JUSTICE 1 COMMITTEE

Tuesday 3 September 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
28th Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Lord James Douglas-Hamilton (Lothians) (Con)
Donald Gorrie (Central Scotland) (LD)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

WITNESSES

John McNeil (Law Society of Scotland)
Professor Roddy Paisley (University of Aberdeen)
Kenneth Swinton (Scottish Law Agents Society)

ACTING CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 3

Scottish Parliament

Justice 1 Committee

Tuesday 3 September 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:46*]

The Convener (Christine Grahame): Leave the cups on the table—we need fortification on our first day back. I remind members to turn off their mobile phones and pagers. I have received apologies from Donald Gorrie.

Before we move to the first item, I inform members that I intend to place on the agenda in succeeding weeks a discussion of the convener's brief, whether or not I have one. That will allow me to refer to the item that members can find in paper J1/02/28/11—a letter from the Peterhead prison officers partners committee on the costings of a prison that was built at the United States penitentiary at Coleman, Florida. I will not refer to the substance of the letter, which was sent to me as the convener. I am not sure whether the minister has received a copy of it. However, as the minister asked us to come up with alternatives, is the committee in agreement that I should write to him, asking whether he has received this correspondence and whether we can receive a copy of the response? I do not know whether members would like the item to be on next week's agenda. My view is that we should wait to hear what the minister has to say.

Maureen Macmillan (Highlands and Islands) (Lab): Do we have a copy of the letter?

The Convener: You have one in your papers. I will not go into the substance of it. It simply describes an alternative prison build, which the partners committee claims could be utilised in Peterhead. I want to ensure that the minister has a copy of the letter and that he responds to us. Are we content with that?

Members *indicated agreement*.

Items in Private

The Convener: We move to item 1 on the agenda. I ask the committee's agreement to take item 2, which is discussion of lines of questioning for witnesses, and item 6, which is the approval of travelling expenses for witnesses, in private.

Members *indicated agreement*.

The Convener: I also ask the committee's agreement that lines of questioning for witnesses on the Title Conditions (Scotland) Bill be discussed in private at future meetings to allow us freedom in our discussions. That would be the only purpose for taking those discussions in private—there would be nothing untoward.

Members *indicated agreement*.

Lord James Douglas-Hamilton (Lothians) (Con): Perhaps I should declare an interest, which is listed in the register of members' interests. I am an unpaid Queen's counsel and an unpaid director of a small, family company that has certain landholdings.

The Convener: Yes. I am still registered with the Law Society of Scotland, but I am not practising. Are you going to mention your matrimonial connections, Maureen?

Maureen Macmillan: My husband is now semi-retired, but he was a member of the council of the Law Society of Scotland.

The Convener: There we are. Let us now move to item 2, which is on lines of questioning.

13:49

Meeting continued in private.

14:01

Meeting continued in public.

Title Conditions (Scotland) Bill: Stage 1

The Convener: I welcome Scott Wortley, who is our adviser on the Title Conditions (Scotland) Bill, although I am sure that the bill's technicalities will not be too much for us and that he will be superfluous.

I also welcome Professor Roddy Paisley of the University of Aberdeen's school of law, who is our first witness. I ask him not be offended that some committee members have remarked that professors seem to get younger all the time.

Professor Paisley, what main problems with the law relating to title conditions and real burdens must be addressed? Does the bill address those problems?

Professor Roddy Paisley (University of Aberdeen): The system of law of title conditions in Scotland is fairly advanced and has become overly complex at common law. In my view, the law of Scotland in this regard is already light years ahead of the law of England.

The Convener: You have won our hearts already—you may stop right there.

Professor Paisley: The bill will improve matters even more. Over the years, the law has become complex and decisions have made the law more obscure than it could be. A brief list of problems would include the manner of creation of some real burdens, which means that it is difficult to find out who can enforce them—the registers obscure that. Title research must be carried out every time a transaction is made and that costs a lot of money. The bill will make the system much cheaper to work and much more efficient for everyone who is involved in landholdings.

Modern urban ways of living require title conditions to be used at almost every turn. The law of title conditions was set up in the 19th century almost by accident and has since grown. We need a more modern and coherent system of land conditions to deal with tenements, sheltered housing, blocks with a single roof and the right to pay a fraction of costs, for example. Currently, there is a completely daft rule that one cannot look outside the four corners of the deed to find out what one must pay. That is completely mad and must be changed—it is old hat. I can list many things that need to change, but the bill is good as it stands.

The Convener: Your general answer to my second question is that the bill addresses those problems.

Professor Paisley: Very largely, yes. The bill is superb.

The Convener: Shall we just go home? There will be no stage 2. We will sweep right through to enforcement. I do not mean to make light of the matter. I hope that the bill is superb.

Professor Paisley: I am an enthusiast for such stuff. The bill will be one of the Scottish Parliament's finest hours, because it is good stuff. It will make a difference to everybody in Scotland.

The Convener: I hope that many members of the press are present. So far, the bill has been described as glamorous stuff. Thank you very much.

Michael Matheson (Central Scotland) (SNP): When local authorities and other social landlords sell properties under right-to-buy provisions, they often reserve to themselves the right to enforce some burdens. It appears from the bill that, in an estate with a mixture of public and private ownership, only the private part will be classed as the community, which the bill will affect. Would the Executive's proposal of the registration of a deed of conditions for the entire community, which would include the publicly owned part, overcome potential problems for many local authorities and social landlords with having to lay many different certificates under the Abolition of Feudal Tenure etc (Scotland) Act 2000? Is that the best way of dealing with the problem?

Professor Paisley: No. That will not work. The Executive's proposed solution is ingenious, but it will fall at the first hurdle. Paragraph 53 onwards of the policy memorandum to the bill outlines an ingenious scheme—I do not mean to rubbish it—but it will not work for two reasons: one is highly technical and the other is common sense.

The highly technical reason is that if, for example, a local authority had feued off 50 per cent of the properties in a tower block and the feudal deeds imposed restrictions that said, "You won't do this, you won't do that and you won't keep a dog," for example, only 50 per cent of the titles would have been burdened, which would leave 50 per cent unburdened. The Executive has proposed registration of a deed of conditions for the 50 per cent that are unburdened, which the present law would allow. That would even out the situation for everyone, as 100 per cent would be subject to the burden. That would create a community and the deed of conditions would remain enforceable after feudal reform. That sounds great, but I am sorry to say that it will not work for two reasons. However, perhaps something can be done about that.

Deeds of conditions were first established under section 32 of the Conveyancing (Scotland) Act 1874. It would be convenient if the committee referred to a copy of that act. From memory, I think that the section starts with about six lines of verbiage and then says that a deed of conditions can be used when a proprietor wishes

"to feu or otherwise deal with or affect his lands".

The technical reason why the proposal will not work is that those words do not cover taking advantage of the community burdens provisions in the Title Conditions (Scotland) Bill. To

"feu or otherwise deal with or affect"

is to perform a juristic or legal transaction, such as disposal. It does not mean taking advantage of community burdens. That is a highly technical reason why the proposal will not work, but I think that it is right.

The bill will abolish section 32 of the 1874 act but, to allow the proposal to work, the change to elide those words in section 32 and say that deeds of conditions can be used for any reason that is thought appropriate must be made now. Retrospective legislation could declare deeds of conditions to be valid in the future for any reason in addition to feuing, dealing with or otherwise affecting ground, but there is a more fundamental commonsense reason why the proposal would not work.

Imagine that you are one of 50 individuals who have received a feu and that you have been told that you cannot keep a dog or cat, which you are dying to do. Imagine that you know that the local authority has not introduced a deed of conditions, but is thinking of doing so to burden the land that remains in its ownership. The only way in which the scheme can work is for everything in the building to become part of a community. A local authority may record a deed of conditions and tell people that they are stuck, because the deed applies to 100 per cent of the properties. Such a deed may burden the land, but in whose favour has that been done? It has been done in favour of the feuars. However, if they waive their rights, the deed of conditions is stymied from the word go. One cannot force people to have a right. They can say that they do not want it.

The Convener: You are saying that someone who has bought a flat in a tower block may be subject to a burden that prevents them from keeping a dog.

Professor Paisley: Yes.

The Convener: Are you also saying that, if the local authority wants to create a deed of conditions for all the rented properties in the block specifying that tenants cannot keep a dog, it cannot do that?

Professor Paisley: The local authority will try to create a deed of conditions for all the properties that remain in its ownership—the rented properties. However, the people who have already bought their flats may say that they do not want the burdens on their properties to survive, now that the feudal system has been abolished. The local authority can make those burdens survive only by creating a community.

The Convener: Fifty per cent or more of those people may say that they do not want to be part of the community.

Professor Paisley: Exactly. They may not accept the rights in the first place. They may say, "The deed of conditions favours us. That is great—we will waive our rights instantaneously." Alternatively, they may say that no one consulted them and that they do not want the rights that are being given to them. The local authority cannot force people to have rights of enforcement. If they say, "No thanks," the scheme will fall at the first hurdle—leaving aside the technical point that has been made about section 32 of the Conveyancing (Scotland) Act 1874.

Michael Matheson: How do you think that we should proceed?

Professor Paisley: You could include in the bill a simple provision to amend section 32 retrospectively. You could say that deeds of conditions have always been competent for feuing and any other purpose. That would resolve the technical issue that has been raised. You could say that if, in the intervening period, the local authority introduces a deed of conditions, the benefit to proprietors will be deemed to exist, regardless of whether they waive it. In other words, the deed of conditions would apply even if the proprietors waived their rights. That would prevent their saying, "No thanks, chum."

The Convener: Our adviser has informed me that section 32 of the Conveyancing (Scotland) Act 1874 would be repealed under the bill. However, that would not solve the technical problem that has been mentioned.

Professor Paisley: The section would be repealed as of the appointed day and re-enacted in another form. The section could be repealed and varied with retrospective effect; the new legislation could give effect to the same idea from the date on which the section is repealed. However, the convener is right to say that, under the bill, section 32 would be repealed.

The Convener: In your view, the section must be amended.

Professor Paisley: Yes. The bill could include a new section to prevent section 32 from having the effect that it may previously have had.

