JUSTICE 2 COMMITTEE

Wednesday 9 January 2002
(*Morning*)

Session 1

£5.00

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

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Wednesday 9 January 2002

JUSTICE 2 COMMITTEE
1st Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
*George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Roseanna Cunningham (Perth) (SNP)

WITNESSES

Robert Balfour (Scottish Landowners Federation)
Craig Campbell (National Farmers Union of Scotland)
Stuart Drummond (Law Society of Scotland)
Alasdair Fox (Law Society of Scotland)
Dr Maurice Hankey (Scottish Landowners Federation)
William Henry (Law Society of Scotland)
John Kinnaird (National Farmers Union of Scotland)
John Mackay (Scottish Natural Heritage)
Professor Jeremy Rowan-Robinson (Scottish Natural Heritage)
John Thomson (Scottish Natural Heritage)
Andy Wightman

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Wednesday 9 January 2002

(*Morning*)

[THE CONVENER *opened the meeting at 09:33*]

The Convener (Pauline McNeill): I open the Justice 2 Committee's first meeting of 2002 and I welcome everybody back—clerks, other staff and committee members. Our work load will start us with a bang. I ask members to do the usual by turning off mobile phones and I wish them all a happy and, I hope, prosperous new year.

Interests

The Convener: Before we discuss meeting in private, we will deal with agenda item 1, which is a declaration of interests. I welcome Duncan Hamilton to the committee. By my count, this is the committee's eighth membership change in a year. I hope that it will be the last for a while. Duncan is very welcome and I hope that he will stay with us for some time.

I invite Duncan Hamilton to declare any relevant interests.

Mr Duncan Hamilton (Highlands and Islands) (SNP): I have no interests to declare.

Items in Private

The Convener: Does the committee agree to discuss agenda item 3 in private? For the record, item 3 is lines of questioning on the Land Reform (Scotland) Bill. Does the committee also agree to decide lines of inquiry on the bill in private at future meetings?

Members *indicated agreement*.

The Convener: Does the committee agree to discuss item 6, which is consideration of written evidence on the Land Reform (Scotland) Bill, in private?

Members *indicated agreement*.

09:34

Meeting continued in private.

09:52

Meeting continued in public.

Budget Process 2003-04

The Convener: Agenda item 4 is the budget process 2003-04, which makes everybody groan. I refer members to the note that the clerks have prepared. In the past, we have agreed to meet jointly with the Justice 1 Committee to discuss the matter. That has meant a heavy burden of meetings, but has worked to a degree. Members can review that arrangement. If they wish to proceed on the same basis, I ask for their agreement, which will allow us to ask the Parliamentary Bureau whether we can have meetings with the Justice 1 Committee.

Bill Aitken (Glasgow) (Con): That approach is eminently sensible. It has worked in the past and the committees have community of interest. I suggest that we continue along the same lines.

The Convener: Is there any dissent from that?

Stewart Stevenson (Banff and Buchan) (SNP): I ask you only to note that two committee members are also members of the Rural Development Committee and that the Justice 1 Committee meets at the same time as the Rural Development Committee does. I do not oppose the proposal; I merely ask that that is noted.

The Convener: I am happy to note that. At some date, we may discuss the practicalities of ensuring that the committee's issues are aired and that there is a quorum.

Secondly, we had a discussion previously about appointing an adviser to assist the committee with the budget process. The last time we discussed the matter, most committee members felt that the appointment of an adviser to talk us through the process would be helpful. Are members happy to agree to that?

Members *indicated agreement*.

The Convener: We have made a good start. We are running ahead of time; it is just before 10 o'clock.

Land Reform (Scotland) Bill: Stage 1

The Convener: Item 5 is our first stage 1 debate on the Land Reform (Scotland) Bill. The committee will hear from five witnesses this morning. Because of the number of witnesses, there is approximately half an hour to hear from each witness.

I welcome to the committee Andy Wightman, who is affiliated to the Caledonia Centre for Social Development. Thank you for coming and for your written submission. It was a wee bit longer than four pages, but it is helpful and useful. We will not ask for an opening statement as we have your submission. We want to try to get to the point in the half an hour that is available. At the end of that time, I will offer you an opportunity to mention any matter that has not been raised.

I will kick off. I know that you have extensive knowledge of land ownership and that you have written about the issue. I think that you have provided most MSPs with a copy of your book. I am interested to know a bit about the nature of land ownership in Scotland. Who owns land and what kind of land are we talking about? For instance, what percentage is farm land and what percentage is other land.

Andy Wightman: Thank you for inviting me to give evidence.

The nature of land ownership in Scotland has always been different from that in other European countries in the sense that we have a very concentrated pattern of land ownership. If one goes to Ireland, Denmark, France or Germany, one will see a much more pluralistic pattern of land ownership with many more people owning land. That is predominantly a consequence of the revolutionary fervour that gripped Europe 200 or 300 years ago, in which primogeniture and feudalism were abolished.

We have a concentrated pattern of land ownership in which about 350 landowners own more than half the country. We have an unregulated land market whereby anyone from anywhere can buy as much land as they like. Those two features—along with a third, which has to do with the law of inheritance, whereby children do not have any rights to inherit land, which is unique in Europe—make Scotland quite different from the rest of Europe.

I think that the Scottish Executive has official statistics on the proportions of land under different uses. Some statistics say that more than 80 per cent of Scotland is farm land because rough grazing hill land is defined as farm land as result of its being able to carry a few sheep. I do not have detailed statistics on land use.

The Convener: Is it fair to say that a high percentage of the land is farm land?

Andy Wightman: Yes. I think that about 30 per cent of Scotland's rural land is grade 1 to 4 farm land. The rest is relatively poorer land, including forestry land and the uplands.

The Convener: You talk extensively about the need to widen land ownership in Scotland. That is a principle in which I am interested and which I support. I note all the comments that you make about community right to buy and other ways of transferring ownership. If the bill does not achieve transfer of ownership in the way that you would like, what other ways would there be to transfer ownership in Scotland, bearing it in mind that we are signed up to the European convention on human rights?

Andy Wightman: It is important first to point out that the bill makes a contribution to extending the rights of land ownership in Scotland. That contribution is modest but important.

On the other ways to extend land ownership rights, I make a point in my submission—I stress this—that the bill will not increase the diversity per se of land ownership in Scotland. It will merely increase one element—community ownership—of the existing diversity.

As the convener pointed out, to increase the number of not-for-profit, public sector and individual landowners, other actions must be taken. With individuals, the easiest action that can be taken—there are many, but this is the easiest—is to change the law of inheritance, which is the prime reason for Scotland's concentrated pattern of land ownership. The Scottish Law Commission recommended that change in the early 1990s. Such a change would mean that children and spouses would have a legal and enforceable right to inherit land. That would be the easiest way to ensure over the generations that land is held in more private hands.

The public sector owns about 12 per cent of the land mass of Scotland, which is not untypical—in Europe the figure is between 10 and 20 per cent. In the current economic and political climate, it is difficult to find ways radically to extend that. A review would be useful because, for example, areas of high natural heritage importance, such as the Cairngorms, should be publicly owned.

10:00

Not-for-profit landowners include environmental groups and groups that are concerned with cultural heritage. My submission contains points about drawing those groups into the scope of the

community right to buy. Groups that are interested in places such as Castle Tioram—which I mention in my evidence—or Glen Feshie in the Cairngorms could be partners with community bodies in purchasing land under the bill. They should also have rights conferred on them to intervene in the land market in their own right.

The Convener: Your submission mentions companies that are limited by shares and that one way in which land is transferred is through the transfer of shares. You say that that should be one of the triggers of the right to buy under section 37 and section 38. The bill does not contain such a trigger. I was unaware that shares can change hands without the land being sold.

Andy Wightman: The most obvious example of that is in Mr Morrison's constituency. Much of Lord Leverhulme's estate was split up in 1921, at which time lawyers in Edinburgh set up different companies. Although the titles of those estates have not changed hands, the shares have. That is the most obvious example because those companies were created intentionally as limited companies. That type of thing happens throughout Scotland and it is difficult to deal with. However, it must be dealt with because there is the possibility for evasion.

The Convener: You are interested in transferring ownership or having more owners of land in Scotland. Is the definition of community important? If the definition is too tight, will that reduce opportunities for changing land ownership?

Andy Wightman: That has been one of the big problems in drafting the bill. I sympathise with the Executive, which has had to wrestle with that problem. At an early stage, community was defined in narrow or tight terms as being the people who lived or worked on the land in question. Many people said that that definition had to be widened considerably, which the Executive did. The cost of widening the definition is that more ministerial discretion has been taken to make judgments about what constitutes a community.

For the bill to be as robust as possible, communities should define themselves as much as possible. The general guideline should be that a community should be defined by a preordained set of parameters. In my view, the parameters should be postcode units rather than polling districts, which are used in the bill. In the sparsely populated rural areas of the south-west and the Highlands, polling districts can be huge. A community in those areas that wants to exercise a right to purchase or to register an interest in land will have to take into account the views of people who live tens of miles away. The use of postcodes would allow communities to define themselves more tightly and would add flexibility to the bill. It would help communities to define themselves when they go to ministers with applications to register. Communities must be defined geographically by lines on maps, and by the number of adults who live in those defined areas who are on the voters register.

Mr Hamilton: From your books and submissions, it is obvious that you feel a sense of frustration that what we are doing is not radical enough. I am curious to know whether you are unhappy with the bill because you think that the twin aims that it sets out, although laudable, are not the main thrust of what we should be doing, or whether it is because you agree with those twin aims but do not think that the bill will achieve them. Would it be fair to say that you would like us to do something a lot more radical? If so, how would you describe the bill? Is it simply a useful staging post along the way or is it more significant?

Andy Wightman: I have described the bill in various terms. As I said at the outset, it is a useful measure that will achieve some good and go some way towards achieving the two aims that the then Scottish Office originally set out for the process. Nonetheless, as Duncan Hamilton says, we need to do far more to achieve the two aims and to do justice to the issue of land reform, which should constitute a fairly radical redistribution of power over land. That is how land reform is understood in the dictionary and in land reform programmes around the world. Within five to 10 years, the face of land ownership in a country should be radically altered—that is what land reform is about. It is to do with transferring powers from elites to the rest of society.

The bill barely begins to do that. It confers powers only on a certain group in society—predefined communities—and in effect gives them only the power to register land. They might never have the power to purchase that land because of the points that I have made about the nature of the land market. I view the bill as an important start and I commend all the political parties that have backed land reform and taken it on seriously. It is only because we have a Scottish Parliament that we have the time to deal with the issue and I commend those who have taken the initiative. It is a start. We have many more Parliaments to go and we will deal with more fundamental issues as the years go by.

Mr Hamilton: Several questions flow from that answer. You make the point that the bill does not necessarily increase the diversity of land ownership but simply emphasises one aspect of that diversity. If I play devil's advocate, I could ask why your definition of what is important or your particular interests should be regarded as more important than any others and enshrined in

legislation. One of the criticisms that could be made of any position is that it reflects simply one interest that is valued above the rest.

