JUSTICE 1 COMMITTEE

Tuesday 1 October 2002
(*Afternoon*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 1 COMMITTEE
32nd Meeting 2002, Session 1

CONVENER

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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)

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

*attended

WITNESSES

Alan Hampson (Scottish Natural Heritage)
John Mayhew (National Trust for Scotland)
Robin Stimpson (Anderson Strathern)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

ACTING CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Tuesday 1 October 2002

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 13:32*]

13:37

Meeting continued in public.

The Convener (Christine Grahame): Fellows and friends, I convene the 32nd meeting this year of the Justice 1 Committee. I welcome Scott Wortley to the committee. I ask everyone, including those who are in the public area, to ensure that their mobile phones and pagers are switched off.

I have received no apologies.

Convener's Report

The Convener: Item 2 on the agenda is a convener's report. There is only one item that I wish to raise, which members will already have noticed. We have secured a debate on our response to the prison estates review on the morning of Thursday, 10 October. We have a two-hour slot.

Michael Matheson (Central Scotland) (SNP): I am conscious of the recent leaking of the Justice 2 Committee's report on the Criminal Justice (Scotland) Bill. Our report on the prison estates review was also leaked which, if I recall correctly, was referred to the Scottish parliamentary standards commissioner or someone of that ilk.

The Convener: Yes, it was referred to the Standards Committee.

Michael Matheson: I cannot recall receiving its report.

The Convener: The Standards Committee asked the Justice 1 Committee to conduct its own investigation, because we could not provide it with anything other than what we had. It appears that it is impossible for us to carry out our own investigation, because we know no more now than we knew then. I think that when we discussed the matter previously we were not clear whether the report had been leaked, or whether two and two had been put together by an imaginative reporter to make five, because—as Maureen Macmillan may be able to clarify—it was not apparent that the newspaper report contained information from our report. Am I right?

Maureen Macmillan (Highlands and Islands) (Lab): I recall that some bits of the newspaper report were erroneous, but that other bits hit the nail on the head. I suspect that conversations had taken place with the reporter, not that the reporter had seen the document. I spoke to the reporter about it, but he would not say anything.

Michael Matheson: The leaking of the Justice 2 Committee report reminded me that our committee had had a similar problem, although it appears that that might not be the case. It has been at the back of my mind and I meant to mention it a few weeks ago.

The Convener: I am content to bring the letter to next week's meeting so that members can find out what the situation is regarding the Standards Committee, but I think that we are chasing our tails.

Michael Matheson: It was just at the back of my mind.

The Convener: Thank you for raising the matter.

I might call on Paul Martin, who has just arrived, to ask the witnesses certain questions, if that is all right.

Paul Martin (Glasgow Springburn) (Lab): All the hard bits.

The Convener: Arriving slightly late does not absolve you from asking questions.

Petitions

Title Conditions (Scotland) Bill (PE532 and PE533)

The Convener: We come to consider petitions PE532 and PE533 from Mr Ronald Smith. I take it that members have read the petitions and I refer them to the accompanying paper. PE532 asks the Parliament to amend part 2 of the Title Conditions (Scotland) Bill and PE533 asks the Parliament to prevent any excessive delay following enactment of the bill.

Do members wish to consider the details of the petitioner's concerns in the context of our consideration of the Title Conditions (Scotland) Bill, or shall we note them and take no further action?

Michael Matheson: A couple of the points in petition PE532 that deal with sheltered housing were highlighted in the evidence that we received a fortnight ago. I cannot find the petition amongst my papers. At this stage, I am inclined to ask the petitioner to await the outcome of our stage 1 report, given that we have received evidence on the same issues. If he is unhappy with our findings, he can contact us again.

Donald Gorrie (Central Scotland) (LD): If the petitioner has anything to say that was not said in earlier evidence to the committee, it might be reasonable to ask him to say it. However, I do not remember a discussion about timing—with which petition PE533 deals—although my memory might be at fault. The points in the first petition were dealt with thoroughly in evidence. We should not turn away new information, but we do not want to recap what we have covered already.

The Convener: Perhaps you could ask the Minister for Justice about the points that are raised in petition PE533. We are already prepared for that. Are you content with that at the moment?

Donald Gorrie: Okay.

Title Conditions (Scotland) Bill: Stage 1

The Convener: We come now to consideration of the Title Conditions (Scotland) Bill. We are making good time. I welcome Scott Wortley, our adviser on the bill.

We will take evidence on our favourite piece of legislation from representatives of the National Trust for Scotland and Scottish Natural Heritage, who will be sitting as a panel. I welcome Robin Stimpson, law agent from Anderson Strathern; John Mayhew, policy and planning adviser to the National Trust for Scotland; Alan Hampson, national strategy officer and Bob Farrington, designated sites unit, both of whom are from Scottish Natural Heritage. So, on one side of the panel is the National Trust for Scotland and on the other is Scottish Natural Heritage, but you all get on together in real life.

Lord James Douglas-Hamilton (Lothians) (Con): I believe that it is usual to make declarations of interest at the outset. My interest is as stated in the register of interests.

The Convener: I thank members of the panel for their submissions, which committee members have before them. The papers are in the public domain. Could you outline briefly the purpose and functions of your organisation, including any statutory powers that are relevant in the context of the bill? I ask that question first of the National Trust for Scotland.

13:45

John Mayhew (National Trust for Scotland): I thank you for the opportunity to appear before the committee. The National Trust for Scotland is Scotland's largest charity. It has more than a quarter of a million members. Two equal statutory purposes are relevant to the bill. They are set out in the National Trust for Scotland Order Confirmation Act 1935 and the National Trust for Scotland Order Confirmation Act 1938, which set up the trust. The two purposes are to promote the conservation of Scotland's cultural and natural heritage for the benefit of the nation, and to promote the enjoyment of that heritage by the public. The two purposes are mostly achieved through the ownership and management of 127 properties, which cover a total of 76,000 hectares. That is, to set it in context, about 1 per cent of the landmass of Scotland.

There is a wide range of heritage in those properties, including buildings, collections, archaeology, gardens and countryside. We also implement our purposes by influencing and persuading others to follow the trust's objectives.

That is where we come to this bill. We have statutory powers to own land, manage land owned by others and to sell, lease or feu that land. We have two special powers. One is that we are able to declare our land inalienable and most of it has been so declared. What that means in practice is quite complex.

The Convener: We are used to that, but try to give us a simple explanation.

John Mayhew: In one sentence, it means that the land is substantially free from compulsory purchase against our will. If there were a proposed compulsory purchase of land that the trust had declared inalienable, we would ultimately have recourse to the Parliament to override it. Our land is usually immune from compulsory purchase. The idea is that if land has been vested in us for perpetuity, it is reasonable that it should have some level of protection for the benefit of the nation for ever.

The second special power is referred to in the bill. It is that we have the ability under the National Trust for Scotland Confirmation Order Act 1938 to conclude restrictive agreements with other owners. We usually refer to those as conservation agreements; that is our internal shorthand for them. They are a form of title conditions, but they are not feudal. They were created by the National Trust for Scotland Confirmation Order Act 1938, so they have not been abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, and they carry on in force. They are one of the types of title condition that are not a real burden. I hope that that introduction gives the committee enough of a summary of the organisation to set today's discussions in context.

The Convener: I repeat the same question to Scottish Natural Heritage.

Alan Hampson (Scottish Natural Heritage): Thank you for inviting SNH to give evidence. SNH is a non-departmental public body. It was established under the Natural Heritage (Scotland) Act 1991. SNH's purposes and functions are to promote the care and improvement of the natural heritage, its responsible enjoyment, greater understanding and appreciation of it and its sustainable use now and for future generations. A number of acts give SNH a range of powers that are relevant to the bill. The two main powers are the power to create statutory agreements and the power to own land. I will give a brief introduction about the three main forms of statutory agreement; if you want to pursue that, please ask me questions.

The first kind of statutory agreement is a section 16 agreement under the National Parks and Access to the Countryside Act 1949. Section 16 agreements are made in relation to national nature reserves. The second kind is a section 15 agreement under the Countryside Act 1968. Section 15 agreements are made in relation to designated sites of special scientific interest. The third kind is what we call a section 49A agreement, made under the Countryside (Scotland) Act 1967. Section 49A agreements are made in relation to the wider countryside. Essentially, the three statutory agreements that we can make relate to national nature reserves, sites of special scientific interest and non-designated areas in the countryside.

The Convener: Thank you. I understand that you have powers in different respects over the use of land. What role—separate from the other powers that you have—do real burdens currently play in furthering your aims? Will the representative from Scottish Natural Heritage go first this time?

Alan Hampson: We were initially concerned that the statutory agreements that I have just outlined might be affected by what the Title Conditions (Scotland) Bill proposed, because those agreements are registered against titles to land and are commonly viewed as being burdens on that land. However, we have since received clarification from the Scottish Executive justice department that those statutory agreements are not real burdens as defined in the bill. They are statutory equivalents. Our understanding is that the bill will not therefore affect those statutory agreements.

The only remaining burdens that play a role in furthering SNH's aims and objects are feudal burdens associated with land that we own or have owned.

The Convener: Is the situation the same for the National Trust for Scotland?

Robin Stimpson (Anderson Strathern): The real burdens are important to the National Trust for Scotland, particularly in relation to land that it has sold off. That sounds bizarre, but there are circumstances where that can best pursue the NTS's purposes.

I have some brief examples. Properties that have been restored under the little houses improvement scheme—

The Convener: Under the—

Robin Stimpson: The little houses improvement scheme.

The Convener: The little houses improvement scheme. How did that get past us?

Robin Stimpson: The snappy title is LHIS. The NTS buys little houses—some are not so little now—that have architectural merit, restores them and then sells them. The proceeds of the sale are

used to fund another purchase. The scheme is traditionally known for buying properties in places such as Crail and St Monans.

Another example is when the NTS has been given a large estate. Say the core of the estate is of high heritage value and there are farms on the estate. There is no real need for the NTS to hang on to those farms and freeze occupancy or make sure that they are tenanted. The NTS can sell them off, provided that the sale gives some protection to the core heritage part of the estate.

It might also be necessary to sell land on some of the larger estates for social purposes. There might be a need for housing or a doctor's surgery. The land is still important, and it is still part of the estate, but it would be impossible for the estate community to continue to live without its sale. We are talking here about very large estates with several communities living on them.

The Convener: The examples that you have given are helpful.

Are you saying that the burdens would fly off with the abolition of feudal tenure?

Robin Stimpson: Yes. They would just be feudal burdens.

The Convener: Would you then use conservation burdens?

Robin Stimpson: Yes.

The Convener: I think that I am beginning to understand the bill. It is seeping through.