The Convener: The practicalities of the issue are interesting—there are real problems with the proposed changes. You applauded the bill, but immediately threw a grenade at it.

Paul Martin (Glasgow Springburn) (Lab): Will councils always want to enforce something that is ethically desirable? You raised the issue of prohibiting a community from keeping livestock in multistorey flats. I do not advocate that, but what would happen if a community housing association wanted to introduce such a measure?

Professor Paisley: It could put together a new deed of conditions—there is no problem with doing that. If a housing association wants to allow people to keep livestock, there are means of waiving the restriction. The good thing about the bill is that, in effect, it moves the power from a superior to the community itself. In that sense, it is quite democratic.

The Convener: Are you saying that the principle behind the bill is good but that, for technical reasons, it will not work?

Professor Paisley: In principle, the bill is a great idea.

14:15

Lord James Douglas-Hamilton: The Executive has taken a rather different approach to implied rights to enforce under common schemes from that taken by the Scottish Law Commission. For example, the Executive has abandoned the 4m rule in relation to who can enforce the burden and it has preserved all implied rights, but it has re-introduced the rule on discharge. Which approach do you prefer and why?

Professor Paisley: That is a technical and important area of law. I favour the Executive's approach because it has preserved existing rights and not arbitrarily taken them away.

There has to be a way of simplifying the law on discharge. The common law, as it stands, is a complete mess. There must be a limit by which a proprietor who is burdened by such rights can get a clear title. If someone is beyond the limit, and has a right to enforce, the Executive has cleverly provided a means of appealing to the Lands Tribunal for Scotland. It was right to do so, because that will allow us to get over any difficulties to do with claims under article 1 of protocol 1 of the European convention on human rights—or claims made on whatever ground—that rights are being prejudiced or taken away without compensation. I whole-heartedly agree with the Executive's approach, as opposed to that of the Scottish Law Commission.

Lord James Douglas-Hamilton: We understand that the effect of section 48, when read with section 52, is to create new implied rights to enforce in certain circumstances, when none existed previously. Is that a good idea?

Professor Paisley: Yes, I think that it is. However, members may want to consider one thing in section 52. As Lord James says, the two sections create new implied rights. I think that the sections will work well. Section 52(1) says:

"In determining, for the purposes of any of sections 24 and 48 to 51 of this Act whether a property is a benefited property in relation to a real burden, the effect of any reservation of a right to vary or waive the real burden shall be disregarded."

Under the present law on implied rights, if a third party—for example, a neighbour—wanted to enforce burdens, that would be excluded by implication if a superior had reserved a right to vary or waive conditions. That is how the law stands—although there was one case in Glasgow earlier this year where the sheriff's view of the common law was exactly the opposite.

It is common to find an expressed right to vary for the superior, but it is equally common for the burden to be phrased in another way. For example, the burden may be straightforwardly phrased as, "Thou shalt not build except if I, the superior, say so." Alternatively, it may be phrased as, "You shan't build except if I approve the plans." I do not think that the latter is covered by the phrase in the bill about the

"right to vary or waive the real burden".

We are talking about a reserved right to waive plans, which is extremely common. It is in almost every modern development that you will come across. It is standard in the deeds of conditions of Barratt, Cala, Wimpey, the lot. Members may wish to consider expanding the wording of the section so that a right to approve plans is disregarded as well. Unfortunately, the section as it stands would give the neighbours the right to approve plans, which could open a can of worms. However, the bill may contain ways around that.

The Convener: I have a supplementary question. In an earlier briefing, we were told that the bill is carefully balanced and that if one bit is touched another bit will move. Could you advise us—if not now, you could write to us—which other sections of the bill would be affected if we follow your suggestion?

Professor Paisley: The pressure will go down the pipe, as it were, and come out where parties wish to get a discharge of a restriction that is enforceable by not one, but more than one neighbour. If more than one person is required to approve a plan, it will almost invariably end up going to the Lands Tribunal. That will eventually add to the pressure of business that comes before the Lands Tribunal.

The Convener: So your suggestion would have a practical impact rather than an impact on other sections of the bill.

Professor Paisley: Yes. It would have a practical impact.

The Convener: Do you agree with the proposal in the bill to extend rights to enforce to people in occupation of the benefited property other than owners, such as tenants under a lease? I know that there are other categories. What is your view of that?

Professor Paisley: It is a great idea. I am absolutely in favour.

The Convener: That is it—short but sweet.

Maureen Macmillan: Do you agree with the introduction of the sunset rule as a method of discharging unwanted real burdens? Will it operate effectively in practice? Is 100 years the best period to choose before which the rule cannot operate? A hundred years seems like a long time.

Professor Paisley: It is, but not for lawyers, who seem to have awfully long memories. A sunset rule is a good idea. Under the bill, the rule is a triggered sunset rule. I always think of a horse riding out over the horizon, as in westerns, when such rules are mentioned. The rule does not apply automatically; the button has to be pressed by someone who wants to get rid of the burden.

The provisions of the bill as they stand are well thought out and address the point that an easier method is required to get rid of obsolete burdens than is the case for burdens that are relatively new. The question must always be asked: given that the title conditions are real obligations related to land, is what is on the land the same as what was there 100 years ago? The likelihood is that it is not, because things will have moved on. The law has to take account of that by a means that is relatively cheap and relatively quick but that allows people to be heard.

Maureen Macmillan: Is there too much of a rigmarole to go through—putting notices on lamp posts and swearing oaths and so on—to do that?

Professor Paisley: I have a lot of sympathy with your view. There is a rigmarole to go through, but people will want their say and they will not want burdens to be got rid of while they are on holiday. You would be surprised at what people get up to when they realise that their neighbours are away.

The Convener: I am tempted to ask for examples, but I shall not.

Professor Paisley: Eight weeks is a good period, because not many people can swan off for eight weeks. People have to be told that they have rights that can be taken away. They have to be given a little bit more than, "It's been done. Terribly sorry, chum." Such a procedure would be challenged.

Ms Wendy Alexander (Paisley North) (Lab): Lawyers may think in terms of 100 years, but could you reflect further on whether 100 years is the appropriate period? It means that for the next 15 years people will be wanting to act on perspectives from the Edwardian era. Why not have a period of 50 years?

Professor Paisley: Why not 50 years? Other jurisdictions—for example, Australia, Canada and America—have short time frames. There are all sorts of variants, from about 20 years upwards. Land obligations generally have a lengthy duration ahead of them. People invest in land because they have rights over their neighbour's land; investors and people who want to live in an area bear that in mind.

I think that the 100-year duration appears very long when looked at in the abstract. We are talking about 100 years, by golly—I do not know who will be about in 100 years' time. However, when we look at that in conjunction with the other means whereby burdens can be got rid of well ahead of that time, I think that there is a balance. If there were just a single rule that one could get rid of real burdens in 100 years only by pressing a button, that would not be good enough. However, people can go to the Lands Tribunal or use other means—for example, voluntary discharge. People cannot get rid of the 100-year rule voluntarily but, in combination with other rules, I think that it is a long-stop rule; it can, of course, be extended in some cases, but I think that it is okay.

Maureen Macmillan: So you would presumably approve of the reduction to five years of the relevant period for negative prescription.

Professor Paisley: Yes, that is a superb idea.

Maureen Macmillan: You agree that the acquiescence period should be eight weeks. You said that people do not go off on holiday for eight weeks. However, some people go away for the winter, for example. The eight-week period seems to me to be quite short.

Professor Paisley: It can be seen as relatively short. I know of a case in Arbroath in which a guy came back and found that his neighbour had moved the hedge and taken in half his garden—and he was away for a weekend only. Eight weeks, however, is fairly long given that people are bound to have someone looking after their property in the meantime—or at least they should have. Section 16(1) talks about people knowing or those who ought to have known. I think that it is reasonable for people to have a responsibility to keep an eye on their property. The general law cannot police it for them. Eight weeks is a fair amount of time.

Maureen Macmillan: So the onus is on the person who owns or is a tenant of the property to ensure that someone is keeping an eye on it so that they can tell them if a bungalow is suddenly built in the back garden.

Professor Paisley: There is usually a provision in most leases that the tenant will inform the landlord immediately about activities either on the property or next door that could have an effect on the property's value. That is in standard conditions in almost every standard security that I have seen. If a property is mortgaged, the owner is obliged to tell the heritable creditor. However, in the majority of cases, properties are occupied, whether by a tenant or a landlord. My gut feeling is that eight weeks is probably okay.

Maureen Macmillan: The owners of a house could go away for a long time and arrange for a letting agency to rent out their house. If the people next door did something that broke the conditions and the owners came back to find that something had happened to which they would not have agreed and of which the letting agency had not informed them, would the letting agency be responsible?

Professor Paisley: Everything depends on the contract between the individual who wishes to let out the house and the letting agency. If we are talking about a factoring agency, which not only seeks a tenant for the property but looks after the property, I think that there is a fair chance that there would be some implication. It should be expressed in that case that the factor would look after the client's affairs generally in respect of that property, so that as soon as it was found out that something was going on that would materially prejudice the property, the factor would intimate that to the client.

The Convener: Section 16(1) talks about the proprietor of the benefited property

"being aware of … or … being in a position where that person ought to be aware of".

If that proprietor was known to be six months out of the country, would that get round the

"ought to be aware of"?

If the person on the burdened property, knowing that the owners were away for six months, went ahead with something, would not that exclude the eight-week period?

Professor Paisley: Yes, it could. There is that element of justice. However, section 16(1) goes on to say:

"being in any event a period which does not exceed that of eight weeks beginning with the day by which that activity has been substantially completed".

The Convener: I saw that bit.

14:30

Professor Paisley: The straightforward reading would be that that means eight weeks from the time the shovel is in the ground.

The Convener: So it is nothing to do with awareness.

Professor Paisley: Awareness comes into it for a shorter period. Eight weeks is a long stop.

The Convener: We will have to return to the details of this matter later. This is only our first stab at it. Lord James, would you like to ask your question?

Lord James Douglas-Hamilton: As well as the discharge by adjacent proprietors, the bill provides a further method of discharge for community burdens, namely discharge by a majority of affected units. What are your views on that additional method? Is it workable in practice? Do you recommend it?