You also make the point in your submission that there is a public interest above and beyond the interest of the communities that are immediately affected. You give some good high-profile examples of that. Does not that go right to the heart of the bill? The presumption behind the bill is that the immediately affected communities should decide what is in the public interest, but you say that there is a much broader public interest at stake. Is the emphasis that the bill places on local communities and the presumption that they should be in the driving seat somehow misdirected?

Andy Wightman: I shall deal with your second point first. The local communities should be in the driving seat, but I have two points to make. First, the communities that are in the driving seat should have the option of drawing other partners into their initiative. If they want to draw into their partnership a local wildlife group, the local authority, a local natural history society or a local archaeological society, because of certain attributes of the land that they are interested in and perhaps because of its regional or national significance, they should be free to do so. They should not be denied the rights that the bill confers on them.

Secondly, other interests—cultural heritage and natural environmental interests—should have similar rights, perhaps not under the bill but under separate statutes. For example, issues of national environmental importance—high-profile cases of which have included Glen Feshie and Mar Lodge in the Cairngorms—could perhaps be dealt with by conferring on ministers a right of pre-emption in the land market as a whole. That is one possibility. Government agencies such as Scottish Natural Heritage could be given the power to register an interest in land and if or when land came on the market, ministers or agencies could have the power to intervene. I think that other interests should have statutory powers conferred on them to deal alone with issues, but communities should also have the power to draw them into their own initiatives.

On your first point, I do not claim that my views on the matter should have greater precedence than should anybody else's. You guys make the decisions—that is the wonderful thing about having a Parliament. We merely lobby and provide members with material to chew over.

Mr Hamilton: I have a final question. Two proposals have been put forward—the extension of powers of compulsory purchase and, at the other end of the scale, tax breaks to encourage landowners to sell to local communities. What do you think about those proposals?

Andy Wightman: I am sorry—could you repeat the question?

Mr Hamilton: What do you think about the proposal that the power of compulsory purchase should be extended? There is some debate about whether that is a good idea. What do you think about tax breaks to encourage landowners to sell to local communities?

Andy Wightman: I do not think that tax breaks appear in the bill.

Mr Hamilton: No, but tax breaks have been perceived as an additional solution.

Andy Wightman: The landowners suggested that. The issue is tied in to the issue of compulsory purchase. The Scottish Landowners Federation made the point effectively in its response to the draft bill.

In rural communities in countries such as Norway, there can be tens or hundreds of landowners around a village, whereas in Scotland there might be three. My experience is that the former have much more scope to get bits of land that they need and that they have a much more flexible regime of compulsory purchase. That is how we should proceed in Scotland because much community demand for land—or the need that communities express—is for small bits of land next to settlements. We should proceed on the basis that communities should be able to identify land that they need. I am talking about needs as opposed to aspirations or wishes. Landowners should have an incentive to release land and there should be a further process whereby, if they do not take up an incentive, they will be given rather less of an incentive.

At the end of the day, the burden of proof must be put on landowners, in particular under compulsory purchase powers, to demonstrate that they have a real need for what are, in many cases, small bits of land. Currently, the burden of proof is on the applicant.

Ministers have great power over all the compulsory purchase powers that local authorities, SNH and Scottish Enterprise, for example, have. The system is far too centralised and there should be a review of compulsory purchase powers. A new and more flexible regime of compulsory purchase powers would enable many of the bits of land in which communities are interested to be obtained relatively easily and quickly and with minimum pain, not least to the current owner.

Stewart Stevenson: I have three fairly short questions, to which I hope that there will be fairly short answers so that my colleagues can also have a shot.

Parts 2 and 3 of the bill establish clearly the policy principle that people who live in an area

should own the land in the area. However, the bill as introduced has not extended that as a general principle. In Scotland, it is recognised that there is more non-resident ownership—foreign ownership—than in almost any comparable country. Do you share my disappointment that the bill has not taken the opportunity to address that much more general and fundamental issue, which underlies the structure of land ownership in Scotland?

Andy Wightman: What is the more fundamental issue?

Stewart Stevenson: The issue of absentee landlords.

Andy Wightman: In the early stages, I attempted to ensure that initiatives on land reform dealt with as many topics under the sun as could possibly be squeezed in. To be fair, there is a limit to how much can be squeezed into one bill. The bill already deals with topics such as access, which would have been better dealt with in another bill. It would perhaps be too ambitious to try to deal with topics such as absentee landlordism. That is not to say that I do not think that the issue should be tackled. It is a fundamental inequity that tenants of land are required to live on that land while landowners are not. That is one of the features of Scottish land ownership that makes the topic so prominent.

My other point is about Stewart Stevenson's assertion that the communities who live on the land should own it. That is not necessarily the case. We need a diverse pattern of land ownership because private ownership introduces capital and investment. It is important that the bill gives communities the opportunity to—I was about to say "own land", but it does not—register an interest in the land. The communities, therefore, have a stake in or the opportunity to purchase the land at some point in the future.

Stewart Stevenson: Are you aware of the percentage of foreign ownership?

Andy Wightman: How do you define foreign?

10:15

Stewart Stevenson: I will let you do that.

Andy Wightman: I hesitate because the topic is sensitive and there are all sorts of political issues around it. My understanding is that approximately 10 per cent of the privately owned rural land in Scotland is owned by non-UK nationals. In that context, it is important to stress that, under the Treaty of Rome, any European Union citizen is entitled to buy land anywhere in the EU. They are, however, required to observe the domestic laws of the country within which they buy land. If, for example, we wanted to tackle absentee landlordism, it would be perfectly reasonable to introduce into Scots law the notion that someone who owns heritable property should live on that property. That would not be a breach of the Treaty of Rome because it does not disfranchise other EU nationals. It merely attaches a condition to the owning of property.

Stewart Stevenson: There is some interesting food for thought in what you say. I recognise that your interest does not lie particularly in access. However, I would like to hear your comments on the exclusion of people who have a commercial interest from the granting of access rights under the bill. That could mean individual guides. Do you have any comment on that?

Andy Wightman: Yes. It is a retrograde step. I make two points. First, the rights that are conferred under part 1 of the bill cannot take away from the existing rights that people have under the common law of Scotland. If, therefore, groups are to be excluded from the new statute, they cannot be deprived of their existing common-law rights. Perhaps, therefore, the practical implications are not too great, but I stress "perhaps", because I am not totally au fait with the implications of the statute in common law.

Secondly, how do we define commercial? I made the point recently that a childminder taking their charges for a walk forms a commercial group. That childminder might have four children in their charge; they are being paid for their service, part of which is going for a nice walk in the countryside, something that we want everyone to do. The other extreme is a mountain guide with three or four clients. I do not believe that it is the business of landowners to inquire about the private contractual agreements between individual citizens accessing the countryside. That is entirely a private matter of contract law between those citizens and, as such, denying the right of access to commercial groups would be an unenforceable condition.

Stewart Stevenson: I will come back at the end with my final point if time permits.

Mr Alasdair Morrison (Western Isles) (Lab): Before I begin questioning Mr Wightman, I would like to say that I am unashamedly partisan about the proposed legislation. As a Labour politician of my generation, I believe that it is an honour to be involved in such an historic process. It is the beginning of a process that has been an aspiration of my party for around 100 years. My upbringing on the island of North Uist has certainly informed my views on land ownership.

Mr Wightman, it is well known that you have written extensively about land ownership. We are all keen to dismantle the "concentrated pattern", as you put it, of ownership in Scotland and in my part of the world, the Highlands and Islands. What

is your view on self-determination for communities in the past decade? What do you think that it has meant for those communities?

Andy Wightman: I have worked with a number of such communities and have seen that community ownership has meant a lot of things. It has meant a lot of fear and trepidation. It has meant a lot of hope. It has meant quite a bit of empowerment. That is important because, for the first time in generations, people feel—it is an important feeling—that they can influence what happens around them. That is an incredibly liberating experience but it is also extremely scary, because people have opportunities and responsibilities that they did not have before and they have to work co-operatively with others who, in the past, they might have entered into an alliance against—a landlord, for example. The experience of community land ownership in Scotland in the past decade has been empowering and liberating. That is at the heart of what the bill is trying to achieve.

Community land ownership has been around for much longer than 10 years in Stornoway and much of the common land in the Borders—which the common ridings historically celebrate—is owned by the community. Part of the process should be to revitalise existing common land ownership rights. In many cases that I have seen around Scotland, existing rights on communities have been blithely swept aside by landowners. Communities are ill-prepared to find out what their rights are, because that often involves reading many complex legal documents. Moreover, people do not have the confidence to assert their rights. As a result, we are losing a lot of common land rights.

Mr Morrison: You rightly mentioned the Western Isles. I have the pleasure of living on the oldest democratically run estate in Scotland.

In your submission, you mentioned the definition of community and the importance of the postcode definition. Why is that important?

Andy Wightman: It is important that the bill confers flexibility—certainly greater flexibility than exists at the moment—so that communities that would currently have to take into account the views of everyone who lives in the pooling district, which might extend for hundreds of square miles, have only to contact those in the immediate hinterland of their community. A postcode definition would give the community a defined set of boundaries. It would offer more flexibility.

Mr Morrison: Do you believe that, without that flexibility, outside forces could influence a crofting community that was genuinely trying to purchase an estate?

Andy Wightman: That is right. The pooling district for Eigg takes in all the small isles. It is unreasonable to make people from Eigg go to Rum to lobby people there about the acquisition or registration of a piece of land in which those people have little direct interest.

The Convener: I welcome Roseanna Cunningham to the committee. Do you have a question, Roseanna?

Roseanna Cunningham (Perth) (SNP): Yes. Mr Wightman, I have read your submission and a great deal of your other work and I note that you refer to the fact that very little of the land in Scotland will ever be subject to the right to buy under the bill and that an astonishing percentage of it will never come up for sale. Would there be any triggers for a right to buy other than simply land going on the market?

Andy Wightman: The triggers that do not confer the right to buy are detailed in the bill. The right to buy should be triggered when land is inherited. That relates to my earlier point about the law of inheritance. Only by tackling the issue of how land is passed down from one generation to the next can we guarantee that every 20 years other people have an opportunity to become involved in land ownership. For land reform to have a big impact, we must tackle the question of inheritance. If we fail to do that, reform will have only a minimal impact.

However, it is worth stressing that there will be some moral pressure on landowners to enter into private negotiations with communities that register an interest in land. It is possible that when communities have slightly more power, which they can exercise by registering an interest in land, landowners will be persuaded to reach private deals. That could account for more land changing hands than under the community right to buy.

Roseanna Cunningham: That answers the third question that I would have asked, so I have only one question left. If we put to one side the issue of access, the bill relates to the right to buy. It does not deal with effective community rights beyond the right to buy. Could you envisage the bill being expanded to confer other powers on communities?

Andy Wightman: Are you talking about the rights of communities to influence the way in which land is used and decisions are made?

Roseanna Cunningham: Yes.

