JUSTICE 2 COMMITTEE

Wednesday 30 January 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
4th 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)
Rhoda Grant (Highlands and Islands) (Lab)
Richard Lochhead (North-East Scotland) (SNP)

WITNESSES

Ross Finnie (Minister for Environment and Rural Development)
Neil Ingram (Scottish Executive Environment and Rural Affairs Department)
Barry McCaffrey (Office of the Solicitor to the Scottish Executive)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Wednesday 30 January 2002

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:37*]

11:10

Meeting continued in public.

Land Reform (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): I welcome everyone to the fourth meeting in 2002 of the Justice 2 Committee. The main item of business this morning is the Land Reform (Scotland) Bill.

I have apologies from Alasdair Morrison, who cannot be here, but all other members are present. I remind members that it would be helpful if they turned off their mobile phones, if they have not done so already.

I welcome to the committee Ross Finnie, the Minister for Environment and Rural Development, and his team. I also welcome Rhoda Grant MSP, Richard Lochhead MSP and Roseanna Cunningham MSP.

Given that we started late, I have decided to take the reports from Gigha and Stornoway at another meeting. That means that we can go straight to the questions to the minister. Minister, I believe that you are going to make a short statement.

The Minister for Environment and Rural Development (Ross Finnie): Thank you convener. I do not intend to take up much of the committee's time, because the bill is extensive and members will have a lot of questions for me.

I start by emphasising the fact that, despite the long—and rightly so—period of consultation, we are still considering the general principles of the bill and whether it should proceed beyond stage 1. I stress that the bill is ambitious and groundbreaking and that it progresses the main commitments that we made when we took office in 1999.

We believe that the right of responsible access will provide the public with greater confidence to visit the Scottish countryside. It will also give the public the opportunity of using the countryside in a responsible way. We hope that it will encourage greater participation in outdoor pursuits and create opportunities for and bring benefits to rural communities.

We believe that the community right to buy will also benefit communities by providing them with a greater opportunity to determine their future. It will enable them to register an interest in, and subsequently purchase, land to which they can demonstrate a connection. We believe that, over time, that will redress the balance of land ownership in Scotland.

We regard the crofting community right to buy as particularly important. It will enable crofting communities to acquire and control the land on which they live. More than that, it will change decisively the balance of power between the community and the landowner and it will ensure that landowners pay proper heed to the needs of those crofting communities.

I know that the committee has heard many witnesses and has talked about a number of issues. There have also been previous consultations and discussions. I remain confident that the principles of the bill are sound and that many of the concerns have been addressed. Concerns that have been freshly aired can also be addressed. A lot of hard work has gone into getting the bill to its present stage. I am confident that the legislation will be something that the people of Scotland can be proud of. It will contribute to our policies on economic development and community empowerment in Scotland's rural areas. I will be happy to deal with the substantive issues that I have no doubt the committee will wish me to address.

The Convener: Before we come to questions, we would like to raise a matter with you, for the record. The Justice 2 Committee heard through the grapevine that responsibility for the bill, which started in Jim Wallace's department, will be transferred to your department. Is that the case?

Ross Finnie: I shall forbear to tell you whether I was excited or otherwise about the additional responsibility. You used the word "department"; that was an interesting choice. A substantial number of the people who have been engaged in many aspects of the bill and related land reform legislation work with the land reform unit, which falls within my department. The decision was the First Minister's. I would regret it if he, or his office, did not communicate adequately with the committee. There was certainly nothing Machiavellian about the decision.

As far as the transfer is concerned, although I have assumed responsibility for the bill, I retain responsibility for introducing the agricultural holdings bill and, potentially, crofting legislation.

The reform of the—I have forgotten what the antiquated provisions in the feudal conditions are called; Roseanna Cunningham might help me out.

Roseanna Cunningham (Perth) (SNP): Title conditions.

Ross Finnie: Yes. That is what they are now called. I am glad to say that the law of real burdens remains with the Minister for Justice. No discourtesy was intended and I am sorry that that communication did not come to the committee.

11:15

The Convener: I think that we knew the answer to that question, minister, but it was useful to get the explanation into the *Official Report*. Thank you for that.

Stewart Stevenson (Banff and Buchan) (SNP): We are going to start, fairly obviously, with the access part of the bill. Do you think that the bill strikes a proper balance between the responsibilities and rights of the public and those of the land management community?

Ross Finnie: Yes. I am bound to say that. Yours was a bit of an odd leading question, to which you must have anticipated the answer.