Professor Paisley: It is workable in practice and it is worth having. I think that the recommendation is good.

Paragraph 47 of the policy memorandum sets out the various methods by which the owner can get a discharge. As under the existing legislation, the owner can apply to the Lands Tribunal, but frankly, that arrangement is a disaster. You have virtually no chance of getting a discharge in a large housing estate where hundreds of people have title and interest. In the case of Spafford v Bryden, hundreds of people had to be intimated and the discharge was not secured. It must have cost an absolute fortune and I am glad that the bill will deal with that sort of ridiculous situation.

Two other methods are open to the owner. They can obtain the signatures of all neighbours within 4m or obtain the signatures of a majority of the community, which is a good way of enabling people to get around the back of people who are tight up against them. That is an eminently reasonable idea because, especially when there is a boundary dispute, neighbours use any means at their disposal, title conditions included, to beat each other around the head. In some cases, there is not the faintest chance of getting a discharge of anything from your next door neighbour. If the signatures of a majority of the community are secured, the neighbour would have an opportunity to appeal, but they would have to show that the decision would be unfavourable to the majority of the people living in the community.

Paul Martin: The overall effect of the bill is to increase the role of the Lands Tribunal in relation to the title conditions. Do you have any difficulties with that way of reforming the Lands Tribunal process?

Professor Paisley: I want to make it clear that I hold the Lands Tribunal in the highest regard. It is an extremely good organisation and it does a good job. However, I fear that it will be swamped by the amount of work that comes its way. The bill will make many changes to its jurisdiction, all of which I regard as good. However, I understand that it will still be impossible to make an application on the web. You might want to check that with the Lands Tribunal, but I believe that people will still have to fill in forms.

The Lands Tribunal process is quite slow to get started but, once it has got started, it is great. The staff are extremely good, the judgments are fine and the process is quick. However, it faces the prospect of being inundated by a great volume of work that will destroy much of the flexibility that has been built into the bill. I would be interested to know how the Lands Tribunal envisages that it will deal with that amount of work.

The Convener: We have representatives from the Lands Tribunal coming before us on 24 September and we will ask them then.

Paul Martin: So you welcome the reforms, but you have concerns about the structure that would support them.

Professor Paisley: Yes. The reforms are excellent. The Lands Tribunal is a good institution and it should be promoted. I have no idea how it copes with its present volume of work—it does an awful lot of stuff. I envisage that the one judge and one bench might have to be multiplied by three.

Paul Martin: Your written evidence touches on the issue of who can apply to have a burden varied or discharged. You propose that someone who has entered into a contract to purchase land should be able to apply to the Lands Tribunal to discharge the burden on the land. At present, the seller is contractually obliged to the buyer to apply to the Lands Tribunal. Why is that approach inadequate?

Professor Paisley: At present, to apply to the Lands Tribunal for a variation or discharge of a land obligation a person must be the burdened proprietor—nobody else has title. Imagine a situation in which somebody owns a house with a huge field behind it, which he wants to sell to a supermarket. The developer will come along and say, "That is fantastic. Here's £5 million for your field, subject to planning permission being obtained and to a variation of the restriction that there can be only one house on the land."

It is as clear as a bell that the developer will want to run the whole show, because he will pay the money when the discharge and planning permission are obtained. The seller will not want to become involved because showing plans to various people is not within his expertise. However, under the present law, the seller would have to run the action, although that would be done in name only. The developer would indemnify the seller under contract and hand the seller the plans, which would be submitted in the seller's name. My suggestion would simply take the landowner out of the frame so that they do not have that hassle. It would speed up the process.

There is another example in the bill of parties who do not own burdened land being able to apply for a variation of a restriction. With community burdens, which we have just spoken about, the owners of 25 per cent of a property can apply for a discharge for the whole property.

My suggestion is relatively small, given the scope of the bill, but it might help to speed up land transactions and to cut out a bit of heartache for sellers who do not want to get involved in such matters.

Paul Martin: So your main concern is to consider how to speed up the process.

Professor Paisley: Yes. If we can speed things up, that is fine. My intent is not to give a critique of the bill or to say that the rest of it is garbage. The bill is good. My suggestion is a small matter that would fit with the condensing process.

The Convener: Your suggestion brings reality into the issue.

Professor Paisley: Because there are so many indemnities, if nothing else my suggestion would save an awful lot of trees.

Paul Martin: Your written evidence suggests that statutory agreements such as planning agreements that are made under section 75 of the Town and Country Planning (Scotland) Act 1997 should be included in the definition of title conditions and therefore within the jurisdiction of the Lands Tribunal. What do you make of the Scottish Law Commission's view that the tribunal and its procedure are not well equipped to consider matters of public policy?

Professor Paisley: I disagree with that view entirely. The Lands Tribunal is in as fine a position as any body in the land to consider those matters. The tribunal deals with many issues relating to compulsory purchases, such as valuations. When it comes to local authority matters, the Lands Tribunal knows what it is talking about. It is staffed not only by lawyers—if that were the case I would be concerned—but by surveyors, who have a good idea of what is going on.

The Scottish Law Commission seems to have confined its attention only to section 75 planning agreements, which are agreements that local authorities enter into. I want those planning agreements brought within the remit of the Lands Tribunal because at present they cannot be

varied—when they have been agreed, they are set in stone. Exactly the same situation occurred in relation to the feudal system in the 1960s—there was no way that agreements could be varied. In the 1960s, people thought that that was great because they could get rid of feu duty and that the control of their lands in terms of real conditions would never take off and would wither on the vine.

What happened? We have ended up having to draft this bill because it went exactly the opposite way. If there is a potential for power it will be used, whether it is responsible or not. That is the case in relation to the section 75 agreements and all the rest of them—remember that those agreements will be expanded to many other quangos. For example, section 101 adds another one: the amendment of the Enterprise and New Towns (Scotland) Act 1990. Those agreements come in by the back door. There is no means whereby they can be varied unless the statute says so.

The local authority or whatever may be worried that the bill will cause all such agreements to collapse, but what is it that the Lands Tribunal can do? The Lands Tribunal can say only that such agreements will be varied because they are no longer reasonable. If a local authority says that it wants agreements enforced whether they are reasonable or not, I would be worried. All I am saying is that the section 75 agreements—and all the rest, of which there are many—should be capable of variation if they are unreasonable in the light of change. What is there in that to worry local authorities and so on? Are they saying that they want to be unreasonable? If a local authority were to say such a thing it would be clobbered by the European convention on human rights—there is no procedure, no appeal, no nothing; the local authority would not have a hope. It would be destroyed by an action under article 1, protocol 1 of the ECHR.

It is incumbent on local authorities to be reasonable under the law as it presently stands. However, some of the agreements become unreasonable over the course of time. The Lands Tribunal is the ideal forum—provided that it is efficiently staffed—to consider such issues. There is no one better in Scotland at the present time to deal with the matter—not even the courts. The Lands Tribunal is the best forum because it has surveyors and lawyers and does not take a narrow approach. Provided that the Lands Tribunal is well staffed it is ideal. The Scottish Law Commission is not wrong—it simply did not look at all the agreements. The commission looked at only one of about 10 agreements.

The Convener: That is very interesting.

Maureen Macmillan: We want to consider the 100m rule and the transfer from feudal tenure to real burdens. The Executive has decided to retain the 100m rule and I have slight problems with that because farmers have feued off land and put conditions down to protect their livestock that now cannot be transferred. Do you agree with the decision to conserve the 100m rule?

Professor Paisley: I can see your concern. However, on balance, I am persuaded that the 100m rule should be kept in place. There are two qualifications to the reallotment of a feudal real burden in the Abolition of Feudal Tenure etc (Scotland) Act 2000. Sections 18, 19 and onward of that act contain provisions dealing with reallotment. The superior can reallot provided that he can come up with a suitable dominant tenement. It has to be one in respect of which there is a qualifying house that people use for human habitation and the like. It does not include a field or a half-built building site—that is another big problem. It is not just farming areas that might experience problems.

14:45

In addition to that, there has to be a rule to cut off absolute reallotment of everything that a feudal superior had. For example, if there were no horizontal rule, a feudal superior would always reserve his burdens in favour of his minerals reservation. He could always say, “the minerals reservation is about 6ft down there”. There must be a distance stipulation. There is a rule at common law, whereby the dominant tenement must be within a certain area—not a maximum area—to show that there is an interest to enforce. All that section 18 of the 2000 act has done is limit that area to a fixed distance, so that superiors do not chance their arms by reallotting anything. If a 100m rule, or a rule involving any other specified distance, did not exist, one would fall back on the common law, which refers to whatever distance within which there is an interest.

There are only two such cases at common law, both of which come from Aberdeen. The only case that makes much sense is one in which it was indicated that the distance should be checked by reference to the type of burden. Someone in Aberdeen tried to set up a chip shop frying garlic pizzas. The people who lived within smelling distance downwind had an interest. The distance could vary from day to day. For someone who was upwind it would be zero, but for someone who was downwind it could be 200yd. Implementing such a vague rule does not work. That is how stupid it gets. When it comes to law reform, there must be a fixed rule.

I admit that stipulating a distance of 100m will be sore on farmers and on some developers. They could chance their arms by trying to obtain reallotment by agreement with the people who live in the cottages, but they will never get there. No

one will ever agree anything unless there is a quid pro quo. The salvation is that reallotment is obtained by reference to the Lands Tribunal. It is up to farmers' agents to tell them to get on the ball. If farmers have a genuine case, they will win under section 20. That is where the farmers' salvation lies.

The Convener: I make it plain that you were referring to section 20 of the Abolition of Feudal Tenure etc (Scotland) Act 2000, which interacts with the bill that we are considering.

Maureen Macmillan: The Scottish Landowners Federation suggests that feudal superiors will go to the time, trouble and expense of saving only the most worthwhile feudal burdens and those on which they have received legal advice that there would be an interest to enforce. The SLF is arguing that the 100m rule is unnecessary, but you do not agree with that.

Professor Paisley: I completely disagree with that argument. If feudal superiors take the view that saving certain feudal burdens is not worth while, why should we bother? If I throw coins out of the window and decide that it is not worth while going outside to pick them up, that is fine.

The Convener: We can move on from the 100m rule. Maureen Macmillan has made clear her position.