Andy Wightman: That would be quite tricky. Where would we draw the line? If someone owns heritable property in Scotland, under the law they are entitled to peaceable enjoyment of their possessions. It is morally questionable whether others, such as their neighbours, should have a great deal of say in how they use that land. It is

important that, as much as possible, landowners should be free to use their land as they see fit. The fundamental problem is that at the moment that right extends over huge areas. I would be wary about conferring on communities the right to be consulted about the affairs of other landowners. It would be better to tackle the problem at a more fundamental level and to ensure that no one anywhere has disproportionate power to determine how land is used over huge areas.

I have a suggestion about how the bill could be amended slightly. The title of part 2 of the bill is inaccurate: it provides not for a right to buy, but for a right to register. Part 3 of the bill provides for a right to buy. The right to register is, in effect, a right of pre-emption. However, there might be an easier way of giving communities the power to register rights of pre-emption to land.

I am a member of the new opportunities fund Scottish land fund committee. The committee had experience of a case in which a community bought a piece of land that was not ideal, but was the only one that it could get. Two other pieces of land were far more suitable, but they were sold before the community had an opportunity to purchase them. If that community had been able to secure a right of pre-emption on those properties, it would have had a degree of certainty about being able to acquire an asset that was most useful to it, at a price that it could broadly predict.

Communities could, of course, do that privately—they could approach landowners and ask to purchase a right of pre-emption. Landowners are keen on giving communities legal powers to exercise rights of pre-emption as an alternative to the community right to buy. Rights of pre-emption already exist under Scots law, which gives people 20 days to match the best price. Such a proposal would be worth considering.

The Convener: I ask George Lyon to be brief, to ensure that we stay within our time.

George Lyon (Argyll and Bute) (LD): I have only a couple of questions. In your evidence, you make it clear that the pattern of land ownership in Scotland is well out of step with that in the rest of Europe. When the Gigha buy-out was attracting considerable press interest, a German television crew told me that coming to Scotland to examine the pattern of land ownership was like stepping back into the middle ages. You recognise that the bill is a fundamental first step, but how can we move the land reform agenda forward more quickly?

Let us consider another part of the UK. Perhaps you can tell us how the pattern of land ownership in Northern Ireland is different from that in Scotland.

10:30

Andy Wightman: I did not expect to be asked about Northern Ireland. In general terms, in the late 19th century, when the island of Ireland was under British rule, land reform took the form of the British Government giving Irish tenants grants to purchase land from the landlords. At that time, the landlords were on their uppers and in many instances were quite happy to sell. Irish land reform took the form of peasant tenants being given the cash and the right to buy out their landlords; in effect, it was thousands and thousands of tenant farmer rights to buy.

That was rather late in the European experience. The early European experience was predominantly a question of abolishing the rights of primogeniture—when the eldest male son inherited—and conferring rights on children to inherit. Two hundred years of children having a legal right to inherit creates a pluralistic pattern of land ownership. If we introduced that right, limited holding sizes and insisted on residency, that would change the whole nature of the market. People would not have the right or the incentive to hold on to large tracts of land for more than a generation.

George Lyon: Are you saying that in Northern Ireland tenant farmers had real rights to buy?

Andy Wightman: The process was an all-Ireland one. I cannot remember whether tenants were given statutory rights to buy. My recollection is that they were, but I would have to check that.

George Lyon: My understanding is that the Stormont Government introduced that when it was set up in 1922.

Andy Wightman: I am not familiar with the Northern Ireland experience in particular. I know more about the 19th century all-Ireland proposals.

George Lyon: In answer to a question from Roseanna Cunningham on the triggers, you mentioned inheritance. How would we address the situation in large parts of Scotland where estates are held in trust? Such estates are set up in a trust in order to bypass inheritance tax laws.

Andy Wightman: That is part of a broader issue about the legitimacy of titles. There should be a restricted range of vehicles for people to hold titles to land, as is the case in other European countries. I do not think that private trusts or offshore trusts in Bermuda or Liechtenstein should be one of those vehicles. Holding titles to land should be restricted to private citizens in their own legal names or companies that fall under UK company law. If those were the only legal vehicles entitled to hold heritable property, the issue would not arise.

The Convener: I am afraid that we have to end the questions there. Do you want to make any

concluding comments?

Andy Wightman: Yes. I would like to make a point about salmon fisheries. There seems to be a great deal of excitement about part 3 of the bill. It is important that crofting communities have the right to acquire salmon fisheries within a year of taking over ownership of their common grazings. There are well over 200 salmon rivers in Scotland, the majority of which are poorly managed or not managed at all. Few of those rivers are in the crofting areas and even fewer would be of interest to any crofting community. However, those that are would produce great benefits to the economy of those areas.

The salmon fisheries that those who are opposed to the provisions are concerned about—I am talking about the wealthy, profitable fisheries, such as the Halladale and the Naver—are not ones that crofting communities are ever going to take an interest in. There is no real issue there. In any case, those owners could reach legal agreements with the crofting communities to buy back the power of compulsory purchase, perhaps in perpetuity. I do not think that that measure should be dropped—it needs robust defence.

The Convener: You end on a controversial note. Thank you for your excellent submissions. The committee is grateful for all your expertise.

We move on to our second set of witnesses, who are from the Law Society of Scotland rural affairs committee. We are joined by Alasdair Fox, William Henry and Stuart Drummond. I welcome you all to the Justice 2 Committee. Thank you for your written submission; it is helpful for us to see in advance what you have to say.

I warn committee members that, if they are interested in having a coffee break, they will have to exercise some self-control, because I propose to wait until just after 11 o'clock. That means that we have half an hour for this session. Bill Aitken will start the questioning.

Bill Aitken: A number of us have serious concerns about the effect of the right to buy on local economies. Some of our rural economies are fragile; that is beyond dispute. How could a change of title affect investment and property?

Alasdair Fox (Law Society of Scotland): That is not really a legal question; it is a question of economics and policy, so the Law Society of Scotland does not hold a view on it.

Bill Aitken: You stated in your submission that the valuation process may not provide the owner with the full market value.

Alasdair Fox: Correct.

Bill Aitken: Can you justify that statement?

Alasdair Fox: We are concerned about the bill's provisions on valuation. Our main concerns are directed at the appointment of the valuer. The bill gives no guidance on who is to be appointed as valuer, what his qualifications are to be and what experience of valuation he is to have. We are also concerned that the valuer will be employed and presumably paid by ministers. We are worried about the valuer's independence in valuing property between a willing buyer and a willing seller. We also have a couple of concerns about the framing of the bill. I do not know whether you would like me to expand on those.

Bill Aitken: Please do.

Alasdair Fox: Section 55(7)(a) states that account is to be taken

"of any factor attributable to the known existence of a person who … would be willing to buy the land at a price higher than other persons because of a characteristic of the land which relates peculiarly to that person's interest in buying it".

That is the romantic factor of someone saying, "I want to buy that land." However, under section 56(1), on the procedure for valuation, the valuer is required to

"invite the owner of the land and the community body … to make written representations".

It seems that there is no facility for the potential purchaser who is willing to pay a higher price because he likes the place to make representations in the valuation process.

In addition, section 55(6) describes the market value as

"the value … as between a seller and a buyer both of whom are, as respects the transaction, willing, knowledgeable and prudent."

We are not quite sure what "willing, knowledgeable and prudent" means, but we presume that that subsection cuts out the person who is prepared to pay more for the piece of land or property. In purchasing our own houses, we do not necessarily always exercise prudence; we may pay over the odds to secure a particular property.

Bill Aitken: You state that the proposals might not be ECHR-proof and might breach article 1 of protocol 1 of the convention. Is that mitigated by the fact that ministers might exercise a veto if they are satisfied that the purchase might not be in the public interest?

Alasdair Fox: I am not sure to which proposals you are referring.

Bill Aitken: I am referring to the right to buy generally.

Alasdair Fox: I do not believe that the community right to buy necessarily offends ECHR principles.

Bill Aitken: What about the crofting right to buy?

Alasdair Fox: The crofting right to buy is more difficult, because it is exercisable as a right, not as a right of pre-emption. As Mr Wightman said, the community right to buy is a right of pre-emption. The crofting community right to buy is exercisable at any time.

Specific concerns arise from the wording of article 1 of protocol 1 of the ECHR. It states:

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

We are not convinced that moving property from one private individual to another private entity—a company limited by guarantee, which is a private concern—fulfils the test of public interest. As we say in our submission, we believe that public interest is wider than that. It covers something that is open to the enjoyment of all and is not restricted by a particular class. The danger with the crofting community right to buy is that it is restricted to a class.

Stewart Stevenson: I will pick up a couple of points that came out of Bill Aitken's questions. I have assets of less than £1 million in the bank. Do you think that it would be prudent of me to offer £100 million for a quarter-acre of ground in a hilly part of Perthshire?

Alasdair Fox: No.

Stewart Stevenson: Do you think that the courts would be able to judge—as you just did—whether people were acting imprudently in the purchase of land, with respect to market value?

Alasdair Fox: Yes. I think that the courts would be able to form judgments.

Stewart Stevenson: You see my point. Although the expression in the bill is novel, I do not think that there is likely to be a difficulty in practice. We might come back to that.

I turn to the procedure for valuation, in which the community and the seller can make representations. You made the point that another buyer cannot make representations. You mentioned section 55(7)(a), which refers to the

"known existence of a person".

Would not the seller, when acting prudently, be reasonably expected to put forward in their representation the fact that there is known existence of a person who would be prepared to pay a price that the general market would not pay? The land in question may be contiguous with another piece of land and might have special value for that person.

Alasdair Fox: I am quite sure that the seller would make that known under the circumstances. However, the best way of making that known would be to take evidence from that person.

Stewart Stevenson: But at the end of the day, it is in the seller's own interests to achieve a proper return for the property.

Alasdair Fox: Of course.

10:45

Stewart Stevenson: My main point relates to the access provisions in the bill and specifically to section 9, which deals with conduct excluded from access rights. I am sure that you are familiar with section 9(2)(a), which, in relation to such exclusions, mentions

"conducting a business or other activity".

Do you foresee any legal difficulties if that aspect of the bill were to be deleted and the right of access extended without such an exclusion?

Alasdair Fox: We have not considered the point.

Stewart Stevenson: I should point out that, from the 250 or so responses that we have received to the consultation that has just taken place, this is numerically the biggest issue.

William Henry (Law Society of Scotland): Perhaps I could comment on the point that you have raised. As I understand it, the bill as it stands would exclude commercial conduct from the right of access.

Stewart Stevenson: That is correct. Would removing that exclusion have any legal implications that you wish to draw to our attention?

William Henry: Presumably it would mean that commercial conduct would be included within the right of access. As a result, any commercial entity would be entitled to exercise access rights in exactly the same way as a private individual.

Stewart Stevenson: However, that entity would be nonetheless constrained by the other exclusions mentioned in section 9 such as "damaging the land" or "taking away anything" from or "wilfully interfering" with the land. An example mentioned in previous evidence concerned a childminder who is employed to look after a child. If they took a child on to land, they would not be granted the same right of access if that section remained in the bill and was enacted.

