JUSTICE 1 COMMITTEE

Tuesday 10 September 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
29th 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:

Mr Kenneth Macintosh (Eastwood) (Lab)

WITNESSES

John W Curran (Ledingham Chalmers Solicitors)
Alan English (Royal Institution of Chartered Surveyors in Scotland)
Linda Ewart (Scottish Federation of Housing Associations)
Marie Galbraith (Sheltered and Retirement Housing Owners Confederation)
David Gill (Homes for Scotland)
Elaine Hook (Royal Institution of Chartered Surveyors in Scotland)
Stewart Kinsman (Hanover (Scotland) Housing Association)
John McCormick (McSparran McCormick)
Margaret Reid (Sheltered and Retirement Housing Owners Confederation)
John Smart (Ledingham Chalmers Solicitors)
Alison Thompson (T C Young)
Neil Watt (Property Managers Association)
Angela Yih (Age Concern Scotland)

ACTING CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Tuesday 10 September 2002

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 13:49*]

14:00

Meeting continued in public.

Convener's Report

The Convener (Christine Grahame): I welcome everyone to the 29th meeting this year of the Justice 1 Committee and ask members to ensure that they have switched off their mobile phones and pagers. I should inform everyone that Kenneth Macintosh might attend part of today's meeting.

Last week, we decided to take in private the first item on the agenda, which was to discuss lines of questioning for witnesses. As a result, we now move to agenda item 2. I refer members to paper J1/02/29/11, which is the minister's response to the points that we raised about Dungavel detention centre. In particular, we asked whether the chief inspector of prisons could inspect the centre. The substance of the response is that detention centres are a reserved matter under the Scotland Act 1998. Do members have any other comments or should we simply move on?

Michael Matheson (Central Scotland) (SNP): Should we pass a copy of the response to the cross-party group on refugees and asylum seekers for its interest?

The Convener: Yes. Most of the movement on the issue came from that group. Are members content to do that for the moment?

Maureen Macmillan (Highlands and Islands) (Lab): Did we write to the Minister for Justice at the cross-party group's request?

The Convener: I cannot recall. I think that the issue came up in a meeting with Clive Fairweather.

Members will see that a letter from Margaret Curran, the Minister for Social Justice, is also attached. It refers to the response that she received from Jeff Rooker of the Home Office. There have been several fingers in the pie, as it were, but it would be useful to send a copy of the response to the cross-party group on refugees and asylum seekers, which may wish to comment.

If members are satisfied with that, I can now welcome our witnesses as they take their seats. There are so many of them that they are almost like a Welsh choir, waiting to burst into song. Perhaps that would cheer us up, because the Title Conditions (Scotland) Bill has been pretty heavy going for us brave members who have taken questions.

Before I march on—I beg the committee's pardon for being distracted—I advise members that, if they wish to suggest topics for discussion at the justice committees' joint meeting on 17 September, when we will be taking stock with the Minister for Justice, they should contact the clerks by 5 o'clock tomorrow. I should also mention that, as I have said before, I intend to bid for a committee debate in the chamber on the committee's report on the prison estates review. Bids will be considered at this afternoon's conveners liaison group meeting. I must therefore leave at about 3.55 pm to make my pitch.

I also inform members that, as they will have seen from the business bulletin, motion S1M-3210, in the name of Cathie Craigie, on causing death by dangerous driving, has been selected for the members' business debate on Thursday. Like me, members may wish to attend and speak in that debate, in which the committee has had an interest. I commend that debate to members.

Title Conditions (Scotland) Bill: Stage 1

The Convener: If I may now move on, let me properly introduce my Welsh choir. Before doing so, I must first formally welcome Scott Wortley. As the committee's adviser on the bill, this man is dreadfully needed and is providing us with detailed and expert information.

I welcome our witnesses: Neil Watt, who is a past president of the Property Managers Association; David Gill, who is the chairman of Homes for Scotland and the managing director of CALA Homes West (Scotland) Ltd; John Curran, who is a partner in Ledingham Chalmers Solicitors, and John Smart, who is an associate there; and Alan English, who is chairman of the Title Conditions (Scotland) Bill working group of the Royal Institution of Chartered Surveyors in Scotland, and Elaine Hook, who is the institution's policy officer. I hope that I have not missed anyone.

The witnesses will answer the questions as a panel, so I leave it to them to self-select who will give an answer. I will start off with a general question, which is the warm-up act. Will you explain briefly how each of the organisations that you represent—you will all get a pitch here—will be affected by the bill? Do your members support the bill? We can start with Ms Hook first and then work our way along.

Elaine Hook (Royal Institution of Chartered Surveyors in Scotland): I was not going to say anything at this point. I will leave it to Mr English.

Alan English (Royal Institution of Chartered Surveyors in Scotland): The RICS is an organisation that represents people who are involved in property-related professions. We are therefore directly involved with all matters that relate to making property work. We are interested in the bill because we want to influence, if we can, those parts of it that we believe may not be practical. That said, we very much support the general thrust of the proposals. Our criticisms tend to be on matters of technical detail.

The Convener: We shall come to such matters further down the line. Let us move on—sorry, but I am having difficulty in reading your name-plate—to Mr Watt.

Neil Watt (Property Managers Association): The Property Managers Association represents the majority of professional property managers in Scotland. Its members are responsible for the management mainly of owner-occupied housing units. Our members currently have about 100,000 units under management. The association strongly supports the general thrust of the Title Conditions (Scotland) Bill. As property managers, we are in close touch with the bill's end-users, who are the house owners, in whom we obviously have a close interest.

David Gill (Homes for Scotland): I represent house builders in Scotland. We have two interests in the bill. We take title to land for development purposes, so we are glad to see that obstructions and unnecessary burdens in title might be disposed of. We also give title to purchasers under a deed of conditions. Although we want to provide high-amenity developments, we do not wish to be either managers or some sort of neighbour-protection unit. We therefore generally welcome the bill.

The Convener: As I recall, Homes for Scotland and many of the other organisations have submitted papers, which were very helpful. Perhaps I could ask Mr Smart to speak next. Is it Mr Smart? This is a test for my eyesight.

John W Curran (Ledingham Chalmers Solicitors): Perhaps I can answer on John Smart's behalf, because we are as one on this matter. John Smart and I are property lawyers.

The Convener: Sorry. I got who was partner and who was associate the wrong way round. My apologies for an embarrassing mistake.

John W Curran: We are a democratic firm. John and I—the fact that there are two Johns is perhaps confusing—are property lawyers. We normally act for builders and developers of residential and commercial developments, in particular on the acquisition side. We advise a number of the members of Homes for Scotland, which has retained us as an entity to help it in its responses to the bill. Speaking as an adviser to Homes for Scotland and also as a property lawyer, I congratulate the Executive on a particularly fine piece of legislation.

The Convener: Mr Gill wishes to add something.

David Gill: I merely want to add that Ledingham Chalmers Solicitors acts as legal representatives for Homes for Scotland. Many of the questions about the bill are detailed, so the duo of the two Johns will answer for us.

The Convener: We are a bit like that ourselves. Thank you all very much. I want to move on to the next question. Who is going to ask it? Sorry. It is still me. I have a cold and am not functioning properly.

Will you tell me about your views on extending the right to enforce burdens to non-owners in occupation, such as tenants? We have already taken some evidence on that. Who would like to speak first?

John Smart (Ledingham Chalmers Solicitors): I will speak first on behalf of Homes for Scotland.

The Convener: Mr Curran—

John Smart: No, I am Mr Smart.

The Convener: I have you and Mr Curran the wrong way round on my bit of paper. I am sorry.

John Smart: Homes for Scotland's general view is that burdens should be enforced only by the owners of properties, not by short-term tenants. The absent owner has paid the value for the property and should be the one who has the right to enforce the burden, not the tenant, unless the owner specifically agrees that the tenant can enforce it on his behalf.

The Convener: Does anyone on the panel disagree with that view?

Alan English: The RICS is concerned at the potential for conflict of interest where the interest of an owner in enforcing a burden may differ from that of a tenant in occupation. It is difficult to envisage a situation in which such a conflict may arise, but we are of the belief that the right of ownership should be the dominant interest. We do not have a view on a number of the other potential interests that arise in the bill.

The Convener: As I understand it, the non-owner would have a right only to enforce a burden that is already there, not to discharge. The possibility of varying a burden or undermining the proprietor of the title does not arise.

Alan English: We are aware that the proposal is purely on the right of enforcement and not to extend the right to discharge. We are merely expressing a concern that a situation may arise in which there is a potential conflict of interest, where an owner may not wish to enforce a burden but the tenant in occupation may do so.

The Convener: Can someone give me an example of that in layman's terms, rather than leaving it up in the air?

Alan English: I am afraid not.

The Convener: Does anyone on the panel have an example in which they feel that a conflict of interest would arise if a tenant wished to enforce a burden? If you can say where a proposal would not be appropriate, that is what helps the committee.

Alan English: Situations could exist in which the owner of premises had a relationship with an adjoining proprietor that meant that the owner was happy—and had been so for a long period—for the adjoining proprietor to be, in effect, in breach of a burden. A tenant who came in for a relatively short space of time may wish to enforce a burden that the proprietor had not enforced. That could create a conflict.

The Convener: I see where your argument on short tenancies is going, but what about a long lease? Somebody who is in the property over 20 or so years during which the proprietor is never there would have every reason to enforce a burden. John Smart and John W Curran are nodding. Is that a route?

14:15

John W Curran: I can envisage that the bill might increase the incidence of long leasehold. On potential conflicts, it is not unknown for landlords and tenants to be in dispute over rental, for example. One must assume bad faith in this example, but it is not inconceivable that a tenant might chose to enforce a community burden or something of that nature in pure defiance of the owner's—the landlord's—wishes. However, that is the only conflict example of which I can think. I certainly think that, under some of the longer leases that I envisage, a tenant will have the equivalent to owner's rights.

The Convener: As no one else wants to speak, I will leave that issue. We will consider it further when we can, because I believe that there are problems involved. The rights for long leases are attractive in terms of providing balance.

Michael Matheson: Section 28 of the bill provides that a majority of proprietors can instruct common maintenance work. I would like your views on that section because, as you are probably aware if you considered the evidence from last week, there seems to be anxiety that it is unduly bureaucratic.

Neil Watt: The Property Managers Association agrees whole-heartedly with the majority instruction. It happens daily in modern developments with deeds of condition that work perfectly well. We believe that there is an accepted principle that is perfectly satisfactory.

Michael Matheson: Have you had a chance to reflect on the views given by the Law Society of Scotland in last week's evidence?

Neil Watt: No.

Michael Matheson: I see that your colleagues, however, are nodding affirmatively. Would you concur with the Law Society's concerns?