Ms Alexander: Do you agree with the bill's approach to development value burdens and clawback? We are particularly interested in the bill's proposal not to preserve existing feudal burdens of that kind and in the way in which compensation has been dealt with. We also want to know whether you believe that the proposed amendments to the standard securities legislation are sufficient.

Professor Paisley: On both issues, I am in favour of the bill as it stands. However, the law on standard securities will need to be revisited very quickly, if some aspects of it are not dealt with now. The law on standard securities needs a complete revamp. There are many other devices by which clawback can be better secured; development value can also be better secured by other means.

Real conditions have been used because they have proved a handy device in the past. A contract with a standard security is a good way of securing clawback. If one wants to give land to someone for a particular purpose and to make sure that it is not developed, one can set up a trust. Such things are done regularly throughout the country. I cannot deny that development value burdens and clawback exist and are quite common.

The provision for compensation and the formula, which has been commented on, are adequate. The formula is copied from part 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The formula came to the attention of the Lands Tribunal and was challenged on the grounds that it was inconsistent with article 1 of protocol 1 of the ECHR. The challenge failed. In my opinion, the Lands Tribunal made the correct decision. The formula is a good formula, which covers most situations very fairly and the remainder of situations reasonably fairly.

The Convener: Thank you, Professor Paisley, for making the bill sound refreshingly interesting—this territory is quite difficult for us.

Professor Paisley: It was my pleasure.

The Convener: I am sorry to race on. I advise the committee that, so far, we are running only five minutes behind schedule. If we march on, we should finish dealing with this item of business by 3.30 pm. It is my intention to do so, as that would allow us to take a short, five-minute adjournment for refreshments. Members should look pleased about that.

I welcome Kenneth Swinton, who is the convener of the Scottish Law Agents Society's conveyancing committee, and Ian McLeod, who is a member of that committee. We will get into the practical nitty-gritty of the bill, some of which was addressed by our previous witness. From your members' experience in practice, when do they encounter problems with real burdens? Whichever witness replies should be brief—we do not need the book.

Kenneth Swinton (Scottish Law Agents Society): Problems with real burdens arise in domestic transactions. When people think of carrying out work such as extensions or alterations to their houses, they come across the requirement to obtain a minute of waiver from the superior. In practice, not so much attention is paid to obtaining minutes of waiver from third parties who might have rights to enforce. There are good reasons why agents play down the importance of—

The Convener: Could you give us an example of a third party with a right to enforce?

Kenneth Swinton: A neighbouring proprietor may have an implied right, because of the scheme of conveyancing that has been adopted.

The Convener: Are you talking about a Wimpey development, for example?

Kenneth Swinton: In a modern housing development, there may be a deed of conditions, which will be imported into the conveyances of each unit within that development. Those conveyances may confer express rights on the other units to enforce the conditions, or the conveyances may be silent and the rights may be implied into those adjoining titles. Alternatively, the

superior may have a reserved right to vary or discharge the burdens, with the result that none of the adjoining proprietors would have any rights to enforce.

The Convener: Is that why people cannot grow cypress hedges or erect fences?

Kenneth Swinton: Problems typically arise with burdens when one is considering an extension to a dwelling house or the sale of garden ground for the erection of a further house.

The Convener: We are also dealing with commercial situations. Do those problems arise less often in commercial conveyancing?

Kenneth Swinton: Certain burdens prevent particular commercial uses of land. For example, there might be restrictions on the title of a house that one wanted to convert into a hotel, or there might be restrictions on shops—

The Convener: Garlic pizza shops?

Kenneth Swinton: No, not necessarily. It is quite common to find in shop titles restrictions on the sale of excisable liquors, and one would have to get a discharge of that condition if one wanted to run an off-licence, for example.

Lord James Douglas-Hamilton: As the witnesses know, the Executive has taken a different approach to implied rights to enforce under common schemes to that taken by the Scottish Law Commission. The Executive has abandoned the 4m rule in relation to who can enforce the burden and has preserved all the implied rights, but it has reintroduced the rule on the question of discharge. Which approach do you favour and why? Do you think that the Executive is right?

Kenneth Swinton: The bill as it is drafted is the correct course of action. I could perhaps give an example that shows why the Law Commission approach might have certain difficulties. I came across a development that is about 15 years old and comprises about 50 houses. It is in a cul-de-sac, so it is a long, narrow development, which is two houses wide.

A problem has arisen in relation to the development because the roads have not been adopted by the local authority. The roads have not been adopted because the proprietor at the mouth of the cul-de-sac has erected a dwarf wall in his front garden across a 1.8m-wide service strip. The local authority will not adopt the road until the wall is removed, because that is part of the specification for the road. The titles all provide for nothing to be built on the front garden ground and in particular for nothing to be built on that 1.8m-wide service strip. If the proprietors at the end of the cul-de-sac can enforce that burden, they can secure an advantage.

The problem in this particular development is that the carriageway is breaking up near the end of the cul-de-sac—the last bit to be done—and the proprietors near the mouth of the cul-de-sac have no interest because the road is fine where they are. If we adopt the Law Commission 4m rule, those at the end of the cul-de-sac will have no rights to enforce. If we adopt the Executive proposal, everyone will have a right to enforce. They clearly have a financial interest to enforce so that they can get the road made up.

Lord James Douglas-Hamilton: The Executive's proposals are essentially fairer.

Kenneth Swinton: Yes.

Lord James Douglas-Hamilton: Our understanding is that the effect of section 48, when read with section 52, is to create new implied rights, in certain circumstances, when none existed previously. Is that a good idea? Is that aspect of the legislation provision well framed?

Kenneth Swinton: We are not in favour of section 52 at all as it causes certain difficulties. The Scottish Law Commission did not have what is now section 52 in the draft bill. The section introduces new implied rights where none previously existed. I alluded to that in what I said about how implied rights might be created in a common scheme. The rights may be express or they may be implied because there is a common scheme. It is fairly usual for developers to reserve a right to vary or discharge burdens. When that right is reserved, the tenor of decisions is such that it means that there are no third-party rights. Section 52 will create new rights and burdens that are enforceable after feudal abolition by parties who did not have rights before. There is a potential for reallocation of rights from superiors to co-proprietors.

It may be that someone takes a view when they purchase a property that, although the superior has the right to enforce, he resides far away from the property and the chances are that he will not enforce, and the co-proprietors do not have such rights. It is then quite possible that the person will want to extend their house at some time in the future, after the appointed day, and will then find that neighbours have rights that they did not have before and the person's prospective plans for development are scuppered by their neighbours' rights to enforce. We are strongly opposed to the introduction of new rights. That seems to go against the policy of clarifying the law and weeding out burdens that are unenforceable. I am definitely not in favour of section 52 as it is drafted.

Lord James Douglas-Hamilton: Is there much support for that point of view in the profession?

Kenneth Swinton: From discussions of the

matter in our committees, that is the consensus that has been reached.

Lord James Douglas-Hamilton: Implied rights to enforce so-called "neighbour burdens" can be preserved by registering a notice. In your written submission you indicated that you have some concerns about that scheme. You have said a certain amount about that already. Can you briefly outline your concerns?

15:00

Kenneth Swinton: There are two ways in which rights can be implied. One is through the application of Hislop v McRitchie's Trustee, which is the common-scheme type of implied rights.

The other situation where implied rights might exist is said in the Scottish Law Commission report to be the rule in McTaggart v Harrower. That rule is perhaps not as clear-cut as is suggested by the Scottish Law Commission or by the Executive. In fact, in that case, there was an express right. There was no implied right, so it was unnecessary to find an implied right.

One of the other cases that the Scottish Law Commission has cited is Braid Hills Hotel v Manuels. Again, in that case there was an express nomination of the benefited properties. Neither of those cases supports the existence of the rule.

In a more recent case, Marsden v Craighelen Lawn Tennis Club, it was argued that there was such a rule, but the sheriff was of the view that it did not apply in that case, if it existed at all. Therefore, the situation is somewhat less certain than the Scottish Law Commission and the Executive are saying. If it is less certain, should we be carrying forward implied rights where the situation is not clear, when the purpose of the bill is to try to create clarity and to get rid of burdens in so far as they are cluttering up the registers?

The Convener: The committee received a huge volume of written submissions. In case the issue has been passed over in that full response, I inform members that there is a more detailed response in section 52 of the written submission, if we want to revisit the issue when we get into the detail of the bill.

Lord James Douglas-Hamilton: Thank you.

The Convener: I return to the issue of not creating rights. There is a note in the consultation paper about extending the right to enforce real burdens to non-entitled spouses. You are not terribly happy about that provision; you think that it is too extensive. Will you comment on that? Do you have the same view on tenancies?

Kenneth Swinton: No. We are perfectly happy about tenancies

The Convener: Tenancies are fine, but not non-entitled spouses.

Kenneth Swinton: We are happy about non-entitled spouses exercising rights, but only in so far as they are in occupation of the property.

The Convener: That causes a difficulty. What does "in occupation" mean?

Kenneth Swinton: Section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives a non-entitled spouse two rights. One is a right to occupy and if not in occupation—

The Convener: I know that. How do you define "in occupation" in practical terms when a stramash might be going on during a divorce and the wife might be out for two weeks, back for three days, out for three weeks and so on?

Kenneth Swinton: The situation we are concerned with is that in which the wife is not in occupation and is clearly not going back into occupation, but raises an issue of enforcement almost out of spite.

The Convener: Is that not dealt with under title and interest to enforce?

Kenneth Swinton: It might well be dealt with under interest, but it could be clarified and removed simply by requiring the non-entitled spouse to be in occupation before they have the right to enforce.

The Convener: I know what you are saying, but I am interested to test you on that because, as a matrimonial practitioner, I know that it is difficult to say who is in occupation at such times and in volcanic situations when all those issues might be raised.

Kenneth Swinton: I still think that occupation is a question of fact. It will become clear over the period who is in occupation. Resolving a court action based on that right will not be quick. On that basis, it might be more appropriate to qualify the right and restrict it to a situation in which the spouse is in occupation.

The Convener: On the other hand, there might be an interest, which is why occupancy has to be key. There might be a point if there is a right to enforce the burden, from the point of view of financial circumstances, or where preventing things from happening would affect the sale of matrimonial property and the later division of assets.