William Henry: I suppose that there might be concerns about the extent of the commercial conduct. For example, if a commercial organisation that organised football matches regularly chose to play them on random fields chosen on a piecemeal basis, I suspect that logistical difficulties would arise.

The Convener: I have a few questions. Will you clarify whether you are speaking of behalf of the Law Society of Scotland or the committee of the Law Society of Scotland? Does it amount to the same thing?

Stuart Drummond (Law Society of Scotland): It amounts to the same thing.

The Convener: So this is the Law Society of Scotland.

On page 1 of your submission, you say:

"The Committee considers that for an effective right of access, a better balance will be needed between the needs of land managers and those exercising access rights."

What do you mean by "a better balance"? In whose favour would that balance be improved?

William Henry: The Law Society was concerned that, in certain circumstances, commercial operations might impact adversely on public safety. As a result, a landowner could be given a temporary right to prohibit access for the duration of such activities. Although the initial draft bill contained such a provision, it has been removed. The concern was whether, if timber extraction was taking place, it would be reasonable to have some form of limited right to prohibit access during that, lest a member of the public exercising their access right reached timber extraction activities and was injured.

The Convener: Do you accept that, if it was Government policy and the view of the Parliament that the objective of such a bill would be to confer on the public more or better rights such as the right of access, that would be a legitimate thing for the bill to do?

William Henry: Sorry. Could you repeat that?

The Convener: Do you accept that, if it is a policy objective of the Government to attempt to clarify or improve the public's access rights to land in the bill, we can change the law? You seem to have concerns about the balance of the law and the provisions; however, the bill is about ensuring that we change the balance. Surely it is a legitimate policy of any Government to do that.

William Henry: The Law Society accepts the provisions on responsible access and the requirement on landowners to use and manage land in a responsible way. Our concern is about whether there might be limited circumstances in which a more specific power should be given that would be temporary and would cease when the operation in question had been concluded.

The Convener: You also say that you are concerned about potential problems with article 1 of protocol 1 of the ECHR in relation to the powers conferred on local authorities to acquire land. Do you accept that, if it could be shown in case law that such an acquisition was in the public interest, those provisions would not contravene the ECHR?

William Henry: Yes.

Stuart Drummond: Yes. The issue is the wording of section 16(1), which makes no reference to the public interest. The phrase that is used is "necessary or expedient". We felt that the wording might contravene that article of the ECHR. Our only concern was that the public interest is not mentioned.

The Convener: You note, in reference to the crofting community right to buy, that the provisions in part 3 represent a fundamental change in the property law of Scotland. You also state that you are concerned about the compatibility of part 3 with article 1 of the ECHR. Do you accept that if those provisions were shown to be in the public interest, they would not breach article 1 of the ECHR? What specifically do you think would not qualify as being in the public interest?

Alasdair Fox: Of course, if it could be shown that the provisions were in the public interest, they would not infringe on the ECHR. Our concern is that the bill is drafted in such a way as to move property from one private ownership to another private ownership, which would serve the interest of that private ownership and not the broader public interest. The corollary would be the acquisition of land to build roads, drains or water supplies, all of which would be in the public interest as they would benefit the wider public.

The Convener: I take the point that you are making. However, if the public interest was defined as attempting to change fundamentally the nature of land ownership in a country, that would be deemed to be in the public interest.

Alasdair Fox: Yes, if that was the case. However, I do not believe that that is the way in which article 1 is written.

Stewart Stevenson: One of the prerequisites specified in section 35(1)(e) in part 2 is

"that it is in the public interest that the community interest be so registered."

It is therefore not possible to buy land unless it is registered and unless that is in the public interest. In section 71(1)(o) in part 3, a similar prerequisite is

"that it is in the public interest that the right to buy be exercised."

Therefore, in both parts 2 and 3, consideration of the public interest is an absolute prerequisite of either a compulsory right to buy or a pre-emptive right to buy. Is that not sufficient to ensure that the bill complies with the ECHR?

Alasdair Fox: Not necessarily, no. Those are merely statements in what is potentially an act of

Parliament.

Stewart Stevenson: So you do not believe that the point has been addressed? Will whether the bill complies with the ECHR depend on how the ministers—who are the people who will determine what is the public interest, and will do so in Parliament through Scottish statutory instruments, I imagine—apply its terms?

The Convener: All right. I think that the point has been made.

Stewart Stevenson: All right.

Mr Hamilton: I was confused by what Mr Fox said about valuation. I would like to have some points clarified on the record. You said that you had a problem with section 56(1) because of the absence of a facility for an individual who was willing to pay more than the market value. However, you accepted Mr Stevenson's assertion that section 55(7) covered that point.

Even if, under section 56(1), such an individual did not have the right to make an application, and even if the seller did not factor that in—which seems so improbable as to be farcical—is it not the case that the valuer's job is to consider the market rate, taking into account all the circumstances? We have the two checks in sections 55 and 56 and, in section 58, there is an appeals procedure whereby the value can be reassessed anyway, making it a triple check. Given that, I fail to see your problem.

Alasdair Fox: It is certainly the valuer's job to fix the market value. I was simply pointing out what I regard as an inconsistency in the way that the bill has been framed, specifically in the process that must be followed to arrive at a market value. That value is not simply a market value for the land: it is also, because of the wording of the bill, a value that takes into account special factors.

Mr Hamilton: We may be going round in circles, so I will not pursue this. However, I am still left in some confusion as to why you have a problem with the drafting of the bill.

Alasdair Fox: I believe that there is an inconsistency in the drafting.

Mr Hamilton: Despite the triple check?

Alasdair Fox: Yes.

Mr Hamilton: Some other submissions suggested that future private investment for the improvement of land would be hindered because of fears connected with the right to buy. I confess that I am again confused. Why would any improvement not be factored into the market rate that would be used in the valuation? If it was factored in, why would that hinder any private investment?

Alasdair Fox: Private investment is a different question and not one on which the Law Society of Scotland holds any view. It is a question purely of policy and economics, not of law.

Mr Hamilton: But you would be interested in the valuation procedures.

Alasdair Fox: We are neutral on the question.

Mr Hamilton: I understand, but, in principle, there is no reason, as far as you are concerned, why the valuer would not take into account the new market rate caused by the private investment. So, in principle, there is no reason why there should be a hindrance to private investment.

Alasdair Fox: The valuer would have to take all relevant questions into account, but that is not, as I understand it, the point that people are making about investment. However, as I say, this is not a point on which the Law Society holds, or is entitled to hold, any view.

George Lyon: I would like to go back to a question that Pauline McNeill brought up, on the balance that is needed in the access provisions. As a farmer, I am not aware that I have the right to exclude anyone if cows are calving in a field or if silage operations are going on. You might be able to put me right. Is that the current position?

11:00

Alasdair Fox: The current position is a wholly different framework of law. The bill has the intention of shifting what is at the moment a law of trespass to a right of access. There is currently a presumption under the law that people cannot go on to other people's land, whereas when the bill becomes law, that presumption is swept away and there is the right of someone to be on that land.

Our concern is that the people exercising the right of access may be endangered in certain circumstances, such as when cattle are being moved, during lambing or by emergency forestry operations. They may not know that they are being endangered, but they are there because they have the title to exercise a right of access. We feel that, under such circumstances, for the benefit of the public exercising the right of access, there should be a limited power for landowners to temporarily suspend the right of access. I do not need to tell the committee that the countryside is a dangerous place. Many dangerous activities are carried out there. The Law Society feels that it would be reasonable for the public to be protected in that way.

George Lyon: I am not aware of that being an issue in the countryside at the moment. I am trying to clarify what powers we currently have. Under the current law of trespass, can we exclude people from a field if cows are calving in it or if silage

operations or timber clearing are going on? Are we allowed to put up signs? I am not aware of anyone doing that. I have never seen signs. Do we have that right under the law?

Alasdair Fox: Under the occupiers' liability legislation you would be required to take reasonable steps to protect people who were coming on to the land.

George Lyon: On the issue of liability?

Alasdair Fox: Yes.

George Lyon: I think that that is different from being able to stop people coming on to the land.

Alasdair Fox: Yes.

George Lyon: That leads me to my second question, which is on liability. That was highlighted as a matter of concern by a number of organisations, and the Executive has tried to address it in the bill. You seem to raise questions about that issue. Will you make your thinking a bit clearer to us?

William Henry: The Law Society takes the view that the current law on liability is regulated by the Occupiers' Liability (Scotland) Act 1960. In essence, the act says that the duty of care must be reasonable in all the circumstances of the case, to ensure that a party is not injured or property damaged. The way in which the law has been interpreted is fluid, therefore, in the sense that, for example, the greater the danger and the less evident the danger, the higher the duty of care. Similarly, the duty of care may be greater to a very young person or a very elderly person as distinct from a person who is fit.

The law prior to 1960 categorised people as an invitee, a licensee or a trespasser. Although those concepts have disappeared, there is still some factual relevance in that categorisation. For example, if a person invites someone to their land, the duty of care to that invited person may be greater than to one who trespasses on the land. The Law Society felt that the difficulty was to determine where to fit into that overall scheme the person entering the land in the exercise of a statutory right. Much has been said about the degree of risk and about whether the person exercising the statutory right under the bill would exercise that right entirely at their own risk.

George Lyon: That is the intention, is it not?

William Henry: Section 5(2) of the bill says:

"The extent of the duty of care owed by an occupier … is not affected by … this Act".

The Law Society has found difficulty in interpreting that in practice.

Alasdair Fox: That subsection must mean that the existing law on occupiers' liability remains unchanged. That is how we have read it. We have not read it as excluding occupiers' liability. I do not think that it excludes occupiers' liability.

The Convener: We are bang on time. Are there any points that you feel have not been covered in the questions? Will you address in your summary whether part 1 of the bill maintains or alters existing rights and traditions of access? In other words, have we put the status quo into statutory form or does the bill reduce or increase rights?

William Henry: I would think that the rights that are envisaged in the access provision give a statutory form. Clearly, rights to take access for recreational purposes are relatively far-reaching.

The Convener: In using the phrase "far-reaching", are you saying that the bill would increase rights of access rather than maintain them?

Alasdair Fox: There is no existing right of access.

The Convener: There is no statutory right, but there is a right of access.

Alasdair Fox: It is correct that there is no statutory right, so the answer to your question is yes.

The Convener: Are you saying that the bill increases a person's rights?

Alasdair Fox: It does not increase them, it changes them fundamentally.

The Convener: In what way?

Alasdair Fox: They change a law of trespass into a right of access.

The Convener: I am unclear about what you are saying. Given that statutory provision, in terms of the practicalities of the rights that people will be given under the bill, will there be more right to access the countryside, less right or the same?

Alasdair Fox: More right.

The Convener: That is helpful.

Are there any other points that you want to mention to the committee before we finish?