John Smart: Homes for Scotland generally welcomes section 28 and supports the concept of majority instruction for maintenance but not for discharge or variation, which are separate matters. We recognise that the present law is unsatisfactory, as a unanimous instruction for maintenance repairs is usually needed.

John W Curran: We do not agree with the Law Society's submission that section 28 is unduly complicated, but I would ask that you do not tell the Law Society that the partner and associate in Ledingham Chalmers take that view.

Michael Matheson: The Law Society is probably watching the meeting on webcam.

John W Curran: I hope that it gets us confused.

Elaine Hook: The RICS agrees with the introduction of the majority rule for maintenance, but we feel that the proposals in section 28 for administering it are too detailed and difficult.

Michael Matheson: Can you perhaps go through the parts of section 28 that you are particularly concerned about?

Alan English: The provisions in section 28 for setting up and funding a job give us real cause for concern, particularly given the delays that can be involved. I agree whole-heartedly with the Law Society's view that section 28 is too complex. Management currently deal with large numbers of small jobs. The system proposed under section 28 would be potentially workable for a large refurbishment job for a major contract that naturally has a long lead-in time. However, in practice in property management, our members find it necessary to collect moneys in advance for jobs that cost only a few hundred pounds. From that point of view, section 28 is unduly burdensome. The 28-day cooling-off period would require an owner to pay 28 days after the account goes out.

I once calculated that, in the normal course of events for a small roof repair for which the money must be collected in advance, the process can take up to three months before the contractor on site brings the matter to a conclusion. After first receiving the report that work is required on a defect, the manager must send out a contractor to have a look at the job. It might take a week or so before the contractor reports back. If he says that the job is a large one, a couple of other contractors must be asked to provide quotes.

After a delay of two or three weeks caused by the need to press the other contractors to provide their quotes, the manager can then find that each of the contractors has quoted for different work. That must be sorted out before the proprietors can be approached for the money in advance. Of the eight proprietors in a standard tenement, perhaps two or three will pay fairly promptly, but the manager must often write to the others again. Perhaps one or two owners in the building might not pay or there might be one who does not pay for anything. If that is the case, the other proprietors must be asked to underwrite that owner.

Members will be able to see where things are going. The process goes on and on. It can take three months to get a relatively straightforward job under way. Section 28 would add an extra 28 days to that, which would mean that it could take four months to get a job off the ground instead of two or three months. That element must be reconsidered.

The other time-related element in section 28 that gives us cause for concern is the proposal that, if the job has not been commenced within 14 days of its intimated date, everybody can get their money back and the job will not go ahead. The manager does not necessarily have control over the date by which it is anticipated that a job will start. For one reason or another, the contractor may not be able to get down to the job. Such things are outwith the manager's control.

However, we fully support the proposal that requirements such as some of those in section 28 be made for large jobs.

The Convener: Your written submission—I refer members to paper J1/02/29/03—helpfully suggests that such procedures should apply only to jobs that would cost more than £3,000.

Alan English: I appreciate that putting a figure into the bill may cause difficulties over a period of time, but some kind of limit on the costs and severity of the project is required.

Michael Matheson: There is a balance to be struck. Owners will want to be able to ensure that, if a manager undertakes to do something, it will get done. I quite like the 14-day rule because, without such a provision, if a manager is not managing the issue properly, the issue could go on and on before it is properly sorted out. I quite like the idea because, once someone has given their money for the deposit, that 14-day period should help to move things along.

We need to strike a balance between protecting the owner so that they can expect a good service from the manager and recognising that some things are outwith the manager's control. For example, I imagine that in Inverness just now it will be fairly difficult to get hold of a plumber or a joiner to do even a small piece of work within a limited time scale. That sort of thing could happen at the time when one is trying to put things into play.

Alan English: Mr Matheson may have fallen into the trap of thinking that the manager is the one who creates the delay. From the relatively brief résumé that I have given, it can be seen where the delay arises. If everyone paid when they were asked to pay, there would be no inordinate delays. The person who pays his money within the 14 days would have a problem if we still had to wait for two or three months before we received the money from the last two or three owners.

From the manager's point of view, if contractors provided their quotations when asked for and if proprietors provided their payments when requested, things would go ahead far more quickly. It is much easier for the manager to manage properly than to manage badly. If the manager manages badly, he simply creates work for himself. The delays tend to be extrinsic to the manager's office.

Michael Matheson: In the experience of you and your colleagues, are the vast majority of community burdens and maintenance work for jobs that involve only a couple of hundred pounds?

Neil Watt: Yes. It is fair to say that the majority of cases are minor maintenance works such as roof works, although they extend to the other end of the scale and can include re-roofing. However, the problems are no less at either end of the scale. It takes only one owner to bring the whole thing to a halt.

Maureen Macmillan: My question centres on community burdens and their discharge by adjacent proprietors, which is dealt with in sections 34, 35 and 36 of the bill. The bill provides that, subject to a notification procedure, community burdens can be discharged by adjacent proprietors, who are defined as those within 4m of the burdened property. The witnesses may have a range of views on that method of discharge. Is 4m an appropriate distance?

John Smart: I will answer on behalf of Homes for Scotland. We have concerns about the 4m rule, because it is somewhat arbitrary and fails to provide adequate protection to benefited proprietors outwith the 4m radius. Moreover, there is the risk that a minority group of neighbours in a community will prejudice the wishes of the majority. Although we recognise that the need to obtain the consent of the majority can cause difficulties, we firmly believe that all benefited proprietors should have the same rights as those within the 4m radius. That is particularly important for protecting the general amenity of housing developments. For example, a house that stands at the very entrance of a development could ruin the visual impact of the estate as a whole, including properties that are well outside the 4m radius. We are concerned about such cases. When we frame deeds of conditions for developments, all benefited proprietors—not just those within the 4m radius—expect to be able to enforce them.

Maureen Macmillan: In that case, would you prefer to abolish any 4m, 10m, 100m or whatever rule and instead have a system of majority voting?

John Smart: That is our view.

Maureen Macmillan: However, any specific provision within the deed would mean that those burdens would not apply.

John Smart: Such a provision overrides most of what the bill says about community burdens. We can always vary things by referring to different provisions in the title deeds.

Neil Watt: The 4m rule has some merit. However, our concern is that, although the majority could make decisions, those people might be at the far end of the housing estate and not have much of an interest in any changes. The Property Managers Association of Scotland felt that 4m was not enough and arbitrarily came up with the figure of 15m. Before we came into the meeting, we talked about the difficulty of giving any reasons for that figure, other than that 4m was just too small. However, we found merit in allowing the majority to decide, as long as one member of that majority lived within a reasonable distance of the burdened property.

Alan English: When the RICS examined the issue, it tried to work out whether some appropriate distance could be applied and concluded that there was no such distance. Given that the average width of a feu in an average housing estate might be 10m or less, a 4m radius will not take into account the house next door to the house next door, which is still very close.

The 4m rule was lifted from planning legislation, which simply applies to notification to neighbours, for example. However, in this situation, people are linked through their titles and already have a contractual relationship with one another. That is fundamentally different from the situation under planning legislation, where people just happen to be adjacent to each other. We believe that 4m is far too short a distance, because, in most cases, it would take in only the immediately adjoining properties.

I fully support the example that John Smart gave. Something can happen at the entrance to an estate. If two or three people or families live there next door to one another and one happens to operate an articulated lorry business, for example, they can make a fundamental change to the burdens and bring down the appearance of the estate to the detriment of all.

14:30

Maureen Macmillan: What is your opinion of the other methods of discharge? We have dealt with the 4m rule. What about discharge by majority voting? Are you happy with a simple majority?

John Smart: Homes for Scotland has reservations about a simple majority varying or discharging community burdens. I return to the

point that house builders insert amenity restrictions on individual houses to protect the marketability of other houses. Individuals also pay high prices for the houses that they buy, partly because they are secure in the knowledge that they can enforce restrictions against their neighbours.

The ability of a simple majority to vary or discharge burdens could unfairly prejudice minorities and deprive them of rights that they have paid for. We are of the view that a 75 per cent majority would be more appropriate. House purchasers are always given prior notification of the title conditions that will apply to their houses before they purchase them. If they are dissatisfied with the terms of the deeds of conditions for an estate, they do not have to buy the house.

Maureen Macmillan: The presumption would be that they had agreed to the conditions when they bought the house, so you feel that, even with the notification procedure that the bill suggests, a discharge by simple majority would be unfair.

John Smart: Absolutely. There should also be an exception for community burdens that import the provisions of planning conditions or section 75 agreements that have been entered into with the planning authority. Planning authorities often impose obligations to maintain amenity areas when planning consents are granted for development. Those would remain in force, notwithstanding any decision the majority might make to vary or discharge the title condition that imports that planning condition. We would be left with an inconsistency if a section 75 planning agreement that was still enforceable could be varied or discharged by a majority.

Neil Watt: I concur with the idea of 75 per cent majority consent. It is clear that burdens are put into deeds for a purpose. Although we accept that the majority principle is acceptable for the maintenance of burdens, we feel that discharging burdens is something quite different. The "Report on Real Burdens" indicated that 72 per cent of homeowners thought that title conditions were a good idea and went on to say, as the RICS has stated, that that ensured that residential areas retained their character. Property managers would be concerned that a simple majority could erode that.

Alan English: As the committee can see from our submission, the RICS also came up with a figure of 75 per cent. In my business experience, we have only once succeeded in amending a deed of conditions, because under the previous system, as the committee is aware, the agreement of 100 per cent of a community was required. Clearly, that is impractical, because it is almost impossible to get that level of agreement. I cannot say that it is impossible, because it happened once. At the same time, we are dealing with something important. If it is worth removing burdens and changing titles, a substantial majority should be in favour. That is why we opted for a 75 per cent majority consent.

Maureen Macmillan: Do you foresee a rush of people wanting to change their discharge or vary their conditions?

Alan English: People who want to keep dogs will probably want to change them. Dogs and children are the bane of property management.

Maureen Macmillan: I suppose you might have a burden that did not allow you to keep children.

Alan English: I have not come across that one before, but I am sure there is one somewhere

Maureen Macmillan: However, you can foresee problems. You think that there might be communities that would split down the middle.

Alan English: If you require a 75 per cent majority, it cannot be split down the middle and that is the big advantage.

Maureen Macmillan: That is what I am saying. If there was a 75 per cent majority, you could be fairly certain that the community was substantially in agreement.

Perhaps we could move on to talk about the communities that would benefit. Will you give an indication of the size of community in which you see community burdens typically being imposed? Do you think the size of the community affects how effectively the methods of discharge for community burdens will operate in practice? There might be problems in very large or very small communities.

John Smart: The size of housing developments varies. Some housing developments that I have dealt with have comprised as few as four houses. That is the minimum requirement for a community burden. Larger estates could contain in excess of 50 houses.