Kenneth Swinton: It is only a small point and I will not trouble the committee any further with it. I do not see that it serves any useful purpose to pursue the issue further.

The Convener: I was not too happy with the provision and I was interested in your comment.

Maureen Macmillan: I want to ask about the sunset rule as a method of discharging unwanted real burdens. Do you think that such a rule will operate effectively in practice, or will it be too complicated to access? Moreover, do you agree with the selection of 100 years as the relevant period, or is that just the blink of a lawyer's eye?

Kenneth Swinton: No matter what period you select, it will be arbitrary. If we are talking about burdens that have served a useful purpose but no longer do so, 100 years is as good a period as any. Such burdens may or may not have relevance. For example, an area might still have the same character that it had 100 years ago; a Victorian suburb might still be a Victorian suburb and might still be used for residential purposes. As a result, any rule is bound to be arbitrary. A hundred years is a reasonable lifespan for a burden; anything shorter is probably inappropriate. It will certainly get rid of old Victorian burdens such as public dung stances and other burdens that clutter up everyone's titles from Victorian times. The procedures are actually very straightforward if one can address all the issues required for the relevant notice, and I suspect that most people would have to engage a solicitor to prepare the requisite notice. That said, if we are going to have a rule, 100 years is a perfectly sensible period.

Maureen Macmillan: Will the rule be used when there are other ways, such as acquiescence and negative prescription, of getting rid of burdens? What sort of condition would remain after 100 years that had not already been got rid of?

Kenneth Swinton: For example, in the case of a condition regarding use as a suburban villa, changing that use to, say, a vet's surgery would still apply. Prescription and acquiescence will not apply unless there are similar breaches surrounding the burden that might bar a superior from founding on that particular breach.

Maureen Macmillan: What about negative prescription? Are you happy with the five-year expiry period?

Kenneth Swinton: It is a very sensible reduction. If the interest has been lost, we should just get on with it. Five years is a far more appropriate length of time to wait than the current 20-year period.

Maureen Macmillan: What about acquiescence? Is eight weeks the right amount of time in that regard?

Kenneth Swinton: We were certainly concerned about the long stop of eight weeks. Although acquiescence can occur before the end of the eight-week period, it has been long-stopped at eight weeks after the buildings are substantially complete. That could be a very long time. For example, with the Scottish Parliament building itself, building work could be going on for years—

The Convener: Please, no—do not mention the Parliament building.

Kenneth Swinton: It is a long stop. However, I suspect that, in practice, common law will apply. If obvious works are taking place on the property, acquiescence will set in long before substantial completion.

Lord James Douglas-Hamilton: As well as providing for discharge by adjacent proprietors, the bill provides a further method of discharge for community burdens, namely discharge by a majority of affected units. Do you support that additional method in principle and is it workable in practice?

Kenneth Swinton: It is a very good idea. However, any difficulty will be determined by the size of the community. For example, a large Wimpey development with 500 houses is a big threshold to reach. With a small development with 20 or 30 houses, it is far easier to reach the threshold. That said, it is a great idea in principle.

Paul Martin: What is your view on the proposed Lands Tribunal of Scotland reforms? Do you foresee any difficulties with that approach?

Kenneth Swinton: I echo Professor Paisley's evidence. The Lands Tribunal is an excellent institution that does a great job at the moment. We welcome it as the appropriate forum for determining these issues and do not perceive any particular difficulties with it, other than its potential work load. The committee should address the question of how it will cope with that work load to ensure that the tribunal remains adequately resourced for the business that it will be required to undertake.

Paul Martin: So you welcome the reforms, but the resources should be made available—

Kenneth Swinton: I think that it is a resources issue rather than anything else.

The Convener: Now that we have been alerted to that, we will keep an eye on it.

Paul Martin: I want to go back to the complicated question that I asked Professor Paisley about who can apply to have burdens varied or discharged, which you will recall. Do you think that someone who has entered into a contract to buy burdened property should be able to apply to the Lands Tribunal instead of only the owner being allowed to do so?

Kenneth Swinton: We have not addressed that in committee, so the fairest thing to say is that we have not formed a view on it. I am not convinced that we need to extend the indemnity arrangements to which Professor Paisley referred, because they work satisfactorily. The current

owner is indemnified against costs. Leaving the proposals as they are would simplify the jurisdiction of the Lands Tribunal.

Paul Martin: Do you think that the current system adds to the time involved in transactions such as the one that Professor Paisley set out?

Kenneth Swinton: I am not sure that extending the arrangements would result in significant time being saved. I have not thought the issue through, so the answer is that I am not sure. My gut feeling is that extending the arrangements would put an unnecessary complication into the bill.

The Convener: If your society comes to a different view, it will let us know.

Maureen Macmillan has a question on the famous 100m rule.

Maureen Macmillan: I am really quite interested in the rule because, when we were discussing the Abolition of Feudal Tenure etc (Scotland) Act 2000, solicitors in Inverness raised the issue with me. They said that a feudal condition was often involved in a conveyance when a farmer was feuing off land. The people who were going to build a house in the corner of his field would not keep dogs, because of the danger to livestock. Of course the 100m rule means that the burden cannot be transferred into the new conditions. I know that that is a small point and I do not know how commonplace such situations are. You heard Professor Paisley saying that it was an issue, but that in the great scheme of things it was not important enough to make him change his mind about the 100m rule. What is your view on the 100m rule?

Kenneth Swinton: There has to be a rule that is designed to limit the ability of former superiors to preserve their burdens. The limit has to be arbitrary so that it is easy to operate and 100m seems an entirely sensible figure to adopt. I do not think that the condition on the preservation of livestock is a real burden anyway, because livestock is moveable and the condition does not relate to the land.

I will give you an example of why I think that the 100m rule is appropriate. It would be all too easy for the superior to engage the provisions of section 18 to reallot burdens where they retain some sort of property. In titles for estates that have been developed, we find quite often that there have been little conveyancing accidents and that little pockets of property are left over.

A couple of years ago, I was putting an extension on my house and I applied to the superior to find out how much he would charge me for a minute of waiver. He wanted £250 and his solicitors wanted £250 plus VAT to grant me a minute of waiver. All that I was doing was adding to my house an extra bedroom that matched entirely the existing style, and my neighbours did not object to it. By an accident, there is a lane within 100m. If we had a right to reallot the burden on to adjacent or nearby property, the superior could have preserved that burden post the abolition of feudal tenure, but there is no building on the lane so he cannot preserve the burden.

It would be all too easy for superiors to preserve the ability to extract money. I may say that I did not pay. I have been in breach of my feuing conditions ever since, but I do not care. However, I do not care because my superior stays in the Borders and I stay in Dundee, so I do not know what interest he has to enforce it.

15:15

Maureen Macmillan: The Scottish Landowners Federation would not agree with you. It suggests that feudal superiors will not go to the time, trouble and expense of saving all but the most worthwhile feudal burdens and that they will save only those where the legal advice is that there would be interest to enforce. Accordingly, the protection supposedly afforded by the 100m rule is unnecessary. It thinks that the rule should not be there and that the feudal superiors would hardly use it anyway.

Kenneth Swinton: If feudal superiors have no interest to enforce it now, it is not valid, it is not enforceable and they will not have any interest to enforce it in the future. What is the change?

The Convener: We have consolidated views on the 100m rule.

Maureen Macmillan: I do not know what Lord James thinks about it.

The Convener: Lord James, do you feel compelled to ask something about the 100m rule?

Lord James Douglas-Hamilton: I am listening and learning.

The Convener: I am wondering who Kenneth Swinton's superior is and whether they will read the *Official Report*. Do they know you have breached your conditions?

Kenneth Swinton: I am prepared to run that risk.

Ms Alexander: I want to ask about the same issue of the development value burdens and the clawback. Are you comfortable with the bill's approach to those two issues, in particular the decision to preserve existing feudal burdens of that type, the way in which compensation is being dealt with and whether the standard securities legislation is adequate or whether it will need to be revisited?

Kenneth Swinton: I endorse everything that Professor Paisley said about standard securities legislation requiring to be updated. It is not just a question of the Conveyancing and Feudal Reform (Scotland) Act 1970, and the Mortgage Rights (Scotland) Act 2001 in so far as it amended the 1970 act, in relation to standard securities. The matter requires revisiting urgently. That is clear-cut.

There is a significant amount of misconception about what a development value burden is. It is defined closely in section 33 of the Abolition of Feudal Tenure etc (Scotland) Act 2000. There must be a sale at less than market value or no consideration at all at the time the burden was first imposed. The classic example is the superior who gives an area of ground for a tennis court without any consideration. That is not the situation—section 33 does not apply—when a farmer sells off his fields for agricultural value with the potential for future development. Development value burdens are a bit of a misnomer, but that is what is in section 33 of the 1970 act.

It is difficult to frame things as a real burden in a satisfactory way at the moment in order to have some sort of clawback. The typical situation is the farmer who sells off the field for future development. He wants to share in the appreciation and value of that property, normally for a limited period. My experience is that that is always done by way of a contract secured by a standard security. Perhaps I am not clever, but I cannot devise a burden that will be enforceable. Burdens that say the vendor will have a share in a future value will fail the Tailors of Aberdeen v Coutts test for precision and that is clear-cut. I do not know how one would frame it.

Ms Alexander: What conclusion do you draw from that? If we accept the analysis as given, are there extraneous provisions that are unnecessary clutter or are you happy to leave them on the basis of the circumstances in which they will be used?

Kenneth Swinton: Development value burdens are a done deal—they are in the 1970 act. There is nothing about clawback other than the amendment of the standard security ranking provisions in the 1970 act. I am not so sure that the issue is active. My experience has always been that the developer's finance is a first charge and the clawback provisions are already a second charge, so it does not make much difference. The point is well made and the proposed amendment to the ranking provisions in section 13 of the 1970 act is welcome.

Ms Alexander: We have already covered the second point.

The Convener: Unless Kenneth Swinton wants to say something about the fact that two witnesses have said that we must revisit the standard security legislation urgently.

Kenneth Swinton: That is a much bigger task that will produce another bill as large as the one under discussion. The Scottish Law Commission should be invited to engage in that task as a matter of urgency.