Robin Stimpson: It is important to understand that, if people have put up money, whether by charitable donation or a through a Government agency putting a property into the trust's care, they expect that the trust will look after it. That is one of the tools that the trust has in its armoury to make sure that, if there is a good and valid reason why it should dispose of part of the estate, that disposal will still be subject to some control and will still follow the prime purpose for which the property was given.

The Convener: Thank you. Those are helpful examples. Presumably conservation burdens will assist in your work.

Robin Stimpson: Absolutely.

The Convener: Is Scottish Natural Heritage in a similar position?

Alan Hampson: We are in a similar position in relation to land that we own and might sell, or land that we have owned and sold where there are feudal burdens in place.

There are possibly other benefits associated with conservation burdens. We understand that, as a conservation body, we would be able to enter into the agreement of a conservation burden with co-operative landowners. We can see advantages in that because we could then protect the interests of a particular area of land throughout any future changes in ownership. It would be advantageous to us to secure such interests on a designated site through a conservation burden, as part of a management agreement that we have agreed with a sympathetic landowner.

The same would be true of non-designated areas, where we are using our section 49A statutory agreement powers. Again, we could secure conditions using conservation burdens, as proposed in the bill.

Donald Gorrie: Both groups raised two points in slightly different ways. The first point is about the definition of a conservation burden. Could you suggest specifically how that definition might be improved? You are concerned about conservation burdens being used fraudulently to protect personal interests rather than the public good.

John Mayhew: There are two separate but interrelated issues: the definition of the conservation burden and the definition of bodies eligible to be conservation bodies.

Donald Gorrie: That is my second question.

John Mayhew: On your first question, our concern is that the bill's definition of conservation burden appears to give greater weight to architectural or historic matters and that flora and fauna and other matters come in as somewhat of an afterthought. The National Trust for Scotland tries to achieve the integrated management of every aspect of our heritage, but we would like a definition that gives equal weight to aspects of the natural and cultural heritage. Indeed, we feel that the explanatory note gives a better definition.

We have not drafted a proposal because we are discussing the bill's general principles at this stage. However, we would be willing to draft a proposal for stage 2 if the committee would find that helpful. We feel that the bill could usefully refer to other issues, such as biodiversity, landscape and public enjoyment. We could arrive at detailed wording at some point in the future, if the committee felt that the general principle was relevant.

On your second question about the definition of a conservation body, we would like to bring that matter to the committee's attention, but we feel that it might not be appropriate for the matter to be dealt with in the bill. However, we are concerned about the fact that the bill's definition of a conservation body merely states that one aim of such a body should be whatever the definition of conservation is.

We feel that it might be possible for an organisation that is not primarily interested in conservation to use the bill's mechanism against the spirit of the bill in order to preserve aspects of the feudal system other than conservation. For example, that could mean an enterprise company whose primary purpose is business development or a private trust that exists to benefit an individual or several individuals. It would be relatively easy for such organisations to qualify as conservation bodies. The decision about which bodies should qualify and which should not would depend greatly on ministers.

We feel that there is a need for guidance, whether that is subordinate legislation or non-statutory ministerial guidance. We feel that it would be helpful if that could be done to make it clear which bodies were to be given the power of concluding conservation burdens. I hope that that answers your points.

Alan Hampson: On your first point about the definition of the conservation burden, SNH saw an advantage in the breadth of the definition because it would enable a wide range of circumstances to be covered. However, we also saw a considerable drawback. It is probably fair to say that most people would consider part of their holding to be special and to have special characteristics. We felt that it would be helpful if there were a bit more of a steer in the definition, particularly in relation to the natural and cultural heritages. I have nothing more to add, over and above what the NTS said on that point.

SNH did not consider the definition of a conservation body, beyond the fact that we were likely to qualify as one. We looked at things from that perspective thereafter.

Donald Gorrie: The NTS view, if I understand it, is that it would not like anything included in the bill, but would like guidance, or a commitment from ministers or a mechanism to ensure that ministers properly vetted dodgy applications from alleged conservation bodies.

John Mayhew: That would be helpful. Perhaps the committee's adviser or Executive officials might be able to advise on possible mechanisms for doing that. We are merely raising the general principle. We do not have a definitive solution at this stage.

Donald Gorrie: In its written submission SNH envisages a long queue of bodies asking it to agree that they are okay bodies. Do you have any specific suggestions about how to dissipate such a queue?

Alan Hampson: We felt that clear criteria would be needed to test both the public interest and the special characteristic of the land in question. We felt that such a test would be helpful in deciding whether there was a case for adopting a conservation burden. It would also be helpful in the enforcement of the conservation burden, because it would give clear guidance about what the issues were. Was there a second part to your question?

14:00

Donald Gorrie: No, that is okay. Thank you very much.

The Convener: We can put those matters to the minister, who is coming later.

Lord James Douglas-Hamilton: The bill provides that, prior to feudal abolition, the feudal superior can nominate a conservation body to take over as the person who can enforce a conservation burden. Do you welcome that generally?

John Mayhew: In principle, we cannot do anything other than welcome it, because it could provide a means by which conservation bodies, including ourselves, could further their purposes. We did not request the provision, but when it was put to us, we said that we were very interested in it, because it might be an additional means that we do not have at the moment.

Our concern is not about the legislation, but about expense and work load. Our concern is that if such a provision were in place, there might be a long queue of people with a very good case for the ability to enforce their feudal burdens being assigned to us and to other conservation bodies. In order for us to act responsibly, each case, however many there are, would have to be considered on its merits. That might take a great deal of research and expense and, as a charity, we would have to raise the money from somewhere. We would find that difficult and our only option might be to levy some sort of administrative charge on those seeking to take such a step. That charge might act against the public interest, because it might put off the people who are wishing to take the step.

Those are our concerns, but there are undoubtedly circumstances in which existing feudal superiors have imposed burdens, not in their own interests, but for altruistic reasons of public interest. I am thinking of designed settlements and planned villages or the layout of suburbs of towns.

Lord James Douglas-Hamilton: Is it not the case that the conservation body's consent to the nomination has to be sought first? Is that not an important safeguard?

John Mayhew: Yes, it is. It is essential that the body should have to consent. However, that does not remove the requirement for a responsible

conservation body to consider the full merits of the case, which takes time, even if it is going to refuse consent. It is possible that offence might be caused to an existing superior who feels that they have a case. This is similar to what Alan Hampson said. Many people who own land and buildings are proud of that and feel that it is special. If the conservation body took a different view, they might be disappointed that they did not meet whatever criteria had been set.

Lord James Douglas-Hamilton: The bill as introduced differs from the Scottish Law Commission's version of the bill in that all burdens are extinguished on compulsory purchase. The Scottish Law Commission recommended an exception for conservation burdens for a situation in which compulsory purchase powers could have been used, but were not. Do you think that the Executive's amendment of the Scottish Law Commission's version of the bill is desirable?

John Mayhew: We do not think that it is desirable. We prefer the original Scottish Law Commission recommendation. Our preference would be that conservation burdens, in which we are primarily interested, should be excepted both from compulsory purchase and from situations in which such purchase powers could have been used, but were not. Perhaps the easiest thing to say is that there are three options. Option 1 is our preference, which is that conservation burdens survive in both circumstances. Option 2 is the Scottish Law Commission recommendation, which is our second preference, where conservation burdens are excepted where compulsory purchase powers are not used, but could have been. The third option is the current draft bill, in which conservation burdens and others are extinguished in both circumstances.

It is perhaps helpful to explain the reasoning behind that. The value of the land that the conservation burden recognises might not be extinguished by the compulsory purchase. For example, if a strip of land was required to build a road, it is likely that the value of the land on which the road was built would be destroyed, but there might be verges in relation to which the special interest of the land would continue. There is an argument that the conservation burden should continue, whether or not the land was acquired by compulsory purchase.

Lord James Douglas-Hamilton: In its treatment of conservation burdens, was the Scottish Law Commission right to distinguish between situations in which compulsory purchase orders were used and situations in which they could have been used?

John Mayhew: Our preference is that conservation burdens should survive both situations, because they are for the public benefit. We prefer the SLC's recommendations to those that are in the bill. In the example that I quoted, our interest is in what happens to the land. The way in which the land had been acquired—whether by agreement or by compulsory purchase—would make no difference to what happened to the land.

Alan Hampson: That is also our position. I will add that there are situations in which land is bought by compulsory purchase, but is never actually used for the purpose for which it was purchased. In such situations, we would want the conservation burdens that were associated with that land to remain.

John Mayhew: After being acquired by compulsory purchase, some land is used for the purpose for which it was purchased, but that use ceases at some point in the future. My organisation works over very long periods of time. I can envisage a situation in which a piece of land is purchased for a road. In the future, the road might be superseded by a bigger or faster road, which would mean that it would no longer have a purpose. In such a case, we would seek the restoration of the road to its previous state, if possible. We think that the survival of the conservation burden in the long term through such a process would help.

Maureen Macmillan: The National Trust for Scotland proposed in its written evidence that maritime burdens should be enforceable by conservation bodies as well as by the Crown. What are the advantages of that proposal, in the opinion of the National Trust for Scotland? What are SNH's views on the issue? It would be helpful if you could explain how much of the sea bed or of the foreshore is not owned by the Crown Estate. I had assumed that most of the sea bed and the foreshore was owned by the Crown Estate.

John Mayhew: I do not know the answer to that. I know that the Crown does not own all of the sea bed or the foreshore. Through historical accident, the National Trust for Scotland owns the foreshore in certain places. In the long-distant past, such land was probably owned by the Crown and was then sold off. That is how it will have come into our ownership.

Robin Stimpson: Quite a number of proprietors have been granted titles by the Crown and are owners of areas of foreshore and sea bed. We do not seek to put ourselves in the same position as the Crown. The critical issue is that the bill contains the possible inference that one could not have a burden on the foreshore, other than a maritime burden that was enforceable by the Crown. Our concern is that there are perfectly valid reasons for other sorts of burdens. The foreshore is often an area of bird life and other examples of natural heritage. It would be important

to be able to have a conservation burden, for example. We appreciate that the bill does not say that it is not possible to have a conservation burden or any other sort of burden in relation to the foreshore. However, the bill implies that only a maritime burden relates to the foreshore—

John Mayhew: It implies that a maritime burden relates only to the Crown.

Robin Stimpson: Sorry. It is fine if a maritime burden relates only to the Crown and the foreshore, but we feel that there should be no difficulty in imposing other sorts of burdens in cases in which the owner is not the Crown, but another landowner. We would like clarification on that issue.

Maureen Macmillan: I wondered how necessary the ability to impose such burdens was. A great deal of legislation on protecting the water environment and the foreshore, such as the Water Environment and Water Services (Scotland) Bill, is being introduced. Integrated coastal zone management is also being dealt with. There is all sorts of legislation that will enable you to achieve what you want.