A consistent approach needs to be taken, notwithstanding the size of the community concerned. Although in some cases it might be inconvenient to obtain the consent of a majority of, say, 50 houses, developers could divide larger estates into smaller pockets and divide the enforcement rights among those pockets. That would make it easier to discharge community burdens within those estates.

I would not be in favour of having different rules for different numbers just because the nature of each estate could vary considerably. A consistent approach must be maintained in the bill.

Alan English: The RICS also supports the view that the community has to comprise those properties or proprietors who hold their properties

under a common deed of conditions or common title. Such a community is quite clearly defined.

I subscribe to the view that there is merit in restricting the size of such a community. We have one example of a large estate of approximately 580 houses in East Kilbride, which was developed in phases over approximately five years. The houses were all retained under the one deed of conditions and all had to pay a five-hundred-and-eightieth share of the ground maintenance. The estate became unmanageable because people did not understand why they had to pay for the maintenance of ground that was a quarter of a mile away from where they lived. The estate would have benefited from separate deeds of conditions for each of the phases.

Maureen Macmillan: In other words, it should have been split up into manageable units that felt a sense of community towards one another.

Alan English: Yes, or rather a practical community and not just an area with a sense of community. I cannot speak from the point of view of the social community. I am looking at the management community.

Maureen Macmillan: But if people can see the piece of grass that needs to be cut or whatever needs to be mended, they might be agreeable. They will not be so keen to pay out money for something that they never see or that they do not know about. That is human nature, I would have thought.

The Convener: Why did the Scottish Law Commission reject the suggestion of a three-quarters majority? Did you make submissions to the Scottish Law Commission about the majority ruling, which you are now saying should be three-quarters? The Scottish Executive has taken up the Scottish Law Commission's recommendation.

John W Curran: It is quite simple for me to respond on behalf of Homes for Scotland, because it did not exist when the consultation papers came out. It came into being in September last year.

The Convener: Is the RICS of a like view? Did you make a submission in favour of 75 per cent?

Alan English: I think that we did. [*Interruption.*] I am sorry—the papers are fairly bulky, as I am sure you are aware. We opted for 75 per cent because—

The Convener: If you made such a submission, were you told why the Scottish Law Commission did not accept your views? Do you get that information, or do you simply find out afterwards what has been decided?

Alan English: We wait to find out what comes out of the consultation.

The Convener: I was trying to find a shortcut.

Ms Wendy Alexander (Paisley North) (Lab): I will turn to the model development management scheme. What are the witnesses' views of the scheme that has been proposed by the Scottish Law Commission? Do you support the inclusion of the scheme in the bill, assuming that a solution can be found to the problem that it partially concerns a matter that is reserved to Westminster? At this stage, we are simply looking for your in-principle reaction to the scheme.

John Smart: I will answer on behalf of Homes for Scotland, which was disappointed that the model management scheme was not included in the bill as introduced. The organisation thinks that the scheme would be worth while, although it is possible to overstate the need for it at this stage. The scheme would be useful in regulating what I describe as complex facilities, such as health clubs and swimming pools, although I do not think that it would be needed for grass cutting on common amenity areas. Complex facilities will become more common in developments, and the model management scheme would definitely benefit developers in such circumstances.

The Convener: One of the papers says that we might be led by the American precedent of building swimming pools and leisure facilities in developments. We are making legislation that will last for decades, if not centuries, and we hope that the Executive will resolve those problems.

David Gill: As more high-density urban development is undertaken, the concepts of concierges for common areas and common facilities within buildings are coming through in developments. If we had a consistent model that we could apply to such developments, customers, developers and management companies would know where they stood. It would be helpful to include the scheme in the bill.

The Convener: I have no doubt that we will address that point when we take evidence later on.

Neil Watt: The model scheme is a fallback position, but the Property Managers Association supports its principles. It is fair to say that the principles are already in place in most modern deeds of conditions in residential developments. The imposition of a development management scheme in its present form will undoubtedly increase owners' costs in respect of the management service provided by the property managers and the additional administration that the scheme calls for. The downside of the scheme is that it will have a knock-on effect on owners.

As I see it, the development management scheme does not minimise the problems of non-co-operating proprietors and of proprietors who do

not pay their way, which the RICS has discussed. The scheme follows the commonhold model in New South Wales and California, in which proprietors are asked to pay money in advance. For the past 15 or 20 years, property managers have tried hard to encourage proprietors to part with money in advance, but, unfortunately, that approach does not work. Property managers have reverted to the old-fashioned system of accounting to their clients, the co-proprietors, in arrears. In that way, they have a fund, or a float, on which they can call to maintain cash flow. The development scheme appears to be a good idea in principle, but enforcing funds from proprietors is a huge problem.

Lord James Douglas-Hamilton (Lothians) (Con): Is the manager burden created in the bill sufficient for your purposes?

John Smart: As far as we are concerned, the manager burden provisions are sufficient. We recognise that feudal abolition will take away the potential right that developers had to enforce conditions expressed feudally over developments. Manager burdens represent a suitable replacement. We are also happy with the 10-year period. The time frame is sufficient.

14:45

Lord James Douglas-Hamilton: What are your views on the provisions relating to manager burdens? In particular, a manager burden will, in many cases, be extinguished after a maximum of 10 years, even if a developer continues to own some units. Is that an appropriate time period?

John Smart: Yes. As I said, the 10-year period is sufficient. Most housing developments would be sold off within 10 years and we recognise that there must be a time scale.

The Convener: Does anyone else want to answer before Lord James rattles through his questions?

Alan English: That was quick. In fact, I had a comment to make on a previous matter, but that seems to have gone by.

The Convener: If you have comments on a previous matter, please make them.

Alan English: I have comments on the development management scheme. The RICS supports the principle of the development management scheme, but we have on-going concerns about what is in the draft bill. Much of it tends to be detail. We have concerns about the quorum and the fact that, once the first meeting is called and the quorum is not achieved, the next meeting has a quorum of one, in effect. That could lead to considerable difficulties, whereby an estate could be run by a small coterie of people.

The other concern we have relates to the wording of the provision that says that the proprietor is liable to pay from the time when he has received his counter intimation of what he requires to pay. It is amazing how many people do not receive intimations to pay. Perhaps they arrive in white envelopes rather than brown envelopes—my heart sinks when I see a brown envelope, but I open them; some people must put them in a file. I would rather the provision referred to intimations to pay being issued than to their being received, because there is great scope for people to say that the post office did not deliver them.

The third element is practical and concerns difficulties over how the development of the management of an estate will be financed in the first instance, before the first meeting is called. The manager will require to pay contractors, but will not have any funds from which to pay them. There will require to be a delay before the first meeting of owners and there will be a further delay if the meeting is inquorate. Therefore, pump priming perhaps requires to be introduced.

The other problem is about what happens in the event that a budget is referred back to the manager from a meeting. I am not entirely clear from the wording how the estate will be funded in the interim, before the new budget is fixed. Does the previous year's budget continue? Those are little details, but they still require consideration.

Lord James Douglas-Hamilton: I have another question on manager burdens.

The Convener: You are raising practical issues, which is helpful.

Lord James Douglas-Hamilton: Manager burdens can exist for a maximum of 30 years—not 10—when they are imposed in a sale under the right-to-buy legislation for council houses, or in a sale by a local authority to its tenant. Is there merit in making special provision for manager burdens in that kind of situation? Are there other situations for which a longer period might be beneficial?

Alan English: The RICS sees a justification for having a longer period for sales by the public sector, which includes local authorities and perhaps even housing associations. Such sales tend to happen over a prolonged period; it takes much longer before there is a majority of owner-occupiers. Private developers tend to look to the next development, which means that sales take place over a shorter period. That is why we support the differential.

David Gill: Homes for Scotland has no view on the matter.

Donald Gorrie (Central Scotland) (LD): I am intrigued by the concept of terminators, which seems to refer to "Star Trek" or something. I have

a question about termination and the sunset rule. I understand that there are differences of opinion about whether 100 years, 50 years or some other period is correct. Is the sunset rule a good idea? What should be the period before which the rule cannot operate?

John Smart: Homes for Scotland supports the sunset rule in principle. Too many obsolete real burdens are kicking around that are of no practical relevance today. Such burdens can severely hamper developers who want to purchase sites for housing development. The bill suggests a period of 100 years, but we think that 50 years would be more appropriate. Burdens can easily become irrelevant in 50 years.

Neil Watt: The Property Managers Association has no view on the sunset rule. We find acceptable the two-thirds majority that is required to terminate or dismiss a manager.

The Convener: Does the RICS wish to talk about the sunset rule?

Alan English: You will be glad to hear that my answer is no. We support the 100-year cut-off point. Any period is arbitrary and that one is as good as any.

Maureen Macmillan: My question is principally for Mr English, but the other witnesses might wish to comment. I am interested in the 100m rule because I have a rural constituency. Lawyers in Inverness have asked me about the rule because they have clients who made feudal conditions when they sold a piece of land from a farm. One such condition might be that the buyer must not keep dogs in case they worry livestock. The RICS has given other examples of cases in which the 100m rule would have a deleterious effect on the management of the countryside. Will Mr English remind us of those examples?

Alan English: The RICS takes the view that the protection should be for all open land, rather than only for land that is for residence or human resort. We are concerned about the emphasis that is being placed on livestock; I refer to the example that the member has just quoted. We believe that the burden should relate to the protection of land rather than to the protection of livestock. That said, we understand and sympathise with the example that the member gave. We have other examples, including the case of a woodland owner who could sell a plot of land in the vicinity of the woodland for residential development and include—for obvious reasons—a burden in relation to garden bonfires. Such a burden would create a situation in which a proprietor could not have an adjoining property within 100 metres or one that is used for human resort.

Difficulties can arise in relation to the use of roads for haulage or for particular types of traffic. Burdens in respect of those roads may be of value to a landowner from the point of view of privacy or for reasons of road maintenance. Local authorities may sell plots of land to a developer for industrial development but, for economic development purposes, might decide to include a burden that stipulates the type of businesses that have to occupy the development. Such a burden would be included to ensure that the site had a healthy mix of commercial uses. There are many other similar examples: a hotel could dispose of a piece of ground for paddocking horses, but times change and the ground may have the potential to be used for another purpose, which could be detrimental to the hotel.

Maureen Macmillan: Landowners who live many miles away or perhaps out of the country could impose intolerable conditions on people. Are you suggesting that the 100m rule should not exist or that it should stay under certain conditions?

Alan English: We are not suggesting that the 100m rule should not exist. If the burden is worth keeping, the owner will maintain it and will take the steps to do so. The RICS feels that there is unlikely to be a massive move by absentee or remote proprietors to go to the expense and trouble of retaining burdens that have no material value. If the burdens have a material value to proprietors, they will be worth retaining and there should be a facility whereby they can be retained.