The Convener: Perhaps some of us will be back in the next four years and will have the pleasure of that task.

Lord James Douglas-Hamilton: Following on from the last point, would it be in order to invite the Scottish Law Commission to comment on that particular issue and on the prospect of the commission doing a report on standard securities?

The Convener: I know that some members of the Scottish Law Commission are sitting in on the meeting in an informal capacity and we would be delighted to hear their comments on that matter.

15:20

Meeting suspended.

15:31

On resuming—

The Convener: In the interests of keeping good time, I now reconvene this meeting of the Justice 1 Committee. I forgot to welcome everybody back from their holidays—but, hey, we just plunge straight in in this committee. There is no time for such niceties. I am thrilled by today's attendance. We must get a bigger venue if we continue to receive the same interest in the Title Conditions (Scotland) Bill.

We will now take evidence from John McNeil, who is a member of the conveyancing committee of the Law Society of Scotland, and Linsey Lewin, who is the deputy director of the Law Society of Scotland. Thank you very much for coming. I hope that you got coffee or tea—or perhaps we knocked you over in the rush.

John McNeil (Law Society of Scotland): Water only, convener.

The Convener: I ask you what I asked the previous witness. When do your members, in their experience and practice, encounter problems in relation to real burdens? Do you have any examples, or would you repeat what we have just heard?

John McNeil: I am more than happy to subscribe to what was said by Ken Swinton and Professor Paisley. Generally, the situation is all right as the law stands, but it certainly will not be when the feudal system is abolished. Something must be put in place to fill the void with regard to

the enforcement and continuing validity of feudal burdens. That is what the Title Conditions (Scotland) Bill will do—leaving aside the provisions for reallotment in the Abolition of Feudal Tenure etc (Scotland) Act 2000. The bill sets up a code for the creation, variation, extinction and enforcement of real burdens. To that extent, it is very much to be welcomed.

The Convener: I do not wish to malign academics, to whom we are greatly indebted, but this is good stuff for practitioners.

John McNeil: Yes. The benefit of certainty that codification should bring with it—

The Convener: Typical lawyer. You have hedged your bets.

John McNeil: No, it is something that the Law Society really welcomes.

The Convener: It is clear from the range of written responses that have been received that it is important that the bill should strike a balance between the interests and rights of the benefited proprietor and those of the burdened proprietor. Paragraph 5 of your written submission suggests that certain provisions in the bill shift the balance too far in favour of the burdened proprietor. In particular, it says:

"there are detailed provisions in this Bill (for example regarding acquiescence), which may potentially shift the rights of the enforcer to the rights of the enforcee excessively."

It also says that you will give the Executive a more detailed note. Have you done that?

John McNeil: We have not done that yet, I am afraid, but we will do so shortly.

The Convener: Could you give us the highlights of that note?

John McNeil: With regard to the new provisions on acquiescence, there seems to be a fairly dramatic shift from the rights of the enforcer to the rights of the person who is burdened by the specific burden. As has already been discussed, we are talking about a very limited period—eight weeks from completion of the works in breach of the real burden—after which one loses the right to enforce that burden.

The Convener: Could you give us an example?

John McNeil: Members have mentioned people going away for extended periods, either on holiday or on business, totally unaware of what might be going on next door. They come back three months later to find that a substantial extension has been built on to the adjoining property, which has a prohibition in the title deeds against such a construction, but they have been unable to do anything about it.

The Convener: In those circumstances, would there not have been notification under planning legislation? Sometimes one does not need planning consent, of course.

John McNeil: That is right. Neighbour notification would certainly be required under building regulations, but not necessarily under planning legislation. It would depend on the size of the structure, or on whether it is in a conservation area or is an extension to a listed building.

The Convener: So you do not endorse everything that Professor Paisley and other witnesses said about the eight-week limit not being a problem.

John McNeil: We had some reservations about it. We propose to give the Executive some practical examples of the kind of situation that might arise. I am not saying that we are opposed to it root and branch, or anything even remotely approaching that.

The Convener: I know, but I think that some members wonder about the issue that you have raised. It is quite common now for people to take three months away in the sun, but not for me, I have to say. MSPs do not generally have that fortunate opportunity.

John McNeil: Members of the legal profession, as you well know, convener—

The Convener: Are very hard done by. [*Laughter.*] Now, before this love-in proceeds any further, Michael Matheson has a question.

Michael Matheson: Mr McNeil, I think that you were present during the other evidence session that we held, so you will be familiar with the line of questioning on the 4m rule. You will know that the Executive has chosen to take a different route from that proposed by the Scottish Law Commission. Do you think that the Executive's proposal is the best route?

John McNeil: Yes, definitely. We much prefer the Executive proposal to the Scottish Law Commission's proposal, for the reasons that have already been enunciated by Professor Paisley and Mr Swinton.

Michael Matheson: That seems straightforward. I turn now to section 48 which, in conjunction with section 52, creates new implied rights to enforce in certain circumstances where none existed previously. Do you think that that is a good idea?

John McNeil: I hate to disagree with my colleagues from the Scottish Law Agents Society, but we do disagree. We are in favour of the Executive's proposal. I touched on the issue of a vacuum being created by the abolition of feudal burdens. In the sort of situation described by

Professor Paisley as a Hislop v MacRitchie situation, there is a "community", as that word is used in the bill, in which more than four houses have similar or identical burdens and other title conditions in the deeds. Even though there may be no express right to enforce those burdens, where it is obviously in the interests of the community that there should be uniformity in development and that people should behave—or refrain from behaving—in a certain way, it is right that a statutory power should exist to enforce burdens in cases where, under the old law, they might otherwise merely have been implied. That is also the case for the various categories that are described in section 52. We are in favour of the provision.

Michael Matheson: You indicate in your submission that you are concerned about the implied right to enforce the so-called "neighbourhood burdens" that can be preserved by registering a notice. Will you expand on those concerns?

John McNeil: Are you referring to section 28? If not, would you direct me to the section of the bill to which we refer in our comments?

Michael Matheson: It is 46.

The Convener: We will direct you to the correct paragraph in your submission—it is paragraph 10.

John McNeil: Thank you. I now see that the member is referring to paragraph 10 of our submission, which is headed "Implied Rights of Enforcement" and which sets out our concerns about the amount of information that requires to be incorporated into the notice of preservation. The notice of preservation requires five issues to be covered. The notice shall

"identify the land which is the burdened property … the land which is the benefited property … set out the midcouples"

linking the title of the applicant to the last registered proprietor;

"set out the terms of the real burden; and … the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above."

That is an awful rigmarole for people to have to go through and one would anticipate that it would give rise to quite a lot of expense. The average lay person could not go through that process without assistance from a solicitor or other legally qualified person.

Michael Matheson: Is the process unduly bureaucratic?

John McNeil: Yes. That is a better word.

Lord James Douglas-Hamilton: I have three questions for Mr John McNeil. In your submission, you express concerns about extending the right to enforce real burdens to certain categories of non-owners in occupation. Will you remind the committee what those concerns are? Do they outweigh the concern that people other than owners have a legitimate and distinct interest in the enforcement of real burdens?

John McNeil: I realise that this is a tricky area. The society has no objection to the principle that all persons with a legitimate interest to enforce, as defined in the bill, should be able to do so, but we are worried about the fact that a person seeking to have a particular burden varied, waived or discharged will not know on whom to serve the notice. That is because there is no public record of tenants or, more particularly, non-entitled spouses.

We take the rather archaic view that it is not appropriate for a non-entitled spouse to have an unfettered right to enforce real burdens. We would prefer the right to be restricted to the case that Mr Swinton mentioned—of a non-entitled spouse who is in occupation of the burdened property. The introduction of an unfettered right to enforce real burdens might give rise to capricious or malicious attempts to make difficulties for the entitled spouse in situations of marital estrangement.

15:45

Lord James Douglas-Hamilton: You may have answered this question already, but how great do you think the implications of the measure would be in practice, given that non-owners in occupation would have a right only to enforce real burdens, as opposed to a right to enforce and discharge them?

John McNeil: It would certainly not be appropriate for non-owners in occupation to have a right to discharge real burdens, because they do not have an interest in the title of the property. They are not burdened or benefited proprietors in the true sense.

Lord James Douglas-Hamilton: Would you be happier if the right to enforce were restricted to tenants under long leases?

John McNeil: I would. That is only my personal view, as we have not discussed the issue in the conveyancing committee. I take it that by long leases you mean leases of 20 years or more.

The Convener: I was about to ask you to define a long lease.

John McNeil: Registration would deal with my major concern about lack of knowledge regarding the identity of tenants.

The Convener: We should ask tenants organisations about that issue. Some people in five-year tenancies renew those for a further five years. They can be in a property for a long time. I understand what you are saying.

John McNeil: In my view, it would be wholly inappropriate to enable a tenant under a short assured tenancy—which is by far the most common residential tenancy nowadays—to become involved in the enforcement of regulations that apply to the land on which a property is located.

The Convener: Is there not a test of interest?

John McNeil: People must demonstrate an interest, but short assured tenancies have a maximum duration of five years. If the right to enforce were extended to residential property, it would have to relate to non-assured tenancies—tenancies that are outwith the housing acts and are between five and 20 years in duration.

Lord James Douglas-Hamilton: If the right to enforce were restricted to tenants, would you want it to apply to those with leases of five years or more?

John McNeil: Yes—to tenancies longer than five years.

Ms Alexander: I have a question about the powers to instruct common maintenance. In your written evidence, you make clear that you are broadly in favour of majority decision making by the community. However, you have some concerns about section 28, especially its provision for the default rule of majority decision making. Could you elaborate on those concerns?

John McNeil: At issue is the amount of detail that must be supplied when a majority proposes to instruct repairs or maintenance. Section 28(4) would require any notice to contain information on

"(a) the estimated cost of carrying out that maintenance;

(b) why the estimate is considered a reasonable estimate;

(c) how—

(i) the sum required from the owner in question; and

(ii) the apportionment among the owners,

have been arrived at;

(d) what the apportioned shares of the other owners are".