Robin Stimpson: The listed buildings initiative was supposed to protect buildings, but the little houses improvement scheme that we were discussing was meant to rescue properties that were hedged around by other protections where the procedures had simply failed and the properties had fallen into dereliction. I am supportive of all the other measures, but they have failed in the past. We are taking a belt-and-braces approach.

John Mayhew: We feel that the arguments for having conservation burdens that are a system of private regulation running alongside the many forms of public regulation are as strong in relation to the sea bed and foreshore as they are in relation to land. The same thing applies in relation to natural heritage. Many kinds of regulation apply to the terrestrial part of the country and the maritime part of the country, such as sites of special scientific interest, national scenic areas and national nature reserves, but they are not the whole picture. A lot of Scotland's heritage has been kept for us to enjoy through the centuries not as the result of legislation or public regulation, but by means of benevolent private regulation, which is what the bill seeks to maintain.

Maureen Macmillan: I would not want it to be thought that a body could make arbitrary decisions about maritime burdens or conservation on the foreshore or sea bed. In particular, the situation in coastal areas seems to be moving towards planning permission being transferred from the Crown Estate to local authorities so that the community has some input to the development that should take place on the foreshore and the sea bed. I would not want those powers to be given to bodies that might be in conflict with the local plan that has been decided through consultation by the local authority.

John Mayhew: We agree with that view. I understand that local authorities could qualify as conservation bodies, which means that they might use the mechanism to back up and support the initiatives to which you refer. That would be an extra tool that could be used for integrated coastal zone management or for protecting the water environment. The National Trust for Scotland is here to argue not only for its own powers, but for the theory of conservation bodies and conservation burdens. The legislation will apply for many years to come, so it is important that we get it right. Part of that means ensuring that the ability to have burdens that apply on the foreshore and sea bed is not solely reserved to the Crown. That is the issue that we would like to be clarified.

The Convener: I want to ask a really daft question. Is the Crown a conservation body? You say that the Crown owns most of the foreshore, and section 109 says that the legislation binds the Crown. If the Crown is not a conservation body, will it have to become one?

John Mayhew: At present, nobody is a conservation body.

The Convener: Which means that the National Trust for Scotland is not a conservation body either. Is that correct?

John Mayhew: We anticipate that we will be eligible to become one.

The Convener: I would have thought that you had a reasonable chance.

John Mayhew: We like to think so. You should ask your adviser to advise you on the question that you asked.

The Convener: The question just came into my head when I noted that the Crown owns most of the foreshore and when I read in the bill that

"This Act binds the Crown".

What is the status of the Crown with regard to conservation?

Alan Hampson: The bill leaves unclear the role of the Crown with regard to conservation burdens. Does it mean that the Crown can create conservation burdens only on land that it owns in order to protect the land if it decides to sell? It is not clear whether the Crown would be able to create maritime burdens on land that it no longer owns. Would it need to do so in co-operation with an owner, as is proposed for conservation burdens?

If the Crown were able to create maritime burdens only on land that it owned but might sell, so that it could continue a degree of safeguard, there would be merit in other organisations having the power to create maritime burdens or in the proposals for conservation burdens being extended to the foreshore and sea bed.

The Convener: We are talking about a large owner—if we may talk about the Crown in that way—or proprietor of large stretches of Scotland's foreshore and sea bed.

14:15

John Mayhew: The bill gives Scottish ministers the responsibility to decide which bodies shall be conservation bodies. Bodies must pass two tests: they must meet the criteria in the bill, then they must be approved by Scottish ministers. The possible candidates are Scottish ministers themselves, local authorities, Government agencies of various sorts and non-governmental bodies such as the National Trust for Scotland. I do not know whether the Crown falls into that list.

The Convener: I would have to ask a constitutional lawyer. I do not think that the Scottish ministers are the Crown. We do not know. I wish that I had not asked. It was an interesting point, but obviously only for me.

Maureen Macmillan: I want to ask SNH about statutory agreements and the Lands Tribunal. Professor Paisley of the University of Aberdeen has suggested that a variety of statutory agreements into which SNH can enter with private owners, such as section 15 agreements, should be brought within the jurisdiction of the Lands Tribunal. It would then have power to vary or discharge such agreements on application by the affected individual. What are your views on the merits of that proposal?

Alan Hampson: As I said when I outlined our statutory powers, it is now clear that the statutory agreements into which we can enter do not fall within what is legally defined as a real burden and therefore do not fall under the bill's remit. We therefore suggest that the bill is not the most appropriate place to consider them.

We understand that the Executive plans a bill to implement its policy on "The Nature of Scotland", which will revise some of the existing wildlife legislation from which the statutory agreements arise. We suggest that that would be the most appropriate place to examine the way in which other arbitratory processes might become involved in the statutory agreements for which we are responsible. One of the advantages of doing that would be that the statutory agreements would not be considered in isolation from the rest of the arrangements of which they are part. Any changes to them would be considered as part of the broader context. We do not want to pre-empt that forthcoming bill.

Maureen Macmillan: The effect of section 110 is to include in the jurisdiction of the Lands Tribunal for Scotland agreements into which the National Trust for Scotland has entered with private individuals under section 7 of the National Trust for Scotland Order Confirmation Act 1938. What are your views of the merits of that inclusion? Do you have any views on the merits of including in the Lands Tribunal's jurisdiction the statutory agreements that are used by other bodies?

Robin Stimpson: We can speak only for ourselves. We are prepared to accept that such conservation agreements should be subject to the jurisdiction of the Lands Tribunal.

The Convener: There are no further questions. Is there anything that we have omitted to ask you that you wish to record?

John Mayhew: One of the advantages of the bill's proposals on conservation burdens is that philanthropic or altruistic private owners will have a wider range of bodies with which they can co-operate in looking after the heritage of their land. At the moment, anyone who wants to conclude such an agreement has a limited range of options. The National Trust for Scotland understands that it is the only such option among non-governmental organisations.

If the proposals are passed, they will be beneficial because owners of land will have a wider range of options to choose from. They could choose a statutory organisation or one of the non-governmental organisations—whichever they feel will do the best job of looking after the heritage value of that land or whichever they have an affinity with. I wanted to make that positive remark.

Lord James Douglas-Hamilton: I have a question that is slightly outwith the areas that you have covered so far. Earlier in our evidence taking, the lawyers expressed a difference of opinion over whether they supported section 52. Legal opinion seemed to be divided on that. What is your view of section 52? On balance, would you prefer that section to be included in the bill? Its provisions relate to the implied rights of enforcement by neighbours.

John Mayhew: I do not have a view. As the area is not one that I have studied, it would be inappropriate for me to comment.

Donald Gorrie: Do the witnesses have a view on methods of better controlling controversial but well-meant developments in areas that are under the control of the National Trust for Scotland or Scottish Natural Heritage? I am thinking of the big

hoo-hah that happened a few years ago about the National Trust's development at Glencoe. Should the bill include a mechanism for a system of appeal in instances where one of the heritage bodies is pursuing in good faith a course of action to which many people take exception? Perhaps a system of arbitration should be included in the provisions of the bill.

John Mayhew: We should be subject to the town and country planning system in exactly the same way that any other individual or organisation is subject to it. It is for the democratically elected local authority to take such decisions. If we, or any other conservation body, propose a development that we believe to be in the public interest, we nearly always have to apply for planning permission.

If people have concerns and objections, they can raise them through their local councillors. If their objections are strong enough and they prevail, the local authority would refuse to give us planning permission. In such cases, we have the right of appeal to ministers. Ministers can call in more controversial developments for ministerial determination. In those cases, constituents could make their views known through their MSPs; the Parliament has an input to make at that level of planning determination. We do not feel that it is appropriate to introduce additional regulations in respect of land law—the planning system is sufficient.

In the example to which Mr Gorrie referred, the National Trust for Scotland received planning permission from Highland Council and the controversy largely ensued afterwards. As Mr Gorrie rightly said, a vocal minority of local people felt that we were doing the wrong thing. However, we feel that sufficient checks and balances are in place to ensure that local people's voices can be heard and that the proposals of a heritage organisation, such as our own, receive due consideration through the normal procedures.

Maureen Macmillan: I urge everyone to visit the National Trust for Scotland development at Glencoe. It is an excellent attraction and is in keeping with the landscape. I am pleased that that controversy has died down and that people appreciate what you have done.

John Mayhew: Thank you.

Alan Hampson: I have nothing to add in reply to Donald Gorrie's question. Scottish Natural Heritage is bound by the same statutory controls that apply to anyone else.

The Convener: I thank all the witnesses for their evidence. I suspend the meeting for 10 minutes.

14:24

Meeting suspended.

14:35

On resuming—

The Convener: I refer members to paper J1/02/32/4, which is the memorandum from the Executive. It answers some of the points that were raised in previous evidence sessions. Of course, we are now able to raise issues concerning conservation, having taken evidence on that matter this morning.

I thank the minister for coming, and welcome him to the committee. I think that this will be a more pleasant visit than some of the other times that he been before us.

Maureen Macmillan: Professor Roddy Paisley, in his evidence to us on 3 September, said that the proposal for right-to-buy schemes that is outlined from paragraph 53 of the policy memorandum onwards is ingenious but that it would not work. He suggested an amendment, so that it will always have been deemed competent to use section 32 of the Conveyancing (Scotland) Act 1874 to take advantage of the community burdens provisions in the Title Conditions (Scotland) Bill. Does the minister plan to follow Professor Paisley's advice?

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): Fortunately, people keep track of the committee's proceedings, and I was aware of Professor Paisley's comments.

Professor Paisley doubted that the Executive's proposal would work for two reasons. First, section 32 of the Conveyancing (Scotland) Act 1874 does not permit the creation of burdens over property where there was no intention to sell. We have consulted the Scottish Law Commission, and the commission and we are confident that that problem will not apply. Houses that are to be burdened are subject to the statutory right to buy, so it is not entirely the case that there is no intention to sell, because a statutory right to buy exists and there is a realistic prospect that any of the properties could be sold at any time. Of course, the local authority must sell if the tenant wishes to buy. I am advised that the operation of section 17 of the Land Registration (Scotland) Act 1979 also reduces the chances of there being a problem. That issue was dealt with in the memorandum that the committee was sent.

The Convener: Yes, it was.

Mr Wallace: Secondly, Professor Paisley conjured up a situation where owners of properties that had already been sold could refuse to accept new burdens being applied to their properties. As a general statement, that is probably right, because new burdens could not be applied to their properties. I think that he was thinking that those

owners could agree among themselves mutually to discharge all their burdens, but it is anticipated that under the scheme the local authority would burden itself and therefore it would be part of the community. While those who, in that hypothetical situation, discharged the burden among themselves could not discharge the burden vis-à-vis the local authority, the local authority would still have the title and interest to enforce the burden.

