the decisions that we make, particularly those that are of low risk to the environment.

The Convener: With regard to digital systems, you are still struggling as an organisation to get past the 2020 hack and get everything back online. The system still does not work particularly easily, to my mind. In your submission, you say that you are creating, designing and formulating new systems, and yet we are putting the regulations in force before those systems are in force. Are you confident that SEPA's digital transition is going to be smooth? I would suggest that you have not had a great record in that respect in the past.

Lin Bunten: I might indicate that it is unfair to characterise our behaviour in terms of previous unexpected experiences. Our approach is to have a digital system available at the point at which the regulations come into effect for applications. That is our plan at the moment, and we are working hard towards making that a reality.

The Convener: Other committee members want to ask questions, so I will stop hogging the floor and move to Douglas Lumsden.

Douglas Lumsden (North East Scotland) (Con): Did SEPA consider how any changes to waste licensing might support the transition to a circular economy?

Lin Bunten: Absolutely, yes.

Douglas Lumsden: Will you expand a bit on that and on how it all fits together?

Lin Bunten: The waste sector will see the most significant changes, because of the age of some of the waste sector regulations that we are assimilating into the new framework—they are some of the oldest, most complex and most bureaucratic that we have. The circular economy principles underpin our thinking across the regulatory framework that we are bringing into effect.

Douglas Lumsden: Will the changes that you are bringing in drive us all towards a more circular economy?

Lin Bunten: They will support it. If you want to know about the detail of the policy behind the regulations, I recommend that you ask our Government colleagues. This is about the assimilation of the regulations as they exist at the moment.

09:15

The Convener: Monica Lennon has some questions.

Monica Lennon (Central Scotland) (Lab): What are the key workstreams and associated resourcing requirements for SEPA as it transitions to the integrated authorisation framework? Do you accept what is said in the business and regulatory impact assessment about SEPA not incurring any additional costs?

Lin Bunten: We are working through a number of workstreams. We have a large programme of engagement and consultation with the stakeholders that will be affected and will see a change in how they are regulated. We are working through our digital transformation workstream in order to make our customer journey more straightforward, efficient and effective. We are working closely with our technical teams to develop appropriate guidance that reflects the changes to the regulatory framework. Last but not least, we are working through our internal staff development and training. Those are the main workstreams in our implementation plan for bringing the regulations into effect.

Regarding any comments in the BRIA, I refer you to Scottish Government colleagues.

Monica Lennon: Will the new regulations have any implications for SEPA's existing fee structure and for the approach to full cost recovery?

Lin Bunten: The consultation that closed in the past month or so considered the changes that the framework will make. We will publish the consultation output early in the new year and will make a recommendation to the cabinet secretary about the charging scheme changes that will be necessary. That scheme ensures that we have full cost recovery for chargeable elements that we undertake, and we will continue operating on that principle in the future.

Monica Lennon: The draft Scottish budget for 2025-26 has recently been announced, and your budget will remain relatively steady. Do you have any concerns about resourcing the transition in the coming year, and do you have any other budgetary concerns?

Lin Bunten: We have been working on implementation plans in recent years. As always, we engaged with our sponsor division in the Scottish Government to discuss the draft budget settlement. Implementing the regulations is a key outcome in our corporate plan and has formed the basis of the budget discussions.

Monica Lennon: What have you identified as the key risks to the implementation of those plans?

Lin Bunten: We are working through a comprehensive plan that assesses and mitigates any risks that we have identified in planning the implementation phase.

My greatest concern—if I can turn the question that way—would be any avoidable delay that stopped us bringing the regulations forward in line with the timescale that we currently anticipate.

Monica Lennon: Can you expand a little? What would be the impact of any delay?

Lin Bunten: I will eulogise if I am not careful, but the benefit for us and for communities, the environment and those that we regulate is significant when compared with the position that SEPA has been in, as an environmental regulator, since we were formed in 1996.

The regulations present an opportunity to harmonise processes. That might not sound like a significant step change, but we have faced challenges as a regulator because regulations have been constructed as a patchwork or network. The challenges that the current position can present to us are difficult to comprehend unless you work in the system, but those will be removed as we bring in the new integrated framework across the four major regimes.

Those are only four of the big regimes that we deal with. I have talked about the 70 statutory instruments that we are bringing together. We have 150-plus statutory instruments from which we, as an organisation, draw duties and powers. This is a big deal—these are the biggest activities. Therefore, it is important to us that we are able to gain the efficiencies and effectiveness that the regulations will bring, so that we can do the job of protecting the environment better in the future.

Monica Lennon: That is helpful. I understand that SEPA might be changing the way that the out-of-hours contact centre operates by moving to a more automated system. You can correct me if I have got that wrong. If that is the case, what assessment has been made of the impact of the change on transitioning to the new framework that we have just discussed?

Lin Bunten: The services that the 24/7 contact centre has offered historically will continue under the new arrangements. The ability of the public, those that we regulate and emergency services to make contact with us, as a civil contingencies category 1 responder, continues. The provisions to ensure that that contact is available will still be in place as we move forward and modernise our approach with our new customer hub—I think that that is the terminology that we are using—so we will retain the ability to do what we were able to do.

Monica Lennon: When will the change to the customer hub approach come into effect?

Lin Bunten: We are in the midst of the transition.

Mark Ruskell (Mid Scotland and Fife) (Green): A couple of years ago, your previous chief executive talked quite openly about SEPA focusing its activities on the big sectors that were not meeting environmental compliance—at the time, salmon farming was a focus, as was the Mossmorran plant—and that is where a lot of SEPA's resources were going. He also talked about streamlining the regulatory process for sectors that were broadly compliant and in which a lack of compliance was a rarity.

The previous chief executive has been gone for some time, but is that the current direction of SEPA—simplifying regulation at one end and focusing on key sectors that are still problematic at the other end—or are we looking at a slightly different approach now? I am trying to see where you sit now, several years on, in relation to how you focus resources on the current environmental challenges in Scotland.

Lin Bunten: Our current direction of travel with the integrated framework is the same as it was during the period that you are talking about, so there is a continuum in our thinking. I cannot speak to the evidence that was provided before, but you should have the written evidence that we provided to the committee in advance of today's meeting. At the back of that evidence, we have set out the pyramid of types of authorisation. That is really important, because it is based on an

assessment of risk to the environment and the kinds of conditions that need to apply to different types of activities. One could say that it does not matter what sector you are in; the issue is the risk that you pose to the environment because of the inherent characteristics of your activity, which fit you into a particular area in that pyramid.

However, examples have been given of some common characteristics of certain activities. For example, that approach has allowed us to drop mobile crushers down the hierarchy of permissions that we have put in place. We are an intelligence-led or evidence-led organisation, and we operate on the basis of environmental risk. I would not use a blanket category of sectors to describe our approach to authorisation through the integrated authorisation framework. I hope that that helps.

Mark Ruskell: Yes, but do particular sectors stand out at the moment in relation to compliance?

Lin Bunten: As a result of work over the past few years, we are moving forward with the development of an environmental performance assessment scheme, which we intend to consult on next year. That is outwith the scope of the evidence that we are here to give, but that scheme will give us the ability to report holistically on the environmental performance of all those that we regulate at this moment in time. Our site-by-site compliance information drives how we focus on each individual activity that we regulate.

Mark Ruskell: Is that transparent for members of the public who want to get a grasp on which sectors or sites are problematic? We have talked about point-source pollution, for example. How will that interface with all those issues?

Lin Bunten: Our environmental performance assessment scheme, which will be subject to consultation next year, will reintroduce transparency for everyone.

Mark Ruskell: That is long awaited, I think.

The Convener: Mr Lumsden wants to ask a question. As it is Christmas, I will let him in.

Douglas Lumsden: Thank you very much, convener. I will follow up on Monica Lennon's question. What changes have been made to the call centre? Have things all been automated? When did it go live?

Lin Bunten: It would perhaps be helpful if we provided information to the committee separate from the evidence that I am able to give you today about the integrated authorisation framework. You are moving into an area that is outwith the scope of the regulatory change.

Douglas Lumsden: Did the call centre go live on 8 December?

Lin Bunten: We are in the process of transitioning—I have provided that answer already.

Douglas Lumsden: So, do you not know?

Lin Bunten: We are in the process of transitioning.

The Convener: It would be helpful if you provided a briefing with the dates, so that we can understand the position.

Monica Lennon asked a question about raising fees on a full recovery basis. When other agencies are involved, will you be the central fee point? If NatureScot and Scottish Water must give consent, will they raise a fee and put it to you, and will that be part of the licence fee?

Lin Bunten: In relation to the consenting process, we cost recover for our activities and, when other organisations are licensing, they cost recover for theirs. We often have input from other organisations when they are statutory consultees that provide advice to us; likewise, we provide advice to the planning system. Those costs are not recovered by SEPA on the part of other organisations.

The Convener: Do you predict big fee increases for some of the activities?

Lin Bunten: Our consultation, which closed in November, did not. Let me just check—Mr Crawford has confirmed that it did not. We will go through the process of publishing the results of that consultation early next year.

The integrated authorisation framework is an amalgamation of the four schemes. The current fee structure will broadly continue, with the additional activities and the subtle changes in certain areas that were consulted on last year. We are going through due process to ensure that we get sign-off for those changes.

The Convener: Would it be fair to say that fees will not increase by more than the retail prices index, or am I putting words into your mouth?

Lin Bunten: I would prefer to take those matters off the table. We can provide you with a written update on the consultation response. I am not in a position to confirm whether that will be the case, because the decision making is subject to our recommendation to the cabinet secretary.

The Convener: We look forward to seeing that.

Kevin Stewart (Aberdeen Central) (SNP): Good morning. I want to ask about the fit-and-proper-person test. First, can you explain how that test will be applied to the new framework? How is it expected to support more robust environmental regulation?

Lin Bunten: The fit-and-proper-person test was a once-and-done process for certain types of application historically. Its introduction through the new framework across the activities more broadly makes a significant difference to our ability to consider an authorisation holder's abilities on an on-going basis.

Historically, for some regimes, we were able to make a judgment to some extent about whether an applicant would be able to comply with the conditions. In specific areas of the waste regime, there was a requirement to ensure that there were no relevant convictions and that financial provision was in place, as well as the technical competence to deliver. The new framework expands our consideration of the fit-and-proper-person test.

I will bring in my colleague Wendy Thornton to add a bit more detail and to put some context around that.

09:30

Wendy Thornton (Scottish Environment Protection Agency): Lin Bunten has covered most of the key changes to the fit-and-proper-person test. An important one is that an applicant will have to maintain their fit-and-properness over the lifetime of the authorisation.

The fit-and-proper-person test currently applies only to waste activities, and we can apply it only at the application stage. For example, if we require an operator to have financial provision for site remediation at the end of a site's life, nothing requires them to maintain that financial provision. They can have the money in the bank at the application point, but that money might not be there at the end of the activity's life when it is needed for remediation. The change to that is really important in making the fit-and-proper-person test maintain compliance and protect the environment.

We will also be able to take additional factors into account when we consider the fit-and-proper-person test. We will be able to take a wider range of convictions into account, which is important to help us to tackle waste crime. We will also be able to take into account things that we have not been able to take into account in the past. For example, if somebody has a history of forming and dissolving companies to avoid their environmental liabilities and we can see such a pattern over time, we can take that into account in our decision on whether they are a suitable person to be given an environmental authorisation in the first place. That is a really important improvement for us, because ensuring that we give an authorisation only to the right person in the first place avoids a lot of enforcement problems further down the road if they prove not to be the right sort of person to hold an authorisation.

The other big change is that the fit-and-proper-person test currently applies only to waste activities, but we will have the ability to apply it across all our activities, although we are still thinking about how we will do that. We are planning to consult on some changes to our guidance on the test, which was published in January 2018.

Kevin Stewart: Obviously, that applies to the new framework, but what about current permit holders? Where do they lie in the change?