That would involve a great deal of research. The notice would also have to provide information on

"(e) the date on which the decision to carry out the maintenance was taken and the names of those by whom it was taken;"

and

"(f) a timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be—

(i) commenced; and

(ii) completed".

Subsection (4) continues with two further paragraphs, but those that I have mentioned are ones that cause us concerns because of the amount of detailed information that is required to be provided before the provisions of the relevant sections click in.

Ms Alexander: Convener, we will obviously have to return to the issue, but at this stage it is sufficient that it has been flagged up.

The Convener: Yes. We will move on to Maureen Macmillan's question.

Maureen Macmillan: The Law Society's written evidence supports the sunset rule as a method of discharging burdens. Will you expand on why the society supports that rule? Are you happy with the 100-year provision or would you like it to be 200 years?

John McNeil: I do not know about anyone else, but I for one would be a little concerned if it were 200 years.

Maureen Macmillan: Well, somebody said that 100 years was just the blink of an eye to a lawyer.

John McNeil: Thank you, Maureen.

As has already been said twice this afternoon, if we are to have a sunset rule—and the Law Society certainly thinks that we should—a cut-off period is required. For that, 100 years seems about right. There are a number of 100-year-old feu charters that are still in existence, some of which are chock-full of prohibitions against using houses as tanneries and tallow works and heaven knows what. Such prohibitions are completely irrelevant and inappropriate in this day and age but—believe it or not—they are theoretically still enforceable. Thus, if perchance one were able to give the planners the slip and set up an illicit still in the back garden, even though one's title emanated from a feu charter that was granted in 1855, that feu charter could still be enforced by the superior if he or she could be found. The superior could still stop the activity taking place. In fact, until 9 June 2000 the superior could have irritated the feu.

The answer to the question is yes. We approve of the sunset rule. The choice of 100 years seems good. Fifty years would be a bit short. It is more than 50 years since the second world war, but hundreds and hundreds of feu charters that were granted 50 years ago contain conditions that are still perfectly valid and perfectly appropriate in 2002.

The Convener: I think that everyone is agreed that the 100-year rule is fine. Let us move on.

Maureen Macmillan: I want to go back to the subject of acquiescence. John McNeil said that he was not happy with the eight-week period that is provided for by the bill. Ought the bill to contain more safeguards to maintain a balance?

John McNeil: I do not think so. We are not worried about the bill's proposal on acquiescence;

on the contrary, we approve of it because it will mean that real burdens are no longer enforceable. We simply had a question about the period of time that the bill mentions. We thought that 12 weeks, which is three months, might be better.

Maureen Macmillan: I see that it is not a big issue.

Paul Martin: My question for John McNeil is the same as that which I put to Professor Paisley and Mr Swinton. What is your view on the effect of the proposed reform on the Lands Tribunal for Scotland? Do you foresee any difficulties?

John McNeil: Again, we very much welcome the proposals. As of now, the Lands Tribunal is a thoroughly useful and effective tribunal. As Roddy Paisley said, heaven only knows how the tribunal gets through the work that it does at the moment, but the bill will undoubtedly generate serious resources implications.

The other piece of great news in the bill is the fact that the Executive has taken the trouble to introduce a provision that will allow the tribunal to adjudicate on the validity, as opposed to the enforceability, of real burdens. I think that I am right to say that the Scottish Law Commission recommended that that provision should be included in the bill. It has been mentioned in the committee's briefing papers and elsewhere that previously, as a preliminary step, people had to go to the courts to resolve disputes with the other side about whether a real burden was valid. As that doubled the court procedures and probably tripled the expense, we very much approve of the provision.

Paul Martin: Are the resources that are made available to the tribunal also an issue?

John McNeil: Yes.

Paul Martin: I will ask the same question that I put to the previous witnesses about who can apply to have the burdens varied and discharged. Professor Paisley had his own views about an applicant who has entered into a contractual agreement, rather than the selling agent, or the seller, being able to make that application. What are the Law Society's views?

John McNeil: Are you talking about the situation in which the purchaser of a property has in place what we call missives—that is, a contract—but the price remains unpaid and the title has not yet been transferred?

Paul Martin: No. Professor Paisley suggested that someone who has concluded a contract to purchase a property should have the right to apply to the Lands Tribunal to have the burden discharged.

John McNeil: That is precisely what I was saying when I referred to missives.

I do not think that the Law Society's conveyancing committee has addressed that matter but, personally, I have no issue with it. A definite interest arises and if, as Professor Paisley said, the purchaser is going to pull all the strings with regard to the application, why not make it possible for the application to proceed in the purchaser's name?

Paul Martin: Would that reduce the length of time taken by the transaction? That is the point that Professor Paisley raised.

John McNeil: I do not know. In practice, the contract is made what we call suspensively conditional on those issues being resolved—in other words, the transaction is put on hold. That means that the purchaser has a written option to acquire the property, subject to the requisite permissions—or, in this case, the requisite discharge of the real burdens—being obtained. Usually, the suspensive conditions relate to planning and building control approvals and so on. Neither Linsey Lewin nor I think that there would be material effects—or any effects at all—on the time scales.

Paul Martin: Thank you for that helpful response.

Michael Matheson: I turn briefly to the potential impact on the Lands Tribunal, about which concern was expressed in the evidence that we heard this afternoon. In the explanatory notes, which I just flicked through, the Executive states that it would find it difficult to quantify how much more business the tribunal will get as a result of the bill. I note that the Executive believes that the tribunal may require only one additional part-time member to pick up the extra work generated by the legislation. Are you inclined to agree with the Executive?

John McNeil: To be honest, I could not comment with certainty on that. Obviously, the Executive has looked into the situation, and the answer undoubtedly depends to a huge extent on how much extra work is generated for the tribunal and on how many applications are made to it.

I would not be at all surprised if, as Roddy Paisley said, the tribunal had to appoint a second chairman—in fact, a second division of the tribunal might be required. It will depend on how many applications are made by former superiors, prior to the appointed day, for reallotment by the tribunal of burdens on other land that is owned by them, in circumstances in which there is within 100m no building that is in the ownership of the former superior, and they have approached the vassal—the feuar—to see whether they would be prepared to consent to the reallotment of the burden after the appointed day. I suspect that the answer to that in 103 per cent of cases will be no. In every

case in which a superior considers it to be vital to reallot, he, she or it—if it is a corporation—will automatically have to go the Lands Tribunal. That could cover Maureen Macmillan's concerns regarding agricultural property and rural property in general.

16:00

The Convener: The explanatory notes say:

"The additional costs may be of the order of £55,000 per annum".

They also claim that that figure

"will not be wholly attributable to the Bill, since the Tribunal"

will

"deal with the combined effect of a number of pieces of legislation".

The committee will monitor that—it does not seem to be what the evidence that we have had suggests. If anything is coming across, it is a hint that the Lands Tribunal might not even have sufficient funds at the moment. I do not ask you to comment on that, but it seems to be the case now. We may have to address that. I point members to the explanatory notes.

For variety, the questions on the 100m rule now pass from Maureen Macmillan to Michael Matheson.

Michael Matheson: I will ask about the bill's interaction with the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the 100m rule. The Law Society of Scotland is in favour of the 100m rule that is proposed in the bill, but the evidence that we have received from the Scottish Landowners Federation suggests that the rule is unnecessary because its members will be interested only in burdens that they consider to be important and will not pursue the others. Are you inclined to agree with the Scottish Landowners Federation?

John McNeil: I have no idea what the Scottish Landowners Federation is getting at with that comment. If we are going to abolish the right to enforce feudal burdens at the same time as there ceases to be an interest called the superiority, the burdens that are worth retaining should be retained and there should be some mechanism for enabling them to be reallotted to another benefited property in the ownership of the former superior. If we are going to say that all that is needed is another property, interest—as opposed to title—flies out of the window altogether. The superior must have an interest as well as title to enforce a burden.

The Scottish Law Commission came up with the bright idea of parking within 100m a building that the superior happens to own. That building could then become a benefited property, which would entitle the superior and their successors in the ownership of that newly benefited property to continue to enforce a burden that they consider important to be maintained in perpetuity—speaking technically—from the point of view of their amenity and interests. That is a compromise. Like all the limits in the bill—whether of time, space or anything else—it is an intelligent guess at what is a reasonable intervening space.

The Convener: We have exhausted that line of questioning.

Ms Alexander: I return to an issue on which we touched earlier: development value burdens and clawback. We are interested in the decision not to preserve feudal burdens of that type, how compensation has been dealt with and whether the amendments to the legislation on standard securities are adequate.

John McNeil: I will deal first with the last of those issues. We are happy with the proposed amendment to the Conveyancing and Feudal Reform (Scotland) Act 1970. I share the views of Professor Paisley and Ken Swinton that the law relating to standard securities requires re-examination. It does not require re-examination quite as urgently as they imply, but it needs to be looked at long and hard.

Quoad the bill, the proposed change is fine and would clear up whether a standard security that is used to secure anything other than a debt in money or money's worth is valid as a security. That was the uncertain area as far as standard securities are concerned.

Of course, apart from that, our views on the continuation of development value of burdens and the enforcement of existing clawback provisions seem to differ radically from those of the other people who have given evidence this afternoon. In fact, the information that we have gathered from our members has led us to the conclusion that the so-called development value burdens—whether they are burdens or not does not interest me—are used widely to ensure a kickback in the event of a change to the express purpose for which a property was sold at a price that was less than it was worth. To my mind, that is only fair and reasonable.

It seems to me, to the members of my working party and to the members of the conveyancing committee, which is above the working party, that it is quite wrong for the state to intervene and say that a payment of compensation in accordance with the terms that are set out in a contract that has been freely entered into cannot be enforced simply because it is held to be unenforceable as a result of the burdened property having changed hands. That is where we stand. We are root-and-branch opposed to the entire part of the bill that

deals with development value of burdens and clawback. We think that the burdens—whatever they are—should be enforceable in accordance with their terms, whether they were imposed in a grant in feu or in a straight disposition.

Ms Alexander: Because it is such a point of dispute, it raises the question of the frequency with which some of the problems arise. That is not a subject for discussion at this meeting, but is something that we might want to take up offline in written correspondence.