The objective is to give local authorities and other social landlords the opportunity to enforce burdens that they have placed on individual properties. The burdens have been placed not for a whim, but for good reason. Having been made aware of what Professor Paisley said, we considered the matter further and we believe that the bill's scheme will deliver its intended objective.

Maureen Macmillan: In relation to the proposal in paragraph 53 of the policy memorandum, Mr Leggat of the Convention of Scottish Local Authorities said on 24 September that the resource implications for local authorities were so great that they might not be able to do as had been suggested and that many burdens would fall. Do you agree with his assessment? Is that situation satisfactory?

Mr Wallace: We do not believe that the proposal will involve unworkable numbers, because in many cases it will involve registering only one deed for the whole estate, rather than doing one deed for number 25, one for number 27 and so on. The alternative of re-allotting burdens using the Abolition of Feudal Tenure etc (Scotland) Act 2000 would require thousands of notices.

The merits of the proposed solution have been recognised by some local authorities. The City of Edinburgh Council has indicated that it is satisfied with what the bill proposes. Obviously, sufficient time will have to be allowed for the authorities to register the requisite deeds of condition. That is why there will be sufficient time between the act getting royal assent and the appointed day.

The Convener: In evidence to us on 3 September, Kenneth Swinton of the Scottish Law Agents Society and John McNeil of the Law Society of Scotland suggested that it was not appropriate for a non-entitled spouse who was not in occupation to have a right to enforce a real burden. I remember that point because I asked about it. Why did the Executive come to a different view? The witnesses said that that right might be used in a malicious or mischievous fashion by a disgruntled spouse.

Mr Wallace: We have tried to work out where the concern about perceived mischief comes from, but it is not obvious. The burden would not be enforced against the owner of a property but against the benefited—sorry, not the benefited but the burdened proprietor.

The Convener: We are with you. We understand. We are at one about the bill.

Mr Wallace: It is the extension to life renters of the rights to enforce—for example, to non-entitled spouses. There will be no enforcement against the entitled spouse, but against another party. It should be remembered that not only must there be the title to enforce the burden, there must be an interest. If the non-entitled spouse is not in occupation, there could be a title to enforce. However, there would not necessarily be an interest to enforce. It would be necessary to show material detriment to the value or enjoyment of the occupancy right in order for there to be an interest to enforce.

I can see how in circumstances of marital break-up there is, sadly, potential for conflict. However, that conflict would not be between the entitled and non-entitled spouse. It is difficult to see why the non-entitled spouse might want to bear a grudge against, or take out some spite on, a third party.

The Convener: One day there may be a case on the issue and you will find out—who knows? Anyway, I do not think that it is a major issue.

A number of witnesses, including Homes for Scotland and the Scottish Landowners Federation, have expressed concern about short-term tenants having the right to enforce a real burden. That is a more interesting or more difficult issue, given that there is no clear way of identifying those tenants. Have you any comment on those witnesses' concern? For example, would you consider amending the right so that only tenants who have leases greater than 20 years can have the right?

Mr Wallace: Again, we considered that matter and we believe that our policy decision to allow tenancy rights to short-term tenants is the right one. Clearly, if a tenant is going to be leaving in 10 days' time, it might be difficult to show that there is an interest, albeit that there might be a title.

De facto, the tenant might not think that enforcing the burden was worth the candle. The tenant is the person in occupation and they may be most affected by any breach that takes place—possibly more so than the owner.

The Convener: That is not the problem—we appreciate that. Can you remind me how long a short-term tenancy is?

Mr Wallace: The general length is six months.

14:45

The Convener: Is not that a pretty short length of time in which to give someone rights in these circumstances?

Mr Wallace: May I give—

The Convener: May I add to my question first? How would you know who the tenant was when there was such a turnover? Such leases do not have to be registered—there is no record of them. I am thinking of the practicalities.

Mr Wallace: Let us imagine that someone took an action to enforce a burden. That person would have to establish their title to sue—there would have to be an averment that they had title as a tenant and they would have to be able to prove that. The onus would be on the person who seeks to enforce the burden to establish that he or she is the tenant. That prerequisite would have to be met before the person could enforce the burden. If a person cannot prove that they are the tenant, it is clear that they will not get past square one. People have to be able to prove their tenancies.

Let me give an example of a tenant who happens to have a family with young children and whose burden says that they cannot keep pet dogs or Rottweilers. If the person who lives next door decides to keep Rottweilers, the tenant probably has a much more direct interest in enforcing that condition, or burden, than the landlord or the owner. In such cases, the breach is more likely to annoy the tenant than an absentee landlord.

The Convener: Absolutely. The principle and the thought behind it are laudable. I just wanted to tease out some of the practicalities of knowing who has the right to do something.

Do all short-term tenancies have to be in writing?

Mr Wallace: I will take us back to square one. A tenant would have to prove that he or she was a tenant, irrespective of whether such proof existed in writing or in some other form. I suspect that written proof would be the most obvious, but it is not essential that proof must be in writing. The onus would be on the person who seeks to enforce a burden to establish that they had a title to do so.

The Convener: Landlords might not want to give their tenants a written tenancy agreement, to prevent them doing anything. That is how I look at it.

Mr Wallace: That is possible.

The Convener: A lot of people do not have tenancy agreements.

Mr Wallace: Obviously, it is open to the landlord or the owner to ca the feet from under the tenant by agreeing to discharge the burden, but one assumes that in most cases of benefited property the owner has had some interest in placing burdens on that burdened property. The owner may not have as direct or immediate an interest as the tenant. Nevertheless, the owner might be thankful that there is someone on the ground to—

The Convener: The rights of the landlord, the proprietor and the tenant co-exist.

Mr Wallace: Yes.

The Convener: I am going to boldly go where I may regret going.

Mr Wallace: Is it dangerous territory, convener?

The Convener: I understand section 52 combined with section 48 now—I think I have cracked it. I am talking about the business of a deed of conditions in which the developer narrates that, notwithstanding the deed of conditions, he has a right to vary or discharge. I understand that, by having that provision in the deed, all others who are affected by it are prevented from having enforcement rights. Is that wrong? I am getting frowns—perhaps I have not cracked it.

Mr Wallace: I think that you are talking about the improvement in rights to enforce in common schemes.

The Convener: As I understand the position at the moment, if the right to vary or discharge the deed is retained by the developer, all the other proprietors who come within the embrace of the deed of conditions cannot enforce. It is only the developer who can enforce. Is that correct?

Mr Wallace: Yes. At present, the other proprietors cannot. However, it is my understanding that the bill would allow them to enforce the existing conditions.

The Convener: That is what I am getting to. When the right to vary or discharge is in the deed of conditions, it will be as if it is not written. Section 52 says that it will be disregarded.

Mr Wallace: Where there is a community.

The Convener: All parties affected by deeds of conditions will have the same entitlements.

Mr Wallace: All who belong to the community.

The Convener: Yes. I think that I have understood that. What on earth was Mr Merchant going on about then? He seemed to think that the bill would not do that.

I am advised that he did, but that he went on to say that it would be very expensive. That was his point. I knew there was a point.

Mr Wallace: He said that he thought it would be cumbersome.

The Convener: I will follow my thought trail. Mr Merchant's point was that someone can go to the developers and get them to consent to the building of a porch, for example, under a particular deed of conditions containing the right to vary or discharge but, according to the bill, if someone wanted to put on a porch and that was prohibited by the deed of

conditions they would have to go around everybody. Is that correct?

Mr Wallace: Yes. Essentially there are three ways of discharging a burden. One is to apply to the Lands Tribunal for Scotland—as can happen at present. The second way is to obtain the signatures of all neighbours within 4m and then to notify the other members of the community by conspicuous notices on nearby lamp posts. Thirdly, one can obtain the signatures of the majority of the community and then notify the other members of the community individually.

Our starting point is that because the burdens are community burdens, there is a communal or mutual interest in them. If one person discharges a burden, that could impinge on others.

For example—this is why we want to cover the wider community rather than neighbours within 4m, as the Scottish Law Commission suggested—someone may live at the centre of or in a well inside a housing estate and there might be something at the entrance to that estate that they have an interest in because it preserves an amenity or the attractiveness of the estate. They might not want to see that discharged without having the opportunity to object if they wish.

We are trying to achieve mutuality.

The Convener: Will you explain something to me? I will leave the Lands Tribunal for Scotland to one side because that is the final place someone can go if they cannot get agreement to do what they want.

The first thing to do is to get the consent of the people who live within 4m. You can ask them whether they are happy about your building a porch, for example. Is it also the case that you have to get the consent of the majority of the people in the community?

Mr Wallace: No, not if you have the signatures of all your neighbours who live within 4m. You then have to put a notice up on your property and the lamp posts.

The Convener: That would be to inform the people who live outwith the inner ring, as it were.

Mr Wallace: They would then get an opportunity to object.

The Convener: So there are two parts to the process.

Mr Wallace: The alternative way is to go around and get the signatures of the majority of the community.

The Convener: That includes those within 4m. If they do not agree, that is tough.

Mr Wallace: Yes. There are two options because it makes things a lot easier. If what a person is proposing does not affect someone who lives further away, it makes sense to have the 4m rule.

Also, someone might not know precisely what the extent of the community is. They might therefore not know whether they have a majority of signatures. In other circumstances, it might be obvious how many houses comprise the community and the person will know what the majority is. That is why there are alternatives.

I return to what Mr Merchant said. Although I understand that he made a persuasive case, we do not believe that the costs would be as high as he suggested. I think he suggested that all the neighbours would have to go to their building societies and get their title deeds and that the full terms of the burden would be set out in them. In fact, schedule 3 to the bill includes the style of the notice and an explanatory note. That notice would set out the burden that is to be the subject of a variation or discharge.

Mr Merchant mentioned letters of consent. If a letter of consent is not a discharge, it is difficult to know its worth and I doubt whether it could be put on the land register. That would weaken its effect, particularly when one came to sell and found that a porch had been built. What would the letter be worth?

I think that Mr Merchant welcomed the provisions in section 16, on acquiescence. Those provisions and the shortening of the prescriptive period operate together to make the system relatively straightforward. A balance must be struck. We want to ensure that the amenity value of the burdens is not lost and we do not believe that, in practice, the system will be as cumbersome or as expensive as has been suggested. It might be more expensive to go to the Lands Tribunal for Scotland.

The Convener: I understand the problems and the explanation, which is a start.

Lord James Douglas-Hamilton: I think that the minister has answered my questions.

The Convener: I think that he probably has. I am sorry about that—I am sure that you are, too. Feel free to come in as a wild card at any time.