Wendy Thornton: The new fit-and-proper-person test will apply to current permit holders. We do not plan to assess every existing authorisation holder retrospectively against the new test, but we will be able to take it into account as part of our routine compliance work.

Kevin Stewart: Why will you not go back and reassess current permit holders? You said earlier that, throughout the lifetime of the authorisation, you will continue to check whether a person is fit and proper.

Wendy Thornton: Most current permit holders are compliant. That ties in with the work that Lin Bunten described on our environmental performance assessment scheme. We will target the assessments where we consider that non-compliance is perhaps due to somebody not being fit and proper.

Kevin Stewart: I understand the targeting aspect, but you said earlier that this change will ensure that, throughout the lifetime of a permission, you will check whether somebody is fit and proper. Why would you not go back and check current permit holders—obviously, targeting those who are non-compliant first—if you intend the change to involve continuous consideration of whether somebody is fit and proper under the new regime?

Lin Bunten: There are a couple of reasons for that. First, as Wendy Thornton said, most of the activities that we regulate are compliant and we can use the fit-and-proper-person test to impose additional requirements that an operator has to comply with.

We absolutely need to focus our resources, which are not unlimited and are precious, in the areas where we have known issues. In that regard, we will use the test as a tool. We will not go back and run through the assessment element of the fit-and-proper-person test as a decision-making tool; we use it to decide whether someone can have a permission granted to them. We are not in the business of taking permissions away

from people, unless there are very good environmental reasons for us to do so.

That tool will allow us to use other criteria to consider whether there are other reasons, or other signals that we can use with regard to the behaviour of those who hold permits. That might include, for example, whether they have other types of convictions, or whether they are exposing SEPA staff and other public servants to behaviours that would be characterised as violence and aggression. That will influence how we might then consider our compliance activity.

We will have available to us the same tools that we currently have to consider whether to remove a permission from someone, and that heavily, if not wholly, relies on their environmental impact. It is partly about ensuring that we are fairly and equitably considering new material as we transition to the new regime. There is no guillotine that comes down. SEPA operates its enforcement policy as a continuum of activities that we apply, from offering advice and guidance on correcting and adjusting behaviours to ensure compliance, to a hard-nosed approach by which we can directly fine people through variable and fixed monetary penalties or make a report to the Crown Office and Procurator Fiscal Service to seek a prosecution if an offence is significant.

That activity falls into our consideration of environmental behaviour. Rather than taking the step of going back and reviewing every single permission that we have in place, which is not an efficient or effective way for us to use the new power, we will bring it in as we go through the compliance work—

Kevin Stewart: Let me be helpful here. I am quite sure that SEPA, and certainly the public, would not want to see two regimes: one for those folks who have received permission under the new framework, and another for those folks with existing permits. That would be fair to say, would it not?

Lin Bunten: There will always be a transition—

Kevin Stewart: I get the transition point, but what you do not want to see, as you progress with the new power, is that there are, or are even seen to be, two regimes. Would it be fair to say that?

Lin Bunten: We will move across as we progress. If an operator were to come to us and seek to vary their licence, that would be an opportunity for us to reconsider their status as a fit and proper person for a particular activity.

What I think that you are trying to get at is whether there will be dual standards here. We will apply the fit-and-proper-person test consistently. We will apply it at the application phase, and then consider it through the life of every activity that has had it applied at the application stage. For anything that has not had it applied, we will consider it through the life of an activity anyway, in the future.

Kevin Stewart: I think that this is a very easy question but, to be honest, you are complicating the answer. I get the point about transition and all the rest of it, but there is a simple question. We want to know that this will not lead to two regimes, whereby those folks who apply under the new framework are under a different regime from those folks who have current permits.

You will transition to ensure that everybody is deemed to be a fit and proper person.

Lin Bunten: Over time, yes, because that will form part of—

Kevin Stewart: A simple answer.

Lin Bunten: Yes.

Kevin Stewart: So—

The Convener: Sorry, Kevin—I am sure that you want to know the timeframe that is being talked about.

Kevin Stewart: I will come to all that, convener.

The Convener: Good.

Kevin Stewart: As the convener has just asked about the timeframe, I move to that question first. What are the timeframes for the changes, so that we have the transition complete and one regime in place?

Lin Bunten: The regime will come in, as is currently planned, on 1 November. For some elements, it will be on 1 June but, for the majority of the elements that we are bringing in, it will be on 1 November. There are then further transition dates throughout the following three or four years. From the point at which all the authorisations that are currently in effect are deemed—which will be on 1 November 2025—we will be able to apply the fit-and-proper-person considerations to our compliance work.

Kevin Stewart: One of the things that I am most interested in, and that the general public is interested in, is complaints. If there are complaints, will you apply the fit-and-proper-person test to ensure that nothing has gone askew since the application or since a previous look was taken at whether somebody is a fit and proper person? Beyond that, are there court notifications if folks with permits fall foul of the law in some shape or form?

Lin Bunten: Yes, we will do that if we receive complaints. I take that in its widest sense. Perhaps I could ask you to elaborate. Did you mean environmental concerns that are raised with us?

Kevin Stewart: Somebody might come to SEPA with environmental concerns, or somebody could say that there might be a financial problem with a permit holder. It could be a number of things. How do you deal with those things?

Lin Bunten: We look for evidence and identify whether there is an issue, and we follow our enforcement policy in addressing that issue, if we have identified that there is supporting evidence.

On court notifications, I do not think that there is anything specific relating to fit-and-proper-person tests; that is a regulatory decision for us. However, a court notification would be a factor in our considerations. If there was evidence that supported our taking forward our enforcement policy, we would use it in that way. It might factor into a decision about whether a notice is required to adjust the behaviour of someone who holds a licence, or about any other kind of enforcement activity that we undertake. I think that that answers the second part of your question.

Kevin Stewart: At the beginning of the meeting, you talked about the simplification and modernisation of the regulations. Some of today's evidence does not make it sound as if there is simplification. In fact, some of what you have said sounds a bit complicated, to say the least. If Parliament passes the regulations and they come into play, what is the communications strategy from SEPA to get across the supposed simplification and ensure that the messaging to the general public, in particular, is simplified?

Lin Bunten: I am sorry to hear that it is coming across as a more complex situation. That is certainly not our expectation or the design intent behind the regulations or our implementation plan for them. Our consultation and engagement exercises started some time ago, and the feedback from those whom we have consulted—they are many and varied and include individual bodies, third-party stakeholders and trade bodies—is very supportive of the changes that we propose.

I ask Scott Crawford to provide a bit more detail about our consultation and engagement processes, the way that we have gone about that and what we have planned for the future.

Scott Crawford (Scottish Environment Protection Agency): During the past year alone, we have done three public consultations. We ran stakeholder events for the first one, which was on the type of authorisation that regulated business would require under the amended regulations. We did that in collaboration with the Scottish Government, which was consulting on the draft regulations at that time. Since then, we have done two further public consultations, one on changes to the charging scheme, which we have already mentioned, and one on standard conditions that apply to the registration tier.

Overall, 160 stakeholders came along to those events. We received quite a lot of feedback from that. We engaged further with those who raised concerns and we made some changes on the back of that. Another consultation will go live at the beginning of next year.

09:45

Kevin Stewart: Can I stop you there, Mr Crawford? My question was not about consultation. I get the point about all the consultation that has been going on, but my question was about communication. How will you communicate to the public about the changes if the Parliament passes the framework?

We heard earlier that this is about simplification. I and colleagues round the table have constituents who talk to us about the complications in dealing with SEPA. It was you who talked about simplification, Ms Bunten. What is the comms strategy? In simple terms, how do we get across the changes so that they are meaningful not only to the stakeholders, who know a lot more, but to the general public, who often feel that they are not listened to?

Scott Crawford: We have a transition plan that has been built up, and which we are developing. We are doing a complete review of a lot of the guidance that will apply, and we are developing new guidance in simple terms on the types of authorisation that people need and on how much that will cost them. That will go on our website, and we are doing a review of the content. We have done external usability testing with people from outside the organisation to see how the web pages would look. Overall, that has been very positive. We have a comms strategy for campaigns and social media, highlighting the stakeholders and members of the public who will be most affected, and we are using targeted communications.

The Convener: We come to questions from the deputy convener, Michael Matheson.

Michael Matheson (Falkirk West) (SNP): Good morning. I turn to the call-in procedure and the new pre-application process that is envisaged under the new regulations. How do you feel the existing call-in procedure for CAR has operated? What has not worked well under the existing procedure and resulted in the need to change it?

Lin Bunten: From SEPA's perspective, the call-in procedure is a process that we follow. It is a process that the Scottish Government undertakes, so I suggest that the Scottish Government could provide its view on how effectively the process has

worked. We follow the processes as they are set out.

Michael Matheson: Yes, but what is your opinion on how the processes have operated?

Lin Bunten: In terms of opinion, we follow the process as it is set out.

Michael Matheson: So you do not have an opinion on whether the process operates well. Was that a serious answer?

Lin Bunten: The process has applied only to CAR. It was brought in 10 or so years ago, and it has applied to a very small number of the applications across the whole range that we are talking about regarding the integrated framework. We consider that on an annual basis. This is not an area where I have an opinion.

Michael Matheson: So you do not have an opinion on the call-in procedure.

Regarding the existing system, the consultation document states that, to judge from practical experience,

"the procedure ... rarely results in a change of outcome"

but often

"results in delays",

with very little change. Is that an accurate reflection of your experience, as the regulator, of how the call-in procedure under CAR operates?

Lin Bunten: If those are the facts that have been provided by the Scottish Government, I have nothing to add.

Michael Matheson: I am asking you specifically whether that is your experience of the process. I am not asking you for your opinion—I am asking whether, as a fact, that is your experience.

Lin Bunten: My apologies, deputy convener—I do not think that I can answer that question, because it is beyond the scope of the work that SEPA undertakes. We await a response when a third-party call-in has been made, and we act on it when we receive it.

Michael Matheson: So, as the regulator, you have no view on whether the call-in procedure operates well or whether what is set out in the document is correct. You have no idea, as the regulator.

Lin Bunten: It is not that we have no idea—it is that we follow the process as set. It is an element of the decision making that we follow through.

As for timing, the key issue, from my perspective, is that when a call-in has been triggered, we pause our determination until we have a response, and then we restart our determination. It is a due process that we follow.

Michael Matheson: I am not really asking you about the due process that you presently follow as a regulator. The claim in the consultation is that the change is needed because the existing procedure

"results in delays, rarely results in a change of outcome, and is of limited utility".

That is a direct quote from the consultation document and the findings of the review. Does that match your experience as the regulator, with responsibility for implementing the call-in procedure? I find it quite hard to believe that, as the regulator, you have no view on your experience of using the call-in procedure. It is quite a simple question; it is not a trick. To be very clear, I am asking you whether what is reflected in the document accurately reflects your experience.

Lin Bunten: What is reflected in the document is the Scottish Government's experience. Yes, when an application is called in, an extra piece of time appears in the determination window from the point at which the applicant makes their application to the point at which we are then able to move forward and determine something. The point that is being made in the evidence that the Scottish Government has provided to the committee is that there is very rarely a change, if ever, to the decision that has been proposed.

We follow the due process as set out. Would I prefer us to move forward as swiftly as possible? I would, but the call-in procedure is part of the process at the moment, and we factor it into our determination period. It is just a fact of life with the decision making that we have at the moment.

Michael Matheson: Okay—right. I do not know whether that gives me much to go on. However, I will put on the record that I find it really surprising that, as the regulator, you cannot confirm whether the details that are set out in the document and the consultation are correct. I will let you take that away and you can reflect on it as a regulator, but I do not think that it reflects well on you.

My second issue is pre-application community engagement. You will be required to put in place a public participation statement, given the discretionary nature of what will operate with regard to some of the call-in procedures. How do you intend to develop the public participation statement, and what is the timeline for that?

Lin Bunten: I can confirm that we will be consulting on our proposed approach in January, which will give stakeholders and the public an opportunity to respond to our proposal.