The bill confers on the public a right of responsible access. Within the provisions there are checks and balances that allow the landowners and managers to protect their interests. There is a mix between what, of necessity, has had to be committed to the bill and will form part of the statute and the matters that will be part of the access code. That strikes the kind of balance to which you referred.

Stewart Stevenson: Thank you, minister. You referred to the access code. It is clear that the intention in relation to access is expressed partly in the 18 pages of the bill and, equally, in the access code. The bill is complex and the access code adds further complexities. Do you think that it would be useful to transfer some of the detail from the bill to the access code? I refer to section 9(2) only as an example, and not for any particular reason. Section 9 relates to conduct that will be excluded from access rights, most of which might properly be within the code.

Ross Finnie: There will always be a difficult balance when there is a statute and a code. We have tried hard to contain those matters that deal with people's rights, which might give rise to other actions, in the bill. In the vast majority of cases, the access forum will manage the access code. Therefore, there will be community and local interest. The precise way in which that code is interpreted will depend, I hope, on local circumstances. That is a right and proper way of dealing with it. Other issues might require a more statutory framework; the matters that are currently in the bill are the ones that ought properly to be there.

This is a different form of management. A vast amount is in the code, as you rightly say. Given that the local access forum will regulate 90 per cent of that, local opinion can be brought to bear on it.

Stewart Stevenson: Do you still see the access code as analogous to the highway code, in that it creates no new law in itself—although it refers to the bill—but helps the courts to interpret the word "responsible" in relation to access?

Ross Finnie: I am not sure that that is a strict analogy, although it is probably a fair one. The rights will be conferred by the bill, when it is enacted. In many cases, such codes can form guidance only. That is why I hope that it is implemented through local access forums and that local circumstances will be brought to bear. I hope that the concerns about the different circumstances in different parts of the country will be accommodated through the dual format.

Stewart Stevenson: What about my point that, in particular, the code guides us on the meaning of responsible access?

Ross Finnie: We tried to set out what we mean by responsible access in sections 2 and 3. As members have found, there is a whole range of words in the English language with which the persons corresponding with the committee are familiar—perhaps they are running around with copies of the "Shorter Oxford English Dictionary" or thesauruses. I had not recognised that there was any difficulty with the meaning of "contiguous". However, having read the *Official Report*, I understand that, my goodness, some of those who have given evidence to the committee see that difficulty.

We have set out in sections 2 and 3 what we believe responsible access means. The code will amplify that. The code contains much that is common sense. I hope that common sense will prevail and that we will not make the genuine conferral of a public right the opportunity for various organisations to indulge in advancing a conspiracy theory about problems that, in most cases, do not exist.

Stewart Stevenson: How much research has been done into models of access in other countries and how do the proposals that we are considering compare?

Ross Finnie: One of the principal pieces of advice that we took in formulating the bill—which we have been doing for some time—came from Scottish Natural Heritage. SNH took much guidance from models of access in other

countries. I do not have the precise details, but I know that SNH examined other examples.

Bill Aitken (Glasgow) (Con): We have taken quite a lot of evidence, some of which we have found to be contradictory. It is not entirely clear how the bill changes the current common-law rights of access. For example, the outdoor pursuits lobby, which is obviously enthusiastically in favour of the bill, sees it as useful clarification. How does the bill change the situation?

Ross Finnie: Fundamentally, the bill confers a right of access on the individual citizen. At no stage does it extinguish an existing right that anyone may have established, by whatever means. There are areas throughout the country where the interpretation of common law gives rise to difficulty and doubt. However, if there is no doubt and the practices are accepted, the situation will not change. The bill confers on the individual an absolute right of access, subject to the remaining provisions of the bill.

Bill Aitken: Many of the rights were in place anyway.

Ross Finnie: If you read the submissions in response to the white paper two and half years ago, you will know the degree and diversity of uncertainty that exists. The issue is fundamental—the bill confers a right of access. It is just as important that it does not extinguish existing rights, express or implied.

Bill Aitken: Do you expect any difficulties for people exercising the right of access?

Ross Finnie: I do not expect any difficulty for anyone exercising a responsible right of access.

The Convener: I want to go back to the question of the pre-existing rights. One of the issues that the committee is considering is what those rights are. Is the Executive clear about what rights currently exist? We have heard evidence suggesting that the situation is unclear. If the statutory provision will sit on top of the current provision, we need to be clear what the current provision is.

Ross Finnie: If the statutory provision were sitting on top of an existing provision, in a way that sought to extinguish the existing provision, I would share the committee's concern. However, the bill in no way seeks to extinguish an existing provision. I understand the point and can say that we have given it much thought. I do not wish to sound flippant, but we are not too concerned about the issue because we believe that the statutory right will not extinguish any existing right.