Donald Gorrie: I want to ask about the concerns of previous witnesses about the definitions of conservation burdens and conservation bodies. The National Trust for Scotland thought that conservation burdens were skewed against flora and fauna and it thought that it had a better suggestion. SNH was afraid that the wording of the bill would still enable many people to queue up at its door with selfish schemes rather than schemes for the public good. The National Trust for Scotland said that it would be possible for

not very public-spirited organisations to alter their rules slightly to qualify as a conservation body, then pursue a somewhat selfish policy. It did not seek a change in the bill, but wanted an explanation of guidelines or on the position that ministers would take. Perhaps definitions are an issue for the bill.

Mr Wallace: I do not accept the criticism that the bill is skewed towards the built heritage rather than the natural heritage. Section 37(1) refers to

"the architectural or historical characteristics of any land"

and

"any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land)".

The

"general appearance of the land"

might include particular scenic attractions. I think that the bill deals with the matter. If SNH or the National Trust for Scotland think that they have better definitions, I would not be so proud as not to consider them. However, the draftsmen might say that a definition is all very well but would open floodgates that were never intended to be opened. If they want to suggest different definitions, I would be prepared to consider whether they improve the bill. No one is in any doubt that we are trying to cover both our natural and our built heritage.

The Convener: In its submission, the National Trust for Scotland says that it is happy with the definition in paragraph 164 of the bill's explanatory notes, which says

"for the benefit of the public, burdens which protect the built or natural environment."

The National Trust for Scotland says that that is more satisfactory.

Mr Wallace: I suspect that we are dealing with drafting points.

The Convener: Yes, but it is interesting that the National Trust for Scotland recommended wording.

Donald Gorrie: Will the minister take care of my second point?

15:00

Mr Wallace: I have still to answer the question about bodies that might qualify. The Abolition of Feudal Tenure etc (Scotland) Act 2000 allows conservation bodies prescribed by the Scottish ministers to preserve the feudal burdens that were intended. It is intended that the Scottish ministers or individual ministers will have that power. The list will be subject to Parliament's scrutiny.

No procedures or criteria have been drawn up on applications for prescription as a conservation body. They will be or are being considered by the Executive. The starting point for those bodies will be the definition in the 2000 act. Bodies such as the National Trust for Scotland could be conservation bodies. It is always dangerous to start on lists, but that is an obvious body.

We would be less persuaded by a landed estate that had been enforcing feudal burdens as superiors for a long time that tried to change its title or establish a trust to have a perceived interest in conservation. It is a bit like asking someone to describe an elephant—they know one when they see one and they know what is not an elephant. Parliament will consider the matter. That is a good safeguard against some of the concerns that Donald Gorrie expressed.

The Convener: I have asked this question before and I would be grateful for advice. Can the Crown be a conservation body under section 37?

Mr Wallace: The Scottish ministers can—

The Convener: I am coming to that. Would the Scottish ministers protect the public interest? The Scottish ministers and the Crown are not the same.

Mr Wallace: They are not the same, but it is difficult to see how the concept of the Crown could be a public body without someone acting in the name of the Crown. Normally in Scotland, the Scottish ministers would act on such matters in the name of the Crown.

The Convener: I am trying to get at the treatment of the foreshore and sea beds.

Mr Wallace: I am not readily persuaded that the Crown Estate commissioners would fall into the category under discussion. Perhaps the convener has an idea in mind.

The Convener: This business of the foreshore was raised.

Mr Wallace: That relates to maritime burdens.

The Convener: We are moving on to them, but I am asking about the foreshore. The Crown owns most of the foreshore. I wonder how conservation burdens would be registered in relation to that. Which parties would act in the interest of ensuring that the foreshore was preserved and protected? That question popped into my head because of what the National Trust for Scotland said.

Mr Wallace: The Crown Estate commissioners could have a role in protecting the foreshore—I say that without prejudice to any further consideration of the matter. The Scottish ministers could have a locus, too.

The Convener: Just like a local authority, for example.

Mr Wallace: There is nothing to stop a conservation body that owns the foreshore from creating a conservation burden over it.

The Convener: The Crown owns most of the foreshore. That is why I asked my question.

Mr Wallace: There are some udal areas in Orkney and Shetland where—

The Convener: Yes. I wish that I had not asked the question, but I have, so I will have to find the answer.

Mr Wallace: The question may be relevant in Fair Isle, which the National Trust of Scotland owns.

The Convener: I think that you are saying that there are ways of protecting the foreshore for conservation, through ministers acting in the public interest.

Mr Wallace: Yes. Section 42 says:

"it shall be competent to create a real burden over the sea bed or foreshore in favour of the Crown for the benefit of the public".

The foreshore is specifically identified as a place in respect of which burdens can be created for its protection. The section specifically relates to that.

The Convener: That provision imposes the burden on the Crown, in a sense, because it is a special case.

Mr Wallace: It is of a similar nature to the conservation burden, but it relates to the foreshore and the sea bed.

Maureen Macmillan: I will follow that up because the question from the National Trust for Scotland was: why does that apply only to the Crown Estate? Why can other people who own the sea bed or the foreshore—you mentioned Fair Isle, which the National Trust for Scotland owns—not have conservation burdens and maritime burdens created in their favour?

Mr Wallace: I indicated that there is nothing to stop a conservation body establishing a conservation burden.

Maureen Macmillan: Sorry. I meant to say maritime burden.

Mr Wallace: If the conservation body owns the foreshore, there is nothing to stop it creating a conservation burden.

Maureen Macmillan: What if it owns the sea bed as well? You indicated that the National Trust for Scotland might own the sea bed at Fair Isle.

Mr Wallace: Perhaps anything above the low water mark, but I think there are decided cases about anything below the low water mark that vest it in the Crown. There have been various cases recently—I mean in the past 10 years—involving the Lerwick harbour trustees, fish farming rentals and things like that. The Scottish Law Commission indicated in its report on the sea bed and the foreshore that, in certain parts of Orkney and Shetland, down to the low water mark could be udally held rather than held by the Crown. I think that I am right in saying—I am sure that the committee's adviser will be able to advise on this—that below the low water mark, further out to sea than the low water mark, is held by the Crown.

Maureen Macmillan: So a conservation burden would be sufficient for the foreshore.

Mr Wallace: Yes. Provided that it is conserving something.

Maureen Macmillan: Yes. I am trying to tease out the distinction between a maritime burden and a conservation burden.

Mr Wallace: They are essentially for the same purpose.

Maureen Macmillan: A conservation burden would be sufficient for the foreshore, whereas a maritime burden would be necessary for the sea bed.

Mr Wallace: A maritime burden would always be necessary for the sea bed. In cases where the foreshore is owned by the Crown, a maritime burden could also be established

"in favour of the Crown for the benefit of the public".

The Convener: Yes. We are looking at section 42. Does Maureen Macmillan want to tease the matter out further?

Maureen Macmillan: Sorry. I was consulting the adviser.

The Convener: It is a bit like a tutorial.

Maureen Macmillan: Is there any point in the National Trust for Scotland wanting a maritime burden if it owns part of the foreshore? Can what it wants done be covered by a conservation burden?

Mr Wallace: Yes. If the National Trust for Scotland owns part of the foreshore it can create a burden over it.

The Convener: And if the National Trust for Scotland does not, ministers can do it on behalf of the Crown. There is not a problem. We can disentangle everything. I can see that some people wonder how we are getting so excited about this. It is sometimes like a labyrinth when we get into some of these issues.

Donald Gorrie: I will change tack entirely and ask about model development management schemes, which existed in the Executive's original proposals but are omitted from the bill. I gather that the problem is that one aspect of the scheme

is a reserved matter. Is it your intention to try to sort the problem out and introduce an amendment at stage 2?

Mr Wallace: It is certainly our hope that we will be able to do so. I advise the committee that the Executive is currently liaising with the Department of Trade and Industry and the Scotland Office to find the best way of dealing with the issue. The problem is that the kind of body that we were considering would be a body corporate. Therefore, its status brought it within one of the exemptions of the Scotland Act 1998. It is hoped that we will be able to introduce the scheme by way of an amendment at stage 2.

Donald Gorrie: An Edinburgh witness said that they hoped the scheme would apply to existing properties with common parts, rather than to new properties alone.

Mr Wallace: Are we talking about tenements principally?

Donald Gorrie: I would think so.

Mr Wallace: It would not be possible or wise to tackle everything at once. The bill is part of a larger package. It was preceded by the Abolition of Feudal Tenure etc (Scotland) Act 2000 and we have already indicated that the problems specifically related to common property in tenements will be addressed by subsequent tenements legislation. Perhaps the issue would be dealt with more appropriately by that later legislation.

The Convener: I do not agree with you, minister. I take the view of one of the councillors: that this is a missed opportunity. When one is regulating the rights and obligations of proprietors, the Title Conditions (Scotland) Bill is the place to look. We should not wait for later legislation on tenements, which might take a long time to get here, given the complexities of tenement law. You are not of a view to consider that?

Mr Wallace: It depends on the Scottish Law Commission's report and the draft bill. We will consider the point you raise—we have yet to lodge the amendment. Perhaps the committee will make specific recommendations—

The Convener: Many problems occur in tenements when it comes to getting something done—people agree to repairing the roof if it is leaking on their heads, but the people at the bottom of the stair do not because there is no leak in their living room. If there were a development management scheme in place to deal with such problems, that would be appropriate.

Mr Wallace: Section 28 probably allows at least some scope for the power of majority to construct common maintenance.

The Scottish Law Commission rejected the principle of a mandatory management scheme, which it considered would be too generalised to be of benefit and would lead to difficulties. The Executive has yet to come to a final view on the recommendations of the law of the tenement. As the committee is aware, a housing improvement taskforce is examining some of the issues. If the committee believes that a particular issue should be addressed by the development management scheme, it would be helpful to highlight that in the report.

The Convener: The adviser tells me it would cause another 30 sections and three schedules—it is a pretty big amendment.

Mr Wallace: Perhaps that is why the first thing I said was that it is not possible to do everything at once.

Michael Matheson: Section 50 deals with sheltered housing. It has been suggested to the committee that there is some concern, particularly from the Sheltered and Retirement Housing Owners Confederation, about the distinction that means that the majority consent rule provisions will apply in the discharge of a burden applying to the community—over the core burden. Will you comment on why there must be such a distinction?

Mr Wallace: When Mr McCormick appeared on behalf of the Sheltered and Retirement Housing Owners Confederation, he criticised the concept of core burdens. We believe that core burdens are fundamental to the operation of sheltered housing. If the core burdens are taken away, arguably, it ceases to be sheltered housing in the sense that we understand it. That is why the bill provides that core burdens cannot be removed by a simple majority.

I think that I am right in saying that the written evidence of the Sheltered and Retirement Housing Owners Confederation was supportive of the concept of core burdens. The concept was generally supported in the responses to our consultation. Core burdens are fundamental to sheltered housing: people buy into sheltered housing with a certain expectation of the kind of services that will be provided. Removing them because of a simple majority vote could undermine the whole concept of sheltered housing. If there were further views on the appropriate level for the threshold, I would listen to them, but because of the responses to our consultation and because of the principle involved, we want these provisions to remain in place.