Michael Matheson: How long will the consultation last for and when will the finalised document be published?

Lin Bunten: The best practice for our normal consultation window is 12 weeks, so the consultation would run from January to 12 weeks thereafter. As you will understand, it takes a period of time to distil consultation responses, and then we will move to publish the response to the consultation and set out our proposal as a result of any feedback that we have received.

Michael Matheson: What is the end point for when you expect that to be published?

Lin Bunten: I anticipate that we will have it done in advance of 1 November 2025.

Michael Matheson: How far in advance?

Lin Bunten: You are asking me to anticipate how long it will take, how many consultation responses we will receive and how complicated they will be. I would hazard a guess that it might take us six months from January to do that, on the basis of some significant unknowns at this moment.

The Convener: Monica Lennon has the next question.

Monica Lennon: I turn to the issue of sewage sludge. Will you summarise what the key regulatory changes are in relation to sewage sludge as a result of it being brought into the integrated authorisation framework? What environmental issues does that move aim to address?

Lin Bunten: This follows on from a public petition to the Parliament regarding odour impacts on communities—that was the starting point. The regulations will bring in, for the first time, whole supply chain control by one organisation.

It is currently proposed that, from 1 June, SEPA will authorise all the steps in relation to the production, transport, storage and use of sewage sludge. It will also be subject to the fit-and-proper-person test that we talked about earlier. One of the big steps is that that test will also apply to those transporting sewage sludge. That enhancement, which will be provided by the amended regulations on the integrated authorisation framework, will be quite a significant step forward. We can bring that tool to bear in future, and the fact that we are the single regulator means that there is a single point of contact for all those who may have concerns or may be interested in such activity.

We are working with the major producers—Scottish Water is the biggest—and others to implement the regulations. Those are the significant changes that I would highlight to the committee.

Monica Lennon: Part of the public concern about sewage sludge involves whether we know enough about the impact of microplastics and forever chemicals getting into the environment and food chain. Do you accept Environmental Standards Scotland's recent recommendation that more research is required on that? Will the regulations support that through improved monitoring and soil sampling?

Lin Bunten: We are certainly looking to review the availability and the processes around monitoring for the substances that you mentioned. I am aware that the James Hutton Institute produced a report on that earlier this week, but we have not had an opportunity to fully consider the content of that report. This area is a work in progress for us.

Monica Lennon: That is helpful, thank you.

One change that was made between the draft and the final regulations was to remove the default requirement to monitor nitrogen in the soil. Are you aware of the background to that change? What impact will that have on the robustness of the regime for sewage sludge?

Lin Bunten: I am afraid that the specific issue of what was included following the consultation on the regulations is for the Scottish Government, so I would ask you to raise that with it.

Monica Lennon: I am happy to do so. On the point about nitrogen in the soil, is there anything that you can advise the committee on?

Lin Bunten: No.

Monica Lennon: Okay—no problem.

The Convener: I am sorry to jump in, but I would like to press you on that. You are laying the blame on the Scottish Government. Did you give the Scottish Government a view on whether the default requirement to monitor nitrogen in the soil should be included?

Lin Bunten: As I said earlier, we have worked closely with the Government on the development of the regulations. I am not sure that I can answer on that particular point. We do not have the information in the room, but we could provide it in a separate follow-up communication.

The Convener: We would like to follow up the matter and find out why that requirement was dropped. You have laid the responsibility for that decision at the Scottish Government's door. If we do not know why it is at that door when we come to ask the question, Monica Lennon cannot ask the right question.

Monica Lennon: I do not want to be pushy if you do not have the information at hand, Lin, but we will take you up on the commitment to write to us, because it feels as though it might be a not insignificant change.

Lin Bunten: I am just trying to make clear that we are responsible for implementation and enforcement rather than decisions about what to include in the regulations. Although we have been involved in the development process, such decisions are a matter for the Scottish Government.

10:00

Monica Lennon: I think that the committee understands the distinction, but it is clear that, in the close working relationship between SEPA, as a regulator, and the Scottish Government, there has been discussion, dialogue and input in relation to those matters. Having as much information about those aspects as possible in the public domain would help us to understand why certain decisions have been made.

I have one final question on sewage sludge. To what extent are the provisions in line with existing European Union law, and are you aware of any divergence?

Lin Bunten: We are aware that there are developments in Europe that have not yet come to fruition, which will in due course be considered—I suspect that that will be in terms of EU parity, too. Wendy Thornton might want to add something.

Wendy Thornton: I will just add that the regulations are in alignment with existing EU law but, as Lin Bunten mentioned, we know that some amendments are in the pipeline.

Monica Lennon: So there could be further changes, which we have to take into account. I will leave it there, convener.

The Convener: Douglas Lumsden has a brief question.

Douglas Lumsden: I was going to move on to carbon capture, utilisation and storage.

The Convener: Okay—absolutely; that is what I was expecting.

Douglas Lumsden: SEPA's scope in relation to CCUS is broad. Will you be covering much activity in the broader area? I presume that you are already fully involved in the Acorn project and Peterhead power station. What else would you be involved in, as far as you are aware?

Lin Bunten: This is an evolving area, and there are no shovel-ready projects that I can talk about. However, one of the things that a sector often welcomes is having clarity about the regulatory framework that will apply to it as organisations are starting to develop their projects. That is what the amendment provides. It will take us from a country that has limited controls over activities that are happening on the same site to a country that has expanded those controls to make sure that we have the appropriate environmental protection for any technologies that apply to carbon capture, utilisation and storage.

Douglas Lumsden: Do you have the expertise to deal with that just now, or will you have to go out and get that?

Lin Bunten: We develop and grow our own expertise, and it will depend very much on the types of technologies that are brought forward. We have experience and knowledge about chemical separation, for example, which is one of the potential carbon capture and storage techniques. There might be other areas where we have to draw on expertise if we do not have it in-house. We have good relationships with our sister agencies across the rest of the UK and with other regulators, which enable us to cross-fertilise our experiences.

Douglas Lumsden: So you do not anticipate this causing you a problem.

Lin Bunten: I do not anticipate it causing a problem.

The Convener: Mark Ruskell, it is your turn.

Mark Ruskell: I want to ask about the conversations that you have been having with Environmental Standards Scotland with regard to the regulations. To go back to the point that the deputy convener made about call-in procedures, it appears that you do not really have a view on their efficacy. Does ESS have a view on that, and has it communicated that to you?

Lin Bunten: I am not aware of ESS sharing such a view with us directly. Again, it might have provided a response to the Scottish Government's consultation. That would be my best assessment of where that information might sit.

Mark Ruskell: Has there been any discussion with ESS in relation to the development of the regulations, or have SEPA and ESS been communicating directly with the Government and not with each other?

Lin Bunten: I am sorry, Mark, but I am not sure that I understand the question.

Mark Ruskell: Okay. ESS is your regulator. It assesses whether you are enforcing regulations appropriately. It also advises on whether the law is appropriate, whether regulations need to be changed and whether regimes need to be amended, and on their compliance with EU law. That is my understanding. Is that your understanding?

Lin Bunten: Broadly, yes.

Mark Ruskell: Therefore, what conversation has there been between you and ESS on the regulations?

Lin Bunten: We have many interactions with ESS on a range of subjects. I am not in a position to give you specifics on our interaction with ESS on this particular topic. Again, if the committee would find that information useful, I can come back with a response.

Mark Ruskell: I presume that I could submit a freedom of information request and that you would eventually provide me with the information.

Lin Bunten: If the committee is interested in that information, I think that we could provide it directly to you, without the need for an FOI request.

Mark Ruskell: I think we would be interested in that information, because we will be inviting ESS to the committee in the weeks ahead, and the interaction between you, ESS and the Government is an area of interest to the committee, but—

Lin Bunten: Forgive me for interrupting. The regulations are a matter for the Scottish Government, which has consulted on them. With regard to formal interaction, I believe that ESS has provided a response to the Scottish Government's consultation on the regulations. I cannot speak definitively on whether it has given us formal responses to the many consultations that we have been undertaking on the implementation side. Nor can I speak, at the moment, to our informal interactions with ESS when we have regular updates and discussions with it on particular issues.

Mark Ruskell: To avoid my submitting an FOI request, it would be useful if you could summarise what that engagement has looked like and whether it has covered any of the issues that we have talked about this morning, including the matter of call-in procedures, which the deputy convener raised. We are trying to understand where the advice sits and how Government responds, both to ESS and to any views that you might have.

I understand that, over the past 30 years, ammonia emissions have barely dropped. In fact, there is some evidence that suggests that they have increased. As we know, ammonia causes public health issues and environmental problems. Do you see that situation as a failure of regulation?

Lin Bunten: Certain ammonia sources, such as intensive agriculture installations, are covered by regulation, but not all known sources are covered by regulation. Therefore, it might be that you could characterise that as a gap.

Mark Ruskell: It is a gap in relation to these regulations, is it not?

Lin Bunten: I go back to my description of this framework at the beginning of the evidence session. It is the amalgamation and the consolidation of four existing big pieces of legislation. The framework has introduced one or two additional elements, and we have talked about a couple of those. The Government has chosen not to include ammonia. Again, I suggest that the question why that is the case is for Government colleagues.

Mark Ruskell: Okay, but you are a science-based organisation, so what does that tell you, as scientists, about ammonia levels? If ammonia levels are going up, would you see that as a failure of regulation?

Lin Bunten: Speaking for a science-based and evidence-based organisation, I am not in a position to give you a scientific or evidence-based answer to that question at the moment. However, again, that might be something that we can follow up after the meeting.

Mark Ruskell: That would be very welcome. Let me consider this from the perspective of a constituent. Let us say that I have a constituent who lives close to a dairy farm and that members of the family have particular lung health conditions that are exacerbated by particulates that are derived from ammonia. The family is looking for regulation, for answers to those problems and for action to be taken by the polluter. If they called your helpline, what information would you give them? Where do they sit in the authorisation framework?

Lin Bunten: The framework brings in the application of material to land, including sewage sludge, with a regulatory framework that will contain controls in that area.

I have to say that, at this moment in time, I am racking my brains. There is no additional provision relating to dairy farming in the regulations.

Mark Ruskell: So it is not covered by permit, by registration, by notification and by general binding rules. Is that correct?

Lin Bunten: Not the activity of dairy farming, per se.

Mark Ruskell: Let us go back to this conversation with the constituent. The constituent phones your helpline, wanting answers and action. What action can you take?

Lin Bunten: In the future state, when it comes to the impacts that people are experiencing from sewage sludge being applied to land, there are some considerations that we can make. In relation to dairy farming—

Mark Ruskell: I am not talking about sewage sludge. The fact is that 92 per cent of ammonia

comes from agriculture, so I am not talking about human sewage. I am talking about the inappropriate application and management of slurry wastes in a facility, resulting in increased ammonia.

Let us focus the discussion on where 92 per cent of the problem is in relation to ammonia. What actions do you take?

Lin Bunten: I am perhaps being a bit slow in picking up the impact on the environment that you are raising here.

Mark Ruskell: So, would that be your response if I phoned you up? I am talking about a health issue here. This is an environmental nuisance, with, say, odour issues and impacts on lung health as a result of PM2.5 derived from ammonia. I am on hold to you. What action can you take? What regulatory tools do you have available?

Lin Bunten: When someone contacts us about something, we seek evidence to try to identify the source of the problem. We look at the regulatory framework and identify the action that we can take.

The integrated authorisation framework that we are bringing in contains certain controls that we can bring to bear. There will, in future, be consideration of whether activities should be included in it that are not included currently. This is not the answer that I would give somebody on the phone, because I do not have that skill set, but the activity that we are talking about is something that I know that the EU is considering under the industrial and livestock rearing emissions directive 2.0—or IED 2.0. I imagine that, if the Scottish Government were to consider, in future, that the regulatory framework needed to be amended or expanded, that would be the route by which those controls would be brought in.