Maureen Macmillan: If the burden is worth retaining, and if the vassal refuses to agree to the burden, would not the Lands Tribunal for Scotland deal with the situation? If it was worth while to retain the burden, I presume that the Lands Tribunal would retain it.

Alan English: That is certainly a backstop for proprietors.

Maureen Macmillan: But you are not convinced that that is enough?

Alan English: I am not convinced that that is enough, as in most cases it will be necessary to go to the Lands Tribunal. It is highly unlikely that the vassal will say, "Yes, I agree."

The Convener: I move on to Wendy Alexander for the last of this batch of questions.

Ms Alexander: What is your view of the Executive's approach to development value and clawback burdens? In particular, what is your view of its decision not to preserve development value or clawback burdens in the current compensation arrangements?

John W Curran: I will answer that question on behalf of Homes for Scotland. You used the phrase "the Executive's approach". Homes for Scotland and I had some difficulty identifying what the Executive's approach was. A fine balance has

to be found, but it is probably the lesser of two evils to stick to the compensation provisions in the Abolition of Feudal Tenure etc (Scotland) Act 2000 in favour of superiors in the event of a breach of a development value burden that will be created before the appointed day, as opposed to allowing the burden to be saved. There will be a rush to create new superiors and development value burdens before the appointed day. I have personal and bitter experience of that happening within the last fortnight.

Secondly, Homes for Scotland has no problem with the oft-quoted example of the benevolent seller—which the consultation papers always assume is likely to be a local authority or other public authority selling land cheaply for a community hall, sports field and so on—in some way sharing in the action, if I can use that word, if the land is used by a nasty third party, who is usually a builder or a developer, for a different purpose in future. I have no problem with that, although as far as Homes for Scotland is concerned, under the umbrella of the ubiquitous planning gain, it is more likely to be the nasty builder or developer who donates such social-purpose land to the public authority, under a section 75 agreement or the like. Builders, developers and landowners suffer from the problem of land being used for different purposes as much as, if not more than, public authorities.

15:00

Homes for Scotland has no problem with agricultural or other less valuable land being conveyed in the hope and expectation on the part of the seller that there will be an additional payment if a planning consent for a more valuable use is obtained ultimately. Indeed, that may be the basis of the contract. Once again, that scenario applies as much to landowners, builders and developers as it does to public authorities.

We have a problem with the notion that local or other public authorities seek development value burdens and clawback only when those authorities have conveyed land wearing their benevolent or socially aware seller's hat. Our experience is that nowadays, that is the exception rather than the rule, for the section 75 reasons that I have given. A builder or developer is much more likely to encounter requests for clawbacks from a public authority when embarking on a truly commercial transaction—in other words, when wearing a commercial firm hat.

The authority enters into a commercial transaction for a known and intended land use, but seeks to secure clawback 10, 15 or even 20 years down the line in the event of an even more enhanced and valuable land use. We have no problem with that in the context of a commercial negotiation, if it can be got away with. We do have a problem with the suggestion that there are on-going discussions between the Executive, the Convention of Scottish Local Authorities and other bodies that might result in public or local authorities gaining an unfair advantage over builders, developers and landowners. I hope that that is not being contemplated. All that builders and developers ask for is a level playing field.

The right vehicle has been chosen to rank standard securities, but any claimed victory is pyrrhic. It would be naive not to assume that funds, for example banks and other financial institutions, are what drive the acquisition of residential development land and its development. When they receive an approach from a builder or a developer to fund a development, they simply will not countenance the existence of a prior ranking security, whether it is in favour of a seller or otherwise. It simply will not happen. Indeed, funds are unlikely to countenance a second ranking standard security. The problem exists, and has only been exacerbated by the ranking provisions on standard security, but at least everyone knows where they are. There is a level playing field in a commercial negotiation, and I do not think that that should be muddied by tampering with the underlying themes of what is otherwise an excellent piece of legislation, which is the point I made at the beginning.

Ms Alexander: We note your comments that the clawback issue is difficult. We will discuss the matter with COSLA in light of your perspective.

The Convener: That concludes this session of evidence. I thank the panel for their comments, which have been thought provoking and practical. We need practical answers.

We now move on to the next session of evidence. I welcome from Age Concern Scotland Angela Yih, who is housing policy officer, and Euphan Todd, who is housing advice officer. Do you consider the Title Conditions (Scotland) Bill to be of benefit to your members?

Angela Yih (Age Concern Scotland): Yes. Generally, we welcome the provisions in the bill, particularly in respect of owner-occupied retirement and sheltered housing, which has had an inadequate legal framework for its management until now. An effort has been made, within the limited provisions of the bill, to sort out the management problems.

The Convener: I refer members to Age Concern Scotland's submission.

Lord James Douglas-Hamilton: Are you happy with the current definition of sheltered housing? Do you have any suggestions as to how that definition might be improved? Are retirement housing and sheltered housing one and the same

thing or are they different? What are the reasons for your view?

Angela Yih: There has been much debate about definitions of sheltered housing and what is sheltered housing in relation to retirement housing. There are a few different guidelines on that in a circular from what was the Scottish Office. There is a definition in the Executive's framework code of practice for managing agents and there is now a broader description in the bill. In general, Age Concern Scotland is happy enough to leave the definition as general as it is, given that the bill includes provisions to protect very important burdens in this type of housing. Age Concern Scotland has an advice service, which my colleague Euphan Todd manages, which is specifically for retirement and private sheltered housing. We are very much aware of the fact that when sheltered housing is sold on the open market, it is often referred to as retirement housing in the literature and the advertisements. Owners use that term and I do not think that it is helpful to try to separate the two phrases. We would be happy to see references in the bill to sheltered and retirement housing.

Lord James Douglas-Hamilton: There is some confusion about whether there is a difference between sheltered and retirement housing. Is your evidence that in practice there is so little difference that it is not worth making a distinction?

Angela Yih: We want to concentrate on the services that are provided in the grouped housing that people have bought into. All have an alarm system and a management facility—someone who is called a warden, manager or secretary and who will be on or who will visit the complex. Concentrating on the differences is unhelpful.

Lord James Douglas-Hamilton: If it is argued that the definitions should be separate, that argument is not generally accepted by housing professionals.

Angela Yih: I do not think that separate definitions exist. They are just different words that people use.

Lord James Douglas-Hamilton: You think that the present definition includes both categories.

Angela Yih: The exception is that the evidence from owners is that they would prefer the word "retirement" to be used, since we are using the word "sheltered". Owners would prefer both words to be used.

Donald Gorrie: I will roll my questions about core burdens and other burdens together, because they are all related. Is the concept of distinguishing core burdens from non-core burdens right? Are the distinctions right? Are the right items in the right columns? Is it right to require a 75 per cent majority for core burdens and 50 per cent for other burdens?

Angela Yih: We have asked for core burdens to be distinguished from non-core burdens, in line with the views of some owners. We held a seminar for owners of sheltered housing, which Euphan Todd organised and at which we received comments. Most owners agreed that the removal of some elements of sheltered housing would destroy the housing as people understood it. People have bought into that housing expecting such services.

We asked for a higher level of protection than simple majority voting would offer, because a simple majority is not a good safeguard for some important burdens, such as maintenance facility burdens in communal housing. We are happy with the extra protection that the 75 per cent offers.

Donald Gorrie: Has the Executive got the distinction right between the core burdens and the other burdens?

Angela Yih: The core burdens relate to matters such as the community alarm, the secretary, caretaking or warden service, management of the common facilities and the age requirement. In our view, those are the core burdens. We agree with the Executive.

Lord James Douglas-Hamilton: Hanover (Scotland) Housing Association's submission suggests that although a minimum age requirement should apply in sheltered housing communities, it is not a good idea that the existing minimum age in a deed of conditions should never be alterable. It suggests instead a minimum age—for example, 55 years—that could not be lowered, but that above that age, the figure could be varied with 75 per cent majority consent. What are your views on that?

Angela Yih: That suggestion is sensible. Our understanding of the bill is that the figure could be varied or discharged with unanimity—100 per cent—but in practice, that is well nigh impossible to achieve. We understand owners' concerns about lowering the age to a much younger age group. The figure of 55 seems about right. We would not like the figure to be lower than 55.

Michael Matheson: Do you feel that the concept of manager burdens is sufficient for the purposes of covering sheltered housing and retirement homes?

15:15

Angela Yih: Yes. We need manager burdens for different types of developments. We need them to be in operation from the early stages of development until the units are sold. We are not particularly sure about the 10-year duration. Quite

a few owners have reservations about the need for it to be so long. It must be longer than one or two years; we thought that five or six years might be better. We are giving the views of some owners. We do not have firm views on the period, although we do not see the need for it to be longer than 10 years.

Michael Matheson: So you recognise the need for the manager burden, but you think that there is an issue about the time scale for which it should be in place.

My understanding from the explanatory notes is that in relation to section 58(8) there is an issue about the dismissal of the manager. Do members of your organisation have concerns about the ability to dismiss the manager?

Angela Yih: Owners have found themselves in a position where they are unable to change or dismiss managers. That is a basic infringement of their rights. We welcome the provision for owners to dismiss the manager—if there is a general consensus. We have reservations about any development scheme being left without a managing arrangement, perhaps if not enough owners wanted to reappoint a manager or if they could not find a suitable managing agent.

We have other experience of issues relating to home ownership and older people on low incomes and difficulties with property maintenance. We understand the difficulties that the previous witnesses were talking about. Those difficulties are related to a lack of a factoring service, when there is no one whose responsibility it is to ensure the proper on-going maintenance and collection of funds. If there is no regular maintenance service, there will always be one-off difficulties, whatever model of management system is in place. We have worries about how owners will manage to maintain the burdens in sheltered housing.

Michael Matheson: Would you prefer the 10-year time scale to be reduced, and if so, to what length?

Angela Yih: I am not sure whether I made myself clear. The manager burden would drop after 10 years. We think that that period could be shorter. There is a separate and important issue of a development being left without a managing agent.

Michael Matheson: How long should the period last?

Angela Yih: We think that five or six years would be appropriate. Our opinion is based on views expressed to us by owners. We do not see why 10 years would be needed to sell off all the units in a development. It is in the developer's interest to market and sell the units as quickly as possible.

Maureen Macmillan: I am interested in what you were saying about the dilemma in relation to a bad manager. If people are not happy with the manager of a sheltered housing complex, the alternative might be no manager at all. How can that be balanced? Do you have any ideas about how we can prevent such a situation from developing?