15:15

Michael Matheson: Are you satisfied that the 75 per cent majority threshold for the core burdens is the right level or do you think that it is too high?

Mr Wallace: As I have just said, I am prepared to listen to views if people think that the level is not appropriate. However, the threshold represents quite a steep mountain to climb for anyone who wanted to change things.

Michael Matheson: There is some concern that the threshold is too high. If I recall, we heard evidence of a sheltered housing complex in Glasgow, which had particular problems. Around 73 per cent supported a change, but the tenants could not get up to 75 per cent. They felt that, with the figure of 73 per cent, there was a clear majority in favour of a change.

Mr Wallace: I hope that I indicated a moment ago that the issue is not set in stone. We considered the matter and the figure of 75 per cent was not chosen at random—it represents three quarters of those involved. If people suggested 73 per cent, I might find it hard to justify that vis-à-vis 75 per cent. That would be special pleading for one particular example.

Michael Matheson: It was merely an illustration, minister.

Mr Wallace: A two-thirds majority might be considered, but I would like to see the arguments behind any suggestion for change. We considered the matter and felt that we had struck the right figure. However, there is nothing hard and fast about it.

Michael Matheson: I can see an amendment coming your way.

In his evidence, John McCormick drew to our attention the fact that the words "retirement housing" and "retirement accommodation" do not appear in the bill. He suggested that it might be possible for a solicitor to draft a deed so as to avoid the bill's special provisions on sheltered housing. Is that a valid concern?

Mr Wallace: Section 50(3) of the bill defines a sheltered housing development as

"a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses."

Members will see in the explanatory notes that accompany the bill

"that although the section refers to 'sheltered' housing, this should not be taken as excluding residential accommodation for the elderly known by other terms such as 'retirement housing'. The contents of the definition are the important consideration, with its emphasis on special facilities and features for the elderly."

The definition is therefore not exclusive, but inserting wording that made retirement part of the definition could exclude people who were disabled, infirm or in some way vulnerable but who were not necessarily retired. I think that we would want the provisions to apply to such people. I hope that a combination of section 50(3) and the explanatory notes will reassure the committee that there is nothing sinister and that the concern has been met.

The Convener: What is the status of explanatory notes once the bill has been enacted? Are they simply for interpretation purposes?

Mr Wallace: I am advised that they are used for the purpose of interpretation. Better still, you now have me on the record as having said what I have said.

Michael Matheson: I want to turn finally to an issue in part 2 of the bill about which concern has been expressed. I believe that the committee has received a petition today on the issue. There could be problems in sheltered housing complexes where absent landlord companies own a majority of the units. The argument is that those companies could use their majority vote to ensure that they are appointed as manager. It is suggested that the solution to the problem of units being owned by what the petitioner calls the "feudal superior" is that people should have a vote only if they are in occupation of the property. Is that a valid concern?

Mr Wallace: I understand the concern, but it is not one with which I agree. Those matters were considered seriously and the view was taken that voting should consist of one vote for each unit in the complex, excluding the warden's unit. If we were to exclude developers from a vote when it was clear that they were maintaining their interest in their units, we might run into difficulties with respect to unfair discrimination. I think that the right balance has been struck for the interested parties. The problem will diminish over time as developers sell off individual units.

The Convener: Shall I continue your questioning, Michael?

Michael Matheson: Please do so.

The Convener: I have received a very exciting note informing me that Michael Matheson has been called out by his mountain rescue team. He has not gone off to join the rescue; he has gone off to explain where he is. He is a young man with an exciting life.

Michael mentioned petition PE532, in which the petitioner raised concerns about absentee landlords buying up houses. I listened to what the minister said, but surely concerns arise about the issue.

Mr Wallace: I understand where people are coming from on the issue, but judgments have to be made. We took the view that one vote per unit

was appropriate and that the issue of unfair discrimination might arise if we were to exclude votes from any owner.

Donald Gorrie: Is there not an argument for the tenant having the vote rather than the owner?

Mr Wallace: The view was taken that the vote goes with ownership. I can hear the next question coming down the track—why give tenants the right of enforcement on other burdens? We discussed that earlier in respect of section 8. In that situation, it is possible to have an enforcement that is exercisable by the tenant and the owner. However, for obvious reasons, it would not be possible for both the tenant and owner to cast the same vote.

The Convener: Do not special circumstances apply in the case of sheltered housing complexes that are owned by private landlords? I am not sure how prevalent the problem is.

Mr Wallace: I am not sure that our consultation produced that information. I will look back through it to see whether there is anything of relevance. In essence, the rights that are established in part 2 of the bill are more suited to ownership than tenancy.

The Convener: The point is that only owners in occupation should have the vote.

Mr Wallace: It would be difficult to give the vote only to owners in occupation. In a particular complex, owners might be in the minority. For the sake of numerical argument, let us say that, in a complex of 10 units, four were owner-occupied and six were rented—

The Convener: We could insert something along the lines of "owners in occupation and tenants who are in the other share of the housing". Perhaps the minister can see the merit in that suggestion.

Mr Wallace: I can see that there might be merit in it, but I can also see that those who have the responsibilities that go with ownership have an interest. It is not appropriate for owners to be disfranchised.

The Convener: I am lost as to why tenants are not getting certain kinds of protection. If tenants have the right of enforcement but not the right to appoint the manager, that is a problem.

Mr Wallace: If you are the owner, you have a certain interest in who the manager is.

The Convener: The problem is that, if you are the owner, you could appoint yourself.

Maureen Macmillan: There seem to be certain unhappy situations that will need to be addressed in some way. Perhaps some kind of arbitration needs to be built in. According to the evidence that we have received, there are conflicts of interest between some owners of sheltered houses and the managers of such complexes.

The Convener: Yes. Although many elderly people are very able, some occupants of sheltered housing could be vulnerable.

Mr Wallace: Undoubtedly, there are cases where there is conflict, but there are probably many where no conflict exists. I think that the bill has a provision dealing with management. Let me see—

The Convener: We could perhaps return to that question once we see how much of an issue it is. Undoubtedly, the petitioner will read the evidence that we are taking today. He may then want to provide us with a written response before we write our report.

If the committee is content, we shall move on. Maureen Macmillan has a question about the famous sunset rule.

Maureen Macmillan: The Scottish Landowners Federation, which is not too happy with some aspects of the sunset rule, has pointed out that anybody against whom a burden is enforceable could apply to have it discharged under the sunset rule. That means that a person in a short-term occupation would have that right and could apply to have a negative real burden discharged. Is it appropriate to grant the power to such individuals?

Mr Wallace: We are talking about burdens that are 100 years old. The Executive took the view that, if the burden is more than 100 years old, the people who are subject to it should have the opportunity to seek to have it discharged, because those people are the ones who are affected by it. The burdens that we are talking about are somewhat ancient, but it should always be up to the landowner to object and make the case to the Lands Tribunal.

Only owners will be able to use the sunset rule to discharge burdens that involve a positive obligation. The obligation must be an obligation to do something, not an obligation to refrain from doing something, because only owners can have such burdens enforced against them. The sunset rule would really apply only to negative burdens.

Maureen Macmillan: I think that the Scottish Landowners Federation was concerned that someone who was in a short-term occupation and who would be there only for a few months would have such a right.

Mr Wallace: In the real world, would someone who was only passing through want to bother to try to get rid of the burden? That may be a factor, to which the Lands Tribunal would have regard. If the person had moved on by the time that the case got to the tribunal, the person would probably not be in a particularly strong position and would

probably no longer have an interest in pursuing the matter. However, that might be a legitimate consideration for the Lands Tribunal.

Paul Martin: I have concerns about what resources will be made available to the Lands Tribunal if its work load increases. Will the minister ensure that resources are made available if there is an increased work load? Does he expect the work load to increase as a result of the bill?

Mr Wallace: Essentially, we have been guided by the Lands Tribunal's assessment of the likely extra work load. In its evidence, the tribunal said that it was not likely that a significant volume of additional work would arise from the bill.

The combination of the Title Conditions (Scotland) Bill and the Abolition of Feudal Tenure etc (Scotland) Act 2000 will arguably relieve the Lands Tribunal of some of its work load. The estimate in the financial memorandum was produced in consultation with the tribunal—we did not simply hazard a guest. Some aspects of the package of measures could lead to a reduction in the tribunal's work. The proposed sunset rule could lead to a reduction in the number of burdens that are around. As in every case, one looks at things in the light of experience. If people apply to the Lands Tribunal, it has to hear them, assuming that the application is competent. In that sense, the system is demand led. The financial memorandum was based on discussions with the Lands Tribunal, which does not anticipate any considerable extra work load.

15:30

Paul Martin: If there is an increased work load for the Lands Tribunal, will you ensure that additional funds are made available?

Mr Wallace: One must remain within budget. The Lands Tribunal has to deal with the work that legitimately comes before it, just as the courts have to. We make money available to allow that to happen. If there were a huge explosion of work, we would have to address that, as we would not want there to be a steadily growing backlog.

Paul Martin: On 3 September, Professor Paisley suggested that the Lands Tribunal ought to have jurisdiction to vary or discharge statutory agreements such as section 75 agreements. One member of the Lands Tribunal informed us last week that the Lands Tribunal in England had had that jurisdiction for a long time and that that had worked satisfactorily. What is your view on that?

Mr Wallace: The Scottish Law Commission considered that but decided against it. The consultation was divided on the matter and the local authorities were strongly opposed. I would point out that section 75 planning agreements are essentially planning related and are more appropriately considered in the context of planning law and obligations relating to public agreements rather than the private-law nature of the burdens.

I understand that, in England, such agreements were once in the jurisdiction of the Lands Tribunal but have since been removed from it. Now, an application can be made to the planning authority for modification or discharge and a refusal by the planning authority can be challenged by appeal to the secretary of state. I will try to confirm that and get back to you in writing.

The Convener: I am sorry to interrupt, Mr Wallace, but our adviser has to leave in order to attend to a serious matter.

Paul Martin: We note that the Executive is committed to discussing with COSLA whether an amendment could be made to the bill to protect local authorities' interests in relation to clawback arrangements. Homes for Scotland, in our evidence session on 10 September, suggested that it is much more common for local authorities to use development-value burdens and clawback in purely commercial transactions, as opposed to when they are acting as benevolent or socially aware sellers. If that is the case, why is special treatment for local authorities justified?

Mr Wallace: You use the word "commercial", but you must remember that local authorities often use their powers to promote economic development, which is a perfectly legitimate thing for them to do. In circumstances like that, there might be a legitimate reason for clawing back funds or having the development-value burden, if, for example, public money had been invested in a project prior to the land being sold and the new owner decided to do something totally different with the land. There is an element of protection of the public interest in that. To draw criteria tightly enough would be difficult if local authorities were given powers to act for what have been termed social or community purposes. That would be too wide a power and might allow local authorities effectively to have their own local forms of the feudal system.