Mark Ruskell: Right. So, basically, my constituent will have to wait until a European directive is considered and concluded in 2026, and then there might be a consultation with the Scottish Government about whether it wants to implement any of those provisions in domestic law. There is no recourse to environmental justice in the short term for somebody living next to a dairy farm or point-source emission of ammonia who has concerns and is suffering real health impacts, because it is not covered by general binding rules, notification, registration or permit.

Lin Bunten: For dairy farming per se, that is my understanding.

Mark Ruskell: Would you say that that is a gap?

Lin Bunten: Simply because it does not exist in the regulations, it is a gap.

Mark Ruskell: Okay, and do you feel that there are other approaches—

The Convener: Mark, I am sorry, but I have given you a fairly good run at this and Bob Doris wants to come in. We are quite short of time, so I must ask you to make this your last question, please.

Mark Ruskell: I have just one more question.

I thank you for responding on what is a difficult issue, given that there is a gap. In that case, is there anything that SEPA—with your limited resources, which I acknowledge—is able to do in this space by, say, promoting good practice with the farming sector? Would that be in any way effective in dealing with the kinds of issues that I have just raised with you?

Lin Bunten: We do work very closely with the farming sector on impacts on the water environment, but I need to correct something that I said a moment ago, if I can. I have just been advised that IED 2.0 does not include dairy farming. I think that it is a gap in IED 2.0. I hope that I am okay to correct the record in that way.

There is a landscape of regulators who work with the agricultural industry, and we will be working with other regulators in our various statutory roles in order to ensure that best practice is delivered. As a regulator, we must operate within the rules that are set. We are a delivery agent for Government in that regard—in every regard, in fact—and we operate within the frameworks that are set for us.

10:15

Mark Ruskell: Okay—I think that that is pretty clear from your evidence this morning.

The Convener: Bob Doris, I ask you to ask your question very briefly.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): I will be incredibly brief, convener, because I was not intending to ask any questions this morning—I am just here to listen. However, I need to know more about your role as a regulator in general.

In many of your answers, you have effectively said, “These are the operational matters, and here is the fact of the matter in terms of operational matters”, and you have not strayed into policy matters. The deputy convener had quite an extensive exchange with you, and I think that members were trying to tease out how your operational experience informs Government as to how it might change its policy as a consequence of that. Members were trying to bring out some of that contrast, but I do not think that we have ever

seen such a passive position from a regulator at committee.

I went and looked at the consultation responses in relation to the changed call-in procedures. A majority were in favour of the change, and a substantial minority were not in favour, so there was a finely balanced decision for Government to make. SEPA must surely have had a role in some of that, but I do not think that we are any the wiser as to what SEPA's role was in relation to any of that.

More generally, in relation to these regulations, what has SEPA's role been? After listening to this evidence session, I am completely unclear.

Lin Bunten: Let me think about how to give you some more information to help with that question.

We are very involved in technical matters to do with future and current regulation. That will be, as it has been, a joint process of continuous improvement, because these regulations are the baseline from which we will move forward. We are involved, in the range of policy areas that are brought into effect through these regulations, in identifying where potential adjustments, amendments, improvements and gaps that need to be filled exist. The integrated framework that we are talking about does a lot, based on the evidence that SEPA has brought forward to the Government over the years, to identify where improvements in regulation need to be made.

If I have characterised the process as a passive journey, that is not the case. We are a delivery agent. We are involved in putting forward thinking and ideas about policy areas and issues and impacts, and recommending other ways by which adjustments can be made. In the event that a decision is taken that a certain element will or will not go forward, we can influence that, but we are not the final decision maker.

I am trying to tease apart our position. Prior to our role in implementing what we have in front of us, we have had 10 years plus of exercises in identifying where improvements would be made. Those have come from the experience of the regulator, the evidence that we have built up and the challenges that we have faced, and we now have the new tools that will help us to address those challenges.

I have no doubt that we will have more challenges in the future, for which we will seek further amendments or changes to regulation in due course. That will happen as we build up the evidence piece to enable us to say, "This is a gap", "This is an issue" or "This is a change that needs to be made".

If I have given the impression that we have not been intrinsically involved in developing this work, I have downplayed my colleagues' work to almost a criminal extent, and that was not my intention. We are heavily embedded in this work.

Bob Doris: I am grateful to you for putting that on the record—I do not think that that was particularly teased out during the session, so I thank you for that.

The Convener: We have slightly overshot our timing. I will keep my last question very simple; it refers back to something that I said earlier.

I am looking at the evidence that you submitted to the committee. To remind you, it says:

"the water, waste and PPC regimes"

will change "from ... 2025" and that will be led by "digital transformation".

It slightly worries me that, with less than a year to go, you are talking about "developing" and "creating" things to try to deliver efficiencies through a computer system with which, I stress, I think that SEPA is still struggling. Can you set my mind at rest and convince me that you are going to be digitally ready by November 2025?

Lin Bunten: To the best of my ability, yes. We are identifying how best to engage with our customers on a user-friendly platform. We are following the principles of reusing what we have, if that is appropriate, before we buy or build something new, which would take us down the hierarchy, given the time that it can take in order to bring a new system into effect. The principles that we are using are designed to bring us the benefits that we need in the shortest possible time.

The Convener: I have to say that I am less than convinced. As somebody who interacts with SEPA using the forms, I think that there is a huge amount of work to do—those forms are not easy to complete or user-friendly. In my opinion, you could learn a lot of lessons from other organisations.

Anyway, today we have looked at a 291-page Scottish statutory instrument, which is pretty complicated. I am extremely grateful that the Government has given us more time to look at it, because I think that we will need every moment of that time. I am not sure that I feel confident that I am much the wiser as a result of today's session. You have offered various bits of information, and you have offered some information to Mark Ruskell that the committee would welcome, too. I think that it would be inappropriate for him to FOI it when it is part of committee business, and I have no doubt that we will get it quicker as a committee than we would through an FOI process.

I thank you for your evidence this morning. I ask the committee members to be back here by 10:26—that would be perfect—and I suspend the meeting.

10:21

Meeting suspended.

10:27

On resuming—

Land Reform (Scotland) Bill: Stage 1

The Convener: Our third item of business is an evidence session on the Land Reform (Scotland) Bill. Today, we are taking evidence from a range of practitioners on part 2 of the bill.

I am pleased to welcome Hamish Lean, partner and head of rural property, Shepherd and Wedderburn LLP; Martin Hall, senior director, Davidson & Robertson; Tom Oates, director, Oates Rural; and Andrew Wood, partner, residential development, Bidwells. Thank you all for accepting the invitation to speak to us this morning.

I am also pleased to welcome for this item Rhoda Grant MSP, who will have an opportunity to ask a few questions once committee members have asked theirs.

I remind members that I have an interest in a farming partnership in Moray, as set out in my entry in the register of members' interests. Specifically, I declare an interest as an owner of approximately 500 acres of farmed land, of which about 50 acres is woodland. I also declare that I am a tenant on approximately 500 acres in Moray under a non-agricultural tenancy, and that I have another farming tenancy under the Agricultural Holdings (Scotland) Act 1991. I also declare that I sometimes take on grass lets on a short-term basis.

I should also point out that, in 2005, I worked with Bidwells and I knew Andrew Wood when I was working there.

We will now move straight to questions from committee members. Monica Lennon will ask the first one.

Monica Lennon: Good morning. I want to begin by asking about the model lease for environmental purposes. Do you think that it serves a practical purpose, and can you foresee any potential issues with the approach that is set out in the bill?

Martin Hall is looking directly at me, so I invite him to respond first.

Martin Hall (Davidson & Robertson): The model lease has the potential to do a good job for the sector. There are a couple of riders on that, though. First, it is important that it falls outwith the Agricultural Holdings (Scotland) Act 1991, as there is a potential that it might conflict with tenancies under that act. Secondly, it is important to consider just what comprises "environmental purposes" and think about how the provision works practically in

that regard—does it mean mainly environmental use, wholly environmental use or something else? However, overall, the provision has some potential, and we welcome an alternative vehicle to use for that purpose.

10:30

Andrew Wood (Bidwells): I agree with Martin Hall. It is vital to keep the model lease separate from the 1991 act. The difficulty will come in situations in which there is a mixed use. The properties are unlikely just to be environmental—there could be an element of agriculture or other commercial uses in the lease. However, there will need to be clear water between the two bits of legislation for the provision to be effective. Therefore, the drafting will have to ensure that there is the ability to carry out certain agricultural operations—grazing would be the obvious one—in an environmental-type structure. Other than that, I welcome the provision. I do not know how often it will be used, because I suspect that we will see that there are a lot of larger agricultural units that are deemed to be agricultural and are already doing environmental things. People would probably consider splitting a holding and creating a new area using the model, if that were possible.

Tom Oates (Oates Rural): I have no massive comment on the issue. The only thing that I would say is that, from a practical angle, it is extremely confusing to have another type of lease. There is an attempt to split out agriculture activities from environmental activities, but they are quite combined. If there is a specific environmental thing that is being done, it could be done with a commercial lease, rather than having another type of lease involved. For the practical people on the ground, it is just another level of confusion.

Monica Lennon: Hamish Lean, do you agree with what has been said, or do you have a different view?

Hamish Lean (Shepherd and Wedderburn LLP): I echo what the previous speakers have said. I do not know whether there will be much in the way of a practical uptake of this sort of lease. The bill contains provisions in relation to compensation for improvements that are tied to sustainable regenerative agriculture, so there is a question about whether the model lease is necessary. I suspect that, in reality, very few landlords and tenants would actively seek out this model.

Monica Lennon: Does anyone have a view on what is in the bill and what was previously consulted on? There is a different approach now. Do you have any comments on that?

Martin Hall: We favoured the former approach, as it gave a great deal more flexibility and scope for the sector to grasp the environment that we are working in now, which is different from the environment that we were working in 30 years ago. The number of uses that land can be put to within a broadly agricultural business is different, and it is important that we have the tools that we need in that regard. We saw the land use tenancy as a good vehicle for that, but that has now been moved towards an environmental use, and that is where I am seeing an issue with the balance between the environmental use and other uses. It is important to understand where the boundaries are.

Monica Lennon: I have a final question on this part of the bill. As we take evidence, we are looking to make suggested improvements to the bill and identify possible areas for amendment at a later stage. Is there anything that you would like to add on the provision that we are discussing? Should it remain in the bill? Should it be changed in any way?

Martin Hall: I would change it back to what was being discussed before the draft came out, in order to ensure that there was greater flexibility.

Andrew Wood: I would support Martin. I also wonder how often the provision will be used in practice. We are creating quite a large piece of legislation that will probably rarely be used in practice, so the balance needs to be considered.

Monica Lennon: If you believe that it will not really be used in practice, is it required at all? Is it serving a purpose?

Andrew Wood: Probably not.

Monica Lennon: Does anyone disagree with that?

Martin Hall: I disagree—I think that it will be used. We need to move forward as a sector, and this is an important flag towards that changing environment.

Monica Lennon: We have got a range of views. Thank you.

The Convener: I forgot to say this at the beginning, but it is quite difficult when every committee member asks every single person on the panel the same question. If you want to come in, catch the questioner's eye, and if you do not want to come in, look away. The problem is that, if you all look away at the same time, somebody will get called in, so it does not always work. Also, if I think that you are going a bit too long on the question, I will give you a sign. It does not mean that you should look away and continue.

Kevin Stewart: Good morning to the panel members. We heard from crofting stakeholders last week. The Scottish Crofting Federation feels that small landholdings should be converted to

crofts. What is your opinion of that? Would you like to see an expansion of the crofting counties? Martin Hall caught my eye first.

Martin Hall: I feel quite strongly that the bill is heading in the right direction, in that it has moved towards agricultural holdings rather than crofting. I advise some small landholders, and they are generally in the lowlands of Scotland and just would not fit with crofting. There are mixed units; one is in the Lothians, some are in Dumfries and Galloway and some are further west. At the moment, there is a great deal of confusion about how to review rents and do certain things within those holdings, so aligning the legislation with agricultural holdings is a sensible move forward.