Angela Yih: We have not really had any experience of owners coming to Age Concern Scotland wanting to replace the managers with themselves. Most of the problems have involved people wanting to change their manager. Owners would benefit from advice and information and help through the process of making the major decision of changing from one managing agent to another. In sheltered and retirement housing there are all sorts of implications that relate to maintaining the service and the facilities that will probably be the property of the current manager, that is the warden's flat and the communal lounge.

Advice, information and help is needed and there is a need to encourage higher standards among factoring and managing agents in general to provide a larger pool from which owners can choose. At the moment, there is a shortage of commercial property managers.

Maureen Macmillan: What about the different kinds of majority that are required in different circumstances? As I understand it, where the title deeds do not provide for the dismissal of a manager, a simple majority of the owners of the units—counting in units rather than in numbers of voters—may dismiss a manager. When the title deeds provide for dismissal by a large majority or even unanimity, a manager may be dismissed by a two-thirds majority regardless of the terms. Are you happy with that? How would you like to see the voting work?

Angela Yih: We would be more comfortable with having a higher threshold than a simple majority for something as major as dismissing a manager. The simple majority will be used in complexes in which there was no provision whatever. Therefore, one would go from a situation whereby a manager was appointed in perpetuity or required a 100 per cent vote for dismissal, straight down to a 51 per cent requirement. There will still be provisions for the two-thirds majority in other cases. For example, managing agents may have made a provision for a 75 per cent vote, but that will go down to 66 per cent. It would seem to us more equitable and sensible if there were a two-thirds majority for all situations unless the deeds specify a lower majority.

Ms Alexander: An issue that we have raised with other people is the question of the model development management scheme. Your interests

in it are obviously slightly different from those of other witnesses. We are interested in your view of the scheme, which is proposed by the Law Commission. Your written submission indicates that you probably like the scheme but would prefer it to be stronger. Perhaps you can give us a flavour of what ideally the character of that development management scheme would be if the question of reservation to Westminster were overcome.

Angela Yih: The owners that we have dealt with are wholly in favour of the model development management scheme. I assume that some of them, like us, have not considered the scheme in detail and so have perhaps not understood how the confusion to which earlier witnesses referred might arise. However, the major concepts of transparency and accountability to the owners about what money is to be collected and why, where it goes and how it is protected would provide safeguards for the owners and higher standards for managing agents. Those aspects of the scheme are crucial to good property maintenance and the management of sheltered and retirement housing.

The Convener: Do you wish to say anything further?

Angela Yih: No, except to thank you for listening to us.

The Convener: Thank you for your evidence, which was helpful.

We are now slightly ahead of time so, if members wish, I will suspend the meeting for 10 minutes for a short coffee break. I see that members are already prising themselves out of their seats, so the answer is yes. We will reconvene promptly at 3.30 pm.

15:23

Meeting suspended.

15:33

On resuming—

The Convener: Before I introduce the next group of witnesses, I ask the committee's leave to postpone for two weeks our discussion of the committee's work programme. We cannot do it this week, simply because of the size of today's agenda. I believe that we cannot do it next week either, because we have an informal meeting with the Auditor General for Scotland to discuss a possible audit of alternatives to custody that are in operation. Given that, it might be appropriate to discuss our work programme after that meeting. Are members agreed?

Members *indicated agreement*.

The Convener: We also have to tweak one or two aspects of our final report on legal aid, which will give us a more assembled programme.

With that, I welcome to the meeting Marie Galbraith and Margaret Reid, who are respectively the convener and an executive committee member of the Sheltered and Retirement Housing Owners Confederation—or SHOC—and John McCormick, who is a partner in McSparran McCormick. I should inform members that I might have to leave at about five to four, so if you see me getting up, I hope that you will not take it personally. The deputy convener will be pleased to take over.

First, do you consider the Title Conditions (Scotland) Bill to be of benefit to your members?

John McCormick (McSparran McCormick): Before we start, I should declare an interest. I am a member of the council of the Law Society of Scotland. However, I appear before the committee today as a representative of SHOC and anything I say is on behalf of that organisation.

SHOC is pleased that the Title Conditions (Scotland) Bill is under consideration and welcomes many of its benefits. As members might be aware, I have been involved in some protracted litigation on behalf of elderly people throughout Scotland. The bill's provisions go some way towards assisting those members and closing off future avenues of dispute.

One of the main problems that SHOC members have experienced is the interpretation of their current deeds of conditions by current factors and superiors. If the bill assists the interpretation of those deeds of conditions, it will assist SHOC representatives and the members whom they serve.

The Convener: I refer members belatedly to paper J1/02/29/5, particularly the second page, in which SHOC summarises its relations. I am just not with it today. I also welcome Ken Macintosh to the committee.

Lord James Douglas-Hamilton: Am I right in thinking that SHOC is not altogether happy with the current definition of sheltered housing? Do you have any suggestions or recommendations as to how it might be improved?

John McCormick: Indeed. It is fair to say that we are not entirely comfortable with the current definition of sheltered housing. However, it could be remedied concisely. In that respect, I echo the comments of previous speakers who said that nowadays properties are rarely sold as sheltered housing; rather, they are usually sold as retirement accommodation or retirement housing. There is a remarkable difference between the terms in the public's eyes. Sheltered housing or sheltered accommodation implies that the people who live

there are somewhat infirm or require a higher standard of care than do people who are simply elderly. I understand that such an implication might have emerged from rented sheltered housing schemes, where people must fulfil certain medical conditions before they are given such accommodation.

I understand that members have copies of the papers that we have submitted, so I do not wish to go through them in great detail. However, it might be useful to refer members to the part of our submission that contains a sample deed of conditions. Although it is only a sample, it reiterates what appears in most deeds of conditions. Page 12 states:

"the remaining thirty five dwellinghouses are to be used for the purpose of providing sheltered housing accommodation for the elderly".

Further on, at page 20, line 14, where the words "two roomed Dwellinghouses" are underlined, the Deed of Conditions says that such houses

"shall be used and occupied by not more than two persons both of whom shall be capable of leading an independent life and one of whom shall be of pensionable age, that is to say, in the case of females a person who has attained the age of sixty years and in the case of males a person who has attained the age of sixty five years or is eligible to receive a Government pension in respect of disablement".

Taken together, those two clauses state that the person who occupies a property must be capable of "leading an independent life". I invite members to colour the argument along the lines that the interests of the managers are not the interests of the residents to whom they are subservient. That will colour what I say later on in response to other questions.

There are two points. First, the deed contains an age requirement. Secondly, one must be capable of "leading an independent life". However, even those clauses have been open to misinterpretation because of the final part of what I read out, which states that the person must be in receipt of

"a Government pension in respect of disablement".

A 34-year-old person was allowed to reside in that particular complex because he was in receipt of a disablement pension. That was in spite of the previous provision which said that the accommodation was meant to be for the elderly. I make no bones about that, although there was no difficulty with the chap involved. However, from the other proprietors' point of view, it created a dangerous precedent.

I will come to the point. My clients want the words,

"also known as retirement housing or retirement accommodation",

to be inserted after the words "sheltered housing development" in section 50(3) of the bill.

Lord James Douglas-Hamilton: Are you arguing for a more comprehensive definition or a different definition?

John McCormick: I am arguing that those words should be inserted in the current definition and that, for all practical purposes, there is no distinction between retirement accommodation and sheltered housing.

Lord James Douglas-Hamilton: You have told us what you believe to be the differences between a sheltered housing complex and a retirement community. Would I be right in thinking that that is not just a question of perception, but of reality?

John McCormick: In my submission, there is no difference between a sheltered housing complex and a retirement complex. When properties are being marketed as retirement accommodation, one finds that the accommodation is sheltered housing only when one looks at the legal documents. That is the difference. The difference is in the public's perception but the reality is that the two are synonymous. That is the first point.

Secondly, if you want to buy a property for your retirement, it is just an ordinary flat if it does not have certain facilities.

Lord James Douglas-Hamilton: Would it therefore be fair to say that within the general definition, there is a breakdown in the fine print, which can be markedly different depending on different circumstances?

John McCormick: The only difference would be from complex to complex in respect of the services that are provided. However, the core burdens—as they have become known in the bill—should be the same whether the accommodation is retirement accommodation or sheltered accommodation.

Lord James Douglas-Hamilton: Is the drafting such that retirement communities could be excluded from the bill?

John McCormick: They could be if a lawyer was clever enough simply to exclude the words "sheltered housing accommodation" from the deeds of conditions. In other words, it could be argued that one or two of the core facilities or services were missing. That would distinguish sheltered housing accommodation from what would be retirement accommodation. Therefore, the unscrupulous developer could distinguish his complex from the purposes and ambit of the bill.

Lord James Douglas-Hamilton: Are you calling for an amendment to clarify the matter so that there can be no misinterpretation?

John McCormick: Yes.

15:45

The Convener: I think I followed that. Is an amendment required, so that evasive measures cannot be taken in deeds of conditions to avoid the consequences of the bill?

John McCormick: Yes. For example, with the deed from which I quoted earlier, the property was marketed as retirement accommodation, but the deed of conditions shows that the accommodation is sheltered housing. The reality is that most clients, especially elderly clients, do not read and digest the terms of the deed of conditions.

The Convener: Few of us do.

John McCormick: As a consequence, if there were a difference between sheltered accommodation and retirement accommodation, and one wanted to avoid the consequences of the bill, it would at least confuse the issue if one marketed property as sheltered accommodation and put into the deed of conditions reference to retirement accommodation, which does not fall within the ambit of the bill. An amendment is required to avoid ambiguity in such a situation.

The Convener: No doubt that amendment will wing its way to us at some point.

Donald Gorrie: I want to explore the question of the burdens that are placed on complexes. Is it a good idea to distinguish between core burdens and other burdens?

John McCormick: Put shortly, the answer is no. There exists a perception that elderly people are unable to make up their minds. That is nonsense for the purposes of the bill. In relation to other matters, I submit that proprietors should be able to determine the conditions with which they as proprietors are obliged to comply. We are dealing with proprietors, not tenants, who should be able to make up their minds about the services that they want and do not want.

I was instructed in relation to a protracted arbitration that took place in 1996 and lasted for 10 days. It involved a dispute between residents of a sheltered housing development in Glasgow called Millbrae Gardens and Hanover (Scotland) Housing Association. There is a copy of the arbiter's award in the papers that we submitted to the committee, so members can peruse the arbiter's award in its entirety. In that case the arbiter thought that the deed to which I have already referred merited changing. He recommended that a meeting of the proprietors should be convened to consider changing the deed of conditions, to balance it more in favour of the proprietors. On page 50, under the heading "Postscript to Part VI of the Award", the arbiter stated:

"The changes I propose will not in my view adversely affect the interests of any single proprietor no matter how infirm or elderly."