John McNeil: We have been opposed to the proposition ever since the Abolition of Feudal Tenure etc (Scotland) Act 2000 was in bill form. We made repeated representations on the matter at the time and were told firmly, in the results of the Executive's recent consultation exercise, that there was to be no change.

The Convener: The last question of the afternoon might be less contentious, although it is wonderful to have lawyers scrapping with each other—nothing changes.

Your written submission says that it might be better to have the appointed days of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Bill one year apart. That is strange because we are told that the two pieces of legislation are so locked together that they must be launched on the same appointed day if they are to function. Are your views affected by the consideration that most of the work that must be done under the Abolition of Feudal Tenure etc (Scotland) Act 2000 must be done prior to the appointed day, whereas most of the work for the Title Conditions (Scotland) Bill must be done after that day? Are your concerns simply to do with the workload of solicitors?

John McNeil: Basically, they are. We do not feel particularly strongly about that point, but we are thinking of the interests of our members, who will have a heck of a lot of work to do prior to the appointed day. They have to consider carefully whether they should advise feudal superiors, if they act for them—

The Convener: Are not they already doing that? I understand that good conveyancers—whom you represent, obviously—are already looking ahead and are building that work into the system.

John McNeil: Absolutely. However, I do not think that the forms and so on are available yet—correct me if I am wrong. I do not think that we can actually do anything practical yet. In any case, I do not think that the appointed day has been decided.

The Convener: It is not a major point.

John McNeil: It is definitely not. We simply thought that it would be possible to deal with the feudal system being abolished on one appointed day while leaving the provisions regarding the reallotment of burdens to coincide with the appointed day for bringing into force the other eventual act.

The Convener: My notes advise me—this is not from my own brains—that feudal burdens must be preserved prior to the appointed day, and I am advised that that relates to the bulk of solicitors' work in this area. Such matters should be off the desk, as it were, before any work requires to be done on title conditions.

John McNeil: I understand that fully but, if I may repeat this point, we thought that we could make the appointed day for the coming into force of the Title Conditions (Scotland) Bill coincide with the coming into force of the feudal burdens element of the Abolition of Feudal Tenure etc (Scotland) Act 2000, but get rid of the feudal system a year earlier. That would deal with all the carry-on about paying off outstanding feu duties and so on.

The Convener: Scott Wortley, the committee's adviser, is noting that. We will chew on some of the more technical aspects.

John McNeil: He will be saying, "There's old McNeil flying a kite again."

The Convener: That is not quite what he has written down.

That concludes this part of the evidence-taking session. I thank John McNeil and Linsey Lewin for taking part.

I apologise to members, but we have to fly on. The committee might prefer to cover the petitions now—we can change the order of the agenda. I ask the clerk to check whether the petitioners are waiting outside the room.

Petitions

The Convener: Item 5 on the agenda covers the petitions that are before us. I welcome Cathie Craigie to the committee. I would like to go ahead and swap agenda items 4 and 5, with the committee's leave.

Members *indicated agreement*.

The Convener: I know that James Douglas-Hamilton has another engagement. I note that the petitioners behind PE29, Mr and Mrs Dekker, are here.

Road Traffic Accidents (PE29, PE55, PE299, PE331, PE111)

The Convener: I ask members to refer to petitions PE29, PE55, PE299, PE331 and PE111, and to paper J1/02/28/8, which is entitled "Dangerous Driving and the Law". Members will recall that, on the committee's behalf, I wrote to the Minister for Justice about this subject on 15 May. The response was sent on 19 June and is contained in the papers that members have in front of them.

A number of options are presented. One is to write back to the minister or to the Lord Advocate, seeking additional information such as time scales for the work of the steering group on the Department for Transport, Local Government and the Regions report—we now have that report. Another is to wait for an announcement on the outcomes of the work of the steering group on the DTLR report and consider the petitions again at that stage. The third option is to copy the responses from the Minister for Justice and the Lord Advocate to the petitioners and to end our consideration of the petitions at this stage. Before I express my views I invite the views of other committee members.

16:15

Lord James Douglas-Hamilton: There is a strong case for writing to the minister or the Lord Advocate for further information. Also, we could deal with the matter more comprehensively if we waited to hear the steering group's considerations.

Maureen Macmillan: I agree.

The Convener: We should also consider the time scales.

Michael Matheson: I, too, agree with Lord James. We have been pursuing the issue for some time; it has been drawn out while we waited for the results of a piece of research. We had those results at the start of the year, but now a steering group has been set up. When we write to the minister, we should ask whether the matter could be expedited. It seems to drag on and on. If we are told that the steering group will sit for about a year, it might be quicker to do something ourselves rather than to wait. However, I am happy to wait if the time scale is reasonable. We need to impress on the minister the need for concrete action as opposed to the setting up of more groups.

Maureen Macmillan: I endorse what Michael Matheson said. We certainly do not want to end our consideration of the matter, because we all feel strongly about it. As Michael said, it is time that the matter was brought to a conclusion. We must hear from the minister about time scales so that we know that something will happen in the near future. We must not be put off for months. How long have we been considering this? It seems interminable.

Michael Matheson: The original—

The Convener: Could you speak through the chair so that we do not have free chat?

Michael Matheson: We started on this away back in the old Justice and Home Affairs Committee, so it has been going on for some time.

The Convener: We should also know whom the members of the steering group will be. Let us have more fingers in the pie and let us ask about the time scales. We were firm in our recommendations and, as Michael says, this has been going on since the early days of the Justice and Home Affairs Committee. There is a hint in the air that the issue might be kicked into touch and that must not happen.

If members are content with the suggestion, we will write to the minister and send a copy to the petitioners. The Lord Advocate must also receive a copy of the letter. We will keep the petitioners advised of any other correspondence; they can be assured that the committee is not prepared simply to pay lip service to the matter—we are seriously engaged in it.

Members *indicated agreement.*

The Convener: It will be for the minister to progress the matter.

Clydesdale Horses (Couping) (PE347)

The Convener: The next petition is on the couping of Clydesdale horses. Maureen Macmillan has spoken to Sylvia Jackson.

Maureen Macmillan: Yes—I am very concerned about petition PE347. Sylvia Jackson is indisposed at present—she has had an operation and cannot be here today—but she spoke to me at some length this morning because she is concerned that couping is still happening. People

who are in a position to know tell us that couping goes against animal welfare. However, the Clydesdale Horse Society contests that.

Sylvia Jackson says that, if we try to make couping illegal, the problem of the definition of couping will arise. People who use the practice will say that they do not actually coup. It is therefore suggested that, in order to prevent harm to horses, it might be better to ensure that vets are present when such shoeing is undertaken. We should not just note the petition and take no further action; we must examine the matter in more detail.

The Convener: It is regrettable that the petitioner, Mr Kenneth Mitchell, who was a registered farrier—it is interesting that he was in the business—has died since he submitted the petition. Mr Jim Sharp is now the primary contact on the petition. Mr Sharp has sent a further paper, which is numbered J1/02/28/14, to ask the committee to take action to ban couping. I add that because we leapt in with the proposal that Sylvia Jackson has made through Maureen Macmillan.

Michael Matheson: I am slightly reluctant for couping to be made an offence, although the Criminal Justice (Scotland) Bill might offer space to do that, because it deals with miscellaneous issues.

I endorse what Maureen Macmillan said on Sylvia Jackson's behalf. Perhaps we should consider ensuring that vets are present if couping is to take place, although I am not sure about the practicalities of that. We need more guidance from people who are concerned about animal welfare, particularly vets, who might have first-hand experience of the practice. Perhaps the British Equine Veterinary Association, which I presume is fairly expert on the welfare of horses, should be invited to give us its views on ways in which to address the matter.

Lord James Douglas-Hamilton: I support the idea of obtaining evidence from veterinary organisations, because the evidence that we have conflicts. Expert information would help us enormously in finding the best way forward.

The Convener: I, too, endorse that. I do not want the issue to slip off the desk. I declare an interest as a member of the cross-party animal welfare group. I do not know whether a Scottish equine veterinary association exists—the British Equine Veterinary Association is mentioned in our committee papers. That association has expressed concerns and sent detailed information to the Public Petitions Committee, so we can produce papers about that organisation's views.

As convener, I will write a letter to the association and copy it to the Public Petitions Committee. The letter will contain the suggestion that Maureen Macmillan made on Sylvia Jackson's behalf and will ask for the association's views not only on the practice of couping, but on the practicalities, propriety and usefulness of a vet's presence during couping. On the surface, couping seems to be a pointless exercise that ought to end.

Lord James Douglas-Hamilton: I, too, am a member of the cross-party group on animal welfare.

The Convener: I knew that.

Michael Matheson: It is all coming out now.

The Convener: We are all animal lovers here.

Do members agree to that suggestion? We will make that part of the normal correspondence and send a copy to Sylvia Jackson.

Maureen Macmillan: Should we appoint a reporter to investigate the matter?

The Convener: That idea crossed my mind, but I wonder whether to do so is important at this stage. We must first obtain a response from the British Equine Veterinary Association, then we can form a view. I am advised that a reporter must be a member of the committee. Given our work load, it is unfortunate that we cannot appropriate somebody, but I have been told that the rules do not allow for that.

We might also send a copy of the correspondence to the cross-party group on animal welfare, which has dealt with the issue. We will ensure that all parts of the operation that have an interest are informed.

Public Appointments and Public Bodies etc (Scotland) Bill

The Convener: We now revert to agenda item 4. I refer members to paper J1/02/28/7, which sets out the background to the Public Appointments and Public Bodies etc (Scotland) Bill and the relevant evidence from the Scottish Conveyancing and Executry Services Board, which appeared before us during our inquiry into regulation of the legal profession.

The Parliamentary Bureau has designated the Justice 1 Committee as secondary committee on the bill. Do members wish to report to the Local Government Committee on the bill? If so, are members content to consider at a future meeting a draft response that is based on the evidence that we took during our inquiry on regulation of the legal profession? The bill's four objectives are described in the paper. The part that interests us is the abolition of the Scottish Conveyancing and Executry Services Board. Are members content to take that proposed route?

Members *indicated agreement*.

The Convener: Members might recall that, early in this life, we decided to discuss agenda item 6, which concerns witness expenses, in private.

16:25

Meeting continued in private until 16:26.

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