I do not think that we can say with absolute certainty what the current rights are under civil law. Indeed, it is not exactly the Executive's role to determine what that body of law is—some of that will be determined in the courts. However, in practice, there are people who enjoy existing rights. If they feel threatened, I can assure them directly that the bill will in no way extinguish a right that is either express or implied.

The Convener: Thank you. I think that the committee is clear that that is the Executive's express intention in the bill. However, you have just told us that the Executive is unclear about the existing provision.

Ross Finnie: There are two aspects to that. First, one must consider what the mischief is and who is threatened by that confusion. Secondly, the fact that there is an element of confusion is one reason—not the principal reason—for introducing the bill. If we want a founded right of access, only legislation can ensure that without a shadow of a doubt. Where there is doubt, we can create certainty through the bill.

Stewart Stevenson: Let me cut to the chase. Is it your understanding that in law there is a presumption that favours access and that it is restricted only where case law and legislation direct otherwise?

Ross Finnie: I have difficulty in saying that we are starting from the position of a presumption. If we were, we would not have framed the bill in such a way as to give a starting point of a universal right, which is then constrained by subsequent provisions, matters of practicality and commercial activity. I am not sure that I agree with the supposition behind that question. We are creating a right of access and I must emphasise again that we are not seeking to do anything to undermine any right that any citizen has currently, either express or implied.

Stewart Stevenson: Are you saying that in Scots law one may exercise access only where it is expressly provided for under common law? That appears to be the opposite position.

Ross Finnie: I agree that there is confusion in the way in which the law is expressed and interpreted. The correct course of action seems to be for the Executive to provide in statute a clear and unambiguous right of access. That is what we seek to do. What is the potential problem? Rather than debating where that problem arises, we should recognise that there is confusion and that part 1 of the bill provides a right of access. That is a much more satisfactory position for the citizen in Scotland.

George Lyon (Argyll and Bute) (LD): My question returns to the present position on access. In his evidence, Alasdair Fox from the Law Society of Scotland stated:

"The bill has the intention of shifting what is at the moment a law of trespass".—[*Official Report*, *Justice 2 Committee*, 9 January 2002; c 828.]

The Law Society believes that a law of trespass exists in Scotland, but Alan Blackshaw mentioned in his evidence to the committee at the meeting in Inverness that different Governments had expressed different views on whether a law of trespass exists in Scotland. What is the view of the Scottish Executive? Does the law of trespass exist? Does the minister agree with Alasdair Fox?

11:30

Ross Finnie: I do not disagree that there is a law of trespass. To try to establish that the citizen has a right in every case is a difficult practical matter. I repeat that I am concerned that, in some circumstances, mischief might result in people not having—or having difficulty in establishing—the right of access. We want to clarify the position without debating the difficulties and differences in the interpretation of the law of trespass. The bill will confer on the citizen an absolute right of access.

Mr Duncan Hamilton (Highlands and Islands) (SNP): You have lost me slightly. You are the minister responsible, but you said that you do not know the law as it stands.

Ross Finnie: That is not what I said, Duncan. I said that, in any court in the land, it is difficult to get a consistent approach to the interpretation of common law and other rights of trespass. The matter is enormously complex.

Mr Hamilton: So you have a large element of dubiety about the situation, which other people share. You said that the bill seeks to augment rights of access and not to diminish them. That is logically strange; if you do not know what the rights are, you cannot know what the bill's effect will be. If the bill is an attempt to codify people's rights—

Ross Finnie: It will give them a new right.

Mr Hamilton: Let me finish the question. If the bill is an attempt to put the rights in statute, does that create an exclusive set of rights that might remove or diminish rights that are not in the statute?

Ross Finnie: I do not think so. That is a serious question, so I must look at the correct part of the bill. I suppose that the question is whether the access right itself might constitute trespass. That is the only area in which the bill changes an existing right. Section 5(1) states:

"The exercise of access rights does not of itself constitute trespass."

Nothing in the bill seeks to constrain other rights of access, such as the rights of people who have contractual arrangements or other express or implied rights. We do not want to constrain access. We want a more uniform and universal right of access.

Mr Hamilton: I understand what you are trying to do, but my question is about expressing that aim in legislation. We must understand the status of the right of access. You say that the bill will augment current rights because it will put certain rights into the statute. By definition, that means that some aspects of the present law—of which we do not seem to have a universal understanding—will not be in the bill. What is the status of those rights?

Ross Finnie: At the risk of repeating myself, I should explain that we are not seeking to extinguish existing rights of access.