It had been argued that those people could not be trusted because they were too ill or elderly and did not know their own minds. The arbiter has scant regard for that. He said:

"It is my sole intention to allow those proprietors who are active and interested to have a say and indeed an influence on many aspects of their property interests at Millbrae Gardens. Their acting as watchdogs for the whole community of owners should be of general benefit."

That takes me back to my primary submission, which is that it should be for the proprietors to determine what is of considerable moment to them, depending on which development they are in, rather than it being for those legislating in the Scottish Parliament—perhaps prompted by the interests of property managers—to determine what should or should not be done in the proprietors' best interests.

The bill deals with the majority and no doubt we will come on to that. The majority should be a simple 50 per cent. It should be for the proprietors to determine what is in their best interests as owners of the property. It is a straightforward matter. The proprietors know what is in their best interests and the idea that they need to be mollycoddled, told what percentage is needed and what are core burdens is absolute nonsense. Core burdens are required to define what is sheltered accommodation. People are buying into sheltered accommodation and they know what they are buying into. It would be foolish for someone to buy into sheltered accommodation in the hope that another 49 per cent of people will agree to re-write the deed of conditions at some future stage. That would be nonsense.

The Convener: As I explained earlier, I have another meeting that I must attend. I hand over to the deputy convener, Maureen Macmillan.

Donald Gorrie: What about protection of the minority? If someone thinks that they have bought into a retirement complex and for whatever reason a majority votes that the complex should become something different—even if the balance is 51 per cent to 49 per cent—should not they have some protection to allow them to remain in a retirement block?

John McCormick: The protection is inherent in the democratic process. The properties are marketed and sold as retirement or sheltered housing accommodation. Anyone who buys into such property knows what they are buying into. Occasionally there will be votes about what should or should not be done, but it is highly unlikely that there would be a vote to cancel a deed of conditions in so far as it related to sheltered housing being the purpose of the accommodation. That is what 100 per cent of the people living there

will have bought into—they will not have bought a property only to find out afterward that it is sheltered housing.

The argument in relation to minority interests applies whether one sets the level at 50 per cent, 66 per cent or 75 per cent. The protection that is afforded to people is what is in their best interests. The best interests of a proprietor will be their best interests regardless of whether a majority of 99 per cent or 50 per cent votes against him or her.

Donald Gorrie: Should not there be some provision to ensure that retirement homes continue to be retirement homes? People can argue about the details of how a development is run, but democracy is about the protection of minorities as well as the will of the majority. One can imagine a situation in which there is a set of retirement homes on an attractive site and a developer comes along and offers everyone £X more than the market value. Should not there be some protection for the minority of people who do not want to accept that bribe?

John McCormick: Indeed—but there is protection because a developer would not be able to do what you suggest. A developer would not be able to acquire such a property—the conditions of being over 60 years of age or of being capable of leading an independent life would not apply, because the developer would probably be a corporate institution.

I have not heard of a case such as the one Donald Gorrie describes, but if the proprietors were so induced, the same 75 per cent rule would apply. When people purchase sheltered accommodation, they do so knowingly. Consequently, the law should interfere only to the minimum extent. I repeat that it is highly unlikely that more than 50 per cent of the people in a development would vote for it to be no longer a sheltered housing development. That is what they have knowingly bought into; if they did not want a warden or a call facility, they would simply buy an ordinary flat.

You suggest that we should strengthen the protection for people in sheltered housing. Those people should be the masters of their own destiny, just like any other proprietor. The mere fact of being over 60 should not deny people the right to determine their own destiny.

Donald Gorrie: Should all decisions be made by a simple majority and should there be no distinction between core burdens and other burdens? Should the owners be able to vote to have the housing managed as they wish?

John McCormick: Indeed. As I said in my submission, one should trust the owners to know their own minds. The drafting of the bill is complicated by talk of core and non-core burdens. A dispute could arise over section 50(4)(a)(ii), which mentions "a service". Section 50(4) says:

"Any real burden which regulates the use, maintenance, reinstatement or management"

of a service will be

"referred to as a 'core burden'."

Does that include, for example, clearing of snow in winter? That is a service, but is it a core service? There could be problems of interpretation. All sorts of possibilities will arise on which views could be canvassed. However, it should be for the proprietors to determine their own destiny.

Donald Gorrie: Thank you. That is very clear. I understand what you are getting at.

The Deputy Convener (Maureen Macmillan): Donald, would you mind if Ken Macintosh came in at this point?

Donald Gorrie: Not at all. I have resigned, as it were.

Mr Kenneth Macintosh (Eastwood) (Lab): There is no need for such drastic action, Donald.

I know that both Mrs Galbraith and Mrs Reid are very capable of deciding their own destinies, and I want to ask them a couple of questions. When people buy into a retirement complex, I assume that they think that the developer has their interests at heart. In your experience, do developers have the owners' interests at heart?

Margaret Reid (Sheltered and Retirement Housing Owners Confederation): I have not found that to be the case.

Mr Macintosh: We have all heard about Millbrae Gardens, a case that sheds light on the use of the 75 per cent majority consent. There was a great deal of unhappiness between the residents and the developer and you tried to get a vote taken to overturn the wishes of the developer. What was the result of that vote?

Margaret Reid: When Hanover called a special meeting to decide on the arbitration award, that award received 74 per cent acceptance from our owners. However, despite that, Hanover did not implement the award.

Mr Macintosh: In the complex, many people were extremely animated about the behaviour of the manager and decided to take action. However, despite that, and despite having very good reason to complain about the increase in service charges, you mustered only 74 cent in the vote.

Margaret Reid: That is correct.

Mr Macintosh: Would it be fair to conclude that a 75 per cent majority consent is a blocking mechanism and not an appropriate threshold?

Margaret Reid: I do not think that the 75 per cent majority consent is in the interest of owners. Everything would remain the same and we would return to fait accompli decisions. Irrespective of the percentage of the majority vote, it was still a majority.

16:00

Mr Macintosh: Yes, indeed. SHOC said that Millbrae Gardens is not an exception. Is it fair to say that many residents in retirement complexes around the country feel that they are vulnerable to bullying?

Marie Galbraith (Sheltered and Retirement Housing Owners Confederation): Yes, it would be fair to say that. In our submission, we referred to research that was compiled by Eleanor Clark of the former Scottish Homes about owners who were frightened. We did not suffer from bullying; we just had our money stolen from us—it was done very politely. I know of complexes in which people are frightened to raise their head above the parapet. If they do so, they are victimised.

Mr Macintosh: Without naming names, can you give examples of what happens? You gave an example in Aberdeen in which the factor or management company removed some of the services that were offered to residents.

Marie Galbraith: That is happening all over the country. Examples include the cutting of warden services without consultation and with no decrease in the management fee, but a decrease in the number of hours provided. Many retirement complex managements are not financially accountable to their residents. As a result, residents feel that, if anything has to be done to their flat and they ask for a breakdown of their account, they are picked on.

Mr Macintosh: The bottom line is that owners should be given greater financial control and that the manager or factor should be made more accountable to the owners. Would SHOC welcome that?

Marie Galbraith: Yes. That said, we feel that the term "manager" is a bit confusing. In many complexes—without consultation—the name "warden" is changed to "manager". If owners talk about a "manager", we immediately think of the person who is the warden and not the management company. I have forgotten the question.

Mr Macintosh: You have answered it. Will you clarify that you would like the use of the word "manager" changed in the bill?

Marie Galbraith: Yes—to "management company". It is difficult to understand any deed of condition. Difficulties could arise if the management company is called the "manager" and the warden is no longer referred to as the "warden" but the "manager".

The Deputy Convener: Before I call Wendy Alexander, I ask her to be careful about the sub judice rule, as we do not want to get into defamation procedures or anything like that.

Ms Alexander: Let me return to the generalities, and to a specific point that would make it less likely for such situations to arise—a model development management scheme. As the Law Commission has proposed it, I will assume that you would be in favour of the inclusion of such a scheme in the bill. The issue that we are trying to reflect on today is whether such a model development management scheme should be tougher and whether it should contain mandatory elements. In terms of redressing the balance in favour of owners, what observations would you like to leave with us on the character of such a scheme?

John McCormick: On the whole, SHOC welcomes the development management scheme, although it contains one or two matters that appear to conflict with the bill.

For example, rule 4.2 of the proposed scheme, which deals with the power to remove the manager, states:

"The association may at a general meeting remove the manager from office before the expiry of his term of office."

That rule may conflict with the contractual obligations in respect of the appointment of a manager and with the 10-year rule, although my clients are not in favour of the 10-year rule in the first place.

It might be useful if I were to outline Mrs Galbraith's situation. When the proprietors at Mrs Galbraith's development approached me, they were in substantial deficit—some funds were taken by someone who served a custodial sentence—but the proprietors were asked to pay up by the factor and the superior. I will not name names but, for the avoidance of doubt, I am not referring to Hanover (Scotland) Housing Association. The proprietors got together, formed a properly constituted owners association and acquired the superiority. It turns out that they bought it for nothing—the superior's legal fees were all that they had to pay. The superiority was transferred to the owners' association, which is completely democratic—the rule on majority consent is 50 per cent. The owners' association appointed a local firm in Glasgow to act as factors, and the firm has continued to act for them for the past two or three years. Some people in the development may wish a change of factor and some may not, but the majority rule is in place. I understand that in that development in Glasgow

no one has ever suggested that a number of proprietors should get together and cancel, or change, its status as a sheltered housing development. The existing warden simply transferred her employment to the new factor and everything continued from there.

My point is that, in that example, it is for the owners' association to hire and fire the factor—monitoring the factor is all that they get together to do. The factor is accountable to the residents, notwithstanding the provisions in the bill. The suggestion that owners are too elderly to act as their own watchdogs is anathema to SHOC, as that is simply not the case. The residents know that from their own experience.

Lord James Douglas-Hamilton: You have already touched on this matter, but it would be helpful if you would clarify the position beyond doubt. Hanover (Scotland) Housing Association suggested that, although there should be a minimum age requirement in sheltered housing or retirement communities, it should be possible to alter the existing minimum age in a deed of conditions. The association suggests that there should be a minimum age—for example, 55—that cannot be lowered. Above that, the age could be varied, if there is a 75 per cent majority consent to such a variation. What are your views on that subject?

John McCormick: SHOC found that proposal somewhat strange. I read Hanover's submission online and I found it patronising. It expressed a fear, on behalf of its residents—rather than on its own behalf—that the young ones may wish to change the deed of conditions. I believe that the terms "the less old people" and "the young ones" have been used in various submissions, although Hanover may not have used them. The submission tells the Parliament that the age should be 55. In SHOC's view, the age should be 60. That addresses Mr Gorrie's point. It should be possible to increase the age by a majority vote. However, setting an age of 60 should protect against young ones' seeking to make a penny or a quick buck by selling sheltered accommodation that they have bought on the open market.