Kevin Stewart: You said that you did not think that certain of those landholdings would fit with crofting. Why do you think that that is the case?

Martin Hall: They already broadly operate as agricultural holdings rather than crofts. That is really the basis for my answer.

Andrew Wood: There is already a wide range of size among agricultural holdings, right down to a few acres operating as an agricultural holding. The way in which the bill has been drafted, it would fit well to bring small landholdings into the agricultural holdings legislation, because it would align them with many small farms, some of which are only a few acres. It would bring them together to operate under the same legislative framework.

Kevin Stewart: You have kind of covered this, but the Faculty of Advocates suggested that, from the point of view of legal clarity, it may be more helpful to wholly codify small landholdings legislation without leaving elements of the old legislation in force. Do you agree with the approach that is taken in the bill, or do you feel that another approach might have been preferable? Who wants to have a crack at that?

Hamish Lean: There are, it is believed, only about 50 to 60 small landholdings in Scotland, and I do not know whether such a wholesale codification could be justified for a relatively small number of holdings. Broadly speaking, I welcome the provisions in the bill, which essentially bring small landholdings legislation up to date and more in line with agricultural holdings legislation, and extend the tenant farming commissioner's functions to small landholdings. A wholesale codification is probably unnecessary.

Kevin Stewart: So it would be a sledgehammer to crack a nut.

Hamish Lean: Essentially.

Kevin Stewart: Tom, can you comment, please?

Tom Oates: To be honest, having never dealt with small landholdings in 25 years, I am not in a position to comment.

Kevin Stewart: I thought that you waved there because you had something to say.

Tom Oates: I was looking away.

Andrew Wood: I agree with Hamish Lean. There are so few of these things. Indeed, I think that in 36 years I have tripped over just one.

Kevin Stewart: You have tripped over one in 36 years—okay. Thank you very much, convener.

The Convener: Thanks, Kevin. I am never sure whether we know quite how many there are. I have heard that there are 50, and I have heard that there are 80. I have not heard any advance on that, but it seems to be quite a small number.

The next question is on the registration of tenants' right to buy. In the first piece of legislation on this matter, which came out in 2003, there was a requirement for registration, but, if I remember correctly, that was removed in 2016. Well, there was the ability to remove it, but nothing was ever done about it. Now this bill is suggesting something else. Is the bill right? Do we need to keep changing this—or keep suggesting that it be changed but not changing it? What is the simple way of doing this?

Hamish Lean: The simplest way of doing this was provided in the Agricultural Holdings (Scotland) Act 2003, in which a secure agricultural tenant had to actively register a pre-emptive right to buy in the agricultural section of the register of community interests in land. That had the benefit of the agricultural tenant having to think about what they occupied under their secure tenancy, as a plan required to be lodged with the registration application. It also gave the opportunity for the landlord to challenge either the extent of the holding or whether a secure agricultural tenancy existed in the first place. Moreover, it gave quite a lot of confidence to the market in respect of a purchaser buying a farm, given that one of the standard checks as part of the due diligence would be to check the register of community interests to see whether a pre-emptive right to buy had been registered.

That prevented the situation that might otherwise have arisen, in which a purchaser would buy in good faith only to find a tenant appearing out of the woodwork, as it were, to claim a secure tenancy over the ground that had just been purchased. We need to bear in mind that, under the 2003 act, the tenant acquired an absolute right to buy, if they had not been given an opportunity to exercise a pre-emptive right to buy. That was always the problem that would have occurred if the need to pre-register had been removed. I do

not know whether that is the reason why that part of the 2016 act was never brought into force, but I welcome the fact that it is not going to happen.

There might well be changes that it would be appropriate to make to the registration process, but first and foremost, I welcome the fact that registration will still be necessary.

The Convener: Does anyone disagree with Hamish Lean? If not, that is perfect. “Leave well alone and move on” is the message that I think I am getting.

Bob Doris: I want to look at the issue of resumption, which, according to my notes, is one of the bill’s more contested aspects. We will find out in this morning’s evidence taking.

Mr Hall, I think that I saw that you were the national president of the Central Association of Agricultural Valuers, which thought that it was about time that compensation rights under resumption were reviewed. Perhaps, Mr Hall, you could say a little more about whether it is right in principle to review some of that.

Martin Hall: I am happy to do so.

I think that it is right in principle to review the process, but there are two parts to my answer. First, in connection with 1991 act tenancies, the mechanism has gone out of kilter with relinquishment and assignation. That is why I think that it is right to review the process. The bill takes steps in that direction, but it needs tidying up, as it looks clunky and cumbersome in that respect.

The second element is to do with 2003 act tenancies. I know that there has been discussion within the sector through groups such as the tenant farming advisory forum—TFAF—suggesting that the 2003 provisions should not be changed, and I broadly agree with that. In short: yes to 1991 act tenancies; no to 2003 act tenancies.

10:45

Bob Doris: You have almost pre-empted my second question. We will come back to that point so that you can put it more clearly on the record.

Hamish, I think that you had some concerns about some of this stuff. Do you want to say a little bit more about that?

Hamish Lean: Yes—and I will do so in two parts. First, on the proposed changes in relation to secure agricultural tenancies, it is my experience that, in practice, resumption in relation to a secure agricultural tenancy is possible only where there is a written lease containing an express provision that allows resumption to take place. There are a surprising number of secure tenancies that exist by virtue of operation of law, so there is nothing in writing. Therefore, there is no contractual right on the part of a landlord to resume land out of the tenancy. In those circumstances, the tenant is in a very strong position to negotiate commercial terms in relation to agreeing the resumption or not.

Even where a lease contains a resumption clause, there is a settled body of case law to the effect that, if the resumption will be materially prejudicial to the viability of the remainder of the farm, the Scottish Land Court will not permit the resumption to take place. The resumption of a small, relatively unimportant part of the farm is reasonably straightforward, and the tenant is entitled to compensation by way of a reduction in rent or disturbance and reorganisation compensation—which is normally five times the rent reduction compensation—for any improvements.

The greater the scope of the proposed resumption, the easier it is for the tenant to challenge it. For example, for a tenant on the edge of a town where half the farm is suitable for commercial or residential development, the resumption clause in the lease will not allow the resumption to take place, because the tenant can oppose it given the materially prejudicial effect on the remainder of the farm. If the resumption happens at all, it is only on the basis that the tenant will be able to negotiate favourable terms. The question that I have over the resumption provisions relating to 1991 act tenancies is whether they are necessary at all.

Secondly, in relation to fixed-duration tenancies under the 2003 act, I would observe that there is a powerful incentive for landlords not to let out land if it is reasonably foreseeable that there is some development potential. If the landlord obtains planning permission, section 17 of the 2003 act allows them to serve a resumption notice, on a 12-month notice period, to take back whatever part of the land—or indeed the whole of the holding—is subject to planning permission. A landlord who has land that they might otherwise have been prepared to let out—although they might be developing part or all of it in the reasonably foreseeable future—will not let that land out if the consequence is that they will have to pay the tenant a substantial amount of compensation for doing so, so they will just avoid letting out land.

Bob Doris: It might have been helpful to let you speak for longer, but this is really important, and I want to keep the questioning moving.

I want to ensure that I do not misrepresent you, Hamish. I think that you are suggesting that reviewing and changing the compensation for tenants on resumption could theoretically weaken the position of some tenants, which would be an unintended consequence in the legislation. I am not trying to summarise that as your entire

position, but is that one of the aspects that you are perhaps hinting at in what you were saying?

Hamish Lean: Certainly in relation to the availability of short limited-duration tenancies and modern limited-duration tenancies going forward.

Bob Doris: That is helpful.

I will bring in the other witnesses shortly but, given that you have a different view, Martin Hall, and that you spoke relatively briefly in relation to reviewing some of the arrangements in principle, how would you respond to some of the concerns that Hamish has put on the record this morning?

Martin Hall: Broadly, we are saying the same thing about the different types of tenancy being treated differently. We are aligned on that front. Another point, which I did not bring out earlier, is that the bill misses the incontestable notice to quit for the whole, which, I believe, was the original intention for the review. It seems to have been missed altogether, in that we are dealing only with resumption, not with a whole-farm situation. That would fall outwith the provision in the bill at the moment.

Bob Doris: Should the bill deal with that?

Martin Hall: Yes.

The Convener: Not everyone will understand, so I would like clarity on the incontestable notice to quit. Could you give the grounds on which such a notice could be served, just so that we can understand that?

Martin Hall: Absolutely. If, for example, a landowner obtains planning permission for a whole farm for residential development, say, he could serve what is called an incontestable notice to quit, because of the alternative use for that farm. There are very few grounds for objecting to or fighting that, and very limited compensation is payable.

Bob Doris: What you are saying is that that should be attended to; in other words, it should not be allowed to happen without more significant compensation for the tenant.

Martin Hall: Yes.

Bob Doris: All witnesses are nodding their heads, I think. Mr Wood, are you nodding your head?

Andrew Wood: I will have my say in a minute.

Bob Doris: At this point, let us move on. I think that Hamish Lean, Martin Hall and Tom Oates were nodding their heads on that point.

I will bring in Andrew Wood first. I think that we have moved on to whether notice-to-quit arrangements should be included in the bill. So far, the witnesses have said that the bill should not include notice-to-quit arrangements. That brings us to where we are in the line of questioning, Mr Wood. What comments would you like to make?

Andrew Wood: I will cover off the 2003 act. It is hard enough to persuade a landlord to let any land at all at the moment, because of the frameworks that they would have to operate under. Further meddling with the 2003 act will completely undermine confidence in using that legislation, so I urge you not to change that. We use it all the time as a method of letting land that could potentially come forward for development, and there is flexibility in the legislation to build in clauses that will allow for land to be released. Everybody who goes into that knows the situation at the start of the agreement. If you effectively and retrospectively change the 2003 act by introducing such a provision, that will significantly undermine confidence in the use of that legislation.

The 1991 act resumption provisions need to be updated. In some situations, the compensation is not appropriate. Generally, people's costs have moved forward with inflation and change. I am not saying that a huge amount of change is needed for the taking back of a small corner of a field for a road improvement, or the selling of a bit of land to the village hall, for example, but people's base costs have changed and the situation can be out of kilter. There needs to be a review of that process.

From a development point of view, the issue is much trickier. I get involved in a lot of rural development. Often, the landlord is on a 20 or 30-year journey of investment to bring forward land for development. The tenant is not involved in the risk or the funding of that. For example, the building of 10 affordable houses on the edge of a village could be completely blocked if we are not careful about how we treat the revisions to the resumption legislation. It needs further looking at.

Bob Doris: Before I bring in Mr Oates, I should say that your answers have helpfully overlapped with all the other questions that I want to ask on this issue.

You said that the issue needs to be reviewed, but I think that your point was that the time is right to look not at fixed-term tenancies but at compensation for resumption in general, because things have moved on. I will not just regurgitate the model that I have in my briefing notes, as it gets quite complex, but you have said that there should be a review. Are you willing to put on record how you think that things should change?

Andrew Wood: I will write to the committee with some proposals.

Bob Doris: That would genuinely be helpful.

Mr Oates, you have been very patient. Do you have any comments or reflections on all of the above?

Tom Oates: Just to clarify, I wholly agree with leaving the 2003 act tenancies as they are, as going back there will be just revisiting a mess.

As for compensation for 1991 act tenancies, I am wholly with Martin Hall on that point. The agricultural tenant, from a practical point of view, loses his agricultural interest—that is, his relinquishment value—so that is where compensation should move to. It is about moving forward with the base costs, in line with what Mr Wood was saying, and increasing the compensation payable there. I strongly believe that tenants should be compensated only for ag value.

On resumption, it has been suggested that the tenant farming commissioner be involved in the process, but I think that that is a complete red herring. There is no need to involve the TFC. A lot of these negotiations happen over the kitchen table, and the ability to have that negotiation will be removed if the immediate default is for the TFC to appoint an independent valuer. Actually, it is a bit of an insult to the industry to remove valuers and negotiators from that position.