The Convener: We must finish with this line of questioning soon. A lot of the evidence, particularly from academics, has stated that the law is not clear. We have heard evidence that the public perception is that, despite what the Law Society might say, there is no such thing as trespass. The committee supports the Executive's intention, but we want to be clear about how the statutory provision will lie alongside the existing provision. We are trying to examine whether there is a common understanding of how that would look.

Ross Finnie: It might be helpful if Barry McCaffrey addressed the issue of existing statutory provision.

Barry McCaffrey (Office of the Solicitor to the Scottish Executive): Two issues must be separated out. The first concerns the current position of the law of trespass. The other is existing rights of access to land, which come from a variety of sources.

When SNH initially examined the issue, the existing position was to some extent laid out so that we could consider it. I do not know whether members have had a chance to consider SNH's advice to the Executive, which was published in 1998, but a useful summary of the existing position is given in chapter 3 of that document. We took that as our starting point for our analysis of the existing rights of access and the interaction between those rights and the law of trespass.

There are obviously rights of access to land for a variety of purposes—a common example is public rights of way—that can be asserted through the common law. A more recent statutory innovation is the Countryside (Scotland) Act 1967, which contains provisions for planning authorities and local authorities to create networks of paths that will constitute rights of way. We have a mixed bag of common law and statutory rights of access. On top of that, existing common-law rights for public navigation over water can be confirmed by asserting them within the period that is set out in the Prescription and Limitation (Scotland) Act

1973. Such rights must have been asserted over a long period of time. I think that navigation rights must have been asserted over about 40 years.

Over and above that, there are what might be termed private contractual rights. A common example is a contractual right to be on the land for a specific purpose at the behest of the landowner. There are also other common-law rights, such as servitude rights. There is, therefore, a mixed bag of existing rights of access. I will not trouble the committee with the details of each of them.

We accept the central proposition that there is a law of trespass in Scotland. If someone goes on to land without the consent—express or implied—of the landowner, a body of law enables the landowner in certain circumstances to exercise some remedies to assert his right of ownership over the land. It is fair to say that, in certain circumstances, the extent to which the trespassory remedies might be exercised is uncertain.

I have tried to clarify what we believe to be the position on rights of way and trespass. The bill does not do away with existing rights, which exist for their various purposes, but builds on to them a new right of responsible access to land. Under the bill, the exercise of responsible access will not constitute trespass. That means that, if someone is not exercising access rights responsibly, or if someone is trying to access land that is exempt from the provisions of the bill, the existing law of trespass will still come into play in certain circumstances. I am sorry if that was laboured, but I am trying to clarify matters.

The Convener: No, that is helpful. I am not saying that it does not raise questions, but it is helpful.

Bill Aitken: I am all for simplicity in such matters. I wonder whether there are dangers in being too explicit. In land law, it can be argued that what is not specifically prohibited is permitted. You might achieve the opposite of what you are—with all good intentions, I accept—seeking to do. For example, we have heard evidence that under the proposed legislation, access to golf courses would be restricted where previously it was not. Do you have any comments on that?

Ross Finnie: If anything, the body and level of evidence that was gathered during the consultative stage have proved one thing, which is that the proposed legislation is not simple.

Bill Aitken: Indeed.

Ross Finnie: I do not wish to raise expectations that rights under the draft bill will be expressed or conferred simply. I hope that people who originally had concerns about aspects of the proposed bill have read the bill. I know that the committee has done so. However, I am a little concerned that one or two people who are citing their concerns and objections have not seen that substantial revisions have been made to the bill.

On golf courses, there was a concern that the proposed legislation could interfere with golf club members' enjoyment. The bill caused concern because people might enter the golf course for enjoyment as well as to pass through it. That gave rise to a conflict between the genuine interests of people playing golf and those who might wish to use the golf course as an access point or for passage from A to B. Section 7(6) clarifies that exercise of access rights is not prevented where exercising those rights does not interfere with recreational interests. I hope that that clarifies section 6(f), which excludes land set out

"for a particular recreational purpose",

such as a golf course.

Bill Aitken: Is there a case for taking the easy option? There do not appear to have been too many difficulties, although I accept that there have been some, which has caused concern. I return to the premise that people are allowed to undertake a particular activity unless the bill says specifically that they cannot. That would obviate any problem and is a basic tenet of Scot laws as it stands.

Ross Finnie: That might be your interpretation of Scots law as it stands. However, if you consider the evidence of the past 10 to 15 years of people in Scotland who have tried to exercise rights of access to enjoy the countryside, it has been a difficult business altogether. In the lead-up to the proposed legislation, an extraordinary volume of people have experienced difficulties and had all sorts of impediments put in their way.