William Henry: The Law Society has a concern about the enforceability of the rights. As you will recollect, in the initial draft of the bill, certain criminal offences were envisaged. Those have now been removed. The Law Society is concerned there is a lack of enforceability in terms of identifying who will ensure that the rights are properly exercised. That applies to both sides. It is necessary to ensure that a party legitimately exercising a right of access should not be prevented from doing so and equally that there should be some form of sanction to prevent a

landowner from obstructing the right of access. The Law Society accepts that there are provisions that address that, but not in a criminal context. There is simply some concern about how that would be addressed under the bill as introduced.

The Convener: That is a helpful point for the committee to consider. I thank you both for your written submission and your oral evidence. I am afraid that we have to end your evidence now to remain on schedule.

George Lyon: I have a point of clarification. Will the Law Society give us a written submission on liability? It is very important that we find out what it thinks that the flaw in that provision is.

The Convener: Would that be possible?

William Henry: Yes, of course.

The Convener: I propose that we have a five-minute break so that members can have a coffee. We will reconvene at 11:15.

11:11

Meeting adjourned.

11:23

On resuming—

The Convener: I welcome everyone back and welcome Dr Maurice Hankey, director, and Robert Balfour, convener, of the Scottish Landowners Federation. You have other people with you, so perhaps you will make the introductions.

Robert Balfour (Scottish Landowners Federation): On my right are Michael Smith, who is our legal adviser, and Marian Silvester, who is our access adviser.

The Convener: Thank you. I thank you also for coming to give evidence today and for your written submission. We will go straight to questions.

Stewart Stevenson: I have a particular interest in access. I will focus on that rather than on the right to buy. In the bill, people who are:

"conducting a business or other activity which is carried on commercially or for profit or any part of such a business or activity"

are excluded from access rights.

It is not unreasonable that the bill should protect an owner's rights if, for example, a fun fair were to appear on their land and decamp to a field for a fortnight. It is clear that it is unreasonable for us to grant unlimited access rights to people conducting that sort of activity. The difficulty lies in the case of a private contract between, say, an individual hill guide and a small group of people who may be exercising access rights. I suspect that, in many instances, the owners of the land would want untrained groups to be guided in a way that enabled responsible access to be exercised.

Would you feel discomfort if the phrase were to be deleted or substituted by another phrase that allowed access for individual contractors or small companies that are, in essence, mentoring people in the exercise of their access rights? I refer to section 9(2)(a), which is on page 6 of the bill.

Robert Balfour: I do not believe that the scenario that you have described would be affected by that section. We cannot remove section 9(2)(a); it should remain. I do not believe that a guide who was taking people out would contravene that section.

Stewart Stevenson: Let me extend my example a little further. There are companies that provide canoeists with equipment and lead them on to rivers for adventure canoeing. How might that be affected by the exclusion that section 9(2)(a) will provide?

Dr Maurice Hankey (Scottish Landowners Federation): It is quite easy to define simple situations such as the babysitter situation that was referred to. Clearly, the babysitter is not being employed to take the child on to the land. A range of situations are relevant. For example, what about a riding school or trekking centre, which may choose to make habitual use of someone else's property for commercial gain without any obligation to contribute towards the costs or to compensate for the disturbance that the landowner experiences?

We are talking about shades of grey. Unfortunately, a line has to be drawn somewhere. I would like to think that most landowners would be willing to enter into a reasonable relationship in a range of such situations, but a legal line needs to be defined.

Stewart Stevenson: There is evidence that the present situation works on a reasonable basis through negotiation. The concern that has been expressed about section 9(2)(a) is that its specific exclusion of access rights could have the effect of disfranchising and destabilising the existing arrangements. I seek your assistance on how the committee might more properly express what we want to achieve, so that the small companies that currently exercise access rights responsibly are able to continue doing so without being priced out of existence.

Dr Hankey: We must be careful to remember that the bill will not mean that nothing can happen beyond the point at which the right stops. For example, restricting access rights at night-time does not mean that we cannot condone people going out in the dark.

The principle is that the right will not apply under

certain circumstances. As the section stands, it does not exclude any other commercial activity, but it does require that such activity be conducted in full liaison with the people whose property is being utilised for someone else's gain. That is not unreasonable; it is a position that is balanced and fair to both parties.

Robert Balfour: It comes back to the grey area. As Maurice Hankey said, we would not be in favour of a situation in which people engage in damaging access but do not put anything back, for example by maintaining footpaths or putting something back into the community. We need safeguards in the bill to cope with business activities.

11:30

Stewart Stevenson: Damage is clearly excluded by section 9(2)(e), so there is an attempt to address the consequences of access and to draw a list of exclusions. I am trying to determine whether there is a better way of expressing something that appears to be so broadly drawn as to cause a lot of people a lot of concern. Of course, the people bring in tourists and visitors to rural areas for the general benefit of businesses in those areas. I do not think that landowners or anyone else would wish to discourage that activity, but we do not want to create a legal position where uncertainty is created and so other rural areas, perhaps in other countries, seem more attractive.

Robert Balfour: If section 9(2)(a) were removed it would upset even more any balance that there is in the bill.

Mr Morrison: I have a few brief questions for Mr Balfour. How many landowners do you represent?

Robert Balfour: About 3,500.

Mr Morrison: As a rough approximation, what percentage of Scotland's land area do they own?

Dr Hankey: The figure is something like 40 per cent of the total land area of Scotland.

Mr Morrison: What do you understand by the phrase "land reform"?

Robert Balfour: It means reforming the way in which heritable property is owned and managed.

Mr Morrison: And you are fundamentally opposed to land reform.

Robert Balfour: No. We have never said that.

Dr Hankey: We have never said that.

Mr Morrison: It is good to have that clarified.

In your submission you state:

"We repeat our concerns that the proposals fail to differentiate in their impact as between "good" and "bad" landowners".

What is your definition of a bad landowner, and how many do you represent?

Robert Balfour: What is the definition of a good landowner?

Mr Morrison: No, what is your definition of a bad landowner, and how many do you represent?

Robert Balfour: There are rotten apples in every barrel, whether they are landowners, civil servants or, dare I say it, MSPs.

The Convener: Wash your mouth out.

Robert Balfour: You cannot define what is bad and good in any situation.

Mr Morrison: I seek only clarification of what you state in your submission. You say that our

"proposals fail to differentiate in their impact as between "good" and "bad" landowners."

I seek clarification of your definition of a bad landowner, and ask how many you represent.

Dr Hankey: The quote that we use is from the late Donald Dewar and refers to the fact that good landowners need have nothing to fear from the legislation. The bill was supposed to be aimed at people who are irresponsible in their use of land—who deprive members of local communities opportunities and things like that. The legislation has moved on since then, to the point that it could impinge upon someone who is, by any definition, a good landowner. A good landowner may still suffer disadvantage, be it in the financial value of a sale, the timing of a sale or whatever, regardless of how minded he might be towards the community good.

A good example is the fact that a lot of landowners operate totally open access policies and have done so for decades. At the moment, they at least have the ability to manage that access. The bill has been changed since the draft stage so that they will be unable to close temporarily, even for essential purposes. That removes their ability to manage access and to integrate that access with their own land management activities.

We have our own code of practice. I should have brought copies with me. The code of practice defines what we think is good land ownership. However, we are a representative body, not a professional association, so we cannot apply the code of practice in the same way that chartered surveyors, accountants or other professions can.

Mr Morrison: Do you have a specific definition of a bad landowner?

Dr Hankey: I will send you a copy of our code of practice and you will be able to deduce from that what we consider to be a bad landowner.

Mr Morrison: I look forward to reading it.

The Convener: Does your organisation believe that most Scots should own land in Scotland?

Robert Balfour: We are not against the community ownership part of the bill in principle. We believe that communities should be able to own land.

The Convener: Do you think that there should be more owners of land in Scotland? I am not sure whether you heard the previous discussion with Andy Wightman, when we were talking about how few people own land in Scotland in comparison with in other countries.

Robert Balfour: I did not hear that bit.

The Convener: We had an exchange about how few people own land in comparison with the amount of land in Scotland. Do you think that we should be aiming to give more people ownership of land?

Robert Balfour: Can you define what you mean by owning land? Having a house and garden means owning land. We have more homeowners than some countries on the continent.

The Convener: I am talking about parcels of land—bigger stretches. I think you know what I mean.

Robert Balfour: Some of the larger open areas of Scotland that are under one owner are not viable in smaller lots. That is the reason why many larger properties are in single ownership. A viable farming unit is a lot bigger than it was 10 years ago.

The Convener: With respect, that was not my question. I am interested in whether you have a view on whether more Scots should own land in Scotland.

Robert Balfour: There are responsibilities if more Scots want to own land.

The Convener: Are you in favour of that?

Robert Balfour: That is fine.

The Convener: In your submission you say:

"It appears that the interests of our members' rights to their home and business life, property and possessions which are all protected interests, has been subordinated to the general public's right to access for '*the enjoyment of the countryside etc*.'."

Will you be more specific about what you are driving at when you say:

"rights to their home and business life"?

What exactly is your concern?

Robert Balfour: There are several sections that concern us. For example, section 12(2)(c)(iii) provides for the local authority to create bylaws that regulate

"the conduct of any trade or business".

In other words, the local authority will be able to control a person's business so that people can take a right of access. It raises access on to a pedestal above other land ownership rights.

The Convener: What is your concern in relation to the "rights to their home"?

Robert Balfour: The definition of a home and a business is the same under European law.

The Convener: So your concern is the specific section that gives powers to local authorities to regulate the business aspect.

Dr Hankey: There are a whole range of ways in which the bill has moved access to a position of supremacy above legitimate land management activities. That interferes with the ability of a landowner, farmer, forester or sporting manager to manage their business. People own property for a purpose. The elevation of consideration of the access taker's position infringes on many of those expectations, under article 8 of the European convention on human rights.

The Convener: You are concerned about interference with your members' rights.

Robert Balfour: We are not opposed to access.

Dr Hankey: We are not opposed to access, but we want access to be integrated with land management. We want access to be manageable, as much for the benefit of the environment and of the people making use of that access as for the benefit of the landowner. We do not believe that the right to access should have supremacy over farmers' decisions about how they rotate crops, for example.

The Convener: Your submission is crystal clear about that. Members of the committee such as Alasdair Morrison are trying to draw you out on specific details. I ask you to bear that in mind when answering members' questions. I know what your fundamental position is, but I am interested to hear more about what your concerns are in practice. That is what we are trying to find out this morning.

Robert Balfour: Fundamentally, our concern is that there needs to be more funding for a core path network, which people want and which would allow them to enjoy the countryside more. We are all in favour of people enjoying the countryside more. The way to achieve that is to establish a core path network. The bill will not do that. The duties that it imposes on local authorities are nowhere near sufficient to ensure that the money that is needed to create a core path network is provided. You have asked for our basic position and I have given it.

Scott Barrie (Dunfermline West) (Lab): At the bottom of page 3 of your submission you say:

"We are disappointed that the Code, which underpins so much, is not available during this consultation period."

You are members of the access forum that published the draft Scottish access code. Do you agree with the code or do you think that it is deficient and needs to go further?

Robert Balfour: The code was not published until 24 hours before we had to make our submission, so we were not able to take into account what it said.