Bob Doris: I think that Mr Wood was nodding his head at that, which should be captured on the record.

I am nearly finished with this section, but I just want to mop up the witnesses' different views. I think that we have to reflect very carefully on what is quite a complex area in the legislation. Mr Oates said that agricultural value only should be compensated for in relation to resumption rights. I think that Mr Wood was nodding his head at that—[*Interruption*.] Oh, right, he was not. In that case, I will bring in Mr Wood, and if there are any other views, it would be helpful to hear them

Andrew Wood: I would not go as far as to say that you have to buy the land back from the tenant.

Tom Oates: No—I was talking about ag value in relation to the relinquishment and assignation value.

Andrew Wood: Well, I do not agree with that, actually. I think that there is a middle way that recognises small-scale resumptions.

Bob Doris: And you are going to write to the committee with your thoughts on that.

Andrew Wood: Yes.

Bob Doris: I am going to let everyone have one more cut at this, if that is okay, convener, because this is quite an important part of the legislation.

Mr Lean, you talked about unintended consequences in relation to some of this stuff and how they might disincentivise landowners from leasing. Do you have any further comments on that, after what we have heard? I want to capture the views of all the witnesses on this particular section, because the committee then has to reflect on them.

Hamish Lean: The thrust of the resumption proposals in the bill do not impact at all on the landlord's underlying ability to resume or otherwise. It is all about compensation, as far as the 1991 act tenancies are concerned. The greater the scope of the resumption in a 1991 act tenancy, the greater the ability of the tenant to resist and negotiate commercial terms. There is nothing in the bill to suggest that that will change in any way. I would be concerned if there were any changes that would impact on the tenant's ability to contest the resumption, but there is nothing there at the moment.

Bob Doris: That clarity was helpful.

Martin Hall: I want to pick up on something that Tom Oates said. The process outlined in the bill looks cumbersome, particularly for small resumptions, and there absolutely needs to be a backstop position. However, for the majority of cases, there should be a negotiated position to start with and if all else failed, you would revert to the process in the bill.

I think that that is all that I have to say.

Bob Doris: Does that need to be clear on the face of the bill?

Martin Hall: As the bill is drafted at the moment, the automatic first position is to refer the matter to the tenant farming commissioner, but the costs and the process involved in that are significant. Someone mentioned the examples of means of access, garden extensions or village halls, but for resumptions of what are small areas, the costs and process would be prohibitive.

11:00

Bob Doris: Your view would be that if both parties could enter into a negotiation in good faith without having to have recourse to the tenant farming commissioner, that would be perfectly acceptable, but that it is a fall-back position.

Martin Hall: Yes.

Bob Doris: The bill does not suggest that.

Martin Hall: No, it does not.

Bob Doris: I will hear Mr Wood and finally Mr Oates.

Andrew Wood: I support what Martin Hall has said. The majority of resumptions and surrenders

are dealt with through negotiation perfectly amicably, and a commercial position is agreed. Having to go to the commissioner as the first point in any of those situations would be complete overkill, with regard to what happens day to day. However, we need the ability to refer on if things do not work, so the bill needs to be amended to say that, in the event that agreement between the parties cannot be reached, the case can be referred to the commissioner.

Bob Doris: That is helpful.

Tom Oates: I agree with that. Martin Hall and Andrew Wood have said that, first and foremost, it is a negotiation, but a backstop would be extremely helpful.

Bob Doris: I thank all four witnesses for helping me to get my head around that complex area in the bill. I have no further questions at this time.

The Convener: Out of interest, if things do not work out and you are going to refer the case to the tenant farming commissioner, what do you think would be a reasonable timescale? Sometimes, negotiations can become so protracted that there is never a solution. Would it be fair to say that you would refer the case if negotiations had not been, or could not be, resolved in—I am just thinking of a timescale to help people—three months? Does anyone have a view on that? You are all looking away. [*Laughter*.]

Hamish Lean: It would not be helpful to have a delay built in. It should be open for either party to be able to go to the tenant farming commissioner immediately if, in fact, that procedure is to be introduced.

The Convener: If either party is unhappy, they could therefore go to the tenant farming commissioner at any stage. Is that not rather like saying, "Don't go to negotiation"?

Hamish Lean: If you are not minded to negotiate at all, you would not engage during the three-month waiting period, after which the other side could go to the tenant farming commissioner anyway. I am not sure that a built-in period to allow negotiation would work. The procedure should be notice driven, in my view.

The Convener: It looks like no one has a contrary view to that. Okay. The next questions come from Mark Ruskell.

Mark Ruskell: Do the witnesses back the provisions on compensation for improvements and the shift from fixed lists to illustrative lists? I understand that the illustrative lists now include improvements that

"are presumed to facilitate or enhance sustainable and regenerative agricultural production."

Are the illustrative lists clear enough? Would they be workable? Tom Oates is nodding.

Tom Oates: I will jump in first. The updated lists are required—they are more encompassing. I do not feel that there is necessarily a need for the new proposed part 4 in schedule 5. A lot of these are practical, on-the-ground items, but some of them will probably not be of value to the incoming tenant. It could be confusing to include some of the things that are identified in part 4.

Mark Ruskell: Do you have an example of that?

Tom Oates: The bill aims to include items such as

"the laying down of ... pastures"

or "making water-meadows"—they are very much new areas. It is guesswork, so it is somewhat confusing as to what they may be.

Mark Ruskell: Are there any other views?

Martin Hall: I broadly agree with what Tom Oates said. The overall principle—of moving towards a general list rather than a prescriptive list—is the right direction of travel. However, with regard to part 4, there is definitely scope for confusion. Part 4 is to do with

"Improvements ... to facilitate or enhance sustainable or regenerative agricultural production".

It looks as though it has just been bolted on to the back of the bill. Within the list, there are elements that will require notice and elements that require consent, but it does not say which are which. For instance, the laying down of pasture might require notice, and the making of water meadows might require consent, because that changes the nature of the land altogether. Planting with trees might also require consent. Within that list, there are different impacts on the land, but it is not clear how they are to be dealt with. If that is not clarified, there will be room for disagreement and dispute.

Mark Ruskell: Therefore, more clarity would be useful.

Martin Hall: There is no reason why part 4 needs to be there. Its provisions could be within the other three parts of the legislation.

Mark Ruskell: I will come back briefly to Tom Oates.

Tom Oates: Sustainable and regenerative farming is a bit of a buzzword, but are there clear definitions of what it is? A lot of sustainable and regenerative practices are now common practice in productive farming. It is a way of utilising the soil and the natural goods to be more productive with less cost. That is practical farming, so is it a bit nonsensical to call it sustainable and regenerative farming? If there is no clear definition, it is confusing.

Mark Ruskell: It depends on how you value and monitor it. If there is testing, such as soil testing, and evaluation of biodiversity—

Tom Oates: That could be good farming practice now.

Andrew Wood: I support Tom's point. If we go back in time, sustainable farming has been going on for ever. It is a catchphrase at the moment, and some new husbandry methods are coming forward that are flagged as sustainable and regenerative, but they are just farming.

Most of part 4 could easily sit in part 3 and be drafted accordingly. There is no clear definition. We are using words that have no clear definition as to what they mean, so that needs some review.

Mark Ruskell: Do you think that there is a link back into land management plans and spelling out what the benefits will be, what the restoration and regeneration look like and whether they are monitorable?

Andrew Wood: Yes, that could be worth looking at.

Mark Ruskell: I will move on. I am interested in your views on the diversification proposals. Are they clear enough? Will they make it easier for tenants to make environmental improvements and supplement their incomes through diversification?

Hamish Lean: My observation is that what will mostly motivate tenants who are looking to diversify is the generation of additional income from their use of the holding. It is not immediately obvious that pursuing diversification to provide environmental benefit will directly benefit the tenant's pocket. Although I have no particular objection to those diversification provisions being introduced, I wonder whether that will mean that tenants will pursue environmental schemes on their farms if there is no immediately obvious commercial benefit from them.

Mark Ruskell: Are there any other views?

Martin Hall: I do not have anything to add other than that I think that what is in the bill is generally a positive move.

Mark Ruskell: Okay—thank you.

The Convener: The next question is from me, and a yes or no answer from each of the witnesses would be helpful.

Have any of you ever completed a compensation claim for game damage?

Tom Oates: Yes.

The Convener: One of you has. How many have you done?

Tom Oates: Probably a dozen.

The Convener: How has that been worked out? Was it based on crop loss?

Tom Oates: It has been an absolute nightmare.

The Convener: Okay. Section 20 is about compensation for game damage, which includes damage to crops; fixed equipment, interestingly; and livestock and habitats.

I am trying to work out in my mind the simple situation where a tenant rents some land and the next-door neighbour has a forest. The neighbour has nothing to do with the landlord. There is a shedload of deer in the forest that pop over the fence and eat the tenant's crops and then pop back over the fence during daylight hours. The landlord, who has no ability to control them unless he spends from 2 o'clock to 4 o'clock in the morning out there shooting them, will be hit for the game damage. Is that what you think the bill will resolve?

Tom Oates: To clarify, the game damage claims that I have done have been specifically for game, as in birds, and damage to them. When I said that it had been a nightmare, I meant that it has been very difficult to accurately assess how bad the damage is, as it goes far beyond what you can see in front of your eye.

I have not done any claims with regard to deer, which I know are a huge issue, particularly where you get marauding deer coming through and damaging fixed equipment. For what it is worth, my thoughts would be that if the tenant has the ability to control the deer on the holding, and not only the tenanted area, that would be a good move forward. A lot of the control happens outwith the area that is within the tenancy and the tenant cannot control that. I appreciate that deer can also come from neighbouring units.

The Convener: If you follow convention, 50 per cent of the fence, for example, would belong to the landlord of the holding, and 50 per cent would belong to the neighbour. You are going to create a claim for both of them.

I am wondering how important and relevant the provision is in the bill, and whether it will make claiming for game damage easier.

Tom Oates: I think that it is highly relevant, because the scale of damage by deer is enormous. It is about not only external fences between neighbouring units, but internal fences, which can often lie with one or the other party—100 per cent. It is a big issue. A relatively small number are affected, but they are massively affected.

The Convener: I will ask another yes-or-no question. You do not have to answer, Tom, as you have given your opinion.

Do Martin, Hamish and Andrew think that that bit in the bill is relevant and important, and is there a way to improve what seems to be quite woolly drafting?

Hamish Lean: I am sorry; this will not be a yes-or-no answer. [*Laughter.*]

I welcome the provisions about compensation for damage by game. Deer damage is an important problem, but it is not the only problem that is being caused to agricultural tenants by game. I have a number of clients who are agricultural tenants and who are severely affected by, for example, pheasants, through pheasant shoots that are grossly overstocked. Pheasants do not only eat crop, but come into farmyards where they litter and cause all sorts of nuisance and damage. I also have tenant clients who complain about the manner in which shoots are conducted, with drives going through fields that contain livestock and causing disturbance to livestock and so on.

The existing provisions are not adequate to address those problems. The provisions in the bill give scope and an opportunity to agricultural tenants to make meaningful claims for damage that they have suffered as a result of irresponsible stocking levels in relation to pheasants, for example, or the irresponsible exercise of sporting rights across the tenanted farm.

The Convener: Thanks, Hamish. It is interesting that you say that. I have never completed a claim.

11:15

Martin Hall: I have never dealt with a game damage claim, so I am speaking from a relatively inexperienced point of view.

I understand that NatureScot has measures in relation to deer damage, but that it does not currently implement them. Therefore, there is already a degree of solution there that could be used, but that is not being used.

Andrew Wood: I have never done a claim. I have been involved in situations where there has been some game damage and the tenant has approached the landlord and it has been remedied and solutions have been found without any formal claims being lodged.