It would be nice to be in the utopian position in which everyone can presume that they have access rights. That has not worked—I must say that very directly. We believe that we need to confer a right on the individual citizen and that is what part 1 of the bill does.

Roseanna Cunningham: I have a brief point to make before the issue becomes even more muddled.

I have a specific example about recognised rights of way—not those about which there is controversy. Where there is an existing right of way that everyone accepts is a right of way, will nothing that the bill says about access affect that public right of way? An example might be a tour guide taking a party of 10 on to a right of way. It would be perfectly legitimate to do so, because the exclusion of commercial activity from the right of access in the bill would not affect that right of way because the right of way is pre-existing, clear and separate.

Ross Finnie: Yes.

Roseanna Cunningham: That is great. Is that an example of the kind of thing about which we are talking?

Ross Finnie: I give an unequivocal yes to that question. Roseanna Cunningham raises the separate issue—to which we will no doubt come—of which commercial activities are excluded. I repeat: if a person is conducting such an activity and has an existing, established, explicit or implied right, other than a right of way, we are not seeking to undermine that right. However, that is not an answer to the question that Roseanna Cunningham asked.

11:45

Roseanna Cunningham: Are you saying that the exclusion could not affect a right of way, that nothing else in the bill could affect a right of way and that there will be other similar existing rights?

Ross Finnie: Absolutely. I am grateful for that question, because it is a central point and I wanted to stress it.

The Convener: I will explore the right of responsible access and the definition of responsible access. The committee members have copies of the memorandum that you helpfully sent to us. It clarifies a number of points in some detail. You point the committee to section 2(1) of the bill, which

"states that a person exercising rights must do so responsibly".

We have been exploring the question of who determines whether the person exercising their rights is acting responsibly, whether there should be any deterrents, what any such deterrents should be and how disputes should be resolved. Have you given any thought to those matters? Are they reasonably straightforward?

Ross Finnie: I would never suggest that matters are straightforward. However, the definitions in sections 2 and 3 provide a reasonable definition of responsible access. I am reluctant to go beyond what is in the bill. If you have a specific concern about something in one of those sections that you believe gives rise to confusion, my colleagues or I will examine that. However, we have tried hard to set out what we believe to be a reasonable definition of exercising rights of access responsibly.

The Convener: The committee accepts that such a definition is difficult to frame. However, we might envisage a scenario in which someone who exercises their rights on land believes that they are doing so responsibly, but the landowner does not. How would such a dispute be resolved? It might not be possible to resolve it, but we should think through practical examples.

Ross Finnie: The combination of sections 2 and 3 is where we have set out what we believe to be a reasonable definition. Those sections will be augmented by the access code to deal with specifics. I hope that the local access forums will play a part in how the bill and code are interpreted locally. Therefore, if a difficulty arises and two sides develop on how to interpret the bill and the code in a particular circumstance, that could be dealt with in the local access forum in the first instance. If a situation became totally disputatious, the sheriff would be available as a last resort. However, I hope that there will be no need for sheriffs' involvement.

The bill must be read in conjunction with the access code. We must also take into account the way in which the local access forums deal with the individuals concerned—the property owners and the people who exercise the access rights for leisure or other purposes. Forums exist in which—we can at least hope—such dispute resolution will be dealt with at an early stage.

George Lyon: You touched on a point that Roseanna Cunningham raised in her original question, in which she highlighted that access for commercial activities is excluded from the rights of access under section 9(2)(a). Will you list the types of business or commercial activities with which that provision is intended to deal?

Ross Finnie: I cannot list them, but I can tell you our clear intention. We are giving people an absolute right to access land, but we are not giving them an absolute right of access to land with the right to use that land for commercial purposes when another person owns it. The exclusion exists in the bill for that purpose.

If people or businesses have already established a right to conduct commercial activity—whether those rights are express or implied—nothing in this bill will remove that right. The bill does not prevent a landowner from conferring upon an individual a right to conduct commercial activity on their land. However, it is not unreasonable to exclude the presumption that a person who has a right of access also has the right to conduct commercial activity on land that they do not own.

George Lyon: How do you define commercial activity? If a group of individuals is gathered together and guided by one individual, is it because they are grouped that they do not have individual access rights? Clearly, under the bill, each individual will have access rights. The definition of when that becomes a commercial activity seems to be crucial.

Ross Finnie: At present, a number of individuals have established rights. Those people do not interfere with the land and their commercial

activity is not based purely on the land. If people have that right, or want to establish it, I think that they will be able to do so. A collection of individuals—who are, for example, hillwalking—does not in itself constitute commercial activity. That depends on how the leader is conducting the activity.