Scott Barrie: Do you support whole-heartedly what is contained in the draft code?

Robert Balfour: We have not had an opportunity to consider the code in detail, but a first reading of it suggests that it is deficient in a number of respects.

Scott Barrie: What are those deficiencies?

Dr Hankey: The bill defines the responsibilities of landowners and lays down sanctions against landowners who are not deemed to be responsible. The conduct of access takers is defined in the code, but there is no sanction to enforce the provisions in that area. The provisions are purely evidential and it is far from clear where evidence could be used. When someone reports that a gate has been blocked, the landowner in question will be brought to book the following Monday morning. However, there will be no one and no mechanism to ensure that action is taken against a rambler who chooses to be irresponsible. That is one of our main concerns.

In our country, a range of laws deal with irresponsible conduct. It is irresponsible for people to drive under the influence of drink or drugs or to drive at 80mph down the High Street in Edinburgh. We have legislation to back up our definitions of responsible and irresponsible behaviour. The access code is not enforceable in the same way. The landowner is expected to accommodate access, but does not have recourse to any sanction when the right to access is not exercised responsibly.

The Convener: The committee shares your concerns about the limited amount of time that organisations have been given to examine the access code. We are in exactly the same position. I am sure that the committee will provide people with a further opportunity to submit written, if not oral, evidence on the access code.

Mr Hamilton: Is it fair to say that—like Andy Wightman, strangely enough—you believe that part 2 of the bill will have only a limited impact, because few properties come on to the market? That is why he is against that part of the bill and why you are for it.

Robert Balfour: We accept the principle of communities being able to own land, but we are not happy with some of the detail of part 2.

Mr Hamilton: The basic point is that part 2 of the bill would have a limited impact and therefore you are happy to try to maintain the status quo for as long as possible. Is that a fair representation of your position?

Robert Balfour: This may sound trite, but most landowners are responsible. They treat the ownership of land in a responsible manner. We hope that communities that own land would treat that ownership in the same responsible way. Responsibility is attached to land ownership.

11:45

Mr Hamilton: Do you have any evidence to suggest that such communities would not behave responsibly?

Dr Hankey: We are fairly relaxed about that side of things. My main concern about part 2 is that it will apply when people choose to sell land. There is a feeling that land reform is about redistribution of wealth. It must be noted that part 2 will not have an impact only on big estates—it will potentially attract registration for all elements of land, particularly around settlements in rural Scotland. The person on whom the registration falls, who will be disadvantaged by the protracted sale, might be a wealthy individual, or they might be a farmer's widow who is not in a position to carry on farming and who wants to sell the farm quickly after her husband's death. That person potentially faces the rigmarole of the registration process. The net worth of the individual who is trying to sell that property may be considerably less than that of half of the individuals in the community that is trying to exercise the right to buy. Let us be clear that part 2 will have a broad-brush effect and will not hit only the big estates.

Mr Hamilton: I understand that. That brings us on to the main objection in your submission, which says:

"We reject … the assertion that because a community body wishes to acquire an area of land, and can make a case of doing so, then there is to be a presumption that this is to be in that community's best interests."

Your submission goes on to say there is

"No comparative test of … benefit to the community."

I refer you to section 47(3)(c) and (d) and ask whether that statement is true.

You make a similar comment about part 3. Your submission says:

"The Bill goes in a completely different direction … without any statutory environmental or social objectives".

I refer you to section 71 and again ask whether that statement is true. It strikes me that the bill deals with that precise issue.

Dr Hankey: Mr Balfour stated earlier that the SLF has no difficulty with community ownership of land. However, we have some difficulty with the principle that communities may be pushed into making a purchase that might deliver some benefit to the exclusion of private individuals coming in and providing an equivalent benefit. All that part 3 does is substitute private investment in land and its management with public investment. That is one of my main concerns about part 3.

Mr Hamilton: With respect, that does not address my question. Your submission is crystal clear: there is no comparative assessment of benefits to the community or any statutory basis on which consideration of environmental or social objectives could be based. However, those points are specifically addressed in section 71.

Dr Hankey: The bill says that those aspects should be addressed in the community application, whereas I was considering the absence of any comparison with the benefits that a private or other purchaser of that property might equally deliver.

Mr Hamilton: Do you accept that there is a statutory basis for the consideration of social and environmental objectives and that those factors are specifically written into the bill?

Dr Hankey: I accept that, but that might not be the optimum delivery mechanism for those benefits. A better means of delivering them could be found, but the community right of pre-emption precludes that comparison.

Mr Hamilton: My next question may stem more from my ignorance than from anything else—if so, I am sure that you will tell me. I asked earlier about the argument that somehow future investment would be hindered by the right to buy. I do not understand that argument, because I do not see why future investment could not be included in a market evaluation. Can you explain that argument to me?

Robert Balfour: We heard the answers to your earlier question on that point. If you install double-glazing in your house, which you then sell, the valuation will not include the value of that double-glazing. If you have a farm and invest in it, by putting up fencing, for example, I assure you that that will not be included in the valuation.

Mr Hamilton: Let us consider such examples. Is it not the case that part of the cost of making that investment is the utility that you derive in benefiting from the double glazing or the fencing, and that part of the cost is defrayed by your use, and that part of that is in the valuation? Is it not also true that if you were the seller and were putting in your valuation of the market rate, you could include those improvements? It is up to the evaluator.

Dr Hankey: I think that a better example was given at yesterday's meeting of the Rural Development Committee, in the context of investment in fishings. Conventionally, the valuation of fishings is based on the historical catch record and on the market price. People might recently have invested considerable funds in the fishings, but those would not be reflected in how those fishings are valued. It is easy in the context of stewardship to make a lot of investment that is not entirely to do with monetary or capital appreciation, which is what a valuation would reflect.

George Lyon: Andy Wightman pointed out that the Land Reform (Scotland) Bill is only a first step, and that it perhaps does not go far enough, but one of the aims of the bill is to create a more diverse ownership pattern. I want to establish what the SLF's position is on that. Some common features of large estates, certainly in my constituency and throughout the Highlands, are a lack of investment; poor-quality housing; the absence of an active land market, with no land being traded over hundreds of years because of single ownership; an inability on the part of the community to purchase small plots of land; a lack of diversification because of no access to capital, which is in turn due to communities' lack of ownership; stagnation; neglect; and decline, which leads to rural depopulation.

One of the key objectives of the bill and of the creation of a wider, more diverse ownership base, is to turn some rural economies round. Does the SLF support that objective? It must, by definition, be in your interest to create more landowners, as that would increase your membership.

Robert Balfour: We are in favour of more rural development and of more money going into rural communities.

George Lyon: I do not think that that was the question. I was asking whether you approved of there being a more diverse ownership.

Dr Hankey: We have no difficulty with that. We represent owners of one to several thousand acres of land. We have no pre-set views about what the optimal size structure is, but a piece of land has to be a viable management unit, or in ownership that is capable of supporting sound management of that unit by other sources.

Bill Aitken: In your written representations, you highlight what you perceive as a difficulty with regard to investment in the event of right to buy being popular among the crofting communities. It has been highlighted in other evidence that there is currently a lack of investment. How would you

answer the point that the new owners might invest more than the existing ones?

Robert Balfour: They might or they might not—we do not know. We cannot turn the clock forward.

Bill Aitken: You obviously have a much greater knowledge of this than I have. Is it the case that many people who are tempted to avail themselves of the rights brought in under the bill could be of fairly limited means and, as such, would require to seek a mortgage from a financial provider, which could inhibit investment?

Dr Hankey: I would not want to impose any constraints or restrictions on community ownership that would not apply to a private buyer. Many farmers have borrowings from banks and so on.

Bill Aitken: But what about individual owners in respect of the crofting right to buy?

Dr Hankey: I do not know what you mean by "individual owners" in the context of the crofting right to buy.

Bill Aitken: Given the right to buy, an individual crofter could purchase his part of the land.

Dr Hankey: You are talking about an individual crofter buying under the Crofters (Scotland) Act 1993.

Bill Aitken: Yes. Do the financial outlays that such an individual requires to make to support a mortgage impinge on their ability to invest in the parcel of land that they have purchased?

Robert Balfour: It is more than likely that a crofter who buys his croft under the 1993 act already owns his house and that the area of land is not great. The situation is probably more relevant to the proposals in part 3. If a crofting community exercises its right to buy, the indications are that it will not have to find the money and that that will come from lottery funding or another public source of money, such as the Scottish land fund. As the director of the Scottish Landowners Federation said, that is an exchange of public money for private money.

Bill Aitken: I speak from abysmal ignorance of managing rivers and so on. If the right to buy included fishing rights, would that create problems for investment in and support of the salmon fishing industry?

Dr Hankey: It is clear that most, if not all, of the fishings on rivers need constant revenue support or capital investment support. I have no doubt that some community groups could run rivers every bit as well as their current owners can, but it is far from clear that the propensity to invest would exist or that funds would be available for investment. I do not say that they will not exist, but I am unconvinced that they will always exist when they are needed. That is a huge concern.

I will step back from that. We fundamentally object to the inclusion of salmon fishings and mineral rights in part 3, because they are separate estates from the land and have never been part of the crofting tenure. We do not regard them as essential for the management of the croft land. I do not doubt that they may be economic assets of which a community could make good use, but I question why those two interests have been singled out and why the bill does not extend to an ability for a community to acquire any business assets in the crofting counties that it feels that it could make better use of, such as a hotel, a garage or a range of other assets.

George Lyon: Does the Scottish Landowners Federation have figures on the investment that rivers receive at present? We have heard the argument that investment would dry up used against the right to buy fishings. Can we have evidence of the amount of investment and the rivers invested in for the past 10 years?

Dr Hankey: Yesterday, the Highlands and Islands Rivers Association said that about £2.6 million—I stand to be corrected—would not be invested this year alone because of the uncertainty that was being created over security of title. That covers a range of investment—

George Lyon: On which rivers?

Dr Hankey: That money was promised for about 70 rivers in the Highlands and it included money that was going to be available to establish a fisheries trust, which would have had conservation objectives. The possibility of compulsory purchase has eliminated that.

George Lyon: Do we have a copy of those figures? Right enough, they will be in the *Official Report* of yesterday's meeting of the Rural Development Committee.

The Convener: They will be in the *Official Report*, which we will obtain. Do the witnesses wish to make any brief final points?

Dr Hankey: We do not oppose public access or the community right to buy. However, the bill does not strike a fair balance between the reasonable expectations of current owners and the political or public aspirations.

The Convener: I thank you for your written and oral submissions and for coming this morning.

We move to our second-last set of witnesses. I invite to come before the committee John Kinnaird, who is the vice-president of the National Farmers Union of Scotland, and Craig Campbell, who is its senior policy adviser.

I welcome you to the Justice 2 Committee. I thank you for coming and for your written submission. We are going straight to questions,

but I will allow you at the end to make summary points that you feel have not been covered. We begin with Scott Barrie.

12:00

Scott Barrie: Good afternoon. We have just heard about the late publication of the draft access code. What role did the National Farmers Union of Scotland play in the access forum?