Personally, I think that the bill goes too far, because it starts to bring in people who potentially have no ability to control the situation, but who become liable.

The deer situation is the biggest issue, and I am not sure that the bill is the right place to deal with deer. We have lots of other legislation in place to deal with deer.

I am very concerned about a complete right being given to all tenants to immediately go and shoot deer without due process and without engaging and communicating with the landlord. On many estates, there will be other people out shooting the deer, and so we need to have that quality communication. We cannot have different people with overlapping rights shooting deer at the same time. That could end up in a very difficult situation.

I think that this provision is in the wrong place, and also that NatureScot has the ability to intervene when there is a problem.

I have been involved with estates for many years, and commuting deer are now a major problem. As a result of the changes in environmental pressures on the high ground, red deer have been pushed down on to the low ground. We now have large populations of red deer on the low ground where we never used to have them before. That is becoming a much bigger issue on low-ground arable farms, where historically it was not an issue.

I would park this somewhere else, personally. Those who are responsible for deer management should step in. We need a process in place to ensure that we have responsible communication before others go shooting deer, where there are overlapping rights.

The Convener: I just add that it is now about shooting not only all day but all night, with thermal sights.

Tom Oates: Just so that the committee is clear, when I said that I had done approximately a dozen claims, a number of them have been repeated claims on the same estates, where the estate or the landowner has been willing to come to the table and do something to recognise the damage. There have been a number of instances of huge frustration where the tenant has been denied or has not been able to get the landlord or the owner to the table to compensate. I echo what Hamish said, in that there is a frustration that there are clients out there who have not been able to claim. Although I have done some claims, they have been in a situation where that specific owner, estate and so on was happy to come and do something.

Martin Hall: I will add one extra point that is important, if the provision is to remain in the bill. There are references to the Scottish Land Court in relation to determining the amount of compensation. However, assessing a game damage claim needs a much quicker reaction; it needs someone on the ground to see it almost there and then. If you are referring a claim to the Scottish Land Court, it could be months—if not

longer—before it is heard. That looks like extra delay that does not need to be there.

The Convener: I agree with that. I imagine that it is sometimes difficult to quantify the claim because you do not know whether the crop will or will not germinate as a result of the damage. Sometimes you have to wait for harvest to see what the crop loss will be in order to quantify your claim.

There were interesting comments there.

Douglas Lumsden has the next question.

Douglas Lumsden: I will move on to the standard claim procedure in the bill. Should the procedure that the bill sets out for waygo apply to claims of all types and sizes, and is there sufficient flexibility in the procedure to take account of unforeseen circumstances?

Would anybody like to go first? Martin?

Martin Hall: I am happy to go first.

The procedure that is set out does not take account of the need to assess various elements at the very end of the tenancy. The principle of front loading is generally a good one, but the timetable that is set out in the procedure is not practical for all elements, and it misses some things out. For instance, growing crops and fodder need to be assessed, if not on the day of the termination of the tenancy, then as close as practically possible to that date. There are dates, in the procedure for assessing elements, that are five months ahead of the end of the tenancy. That is not practical.

Douglas Lumsden: The timescale is a key concern.

Martin Hall: The timescale looks to be unworkable.

Tom Oates: I agree entirely with what Martin said. From a practical point of view, the end of a tenancy is not an easy situation. It is often contentious. By bringing things forward by nine months, you are potentially invigorating a dispute at an early stage. I agree that there need to be long-stop dates on things, but to bring things forward within a rigid timescale is causing more problems and creating a bigger issue.

Douglas Lumsden: We are looking at the bill and ways to improve it, so what amendments would you recommend that could make it workable? Is it just about timescales and making it more compact at the end of a tenancy?

Tom Oates: There are some practical angles. The heads of terms could be agreed at certain dates, but, as Martin Hall said, a number of things cannot be assessed until the end of the tenancy. Some of the things that are included in the procedure will not be completed until the end of the tenancy.

The heads of terms and the items of claim should be agreed, and there should be a point after the end of the tenancy when the quantum of those items should be clarified. So there are two stages, one is the heads of terms and the second is the calculations thereafter.

Douglas Lumsden: That is helpful. Andrew Wood, do you have a comment on that?

Andrew Wood: I agree entirely. Even just pulling together all the documentation takes some time, particularly in relation to the cropping and soil testing and all that sort of thing that has to be done as you roll up to the end of the tenancy. The final weeks or months of the tenancy is when you bring all the information together, inspect the property and the crops, and find out the condition of the buildings at the point of pulling the claim together.

That is not something that happens every day. For a lot of us, the ending of tenancies is pretty infrequent, and they are not all contentious. A lot of them are amicable, such as when the tenant has decided that he is retiring or going off to do something else, and you settle the claim under due process.

Douglas Lumsden: Is the bill too prescriptive then?

Andrew Wood: I think that it is too prescriptive, particularly in relation to the timescales, definitely.

Tom Oates: The timescale that is vitally important is the date by which the claim should be finalised and agreed post tenancy. That should be narrowed down, because there are situations where tenants who have left the holding are still waiting to be compensated months or years later and the can has been kicked down the road. There needs to be a long-stop date by which things need to be finalised, and that should be within a relatively short period of time after the end of the tenancy.

Hamish Lean: The provisions are cumbersome. If it is necessary to give notice in advance of the event, the standard claim procedure could only ever arise in waygoing situations. It would be impossible to give advance notice of a game-damage issue, for example.

The procedure that is outlined in the bill demands a high level of information in the preliminary notice, which will most often be served by a tenant. In my view, it would be next to impossible for a tenant to be able to negotiate those provisions without engaging professional advice at a very early stage. Many tenants will be completely unaware of the statutory process to go

through, and it adds costs and burdens to the tenant.

I agree with Tom Oates that speeding up the determination of claims after the end of the tenancy would be a good idea. However, I am worried that the provisions in the bill are too prescriptive and unnecessary, and that they will make it more rather than less difficult for tenants to navigate their way through waygo claims at the end of the tenancy.

Douglas Lumsden: But do they offer some protection for tenants?

Hamish Lean: I am not sure that they do, because, at the moment, a tenant is able to make waygo claims by service of a much simpler notice than is provided for in the bill. At the moment, the legislation provides timescales—albeit that those are quite long—for parties to attempt to agree their differences, then the matter will end up in the Land Court. Nothing in the bill would stop a dispute between a landlord and a tenant about whether something should be compensated for, or what the value is. Nothing in the bill would stop that dispute from ending up in the Land Court anyway.

The Convener: I have a question on something that may be a unique Highland issue. Often, sheep are hefted to a hill and form part of waygo compensation, because they know their way around. If you have a waygo in November, the ram may have been out with them, but you have no idea whether they are in lamb, because you have not got them back in. At that stage, you probably do not know how many sheep you have anyway, because they could have wandered all over the country, which makes timescales very prescriptive. Is that a fair comment, and would it cause problems?

Tom Oates: Having done a number of sheep stock valuations, I think that, in practice, what happens is that the parties will come to an agreement on when tups are to be released, and the valuation of sheep stock may be brought forward to, say, 1 November, prior to the tups going out—in fact, a lot of tenancy agreements have it stated that the landlord or the incoming tenant has the ability to release their own tups on to the sheep stock prior to valuation. The practical angle is that the parties will come together and work through what a sensible solution might be.

The Convener: But perhaps not five months in advance.

Tom Oates: No. Five months in advance is way too long. In practice, there is no way that you could do a hill sheep valuation in August. Comparable evidence comes from draft ewe sales, which, quite simply, have not happened.

The Convener: And, during that period, you will not know whether the ewes will be in perfect condition for the rams, so the landlord is in somebody else's hands if he is to buy them. So there are problems—is that what you are saying?

Tom Oates: Potentially, there are problems, but it is in the interests of the landlord, the incoming tenant and the outgoing tenant to make sure that the process is dealt with as smoothly as possible.

The Convener: Everyone then gets value for money, surely.

Tom Oates: Agreed.

The Convener: The next questions come from the deputy convener, Michael Matheson.

Michael Matheson: Good morning. The 2016 act made provision for changes to the rent review process that were never fully implemented, largely because, from what we can see in evidence, the process was viewed as being unworkable. Will the changes to the rent review process that are being proposed in the bill be more workable than what was in place previously?

Hamish Lean: I will pick that up and run with it.

I feel that I have to take some responsibility for the provisions in the 2016 act, as a member of the agricultural holdings review group whose work led to the agricultural holdings provisions going into the act to begin with. The group recommended a productive capacity test; I was then a member of the working group that tried to work out such a test, but it proved to be unworkable in practice.

I therefore welcome the bill's changes to the rent review procedure. It will balance a number of competing factors without setting out a hierarchy for doing so, taking into account

"the productive capacity of the holding",

for example, as well as the "rent ... on similar holdings" and

"the prevailing economic conditions in the sectors of agriculture that are relevant to the holding."

Generally speaking, my overview of the rent review provisions is that they are workable and will represent an improvement to the sector.

11:30

The Convener: I am looking to see whether anyone is shaking their head. Tom Oates has nodded his head, so I assume that he agrees with Hamish Lean.

Tom Oates: Yes, I agree with Hamish's point. The one point that I would like to make, though, is that I am concerned about the reference to

"the productive capacity of a holding".

Production is only one part of it. That is the output, not the profit. You can ramp up the output, and there are occasions when landlords will look simply at the output and then try to charge a percentage of output as a rent. That is a very dangerous situation, because output is not real.

The Convener: Martin Hall, did you want to add something?

Martin Hall: No, I do not really want to add anything, but Tom Oates does make a fair point, and there might be scope to look at using phrases such as "earning potential" or something similar. In principle, I am aligned with what Hamish Lean and Tom Oates have said.

There are a couple of practical things that the committee should take account of. First, a new definition is being introduced with the use of the term "fair rent". That is a new term; it is not well understood in the agricultural sector, and we need to better understand what it actually means. Secondly, the proposed amended wording for rent reviews has omitted to adopt some of what is already in the 1991 act in relation to the disregards for comparable holdings. That seems to have been missed altogether, and, in my view, should be put back in.

Andrew Wood: I agree with Martin Hall on that. We should mirror some of the wording in the 1991 act. I have no idea what "fair rent" means in relation to this legislation, either.

The difficulty when it comes to earning potential and productive capacity is that you can inspect the farm, look at the grade of the land and assess it on that basis—that is, what you think it can deliver, if it is well farmed—but the fact is that not all farms are as well farmed as the one next door, or vice versa. You have to take all those factors into account; it is not straightforward. Comparable evidence is vital in assessing what the appropriate rent should be. We touched on the issue of diversification earlier, and that will be a factor in the actual earnings of a farm. All those factors must be taken into account.

Michael Matheson: That is helpful. I am not sure whether Martin Hall was referring to this in his comments, but the bill as drafted does not make provision in relation to charging for tenants' improvements. Should the bill contain such a provision, given that it is in the original 1991 act?

Martin Hall: Under section 13 of the 1991 act, there are things that you take account of and things that you do not take account of when you compare holdings. My understanding is that that has been missed out.

Michael Matheson: And your view is that it should be included.

Martin Hall: Yes, it should be included.

Michael Matheson: Thank you.

Turning to the changes in the rules on good husbandry and good estate management, I note that, in his contribution, Mr Oates referred to the issue of sustainability and regenerative practices and how they can be quite difficult to define. The bill changes the rules in that respect, with specific reference to "sustainable and regenerative agriculture". Do you think that the right approach has been taken to changing those rules? Could the provision be further improved to give greater clarity?

The Convener: Michael, the only person looking at you is Andrew, so I will bring him in now and then we will see what everyone else has to say.

Andrew Wood: Defining good husbandry is incredibly subjective, and we practitioners have all been struggling with it for many years. It particularly comes into play when it is quite obvious where good husbandry is not being carried out, but as for how you define it and how you encourage the resolution of such issues, previous legislation has never really cracked that nut, and neither does the bill.