George Lyon: Who has rights and who does not?

Ross Finnie: If an individual wants to organise a commercial activity on someone else's land, that person will still require to make arrangements to get permission. That is set out in the code.

George Lyon: Are you saying that if, for example, people go to the mountains, they will lose their access rights only once they make a contract with someone to guide them?

Ross Finnie: No. Some people will have such rights already—people should not conduct such activities without first having obtained the rights, express or implied. That will remain the position. People should continue to seek permission to take a party over a piece of land. As has been the case for the past X years, there is unlikely to be a problem if they do no damage.

George Lyon: Could section 9(2)(a) be used by land managers to challenge people who are exercising their rights of access? How should a commercial group respond to such a challenge? Should people say that they are merely a group of individuals who are all exercising their individual rights of access?

Ross Finnie: If someone has set up a new commercial activity and has not gained permission, they will be open to challenge. Individuals have the right of access, but people who conduct commercial activities do not have that right unless they have acquired it.

George Lyon: So, must the leader or the guide declare that—

Ross Finnie: I am talking about someone who is starting afresh and not about someone who has an established right, whether express or implied.

George Lyon: The matter is not terribly clear.

The Convener: The committee is not clear about the distinction.

Ross Finnie: Is Mr Lyon talking about someone who has just started a new business? If a person starts a new business, but has no right of access to the land on which he will conduct the business, he will be required to establish with the landowner some kind of right.

George Lyon: The individuals in a group that is wandering over the land will each have a right of access. The bill will confer that right on them. What defines a commercial activity?

Ross Finnie: The only people who are caught by the provision are individuals who try to conduct business activities or those who receive the profit or gain.

George Lyon: So such people would be excluded from the land.

Ross Finnie: They will not be excluded. Individuals have an absolute right of access. People who make money from using the land—

The Convener: From what you are saying, that is not an absolute right.

Ross Finnie: The right is absolute for individuals, but it is not absolute for people who seek to conduct commercial activities for which they receive money or from which they derive their income. If I want to conduct a commercial activity on your land, convener, I must establish with you a contractual relationship or a right so to do. If I do not have that right, I cannot conduct my activity. New businesses will have to establish with landowners some kind of right of access.

The Convener: Does that apply to people whether they are leading a group of people up a mountain or receiving money for childminding?

Ross Finnie: It applies to individuals who are trying to make money. Such individuals will be in breach of the law.

The Convener: We understand that. Will a person who is in receipt of money for childminding—who is accompanying children who are exercising their right to access—be in the same position as the organisers of T in the Park?

Ross Finnie: People who set up a new business that involves access to the land must establish that right. The bill does not strike against people who currently have such a right. Only the landowner can take that right away. Only people who seek to gain from commercial activity must make arrangements with landowners.

Stewart Stevenson: What policy reason is there for not granting the right of access to individuals who conduct commercial activity on another person's land, when that activity in no way diminishes or restricts the right of the owner to commercially exploit the land? For example, a commercial photographer might walk on land, take photographs and subsequently sell them for a calendar or book. In doing that, he does not deprive the landowner of the right or opportunity to commercially exploit the land. A related argument applies to group leaders and to mountain guides, who will improve compliance with the access code.

Ross Finnie: That argument cuts both ways. I could argue—although the convener will be glad to know that I will not do so for long—that if a landowner wants someone to make money out of taking photographs or to organise walking trips on his land, he should have that right. That might be why the landowner bought the land. The argument cuts both ways but, of course, Stewart Stevenson might be right about what happens in practice. I do not think that it is right to say that such people are not interfering with landowners' rights, but all sorts of people throughout the country allow people access to land for commercial purposes and are happy to do so. That will still be permitted. If they want to do so, they can.

12:00

Stewart Stevenson: The difficulty is that by explicitly denying in the bill the granting of new rights to a particular class of people, we are creating—for example—two categories of mountain guides; those who until now have been exercising their rights and have existing arrangements for which no fees may be being charged, and those who are about to become mountain guides. We appear to be discriminating against a person who takes a photograph standing 12 inches away from another person who is taking a functionally identical photograph but who happens to be standing on someone else's land. That appears to be unenforceable, unreasonable and unnecessary, because the activities concerned in no way diminish the rights and opportunities of the owner of the land to exploit that land for their own purposes.

Ross Finnie: With respect, I do not agree with Stewart Stevenson's basic premise. We are in danger of trying to prescribe every single activity. I do not accept the proposition that every person who has an existing arrangement has made the arrangement for no fee or no return; that is not necessarily the case. If a landowner believes—in the circumstances that Stewart Stevenson described—that an activity does not in any way affect them and is happy to allow persons to enter their land for that purpose, there is nothing in the bill that will stop them allowing that, whether it is a new or existing arrangement.