Paul Martin: Let me probe you on the issue, although I have no views of my own on it. On regeneration, is the point not that a local authority might want to promote a piece of development land for the good of the community? If a private individual wanted to sell such property, could they not use the same argument, although the sale would also be to their financial benefit? I ask simply because I do not know the answer.

Mr Wallace: If a private landowner had similar concerns, other routes would be open to them—for example, leasing or entering into some kind of trust. COSLA seeks powers that mirror those that

Scottish Enterprise has when it enters into agreements on restricting the future use of land. I think that your original question was about why local authorities should be given powers that are wider than those of the private individual. The answer lies in the extent to which the powers would be used. A local authority—along with the enterprise agencies, perhaps—is more likely to enter into such agreements than the private individual is. Private individuals can use other devices to arrive at a similar situation.

Paul Martin: Some witnesses have suggested that the state should not intervene in private arrangements between buyers and sellers. There are various views on that matter. What is your view?

Mr Wallace: Private contractual arrangements are not affected. In many respects, some of the provisions in the bill help private arrangements to be conducted in a more orderly way.

The development-value burden, which the 2000 act introduced, was intended for situations such as when a private individual gifted land to a community for a particular purpose and did so at a much lower price pro bono publico. If the land comes to be sold, it is questionable whether the person who got the land at a knockdown price should take the full benefit of the sale when the land will no longer be used for the purpose for which it was sold to them.

That is the principle that is being pursued. It is not necessarily about the state intervening in arrangements between two private individuals; it is about trying to secure fairness and equity in circumstances where the original parties had a particular view of why a transaction was being entered into and did not intend a windfall sometime later.

Lord James Douglas-Hamilton: In our evidence taking on 3 September, Professor Paisley and Kenneth Swinton of the Scottish Law Agents Society stated that the legislation on standard securities required to be updated and that the Scottish Law Commission should be invited to engage in that task. We have received a letter, dated 20 September, from Jane McLeod of the Scottish Law Commission. She says:

"We are aware of the difficulties in this area. While we are not able to give any commitment at this stage, I confirm that the matter will be considered for inclusion in our next Programme of Law Reform, which will succeed our current *Sixth Programme* due to run until the end of 2004."

Will the minister reassure us that the matter will not be lost sight of and that the Scottish Law Commission will revisit it in due course?

Mr Wallace: I can give that reassurance. Although I acknowledge the representations that have been made during these evidence-taking sessions, the matter has not been raised with my department with any frequency or urgency. However, if feeling grows that the law on standard securities needs to be reformed, I will be happy to consider the suggestion and seek to ensure that it is considered when the Scottish Law Commission's programme is next drawn up.

Maureen Macmillan: People in rural communities have been exercised by the 100m rule. The rule does not protect farmland, because it applies only if there is a building within 100m of land. The building is the important element, not the land. Last week, the Scottish Landowners Federation suggested that the 100m rule was unfair. For example, if a superior sells off part of his land and uses a feu disposition, he must own a building on the neighbouring land within 100m of the burdened property to preserve and enforce his burden after feudal abolition. However, if he uses a disposition instead, he simply has to demonstrate interest to be able to enforce his burden. Do you agree that it is unfair for a former feudal superior to be treated in such a way if he now has land to act as the benefited property?

Mr Wallace: This is a terrible thing to say, but could you repeat the question?

Maureen Macmillan: Do you think that former feudal superiors are being victimised under the 100m rule?

Mr Wallace: I remember that there were many debates about the issue during the passage of the Abolition of Feudal Tenure etc (Scotland) Act 2000. We also gave it great consideration during the preparation of this bill. The 100m rule allows the superior to preserve enforcement rights over a feudal burden if they have a building within 100m of the burdened property. That stipulation is clear and certain.

However, consultees were fairly split over one concern, which should at least be considered. Relaxing the rule in any way might reintroduce—or at least not abolish—the feudal system not even by the back door, but through the front door. Given the underlying policy purpose of the Abolition of Feudal Tenure etc (Scotland) Act 2000, people would feel that Parliament had not done what it had set out to do if we allowed the feudal system to be recreated by other means. That is the thinking behind the provision in the 2000 act, which the bill is not amending.

Maureen Macmillan: Why would relaxing the rule perpetuate the feudal system?

Mr Wallace: Because the superior would probably be able to maintain most of the burdens on anything anywhere near the land.

Maureen Macmillan: The issue is more to do with the fact that, if the superior wanted to transfer

the feudal burdens to neighbour burdens, he could do so only if a dwelling-house existed. The Scottish Landowners Federation asked whether superiors who had a hectare of land could not transfer feudal burdens to neighbour burdens to protect the use of the land—for example, to prevent people from keeping dogs on a sheep farm.

The Convener: They could always get a conservation burden.

Mr Wallace: The concern is that we would allow the superior to preserve everything around the perimeter of the estate, which would mean that the feudal system would still de facto be in existence.

Maureen Macmillan: Right. Thank you. And—

The Convener: I think that I heard a weary sigh there, Maureen.

Maureen Macmillan: I think that this is the end of the road for me.

I am interested in the question, but I am not necessarily taking one side or the other.

Mr Wallace: It is an important question and one that was raised during the passage of the 2000 act. As my officials will confirm, the question whether we should amend the bill exercised us considerably. As the Law Commission found out, there are competing arguments, but there was concern that, by abolishing the 100m rule, we would run the risk of a large number of feudal burdens being saved, so that we would not have done what we set out to achieve in that act.

15:45

Maureen Macmillan: We have received a petition about the period before the provisions come into force. The petitioners suggest that a period of 18 months after the enactment of the Title Conditions (Scotland) Bill, before it and the Abolition of Feudal Tenure etc (Scotland) Act 2000 come into force, is too long, given the length of time that affected individuals have had to prepare for those two pieces of legislation. Can you commit to a shorter period?

Mr Wallace: No, I would not wish to commit today to a shorter period. In answering an earlier question, I indicated that there was work for local authorities to do and it is important that the time is allowed. I hope that the bill will reach the statute book, but we cannot be sure that there will not be changes, which might take time to assimilate. As we know, bills can change during their passage through Parliament. It is therefore important to allow proper time. I hope to be in a position relatively soon to give some indication of the likely dates. No one wants to see all this come to pass more than I do, but we are dealing with a system of land holding that has existed in Scotland for 800 years and we cannot just switch over and change it fundamentally overnight. Two years is probably not an unreasonable time to give practitioners, landowners, tenants, burdened proprietors, benefited proprietors and local authorities to work through the implications and decide what steps they wish to take.

Maureen Macmillan: Are there any other bills in the package that have not yet started their progress?

Mr Wallace: No. As I said, there is a tenements bill, which the Law Commission has now reported on and which we see as part of the package. It was always made clear during the passage of the Abolition of Feudal Tenure etc (Scotland) Act 2000 that the full implementation of that act was contingent on other legislation—the Title Conditions (Scotland) Bill. There is no other piece of legislation that we must wait for to be able to proceed to implementation.

The Convener: Sources have certainly told me that there are problems with the time that it has taken since the Abolition of Feudal Tenure etc (Scotland) Act 2000 was passed, because superiors are using the system, while it is still there, to make some money. There are people who see that they will lose those rights and are putting things in place for themselves by discharging burdens at a cost. The hold-up in the 2000 act is definitely causing problems for the Title Conditions (Scotland) Bill.

Mr Wallace: Do not get me wrong. I want the legislation activated, but if we were to short-cut it there could be another series of problems.

The Convener: Will the bill be enacted before Parliament rises for the election?

Mr Wallace: I very much hope that it will be enacted before the election. It had better be, as we cannot carry bills over into the next session.

The Convener: It might be a different Administration.

Mr Wallace: It might well be. I would like to think that the bill proceeds with a fair degree of cross-party consensus.

The Convener: I am just trying to think of time scales. Eighteen months after enactment would take us to 2005, would it not?

Mr Wallace: It would take us to autumn 2004.

The Convener: That means that the Abolition of Feudal Tenure etc (Scotland) Act 2000 will have been sitting on the shelf for four years.

Mr Wallace: To be honest, I do not think that we pretended otherwise when we passed the Abolition of Feudal Tenure etc (Scotland) Act

2000.

The Convener: I certainly did not expect to wait four years and I do not think that the public did either. I accept that that is the way that it is now, but it is very unfortunate.

Mr Wallace: If you check the record, you will see that it was always indicated that the bill—

The Convener: I understood that, but I did not think that the Abolition of Feudal Tenure etc (Scotland) Act 2000 would take four years to come into force.

Maureen Macmillan: We did not think that we would have to wait for four years after it was passed.

The Convener: That is the point.

Mr Wallace: I would like it to come into force as soon as possible, but there are practical issues. I do not think that it would be sensible to rush, given the problems that might arise.

The Convener: Members will be glad to know that I have completely run out of steam on this. If anybody ever wants to finish me off, they should just point me in the direction of the Title Conditions (Scotland) Bill. Thank you, minister.

Mr Wallace: Thank you.

Petition

Children (Scotland) Act 1995 (PE124)

The Convener: The next item on the agenda is petition PE124. I have a paper that sets out the background to the petition and a note from the Scottish Parliament information centre. We are all pretty familiar with the Grandparents Apart Self-help Group. It has been lobbying the Parliament for some time now, and I do not say that in a condemnatory fashion.

The SPICe briefing refers to the law on parental responsibilities and rights. There are alternative courses of action for us. We could write to the Minister for Justice—we could have told him that we were going to do that—asking whether it would be possible to amend the Children (Scotland) Act 1995 through the forthcoming family law bill. The Children (Scotland) Act 1995 does not name grandparents as having a built-in right to contact or residency with their grandchildren. They can apply for it, but they have to show that they have an interest.

We could write to the Sheriffs Association asking it whether it can provide information on the number of applications received and granted to grandparents under section 11 of the Children (Scotland) Act 1995, which is a catch-all section. Alternatively, we could note the petition and take no further action. Before I tell members what I fancy doing, I am happy to hear views.

Donald Gorrie: In the discussions and correspondence that I have had with the group, it has claimed—no doubt correctly—that on occasion grandparents are dealt with in an unsatisfactory way either by sheriffs or by social workers. The members of the group feel disparaged and they think that their position is ignored and that they are humiliated in the whole exercise. Is it possible to ask the Lord Advocate or the Minister for Justice—I do not know which is more appropriate—to publish guidance to say that grandparents should be treated more seriously?

The Convener: I do not know, but I do not think that the Lord Advocate would deal with that. I would have thought that the sheriff principal would deal with it. Can Lord James help me?