Michael Matheson: I want to return to manager burdens. Are you satisfied with the provisions of part 5 of the bill as they relate to sheltered housing and retirement home accommodation?

The Deputy Convener: The member is referring to the provisions in sections 58 to 61 of the bill.

John McCormick: SHOC is happy with the manager burdens set out in the bill, with the exception of the 10-year rule concerning new developers. The papers that we have submitted provide examples of cases that illustrate our point of view. Mrs Reid acquired her property in 1987 or 1988. In 1989 there was a dispute—the service charge had been increased by more than 20 per cent in one year. There were also other problems. Under the deed of conditions, the dispute went to arbitration. The arbiter charged £100 an hour. I make no complaints—the sum charged was appropriate. The arbiter's clerk also charged £100 an hour, so the cost of the arbitration was £200 an hour plus VAT. That does not include legal expenses.

The panacea of arbitration under deeds of conditions is a mirage. Arbitration is extremely costly for those who are involved in it. In Mrs Reid's case, the arbitration lasted 10 days. That was followed by consideration of the case by the arbiter and his clerk. The costs were horrendous. One can imagine the consequences for elderly people of losing in a case that goes to arbitration. In Mrs Reid's case, they won—expenses were awarded in their favour.

That judgment was made in 1996. The residents had had no say in the superior's decision to appoint itself as the factor, but the arbiter directed that the superior should not be the factor.

The Deputy Convener: I am anxious about the fact that we are discussing individual cases.

John McCormick: I will conclude by saying that in 2001—four years after the arbiter's determination—that decision was subject to judicial review. Lord Wheatley's decision is contained in the papers that have been submitted to the committee. He threw out the judicial review.

In Mrs Reid's case, the developer appointed the factor and the superior. Within months of that happening, there was a dispute. Not only was there a dispute, but both the arbiter and Lord Wheatley determined that there was merit in the residents' case. Ten years is not an acceptable limit on manager burdens. In my view, the figure should be set at three years—at the most, five. The factor will then know that, if he fails to maintain services and standards during the period in question, he will be replaced.

I echo a point made by the previous witness. It is in developers' interests to sell properties as quickly as possible. Therefore, three to five years should be ample time.

Michael Matheson: You accept the bill's provision for the manager burdens being in place until all the properties are sold. If that happens within a year, the owners could vote to change the manager. However, if the manager retained an interest in the property, you would like that to be limited to three to five years at the most.

John McCormick: Indeed. The managers often retain a strategic interest in the property.

16:15

Michael Matheson: The bill contains provisions to ensure that a warden's house, for example, can be classified as the manager's retaining a unit within a property. Those provisions are intended to protect owners. Are there sufficient provisions in the bill to stop the type of abuse whereby a kind of kid-on interest is retained?

John McCormick: There are probably sufficient provisions in the bill, taken in its entirety. However, in that scenario there should again be no reason for the 10-year period; it should simply be three to five years. The principle is acceptable, but not the 10 years.

The Deputy Convener: Thank you to Marie Galbraith, Margaret Reid and John McCormick for their evidence, which has been duly noted and will be taken account of.

I welcome Linda Ewart, deputy director of the Scottish Federation of Housing Associations, Alison Thompson, a partner in T C Young, and Stewart Kinsman, the chief executive of Hanover (Scotland) Housing Association.

I start by asking each of you to explain briefly how the bill affects the organisations that you represent.

Linda Ewart (Scottish Federation of Housing Associations): Good afternoon. The SFHA is the representative body for registered social landlords in Scotland. Our members, who number around 200, have collective responsibility for the ownership and management of some 150,000 properties in Scotland. In addition to being the owners and managers of those properties, RSLs act as factors to a considerable number of owner-occupied properties. The operation of the right to buy, and in future the modernised right to buy, will obviously be relevant to RSLs in connection with the bill. RSLs provide factoring services and are responsible for the provision of shared-ownership housing throughout Scotland. Therefore, they have responsibility for buildings in common ownership. As my colleague Stewart Kinsman will explain, several of our members are also providers of sheltered housing.

Stewart Kinsman (Hanover (Scotland) Housing Association): I am the chief executive of Hanover (Scotland) Housing Association. My association is a registered social landlord and owns and manages 4,000 houses throughout Scotland, which are mostly sheltered housing for older people. We also manage on behalf of owner-occupiers just over 1,000 owner-occupied sheltered houses. We welcome the provisions in the bill for much the same reasons as earlier speakers. We certainly welcome the clarity that the bill brings to areas of title conditions and real burdens that have been unclear. There is another aspect of the bill that we particularly welcome.

Managers of owner-occupied sheltered housing have often been left defending sheltered housing, or, more important, defending the interests of a minority who are older, sometimes more frail and often single residents. The bill assists us with that in two ways. First, it gives us a definition of sheltered housing. Managers will have less need to protect that position, because it is laid out in the bill.

Another factor is that the bill shifts responsibility from the manager to the owners. The owners acquire rights, but they also acquire responsibilities. The juxtaposition of rights and responsibilities in the bill is extremely interesting. Managers will no longer have to shoulder the burden that they have had until now of protecting the sheltered housing position and the interests of a minority of owners, who entered sheltered housing for the support that it offers and who wish that to be protected. We welcome the bill for those reasons.

Alison Thompson (T C Young): I am from a firm of solicitors that specialises in social housing law. We act for about 100 housing associations and for funders and bodies that have an interest in social housing. I am here to support the SFHA's submission because of the bill's legal complexities.

Lord James Douglas-Hamilton: Are you happy with the definition of sheltered housing and do you have suggestions for improving it? We heard the suggestion that deeds of conditions can contain different conditions that depend on whether a house is marketed for elderly people or for people who need a higher level of care. The overall definition appears to cover all categories, but I would be most grateful if you told us whether you are satisfied with the current definition and whether we should be concerned about the differences in deeds of conditions when considering amendments that may arise.

Stewart Kinsman: I reiterate that we welcome the fact that sheltered housing has been given some definition in the bill. However, the definition is less specific than the guidance that accompanies the bill. The guidance spells it out that sheltered housing has a warden service, a central alarm service and other design facilities. The bill does not spell that out, which we find slightly dangerous.

As the definition in the bill is not specific, the danger is that some owners will withdraw from some of the core facilities, yet remain within the definition, which is open and flexible. We are attracted by the idea of defining sheltered housing in the bill, but we would like the definition to be more specific, if possible, in the way that the definition in the guidance is more specific.

Lord James Douglas-Hamilton touched on the different definitions in deeds of conditions and referred to the level of care, which a previous speaker mentioned. I have studied deeds of conditions from a range of developers and providers of owner-occupied sheltered housing.

I have not come across one provider that does not define the provision as sheltered housing. Virtually all the provision is defined as sheltered housing in the deeds of conditions. I therefore find it difficult to see what the problem is in the comparison between sheltered housing and retirement housing. Retirement housing was always intended to be sheltered housing for owner-occupiers. That is the way in which it is defined in most deeds of conditions.

Lord James Douglas-Hamilton: If it is your evidence that the wording should be more specific, will you examine it further and let us have a draft amendment for our consideration in due course?

Stewart Kinsman: I would be perfectly willing to do that, but I draw your attention to the code of practice for owner-occupied sheltered housing, which was drawn up under the auspices of the Scottish Executive, and to the definition of sheltered housing in that document. A wide range of interests, including representatives of SHOC, was represented around the table when the code of practice was prepared. The specific definition of sheltered housing in that document would be perfectly acceptable.

Mr Macintosh: Mr Kinsman said earlier that developers are often in the position of having to protect the most frail and vulnerable residents from the predatory behaviour—I do not know what exactly he was suggesting—of the younger older residents. SHOC has argued that the best protection for the residents lies with the residents themselves. Do you not agree with that?

Stewart Kinsman: I would certainly not use the word "predatory" of the majority of owners, or of any owners. I can only point to the development at Millbrae Gardens that was referred to earlier. A significant minority of owners on that development does not want changes and does not agree with the steps that the majority has taken. Thankfully, the situation at Millbrae is quite exceptional and does not apply throughout Hanover's developments, but it provides us with an example of a minority that feels strongly that its voice is not being heard. If anyone has any doubt about that, I recommend that they attempt to speak to or get information from those in the minority at Millbrae, which was certainly not listened to.

Mr Macintosh: I believe that 74 per cent of the property owners voted in favour of changing the deed of conditions. Is that so?

Stewart Kinsman: Yes.

Mr Macintosh: Do you not think that 74 per cent is a significant number? Should you not listen to those people's wishes?

Stewart Kinsman: We are entering the realms of a particular case but, in response to the question, there were arguments on the other side. The advice that we received was that some of the proposed changes were not permissible under Scots law. That was why we did not agree to the particular change to the deed of conditions. We then took a decision, which I believe was a responsible one, to seek a ruling from the Court of Session on that particular point. Having received advice that certain changes could not be made, we went to the Court of Session, where we were told by Lord Wheatley that they could be made. We have now made those changes.

The Deputy Convener: If I may interrupt, we are here to scrutinise the bill, not to ask questions about particular incidents.

Mr Macintosh: I appreciate that, Convener. My point is that SHOC has presented certain evidence that the owners themselves are the best people to protect their own interests. Mr Kinsman is arguing that the developer is the person best placed to protect the interests of the most frail and vulnerable. In the court case concerning Millbrae Gardens, I believe that Hanover was directed by the arbiter to relinquish the role of superior and factor. That was in 1996. Despite that ruling and the judicial review, Hanover is still factor and superior even today. Is that correct, Mr Kinsman?

Stewart Kinsman: That is correct. We have asked the owners to tell us whom they wish to appoint as factor, but we await their reply.

Michael Matheson: I want to return to part 2 of the bill and consider sections 31 to 36, which deal with the discharge of community burdens. The bill makes two provisions for the discharge of burdens: one by majority and the other by adjacent proprietor. Are you satisfied with those two provisions or have you any concerns about them?

16:30

Stewart Kinsman: In general, I have no concerns about the provisions. The bill strengthens that area of the law and we are quite happy with that. I am interested in sheltered housing, not in the generality. I do not think that discharge by adjacent proprietors affects sheltered housing. Both the provisions are good and are welcome.

Linda Ewart: We broadly support the view that Mr Kinsman has expressed.

Donald Gorrie: We may have trodden in this area a bit already, but I want to explore the issue

of core burdens and non-core burdens and percentages and all that. As was mentioned in the previous discussion, there may be some instances in which the minority is bullied—if that is the right term—by what might be a small majority of residents. However, I am sure that there are also cases in which a developer or feudal superior who is less than enlightened bullies people. It is a question of keeping a balance between the two. Will you set out your views on all that?