The Convener: I will allow members who have indicated that they wish to speak to do so if they restrict themselves to one question.

Richard Lochhead (North-East Scotland) (SNP): Stewart Stevenson covered the points that I was going to make. The committee is looking for a scenario in which a person would be denied their access rights. It is difficult.

The Rural Development Committee took evidence from VisitScotland, which a number of members of this committee heard. VisitScotland did not mince its words, which is unusual for a public agency. Its representatives said that section 9(2)(a) would be a disaster for tourism. On one hand, the minister says in his memorandum to the Justice 2 Committee that the measure will not affect existing business, but on the other hand he says that the principle that anyone who is engaged in commercial activity should be denied access rights should be retained in the bill. Section 9(2)(a) does not make sense in terms of the minister's objectives. Can he give us a scenario in which an individual performing a commercial activity would not have access rights under section 9(2)(a)?

Ross Finnie: There are two different scenarios, which Stewart Stevenson touched on. One is that anybody who has a right of access at the moment will not lose that right; however, we are not conferring upon people an absolute right to conduct commercial activities as part of their access rights. In other words—looking forward to the bill's enactment—if Richard Lochhead was starting up a business activity and he wanted to conduct that business activity on someone else's land, he would have to establish some kind of right to do so.

Stewart Stevenson made the interesting point that if a landlord or landowner does not have a problem with the activity and the activity does not damage his land, there is nothing in the bill that will affect that. If the landowner has permitted the activity in the past, there is nothing that will prevent him from doing so in future. However, if a person says, "I have an absolute right of access as an individual and, by the way, I am going to use that to create an activity on your land for purely commercial purposes", it is not unreasonable that that person should have to obtain from the landlord the right to conduct that activity, because it is distinct from their simple right of access.

Rhoda Grant (Highlands and Islands) (Lab): As an individual, I already have a right of access onto land. If I want to use that right of access by saying to people, "I will take you on a walking holiday and you will pay me for my time for taking you across the land", as long as I do not damage the land or stop the landowner from carrying out any business, I would have that right under common law.

There are huge concerns about this. For instance, if I was a mountain guide and bad weather set in, I might be unable to get off the mountain by the same route as I came in. I might have to cross someone else's land, but not know who the landowner is. I might not have a mobile phone with which I could phone the owner to ask whether it is okay to cross the land when I need to because snow is coming in. I would say that I have a common-law right to cross that land. I am not damaging it; I am only crossing it.

Ross Finnie: I do not believe that any provisions in the bill will mean that a landlord could—unreasonably, in the situation that Rhoda Grant described—seek to bar access. Rhoda Grant spoke about a common-law right. As I said, nothing in the bill will overturn such a right, if it has been established. The only issue that might arise is over whether a person who wants to start new commercial activity on someone else's land, but who has not established the right to do so, has an absolute right to do so. There is a danger of picking over things too much. Many rights are established and they will not be changed by enactment of the bill.

Mr Hamilton: You started by telling us that the idea behind the bill was to add to rights rather than to detract from them. When you answered George Lyon's question, you said that a person who has the good fortune to have started their business before the bill is enacted and who had even an implied existing right would be able to continue. However, somebody who starts a business after enactment of the bill will be in a less advantageous position. How can that do anything but detract from existing rights?

Ross Finnie: It does not detract from existing rights. With all due respect, that first person acquired their rights under the existing law—I am not changing the law on how such rights are acquired. If I am the guy with the existing right and you are the guy who wants that right, you would acquire it in exactly the same way as I did.

Mr Hamilton: What is your definition of what you described as an implied right?

Ross Finnie: If I am conducting an activity and have a right—express or implied—to do so, I will have established that. I do not see how the bill could be an impediment to one's carrying out a commercial activity and inquiring about one's right to do so. Granting of that right would depend on the nature of the activity. Clearly, if one's activity was to cause great damage—let us not say damage. If one were to use the land extensively and cause expense to the landlord, there would be financial considerations.

Mr Hamilton: However, to ensure that there is parity before and after—

The Convener: We must move off this point.

Mr Hamilton: One last thing. Can the minister give us his definition of an implied right?

Barry McCaffrey: I will not get bogged down in specifics, but the most common example of a right would be a business in which one has a landlord's express permission to be on the land and guide people across it. One might have an implied right if one has operated one's business as a mountain guide across a particular piece of land over a period of time without the landlord's ever having objected. That is all that we mean by an implied right. A person might have the implied permission of the landowner because the landowner has never challenged that person's right to be on the land for business purposes.