It is worth exploring the matter further, but it is such a difficult thing to define. Usually, not having good husbandry is a multifaceted issue. It is about whether the livestock are being cared for properly, whether the grass is being managed properly, whether the fences are upright or are all hanging loose, whether the drains are being cleaned and whether the buildings are painted under the terms of the lease. It is all of those things, and it is extremely difficult to deal with the matter in a practical context.

We need to continue to discuss the issue, but I am not sure that the bill quite gets there.

Hamish Lean: In questions involving landlords and tenants, the rules of good husbandry are important in practical terms, because a landlord has a right to apply to the Scottish Land Court for a certificate that the tenant is not practising good husbandry. If the Scottish Land Court agrees, it issues a certificate of bad husbandry, and if it does that, the landlord is in a position to serve an incontestable notice to quit. The rules of good husbandry are in no way esoteric—they have real effects in the real world.

The proposals to change the rules on good husbandry are quite modest in scope; they would change the definition from being "efficient" to farming in a "sustainable and regenerative" way. For example, the bill adds the phrase

"the health and welfare of livestock".

In and of themselves, those changes are straightforward and welcome. I was involved in a

case in which, according to one view, the tenant was guilty of bad husbandry and, according to another, was practising sustainable and regenerative agriculture. If we are attempting to encourage tenants to farm in a sustainable and regenerative way for the benefit of the wider environment, that change to the rules of good husbandry is welcome, because it would allow tenants to do so without their being at risk of challenge under a set of bad husbandry rules that were promulgated at the end of the second world war, when the circumstances in society were very different.

The Convener: I see that Andrew Wood wants to come in, but can I ask witnesses to say whether they have ever applied for and had issued to them a certificate of bad husbandry?

Hamish Lean: I could not quantify how many over the course of my career, but there have been a number of issues.

Andrew Wood: I thought that it would be helpful to give an example in the context of what Hamish Lean has said. Many older leases specifically require the tenant to do certain things that are deemed to be good husbandry, such as the removal of gorse and the management of wetlands to ensure that they are drained. Nowadays, those actions completely go against the rules of the conservation approach. Many leases still have those historical clauses in them, but such acts would not be considered appropriate nowadays.

Even improving the land can now be considered contentious in some cases. Many leases still have that as an absolute requirement, so we are framing the issue in that context.

The Convener: Does anyone else want to come in? All the witnesses are looking away, Michael. Do you have another question?

Michael Matheson: No. I will hand back to you, convener.

The Convener: Bob Doris wants to ask a specific question.

Bob Doris: A little bit of knowledge can be a dangerous thing. I was trying to find out a little bit more about fixed-term tenancies, because there were some things that my notes did not tell me. There are short limited-duration tenancies, which last for a maximum of five years. Those can be converted to limited-duration tenancies, which last for a minimum of five years and a maximum of 10 years. There are also modern limited-duration tenancies.

That made me wonder whether, from the 2003 act onwards, there has been no such thing as a short-term tenancy, because the tenancy could dribble on, by custom and practice or by arrangement, for 10, 15 or 20 years. If that is the situation, should we look again at whether waygo is fit for purpose? Should resumption be considered? Perhaps I am being a daft laddie, but I wonder whether that situation is a wee bit different.

Hamish Lean: I think that the industry would say that that is a vexed problem. The 2003 act introduced short limited-duration tenancies, which could last for up to a maximum period of five years, and limited-duration tenancies, which had a minimum term of 10 years. I am sorry—the limited-duration tenancy that was introduced in 2003 was for a minimum period of 15 years, but that was pulled back to 10 years in 2011. The 2016 act introduced a modern limited-duration tenancy, which was, in essence, a variation on the limited-duration tenancy that gave some additional rights to tenants. The modern limited-duration tenancy is also for 10 years.

Accordingly, at the moment, landlords can choose whether to grant a short limited-duration tenancy of up to five years or a modern limited-duration tenancy of 10 years or longer. If a short limited-duration tenant remains in occupation after five years and the landlord does nothing about it, the tenancy becomes a modern limited-duration tenancy of 10 years, which will be backdated to the original start date. If a tenant who has a modern limited-duration tenancy remains beyond the expiry date and the landlord has not terminated the tenancy through the double notice procedure—the provisions are really quite complex—an automatic seven-year continuation kicks in.

Prior to the Land Reform (Scotland) Act 2016, the default provisions for a limited-duration tenancy involved a cycle of continuations of three years, three years and then 10 years. Out there in the real world, people often have a problem in trying to work out on what basis a tenant is occupying the ground. That has been a problem that I have wrestled with in the Land Court, and which the Land Court has made numerous decisions about.

There is no escaping the fact that those provisions are unduly complex, and there must be scope for simplification.

Bob Doris: Could the bill be a vehicle for that? I suppose that it could be. However, there are tenants out there who have rights that date back to the 2003 act, and 10 years on from now, in 2034, there could be tenants out there who will have been farming land for 30 years. Another committee in 10 years' time might think that they should have the protection of full resumption rights. Do you have any reflections on that, Hamish?

11:45

Hamish Lean: I doubt that there is any time or scope to introduce significant reform into this bill because, as that is such a complicated area, it would demand a great deal of consultation to arrive at provisions.

That was one of the most difficult issues in the 2003 act, when fixed-duration tenancies were introduced, and it is the reason why we have the odd situation of tenancies being for up to five years and now for 10 years or longer.

Bob Doris: I was meant to be asking a very brief question, but I ask Tom Oates to respond, with the convener's permission.

Tom Oates: The point is that a 1991 act secure tenancy gives a clear line of succession, and a resumption would mean that you lose the ability to have that going forward. Albeit that a fixed-term tenancy can be extended, there is a short period of time for which the tenant will have that land available to him. The resumption compensation for a 1991 act tenancy potentially deals with generations down the line, whereas a fixed-term tenancy is relatively short term. There are some longer-term LDTs out there although, to my knowledge, not that many.

Bob Doris: That is helpful. If the convener permits, I would like to hear from Andrew Wood.

Andrew Wood: Hamish Lean's answer has helped you to understand just how complex the issue is. There is a real issue with confidence in letting land.

The Convener: We will come to that in a minute.

Andrew Wood: Then I will shut up.

The Convener: Thank you for cutting your answer short so as not to pre-empt my question.

Rhoda Grant has some questions.

Rhoda Grant (Highlands and Islands) (Lab): Most of my questions reflect on what we have heard today, and my first is for Martin Hall. When you talked about crofting and smallholdings, you said that they are intrinsically different. I know that the legislation is different, but what happens on that land does not to me appear to be different in practice, although you seemed to suggest that it might be.

Martin Hall: It is not particularly different: in general, outwith the crofting counties, small landholders often operate in the same way as agricultural holdings. That was the reason for my view. I do not deal specifically with crofting, so I have less working knowledge of that.

Rhoda Grant: I think of crofting as a form of agricultural holding, but with different legislation, so I was trying to find out whether anything was different for smallholdings.

Martin Hall: I imagine that the activity that takes place on both is largely agricultural.

Rhoda Grant: So, apart from the obvious difference in legislation, they are similar.

Can I push you a little further on the issue of different leases and the environmental lease? We have had some discussion of how the leases that are in place at the moment might work against environmental good practice, and how that might be seen as not being good husbandry either. Is there any way that, rather than creating a different lease, the bill might change the circumstances for all leases? We could have one lease that covers good environmental practice and sees that as good husbandry. I am reflecting on the fact that agricultural funding is going to be much more reflective of how farmers look after the whole area. Rather than create two separate leases, could the bill be an opportunity to bring all that together?

Tom Oates: We must be careful here. It should be acknowledged that good profitable farming practice already involves care of the land and sustainable and regenerative farming. We must be very careful with any attempt to split those things apart. Farmers are farmers: they care for the land and are doing a good job. Trying to create leases for new environmental practices, when that is just an evolution of farming, would be trying to split the thing when we are actually all going down one line—it is all agriculture. Buzzwords such as "sustainable" and "regenerative" are potentially dangerous because it is just agriculture and moving things forward.

Rhoda Grant: Certainly, the new Agriculture and Rural Communities (Scotland) Act 2024 looks at "sustainable and regenerative" farming as part of what subsidies will be based on. Information will come out on that.

I wonder whether the environmental leases are geared more towards things such as carbon offsetting. Is that their purpose? If so, will they bind the landowner and subsequent tenants to carry out such things? People sequestrate carbon in order to offset carbon generation elsewhere, and I wonder whether the environmental leases could create an issue whereby somebody has bought 100 years' worth of forestry on land, for example, to offset their carbon elsewhere. Could those leases be abused in order to do that?

Everyone is looking at me in a very puzzled way.

The Convener: No—we have asked previously about whether a tenant has a right to sell off carbon credits and therefore bind the landowner's hands indefinitely over what can be done with the

land. We struggle with the issue of carbon credits. Does anyone have any views on that? Tom Oates is shaking his head; I think that he wants to stay away from carbon credits, as does everyone else at the moment.

Does anyone have any views? I am sorry for jumping in, Rhoda.

Andrew Wood: If the tenant was to sell something that should stay linked to the holding, he might find that he has a claim situation. To go back in time, some of us have been around for long enough to remember the problems that were caused by transferable milk quotas and similar issues. I would be inclined to try to keep those parked. One party's selling something when they should not do so could be difficult.

I will go back to the environmental lease question. We have the ability to have freedom of contract. We can have a commercial lease that deals with those issues, which can be drawn up by eminent lawyers and say exactly what is needed on the tin, whether it is for forestry production or other things. Such leases exist. There are forestry leases that include other environmental factors. The question is, therefore, whether we need what is in the bill, when we can use specific contracts for specific situations. That should be considered as well.

Martin Hall: The difficulty with what Andrew Wood has described—those commercial contracts for environmental activities or tree planting or whatever—is that you cannot undertake agricultural activity; otherwise, they fall under the definition of agricultural holdings. That is the difficulty, and we are identifying a potential need to avoid that happening, so that a vehicle that can be used largely for environmental purposes will not, through the doing of some agricultural activity, default into a set of rules that was not intended when the lease was entered into.

Rhoda Grant: So there may be a place for environmental leases, but not quite as drafted. The provision needs to be tidied up a little to ensure that some agricultural work can be carried out at the same time as environmental work.

Martin Hall: But it should fall outwith the definition of agricultural holdings. The bill allows the Parliament to produce a model agreement, and there is a period of time in which that can be done. A bit more work is required on that to get there.

Hamish Lean: The environmental lease might allow a tenant to unlock sources of funding and investment to carry out environmental activities. However, in such circumstances, a funder will be looking at the terms of the lease—and, more fundamentally, the length of the lease—to ascertain whether it would be justifiable to make an investment and provide the tenant with funds to carry out an activity. The investor would need to know that the environmental benefit—whatever it was—would continue beyond the end of the environmental lease, because, of course, the landlord is not bound to continue whatever the tenant was doing for environmental purposes. Tenants certainly could not sell carbon credits in a lease of that nature.

Rhoda Grant: Thank you.

The Convener: As convener, I get to ask the last question, which is a simple one, and I encourage you to give a yes-or-no answer to it—you have all been reticent about doing that, for good reason. I guess that the majority of parliamentarians and people who are involved in the sector want more tenants to come into agriculture and increase the tenanted farm sector. Will the bill do that? I ask Hamish Lean first.

Hamish Lean: Thank you, convener. [*Laughter.*]

The Convener: Yes or no?

Hamish Lean: No—not on its own.

Martin Hall: Largely, no. It depends on the land use tenancy. If that could be introduced, it would make a significant difference. Without it, though, my answer is no.

Tom Oates: No. The bigger driver is tax.

Andrew Wood: No—

The Convener: You do not get a second chance if you say no first. You should have said the other bit first and then said no at the end, but you did not do that.

Thanks very much for giving evidence this morning. It is really helpful as we go through the bill. I appreciate your coming in to help the committee in our deliberations.

We move into private session.

11:56

Meeting continued in private until 13:03.

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