John Kinnaird (National Farmers Union of Scotland): We were part of that forum until the launch of the draft bill in February last, at which time we withdrew from the forum.

Scott Barrie: You withdrew from the forum.

John Kinnaird: We withdrew as an organisation from the access forum. We did so because many of the contentious issues that we felt needed to be resolved were not being considered or resolved by that forum. The forum was not reflecting many concerns of its participants.

Scott Barrie: Have you had a chance to look at the published access code?

John Kinnaird: Yes, we have. We have a copy of the access code, which was issued about 21 days after the bill.

Scott Barrie: Do you have still the reservations that you had then?

John Kinnaird: Yes, very much so. A code of practice that has no substantive issue in law must concern us. People will not read or adhere to a code that has 50-odd pages. If a code of practice must come, it must be short, sharp and to the point. I feel that this code is very much a grey area.

Scott Barrie: Access is an important aspect of part 1. Apart from improving the access code by making it much briefer and more to the point, how would you make it a more valuable document?

John Kinnaird: We require in any access code or bill a definition of the word "responsible". Nowhere within the bill or the access code is the phrase "responsible access" defined. That causes us grave concern, because each individual may have a different interpretation of what is responsible.

We must go right back to the start and say that, irrespective of what might appear in any publication, we as an organisation openly welcome visitors to the countryside. We have to. Our primary aim is the production of top-quality food, but that is not our sole function. We welcome people into the countryside. However, because of the nature of farming, particularly in enclosed land, that access must be managed purely and simply for issues of food safety, biodiversity, animal welfare, and—above all—public safety. Public safety has not been taken into consideration anywhere within the access code or the bill.

Roseanna Cunningham: I want to explore issues that the NFUS is concerned about in relation to the past year's experiences, when farmers and farming were under enormous stress for reasons that we all know. During that period, existing access rights could, in theory, have become a huge issue. Would you like to comment on farmers' experience of dealing with access during the foot-and-mouth outbreak? My perception was that the walking population of Scotland almost uniformly behaved responsibly. I wonder why you imagine that there would be any difference after an act and a code of practice were implemented.

John Kinnaird: I must agree that the public supported the farming community very well during the foot-and-mouth crisis. We are grateful for that and must thank the public for their support. There was a need to keep access to the countryside closed for longer periods than some organisations may have considered necessary. The fact that those organisations wanted to get back on to land before it was time to allow that—because of the risk of the spread of disease—gives us cause for concern. The disease was very virulent and easy to spread. At the same time, we do not support anyone who unnecessarily keeps people off the countryside.

Craig Campbell (National Farmers Union of Scotland): At an early stage of the foot-and-mouth outbreak, a group—which was subsequently called the comeback group—came together under the auspices of the National Trust for Scotland. In March, a code of practice—the comeback code—was produced, which we fully supported. Although getting to the hills through enclosed land created the problem of access to the animals, in many instances we were able to provide additional arrangements that circumvented that problem. From the official veterinary point of view, biosecurity would have been threatened if people who took recreational access to the countryside had come into direct contact with animals. We were able to get round that and the response from the access-taking public was splendid.

The Convener: Should there be a presumption in favour of access, which was suggested in some submissions? We have had considerably more than 200 submissions on the new provisions of the bill.

Craig Campbell: At the moment, there is a liberty of access, which is used by individuals and—as Mr Stevenson pointed out—organised groups. My understanding of the bill is that that liberty will not be extinguished. The issue is what

will be gained or lost by adding a right on to that.

As far as our members are concerned, the situation is very different between open hill ground and enclosed ground. As John Kinnaird said, the problem with enclosed ground is the liability for the safety of the public that attaches to the farmer. Someone who goes through a gate or over a fence into a field will not necessarily know what is at the other end of the field, unless it is dead flat. Farmers have a statutory liability under the Occupiers' Liability (Scotland) Act 1960. For example, they must not have dairy bulls in places where the public normally take access under the existing liberty. That position would be made much more complicated if a general right in all places were to be created, which is why the option of managed access through a core path network—with public support to local authorities for providing paths—is a way of addressing the safety issue.

The Convener: In other words, you are against the idea that there should be a presumption of access to land for the public.

Craig Campbell: We draw a line between open hill ground and enclosed land. Enclosed land, particularly in and beside towns, is the real issue. Paths are the way to solve that problem.

The Convener: We seem to be having some difficulty getting straight answers. Are you against the presumption or not?

Craig Campbell: To go down the route of a right of access on enclosed land, we will need lots of safeguards, including the ability to put up notices and direct the public—in other words, to manage the access.

The Convener: I have a question on the ability to put up notices.

On section 11, your submission states:

"Land managers must be able to act quickly to suspend access temporarily—in the interests of public health and safety".

I note what you say about the need to protect the public on health and safety grounds when necessary. Are you saying that land managers should have carte blanche to shut down the land whenever they deem it necessary and that there should be no presumption of access for the public?

John Kinnaird: There is a difficulty for people who do not know how the countryside works and how land is managed—especially enclosed land—at certain times of the year. We must be able to move quickly to restrict access for safety purposes.

The Convener: Are you saying that the public should have general faith in landowners?

John Kinnaird: Not landowners. I am talking about land managers. Our organisation has around 12,000 members; 80 per cent are full-time farmers and food producers. Many are tenants. At certain times of the year, they must be able to withdraw the right of responsible access. That cannot be done unless there is a core path network.

The Convener: I can read about your position in your submission. Do you think that the public should have general faith in land managers to make the right decisions and for the right reasons?

John Kinnaird: No. The local authority is a back-up. If decisions are made irresponsibly over a long period, the local authority will take steps to resolve the situation. During the time that it takes to approach the local authority to restrict access, the public will be exposed to a real and instant danger. By the time the local authority gives an answer, the public might have been exposed to severe danger.

The Convener: Your submission states:

"If people are given the right to enjoy someone else's property",

they should

"also have a duty to carry insurance".

I realise your concerns about that. However, there is a desire among some Scots to change fundamentally the nature of land ownership and access to land. We heard that Andy Wightman believes that approximately 80 per cent of the land in question is farm land. I am concerned about some of the larger estates, such as the "Monarch of the Glen" estate—I cannot remember its name—which is over 38,000 acres, including land and beach. Do you not accept that there is a wider interest and that the bill tries to make provision for land such as that? Ordinary Scots should be able to enjoy those 38,000 acres. That is perhaps why the balance is in favour of access.

John Kinnaird: I can see exactly where you are coming from. Our initial response highlighted that our concerns are aimed primarily at enclosed land. The problem exists where there are higher stocking densities—which does not mean intensive farming—or where there is food production, whether it is vegetables, cereals or potatoes. We are not necessarily concerned about the wide open tracts of land that you mentioned.

George Lyon: It seems to me that liability—where the balance of risk lies—is the crucial issue for farmers. Are you happy with the way in which the bill deals with liability?

John Kinnaird: No. If people have a right to be on land through an act of Parliament, land managers will have a duty of care for them. The

bill will automatically increase our duty of care and the liability risk.

Craig Campbell: I refer the committee to our original submission, in which we suggested a three-part alternative. We are pleased that the issue has been recognised in section 5(2). The question is whether the aim that people have access at their own risk is achieved. We suggested a form of words that we think would achieve the aim; the present form of words is unsatisfactory.

The Convener: There are no further questions, so the witnesses have got off lightly. Do they have any points to make in summary?

John Kinnaird: The issue is emotive and will perhaps rumble on for a considerable time.

As well as being vice-president of the NFUS, I am a practising farmer. As such, I know a lot about the difficulties that arise from people having access to my land. I openly welcome those people. That is our organisation's position and it is also mine, but I must be able to manage that access so that I can carry on my work safely. That is not in conflict with anyone having access. The countryside is there for people to enjoy and it should not be denied them, but neither should those who make their living from the countryside be put in a position of potential conflict. I have great concerns about a member of the public being given the right by an act of Parliament to put themselves in a potentially hazardous position.

12:15

One of the biggest difficulties that we have is in getting people to understand what it is like rather than just looking at the situation from afar. I extend an open invitation to any member of the committee who wants to see a working farm to come and pay us a visit. You are more than welcome to come and see what actually goes on on the ground. I extend that invitation to anyone who wants to come and see what the situation is like, what the risks are, what problems and concerns we have and how, if we work together, we can come up with a solution to the benefit of all.

The Convener: Thank you very much for your written and oral evidence, and indeed for the invitation. Some members will not need to take up your invitation, but others might want to consider it.

Roseanna Cunningham: I am sorry, but I have to leave for this morning. I will see you at the next meeting.

The Convener: The next meeting is in Inverness.

The final witnesses this morning are from Scottish Natural Heritage. They are Professor Jeremy Rowan-Robinson, the main board member, John Thomson, the director of operations and strategy (west), and John Mackay, the national strategy manager.

Welcome to the committee. Thank you for coming along and for sending your written submission. Stewart Stevenson wants to ask the first question.

Stewart Stevenson: I shall begin with my usual question. Do you think that it is appropriate to exclude from the granting of the new access rights under the bill people involved in commercial activity, especially guides and small-scale rurally based companies that help others to enjoy the countryside?

Professor Jeremy Rowan-Robinson (Scottish Natural Heritage): That is a difficult question to answer. One of the hats that I wear is as chairman of the access forum. That is perhaps the most difficult issue that the forum debated. We debated it several times. On the one hand, one can understand the concerns of land managers that people should be able to make a profit from using their land. Indeed, they should have a right to make a profit from using their land. That is a point of principle. The point of practice that the recreational interests take is that it is really a question of impact. It is difficult to distinguish commercial access from other sorts of access. One should really manage the impact. There are two sides to the problem. It is difficult to decide which way to jump. SNH has accepted the exclusion of commercial access.

Stewart Stevenson: Do you accept that, in many instances, groups that will exercise the right of access will do so in a more responsible way if they are accompanied by a professional who is there to ensure that responsibility is exercised and to guarantee the safety of the people they are with, and who will, as a consequence of such services being available, boost the economic viability of fragile rural communities by bringing people into those areas?

Professor Rowan-Robinson: I entirely accept that.

Stewart Stevenson: So how are we to ensure that we continue to allow that? My brother and his family are all avid orienteers. My brother organises large-scale orienteering events that involve commercial activities such as the bringing in of food vans. Clearly, that should not be allowed to happen willy-nilly, and we have to find a way of ensuring that the bill addresses that issue. In many cases, the exercise of small-scale commercial activity takes nothing away from the landowner. Is that the test, and is there a way in which we could express it?

Professor Rowan-Robinson: The hope is that the present situation will continue. Commercial access occurs without any entitlement at the moment and land managers broadly take the view that, if it causes no problem, they have no problem with it. That would be our approach as well.

Stewart Stevenson: Do you accept that the likely consequence of including such an exclusion in the bill is that landowners might start to view the granting of the rights of access—which at the moment is on a grace-and-favour basis, with no exchange of money—as a potential revenue stream? They might start to charge nominal fees, then move on to larger sums later.