Stewart Kinsman: The bill is interesting because it is all about changing the balance of rights and responsibilities and the relationship between them. We believe that the bill has got things about right.

Sheltered housing is intended to provide housing support. Its main aim is to allow people to maintain an independent lifestyle in the community. If we start to hang some detail on that in the form of agreements or deeds of conditions, it soon becomes clear that those who will gain most benefit from sheltered housing will be older and retired people. Those who have become a little less active and perhaps more frail are the people who will get more benefit from the protection, security and safety that sheltered housing offers. At any one time, such people may well be in a minority in any particular sheltered housing complex. For that reason, we support the view that a 75 per cent majority should be required for any substantial changes to the core elements of sheltered housing.

Donald Gorrie: Do you distinguish between the core elements and the other conditions, for which you would accept a simple majority?

Stewart Kinsman: The argument concerning the other elements of sheltered housing is less emphatic. Hanover's written submission gives the example of the keeping of pets, which can be important for a single older person living on their own. A burden that said that one pet could be kept in the house would be a non-core burden, but the removal of that burden could have quite an impact on an older and more frail person. Although we have fewer reservations about the provision that non-core burdens could be changed if more than 50 per cent of the owners of the units were in favour, we are still concerned that it might have an adverse impact on certain individual residents.

Donald Gorrie: So your view is that the best interests of the frail minority of residents are best guarded by the management company, or whatever it is.

Stewart Kinsman: I would not put it quite like that. The bill shifts the burden of responsibility to owners and removes from managers a substantial part of the responsibility for managing developments. If the bill is considered in conjunction with the abolition of the feudal system, superiors' rights will disappear. Most managers' rights and responsibilities are held by managers in their capacity as superiors and those will be shifted to owners. We welcome that. The responsibilities will still be there, but owners will have to take key decisions themselves. We think that that is a step forward.

When owner-occupied sheltered housing was conceived and first set up in the early 1980s, we had to work with the legislation that was in place at the time, which has often been described as not ideal for sheltered housing. Professor Reid of the University of Edinburgh, for example, has said that we should stick with things until the law is changed. The law is about to change, which we welcome and think will be beneficial.

Ms Alexander: You will know that, where the title deeds do not provide for the dismissal of a manager in sheltered housing, the owners of a simple majority of units may dismiss him or her. By virtue of section 59, however, where the title deeds provide for dismissal, a manager may be dismissed by a two-thirds majority of owners, regardless of the terms of the title deeds. Are those provisions right for the special circumstances of sheltered housing? On a smaller point, is it appropriate that a warden's flat will not get a vote?

Stewart Kinsman: My management committee and staff who are involved with the issue have mixed views. On the one hand, we agree that title conditions should not make it difficult for a manager to be dismissed. On the other hand, the manager is often unpopular precisely because he or she has protected the minority of frail owners, which makes matters difficult. However, nothing is to be gained by trying to manage a development in which there is conflict with the owners—I am sure that members will appreciate that from deliberations that they have heard. We do not have strong views on the matter. If it is decided that the bill will refer to 50 per cent, we will work with that figure.

Ms Alexander: What are your views on whether a warden's flat should get a vote?

Stewart Kinsman: We take a similar view about that. Often, the manager owns the warden's flat and there is an argument that it should have a vote. However, I have been involved in situations in which there have been close votes and my organisation has usually abstained so that we could not be seen to carry such a vote by one, which would be unfortunate. We have no strong views on the matter.

Ms Alexander: That is helpful—thank you.

On a slightly different matter, what are your views on the model development management

scheme that the Scottish Law Commission has proposed? Do you support its inclusion in the bill if the issue of covering a matter reserved to Westminster can be overcome? Is the balance between voluntary and mandatory elements right?

Stewart Kinsman: The short answer is yes, we agree with that. Linda Ewart may want to add a few words.

Linda Ewart: The SFHA would strongly support any effort to restore the model development management scheme to the bill. We were disappointed that the scheme was absent, although we understand the reasons for that. There is a lot of merit in having a scheme that provides a degree of consistency and serves as a model that the majority of managers can adapt to suit their own requirements but which is based on a framework that contains certain mandatory core elements.

We would like the scheme to be restored and we would support a basic mandatory framework that included certain core elements with the option for managers to add other elements if that were felt to be appropriate in certain circumstances.

The Deputy Convener: We now move away from consideration of sheltered housing and retirement housing to consider housing in a broader social context.

Michael Matheson: I will stick with part 5 of the bill but go on to manager burdens, particularly in the context of social housing. Are the bill's provisions for manager burdens sufficient?

Stewart Kinsman: I would be happy with the bill's provisions. The bill has got the provisions on manager burdens for sheltered housing about right.

Michael Matheson: Are you happy with the 10-year period?

Stewart Kinsman: I do not have strong views on that. It is about right. We would have no difficulty with the period being reduced to, for example, six years. I believe that Age Concern was pursuing that period. A period of five or six years would be acceptable.

Linda Ewart: The SFHA would go along with that. Ten years seems about right, but we would not be unduly concerned if there were a reduction to five or six years. We would be concerned if the period were to be reduced to below five years.

Michael Matheson: The manager burden can extend to 30 years on a property that is purchased under the right to buy. Is that an adequate time scale or do you have concerns about that length of time?

Linda Ewart: From our reading of the bill, we understand that the provisions of section 58 would apply to local authorities and to registered social landlords where the sale has taken place under the provisions of the Housing (Scotland) Act 1987. On that understanding, we support the principles in the bill. Those provisions should apply equally to registered social landlords. The 30-year time period is appropriate.

We are a little perplexed over why the safeguards that section 58 seems to introduce seem to be capable of being overridden by the provisions of section 59, which would allow a two-thirds majority to dismiss the manager during the period of the burden. There may be a flaw in our understanding of the bill but if our understanding is correct, it is unclear to us why that exemption should be introduced.

Michael Matheson: We may have to check the bill in case there is a lack of consistency.

The Deputy Convener: Our adviser is checking it as we speak.

Section 28 provides that a majority of proprietors can instruct common maintenance work. What are your views on that provision?

Linda Ewart: We would like the bill to include a provision in section 28 that, in addition to the notification procedure, there should be an opportunity for the owners to be consulted on or to discuss the proposed work. We are a little concerned that the bill contains no requirement for discussion or consultation. We suggest that that should take place before work is instructed. If that is not possible, we suggest that a different approach be adopted and that the application of section 28 be confined to works of essential maintenance, rather than the broader definition that is used in the bill. However, we support the definition of maintenance that is provided in the bill, which takes us a little beyond the basic state of repair.

The Deputy Convener: Have you anything to add, Mr Kinsman?

Stewart Kinsman: No, I fully support the view that Linda Ewart has given.

The Deputy Convener: Last week, the Law Society suggested that section 28 was far too detailed and bureaucratic. Do you share that view?

Linda Ewart: No.

16:45

The Deputy Convener: Are the safeguards in the bill in respect of the funds deposited in advance adequate?

Linda Ewart: We have some concerns about those safeguards and believe that they are not adequate. We are concerned about the provision

that would allow a bank account to be operated on the basis of the signatures of two individuals. We are concerned that sufficient safeguards are not in place or may not be in place to protect the money that is deposited in that account. One of the reasons that we were disappointed that the management scheme was not included was that provisions in that scheme would have provided those safeguards.

Lord James Douglas-Hamilton: Paragraph 3.1 of the SFHA's submission says that 10 years, rather than five, would be an appropriate time for the period of negative prescription. Could you explain the reasoning behind that and how negative prescription should work?

Linda Ewart: We were concerned that, at a time when housing associations and individuals will have to deal with complex technical changes, a significant reduction in the period of negative prescription from 20 years to five years could result in some oversights. As a result, while recognising the need for a reduction in the period of negative prescription, we suggest that a more appropriate compromise time scale would be 10 years. That would avoid the possibility of unfortunate oversights and would help people to deal with the period of huge change in a complex environment.

Lord James Douglas-Hamilton: Overall, the effect of the bill is to increase the role of the Lands Tribunal for Scotland in relation to title conditions. Do you foresee any difficulties arising from that approach?

Stewart Kinsman: We believe that making an application to the Lands Tribunal is quite a cumbersome procedure for older people to follow. We support Age Concern's proposal that there should be a mediation service as a sort of halfway house that would ensure that as many decisions as possible could be kept away from the Lands Tribunal. That would allow more efficient use of the Lands Tribunal's time.

Although we have reservations about the cumbersome and expensive nature of the procedure, we welcome the provisions in the bill.

Lord James Douglas-Hamilton: What sort of mediation service did you have in mind? Were you thinking of the creation of a new quango or a voluntary organisation?

Stewart Kinsman: I picked up from Age Concern's submission that it already runs an advisory service that was supported by the Scottish Executive. I believe, however, that it believes that a mediation service would go a stage further and might avoid disputes getting to the Lands Tribunal or to the litigation stage.

Lord James Douglas-Hamilton: Could you give more thought to the matter and let us know whether you have thoughts about who might best provide such a service?

Stewart Kinsman: I would be happy to pursue that.

Michael Matheson: I think that Linda Ewart's interpretation of the bill is correct. Paragraph 237 of the explanatory notes says that the two-thirds rule can be used in relation to estates subject to the 30-year period but not in relation to other types of schemes in which the managed burden is still operative. That suggests a lack of consistency.

Alison Thompson: Could I make a point before we finish?

The Deputy Convener: Certainly.

Alison Thompson: Section 53 of the policy memorandum says that amenity burdens will not be lost as a result of the bill. Under feudal reform, superiors will lose their rights in relation to amenity burdens, but section 52 of the Title Conditions (Scotland) Bill gives enforcement rights to other owners. The idea is that, where superiors lose their rights to enforce burdens, those rights are given to the other owners instead.

We act for a number of housing associations that have taken stock transfers from Scottish Homes and are managing large estates with many owner-occupied properties. For that reason, they are concerned about what will happen to the terms of the deeds of conditions and which clauses will be wiped out as a result of feudal reform.

Having examined the wording of specific clauses in a number of deeds of conditions, I have found that some amenity burdens will be lost simply because of the way in which they have been worded. The types of clauses that have been identified are those that are linked to superiority. For example, some clauses say that you cannot affix a business nameplate or alter your property without the consent of the superiors or that you cannot cause nuisance on the estate, the definition of nuisance being left to the superiors. I believe that, where such a link is made to the superiors, those amenity burdens will be lost. I wonder whether that has been considered and is fully appreciated.

The Deputy Convener: Professor Roddy Paisley raised that point last week and I am sure that we will deal with it further. Thank you for raising it again, as that further highlights its importance.

Thank you all for your attendance. As agreed earlier, we will postpone consideration of our work programme for a fortnight.

Meeting closed at 16:52.

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