Lord James Douglas-Hamilton: We would contact the Minister for Justice.

The Convener: Yes, but I am talking about policy guidelines, perhaps for sheriffs.

Lord James Douglas-Hamilton: Jim Wallace would deal with that.

The Convener: We can find out. Donald Gorrie wishes to find out what policy guidelines are put down for sheriffs.

Donald Gorrie: That would be a start. We could ask them to be more sympathetic to the grandparents. I do not doubt that you have heard stories about this sort of situation. I have heard very bad stories about the fact that the system is entirely unsympathetic to grandparents and they get a worse than fair deal.

The Convener: I do not know whether I would be happy about asking sheriffs to be more sympathetic. I would want to know what the guidelines were first, because there are many interested parties who might also deserve a sympathetic approach, such as natural fathers.

Michael Matheson: You mentioned the desirability of finding out some details about the number of cases that have been brought under section 11 of the Children (Scotland) Act 1995. I, too, would be interested in obtaining such details. I would also like to obtain some information about the percentage of cases in which grandparents were given right of access to the children, because that would help to flesh out the extent of the issue.

I agree with Donald Gorrie that we should find out what guidance is issued. I presume that such information would be issued to sheriffs in the form of a court circular and that the sheriff principal would be responsible for doing that, on the guidance of ministers. It would be helpful to find out that information.

If the Executive is not persuaded that there is a need to amend the Children (Scotland) Act 1995, it could outline some ways in which it thinks that the issue could be progressed. It appears that the Executive does not think that any action on the issue is necessary. There is a problem, so it would be useful to consider what other routes could be taken. If guidance has been offered to sheriffs, we should ask why that could not be pursued.

The Convener: Senators at the Court of Session would also be involved in relation to cases in the senior court.

Michael Matheson: We should look for guidance on what other routes for dealing with the issue are available, if the Children (Scotland) Act 1995 is not to be amended.

The Convener: The suggestions that we have come up with so far are policy guidelines to sheriffs and senators and a desire for data. If the Executive does not intend to amend the Children (Scotland) Act 1995, we want to know what solutions it has to offer, if it thinks that solutions are required.

Paul Martin: When we write to the Minister for Justice, it is important that we should do what Michael Matheson suggested. The other possible avenue would be to contact children's organisations. When there is contact with grandparents, the experience of the child is the important issue. It is right that grandparents should have rights, but we must be clear about whether such rights would always be in the best interests of the child. It would be worth exploring further whether there are situations in which a child does not want to have contact with their grandparents. We should perhaps approach children's organisations for case studies that would set out the child's experience, which is the crucial element. I am sure that the petitioners would want that to happen.

The Convener: In the event of any application for rights in relation to a child, the test is whether the granting of such rights would be in the interests of the child. We all know that parents do not have automatic rights to contact their children or to reside with them.

Maureen Macmillan: The child's interest is paramount. Grandparents have a special role in a child's life, but so do aunties and uncles and the extended family. It strikes me that there are parallels with victim support issues. When a marriage breaks up and children are at the centre of the dispute, there are issues to do with how the extended family copes with the situation. If the court process ignores those issues, people reach a situation such as that in which the petitioners have found themselves, in which they grieve without obtaining any redress.

I would like more support systems to be available to deal with family break-ups. When one side gets custody of the children, the feuding between the husband and wife can extend to the extended family, perhaps unjustifiably. People need help in such situations. It might not be the case that we should write it into law that a grandparent or a cousin or an aunt should have special rights. People can apply for rights of contact. I do not know that I would want to extend such rights, but it is clear that some people feel that they have not been paid attention to, which is not good.

Lord James Douglas-Hamilton: It would be legitimate to write to the Minister for Justice and copy the letter to the Lord Advocate. It would also be legitimate to write to the Sheriffs Association and children's organisations. I note that the Scottish Executive sees no case for introducing a new procedure to provide grandparents with parental responsibilities and rights. The principle that we are bound to support, and which is in the Children (Scotland) Act 1995, is that the child's interests must at all times be paramount. However, the issue is contentious, because grandparents and parents can sometimes be at loggerheads. I am not convinced that a legislative change is necessary, and we would not have time to implement one between now and the May election.

16:00

The Convener: Interestingly, grandparents would not normally be given an intimation of proceedings involving children—although it could be given—so they might not be aware that proceedings on the residency of their grandchildren or on making contact with them are taking place. There may be merit in addressing that.

Lord James Douglas-Hamilton: We are entitled to ask for information on existing practices, procedures and guidance, to ensure that such matters are being dealt with properly.

The Convener: In addition to asking for data on applications under section 11 of the Children (Scotland) Act 1995, I suggest that we ask—if it is possible to retrieve the information—how many applications relating to children were intimated to the grandparents. In other words, how many times did the sheriff take it upon himself, without a submission from either the pursuer or the defendant—the mother or the father—to say, following the reading of the writ by the clerk, "In the circumstances, we should intimate this to the grandparents"? It is always possible for a sheriff to do that. At least grandparents would know that something was going on, when otherwise they would not. I am thinking of grandparents who live outside Scotland, for example in England, and who only see their grandchildren during the holidays. Is the committee happy to request information on the number of cases in which such intimations were made?

Members *indicated agreement.*

Work Programme

The Convener: We are doing really well, because we are 15 minutes ahead of ourselves. We will consider what lies ahead of us in our forward work programme. We will not go into the nitty-gritty of our inquiry into alternatives to custody, because that is an issue for next week, but we have to address whether the committee wants the Executive to respond to our report. If we want that, that will cut down the time that we have to produce the report, because the Executive requires eight weeks in which to respond, and we must bear in mind the fact that the Parliament will be dissolved on 31 March. Alternatively, we must decide whether we are content to issue our report without looking for a response, which would give us an extra eight weeks.

We must also consider whether we should meet fortnightly into March. We are one of the few committees that meets every week—sometimes we meet twice a week. The committee should consider that point in thinking about the work programme.

Michael Matheson: I am not too worried about getting a response from the Executive. I would like to undertake an inquiry into alternatives to custody that produces new ideas as opposed to examining what currently exists. I would be happy for a report to be produced by SPICe or whomever.

The Convener: We will address that issue next week. The point is that the committee decided on a remit—I will let you see it so that you can raise it next week—and, unfortunately, it would not be appropriate to change it. However, your position is that we should not seek a response. Does anybody think otherwise?

Donald Gorrie: I know that bills fall at the end of a session, but do reports fall at the end of a session? If we write a report and it is not considered by this Executive, will it be considered by the next Executive, or will it fall down a big black hole somewhere?

The Convener: The next Executive does not have to consider it, but the report will be in the public domain and it would be a pretty foolish Administration that ignored it. We do not even know what the complexion of the next justice committees will be. We can do the groundwork and leave matters to our successors.

Donald Gorrie: I favour using the time to produce a really good report. Whatever it says in the remit, we should take up the point that Michael Matheson raised. I think that it would be more efficacious—party politics aside—if a new Administration, of whatever composition, and a new minister had copies of a good report on their

desks. With all due respect, if we get a response to a report a few weeks before an election, it is likely to be coloured by the headline in the *Daily Record*—or rather, by what the Executive fears might be the headline in the *Daily Record*.

The Convener: If there are no other views, we will not look for a response. That moves that piece of work on.

I ask members to indicate whether they are content to conclude the inquiry into legal aid by taking evidence from the Minister for Justice on the outstanding issues early in 2003. That would seal off that piece of work.

Michael Matheson: I am not sure that I agree with that proposal. Some changes to the legal aid system have been proposed and I understand that discussions are continuing within the Law Society of Scotland about certain rates for certain pieces of work. I also understand that those discussions are at an advanced stage and are likely to be concluded in the near future. I am conscious that our report may be overtaken by events. I would like to know what stage those discussions have reached and when it is likely that a recommendation will be made to ministers. I would have thought that the committee would want to reflect on the changes that are being proposed to ministers before we publish our report.

The Convener: I seem to recall—although it is almost lost in the mists of time—that we produced an interim report, which we must finalise.

I draw Michael Matheson's attention to the list of outstanding issues for our legal aid inquiry—one of which he raised—that is in the paper on our provisional work programme. Perhaps I should chase up those issues with the clerks and get time scales for the responses. That would allow us to decide when to hear from the minister. Are members happy with that suggestion?

Michael Matheson: We may require time to consider the changes that are being proposed before we hear from the minister. We may need to consider fresh evidence.

The Convener: Therefore, members are not content to conclude the inquiry by taking evidence on the outstanding issues. If possible, we want to hear from the minister and to resolve some of those outstanding issues before we conclude the inquiry. Let us see where we get with the list first, following which we will consider whether to take more evidence.

Michael Matheson: Before we jump ahead and issue a report.

The Convener: The report has drifted a bit.

Lord James Douglas-Hamilton: May I mention a point with which I have been struggling over the years? Civil servants keep coming up with different legal aid orders for this, that and the next thing, in bits and pieces throughout the year. I have repeatedly said that those orders should be introduced in one go. However, civil servants will not do that.

The Convener: We have received a letter about that; I refer members to paper J1/02/32/10. Are you talking about consolidation rather than about automatic uprating?

Lord Douglas-Hamilton: I am not talking about uprating—I am talking about dealing with the orders together, as that would allow us to take all the different factors into account at the same time. However, the civil servants will not do that.

The Convener: We recommend that approach in our report.

Lord James Douglas-Hamilton: We are entitled to pursue that issue, because I have a strong suspicion that civil servants are not taking that approach.

The Convener: I want to deal with the matters that are still in train in correspondence with the Executive, but I will be seeking sharp answers. The report has been drifting for a long time. I thought that much of this would be resolved by now and it is not.

Maureen Macmillan: I am not sure where the community legal services issue has got to. We have been taking evidence and consulting.

The Convener: We are getting an awful lot of that. We want to tighten things up. We will talk about it and I will come back to you when I report next week on what we have done.

Members are getting out of school 20 minutes early today.

In committee room 1 at 10 o'clock tomorrow there is a joint meeting of the justice committees to take evidence on stage 2 of the budget process. Could members let the clerks know if they cannot attend, because we must be quorate?

Paul Martin: I give you my apologies.

Maureen Macmillan: I have a committee meeting at that time so I cannot attend.

Lord James Douglas-Hamilton: I have to leave early because I have to give a speech.

Michael Matheson: I cannot recall what I am doing.

The Convener: Michael is not up mountains. Three of us will be sufficient to man the barricades.

Maureen Macmillan: If there is a problem, come and find me at the Transport and the Environment Committee.

The Convener: Okay. Thank you all very much.

The next meeting will be on Tuesday 8 October when we will consider the draft report on regulation of the legal profession and responses to the inquiry into alternatives to custody. At that stage, I will remind members of the remit and we can discuss it then.

Meeting closed at 16:10.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178