Professor Rowan-Robinson: That is a risk, and we hope that that would not happen. I hope that there would be guidance to land managers on commercial access.

The word "commercial" is difficult to define, and guidance will be required in that regard. Are educational groups of people who pay to go to a centre to be regarded as commercial activities?

George Lyon: The fundamental issue seems to be the definition of "commercial". Surely everyone in a group that is being guided by someone would have a right of access anyway, would they not? Could they be excluded simply because they are in a group that has been organised by someone who is providing a commercial service? How can such undertakings be defined?

Professor Rowan-Robinson: That is a good question, and I do not know what the answer is. Until a court rules on it, I do not think that we will know the answer.

George Lyon: It is a pretty fundamental question for all the groups that provide a service that depends on their having access to land, such as people who run cycling holidays. If someone objects to the presence of a group, will the land manager get the police to arrest the group so that a ruling in court could be secured on whether the activity is commercial?

Professor Rowan-Robinson: The activity would not be a criminal offence. The land manager would, however, be entitled to ask the group to leave if he had an objection.

George Lyon: But if there is a dispute, the situation must be sorted out.

Professor Rowan-Robinson: Indeed, but there are support mechanisms in the framework.

George Lyon: What would the next step be if there were a dispute?

Professor Rowan-Robinson: The problem is that there is no way to beam up a ranger or a local authority officer to solve the dispute. However, local authorities will have clearer duties to provide support for land managers and the land manager will be able to arrange for the director to offer assistance.

If there is a persistent problem, the local authority ought to address it. The local access forums could help to mediate. At the end of the day, the local authority might have to consider using a section 11 order.

John Thomson (Scottish Natural Heritage): The spirit of our proposals is largely reflected in the bill. We were concerned with promoting dialogue between the various interests. We hope that someone who had a commercial guiding or cycling business would, either through the local access forum or directly, engage in dialogue with the relevant land managers. Although there would be no right of access under the proposed framework, I hope that it would be easy enough to agree that the activity was reasonable and was being undertaken in a reasonable way.

The Convener: That seems to be the crux of the matter—there is no specific reference to or forbidding of commercial activity in the bill. The view could be taken that there is a common law or existing right to continue commercial activity. It has been put to me that the situation will not change. A landowner who thinks that someone is on their land who should not be there may call the police, but no crime will have been committed. There is dispute about whether there is a law of trespass. What would change? Is that the current situation?

Professor Rowan-Robinson: It is; however, the difficulty for the land manager is that there are no clear support mechanisms if there is a criminal offence, apart from the police.

The Convener: What crime would have been committed for the police to become involved?

Professor Rowan-Robinson: It would depend on the circumstances. Many crimes could occur when people take access—there is a list at the back of the access code. The difficulty in respect of the criminal side is that things are simply not enforced well. Perhaps the whole issue of rural crime deserves a higher profile.

The Convener: I am specifically talking about access on someone's land. No crime will have been committed.

Professor Rowan-Robinson: Currently, land managers cannot turn to anyone for support. The new framework will impose duties on local authorities to provide support in appropriate cases. There will be provision for much more extensive ranger services. All areas to which the right of access will apply could be covered by rangers. The byelaw-making powers are much more extensive and there will be at least one local

access forum in each local authority area. Those are all mechanisms to provide support to land managers if they have problems with people taking access.

The Convener: I want to be clear. My colleague, Stewart Stevenson, asked about commercial activity. Is commercial activity specifically excluded? Is there an existing common law right?

Professor Rowan-Robinson: I do not think that there is any common law right to take access to land for commercial purposes.

The Convener: There is nothing in the bill that expressly forbids that.

Professor Rowan-Robinson: The bill does not forbid commercial access. It does not include commercial access within the new rights.

The Convener: Exactly. So if the bill does not include it and there is commercial access now, I presume—

Professor Rowan-Robinson: It could continue.

The Convener: What right will a land manager or owner have to say, "You cannot do this on my land"?

Professor Rowan-Robinson: The same right as they currently have. They can ask people to leave their land.

The Convener: That is all that they can do. No crime will have been committed.

John Mackay (Scottish Natural Heritage): We have taken care in revising the code to consider the responsibilities that would fall on organisers of small and large groups across a wide spectrum and in respect of events of the kind that were mentioned. That provides a framework to promote the responsibility of those who lead, organise and engage with land managers through the whole process. Indeed, sections 2 and 3 of the bill provide balancing responsibilities on each of the parties. The legal system aside, we are proposing through the code that there should be a responsible approach to handling such difficult matters.

Mr Hamilton: Section 26(1) states:

"Scottish Natural Heritage may take such steps … as appear to it appropriate to protect the natural heritage of land in respect of which access rights are exercisable."

That is perhaps necessarily vague, but it helpfully adds that those steps

"may include the putting up and maintenance of notices but not fences".

Apart from putting up notices, what parameters do you have in mind?

John Mackay: We agree that the wording seems loose and we are unclear about what can be done. I presume—although this is not entirely clear—that we would not be able to undertake any land management operations without the consent of the owner, although we could put up signs. We could take advisory steps, promote local access and encourage the use of certain routes to avoid possible conservation issues.

Mr Hamilton: So there is still a degree of uncertainty about the parameters.

John Mackay: There is a little uncertainty in my mind.

John Thomson: We are working on the presumption that those who exercise the right of access will not wilfully cause damage to conservation interests any more than we would expect them to cause wilful damage to land management interests. The emphasis, in relation to conservation as in relation to land management operations, should therefore be on education and on management of the kind to which John Mackay referred.

12:30

Mr Hamilton: Okay, but that raises the question whether the powers that you are given will be adequate to achieve what the title of the section rather boldly claims will be the protection of the natural heritage. What you are really talking about is providing information and hoping for the best.

John Mackay: A little more than that, perhaps. If SNH put up a sign that said, "Please do not go beyond here—breeding birds", anyone who disregarded that sign would be acting irresponsibly and putting themselves outwith their access rights. We do not feel that there is a need for any further powers. The Wildlife and Countryside Act 1981 would apply if someone was behaving rather badly on a designated site. In most cases, we would expect byelaws to be used, and various other provisions in wildlife crime law could be used to help in certain difficult circumstances. Perhaps even a section 11 order might apply in rare circumstances. However, we do not expect any great problem in relation to conservation issues. Some problems will arise, but we do not regard them as a major issue.

Mr Hamilton: You do not think that you have been given a responsibility without being given the power to discharge it.

John Mackay: We are working in the spirit of legislation that is promoting a consensual approach based on responsibility. As I said, there are other powers in the background that could be used if the need arose.

Mr Hamilton: Finally, do you envisage that circumstances could arise in which there might be

a dispute concerning the exercise of those powers? We have already said that there is some vagueness about how wide ranging they might be. If there were the possibility of a dispute, would SNH have any objection to an amendment to the bill to include a right of appeal?

John Mackay: I do not think that we could, although the bill already provides at least for a mechanism to resolve disputes through the sheriff courts, should they get that far. In all circumstances, however, we would try to resolve the problems through dialogue long before getting into dispute resolution.

Mr Hamilton: Yes. Legislation always assumes the worst-case scenario. You would have no objection in principle to the inclusion of a right of appeal.

John Mackay: I cannot see any difficulty at all with that.

The Convener: I have two final questions. You talk about the need for more support, and your submission mentions specifically local authorities' powers and duties. You say that rangers should not be used in a policing role. I wonder how you can prevent that. In my experience, giving someone a job that involves monitoring land or checking things tends to encourage them to take on a policing role. How would you prevent that from happening?

John Thomson: You are right. I do not think that we could prevent that from happening. It might happen at times, but it is a question of emphasis. The rangers' role would be to promote responsible access. The line between promoting responsible access and preventing irresponsible access is difficult to draw, and I am sure that the rangers will fall over it at times. The emphasis should be on promoting responsible behaviour and, I hope, mediating when problems arise.

The Convener: Finally, just for the record, can you tell the committee briefly how the access code has changed since its consideration by the access forum?

John Mackay: I cannot do so in detail, as the code has changed in so many different ways. They are virtually all small scale. Perhaps I should explain briefly the process of revision. In the light of responses to its consultation on the draft bill, the Executive asked SNH to revise the code. The Executive also asked us to bring the code into line with the draft bill, as the draft bill and the draft code were not quite in alignment. That was a matter of concern to many of the people who responded to the consultation. It was critical that, when the bill was introduced in the Parliament, both were as closely aligned as possible.

We also took the opportunity to do a little reshaping of the presentation of the code. If members look at the code, which is a long document, they will now find short summaries at the beginning of each major section. We recognise that, one way or another, we will have to move to a process of filleting out the key messages in order to present them in an effective manner.

It is fair to say that the main changes were made in the areas where the bill had changed as a result of the Executive changing its proposals. Greater expectation was also being placed on the code to deliver what was proposed previously for inclusion in the bill. I should explain that SNH undertook the revision in conjunction with the Executive. We were therefore not in a position to engage in wide consultation with landowners or recreational bodies. That was because we were privy to an understanding of what changes might be made to the bill. It is important to stress that, at this stage, the code is a draft code. Once the bill passes through the Parliament, SNH will have a new duty to prepare and consult on a code.

The Convener: Is the code too complex for people to understand? We have heard evidence today that it is too complex for the public to understand.

John Mackay: I hope that it is not. One could argue that "code" is not the right word to describe the document. The code has to carry quite a lot of the detail about access—for whom, for what and where. That cannot be compressed into a document that is much shorter than the one that we have at present. We hope that it is not too complex and that the messages that it contains are straightforward. The job is to convert what exists at present into material that will, in due course, be used to promote the principles of responsible access.

Professor Rowan-Robinson: As members can imagine, the issue was discussed at the access forum. Questions were raised about the production of a back-pocket version and whether the code needed to be so long. It was clear that if the code was to set out helpful guidance on responsible access and—in that context—responsible land management, it had to be a lengthy document. The intention is to unpack it into smaller codes for particular sectors. That might result in a code for horse riders and cyclists and perhaps a separate pack for land managers. We hope that, by such means, the code can be targeted more effectively.

John Thomson: One of the key changes that we have made is to distinguish clearly between what we call the "musts" and the "shoulds". The "musts" are things that people, whether they are recreationalists or land managers, must do in order to behave responsibly, as required by the bill. The "shoulds" are things that are good practice; things that people should do, but which

are not perceived as part of the definition of responsible access. As John Mackay said, the at-a-glance summaries are the foundation of the simpler messages that we will try to communicate in the future.

The issue of balance has been raised. I emphasise that when people look at the at-a-glance sections, they will see that the responsibilities that are attributed to the public are twice as long as those attributed to the land management community. That reflects the emphasis on responsibilities.

The Convener: Do you have any final, brief points to make that have not been covered?

Professor Rowan-Robinson: No, we do not.

The Convener: Thank you for your submissions. We are grateful to you for taking time to appear before the committee.

We move on to item 6. As we agreed earlier, that item will be discussed in private.

12:39

Meeting continued in private until 12:55.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 18 January 2002

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178