Mr Hamilton: Will a new business require express permission?

Barry McCaffrey: No. We are trying to emphasise that there will be absolutely no change. When the bill is enacted, the position will be the same as it is now. If a person operates a commercial business, that person may still go on to land but will not be exercising access rights under the bill. A person might be on land because the landlord has expressly given permission for that, because the landlord has implied that he agrees to the person's being on the land, or—as the minister said earlier—because the person has another right of way that can be asserted.

The Convener: The committee needs more clarity about the intention of this section. As you may have read, there is quite a bit of opposition to its inclusion. There is concern that the section does not seem to differentiate between a photographer who wants to take a photograph to sell and a big commercial event taking place. It would be useful if you could clarify that for the committee.

Ross Finnie: Would it be helpful if we set out additional written material for the committee on that aspect?

The Convener: That would allow the committee to consider the issue and return to you with any further questions.

Ross Finnie: I would be happy to do that.

The Convener: We will rush through some questions and then move on to the community right to buy.

Bill Aitken: We have heard evidence from land managers that they feel that the existing law, under the Occupiers' Liability (Scotland) Act 1960, has been changed by this bill and that the liability on them will increase. Are you in a position to reassure them?

Ross Finnie: Section 5(2) of the bill states:

"The extent of the duty of care owed by an occupier of land to another person present on the land is not affected by this Part of this Act or by its operation."

Bill Aitken: That is a fairly specific answer. I thank you for the clarity of that response. Do you agree that people who seek to avail themselves of walking in the countryside and access to the land do so at their own risk?

Ross Finnie: No. The bill will not affect the

existing liabilities of land managers. A reasonable argument was made that, by granting a right of access, liability might be increased. I have taken on board the evidence that was given by those who made that point very strongly. There are liabilities and duties of care on landowners. I say expressly to the landowners that the duty of care that they have under the Occupiers' Liability (Scotland) Act 1960 remains in place. However, I am not creating an additional duty of care because an absolute right of access is being conferred on the individual citizen. That is a straight answer, if not a simple one.

Bill Aitken: So there will still be a common-law and statutory duty of care.

Ross Finnie: There is a statutory duty under the 1960 act. However, it will not be extended by anything in the bill.

Bill Aitken: Will the common law on negligence be extended by the bill?

Ross Finnie: No.

Bill Aitken: How would you answer the argument that, although the element of individual risk might not increase, the frequency of incursions and excursions on to the land would increase that risk?

Ross Finnie: I do not think that the number of persons is the issue. What exists is a fundamental duty of care. The number of persons accessing the land will not multiply that duty of care. The duty of care that a landowner owes under the Occupiers' Liability (Scotland) Act 1960 remains whether the number of persons involved is one or 1,000. The argument that you put forward is incorrect in law.

Bill Aitken: Do you think that property owners' liability insurance underwriters will accept that argument?

Ross Finnie: I am not aware of any evidence to the contrary. That is a commercial judgment that they will have to make. They will not be able to found it on a statutory provision that says that the liability has been increased. Indeed, if they look at section 5(2), they might have a little difficulty in increasing premiums, as the bill states that there will not be an increased liability.

Scott Barrie (Dunfermline West) (Lab): I am conscious of the time. I hope that these questions will not take too long.

How do you counter the view that part 1 of the bill is not compliant with the European convention on human rights, particularly given that some evidence has claimed that it breaches article 8, which states:

"Everyone has the right to respect for his private and family life, his home and his correspondence"?

Ross Finnie: It is self-evident that I do not share that view. Are you talking about the sections on privacy?

Scott Barrie: Yes.

12:15

Ross Finnie: Section 6 of the bill expressly provides that people have a right under the ECHR to an element and degree of privacy. We are mindful of that. That is why we included houses and land that is adjacent or contiguous to houses, which might be required for the enjoyment of the property, in the definition of land over which access rights are not exercisable. That grants the rights under the ECHR as required.

Scott Barrie: That is fine. It was important that you gave your view. We have heard evidence to the contrary.

I have two quick questions on the powers of local authorities. Do you believe that the restriction of night-time access is an infringement of the existing common-law right of access?

Ross Finnie: I do not think that we are impacting on existing rights and we are not necessarily giving local authorities powers over night-time access. Those powers would have to be granted by a specific order, which would have to specify the circumstances.

Scott Barrie: Would giving that power to local authorities, even though they will be consulted, not restrict individuals' common-law rights?

Ross Finnie: If there is a common-law right, we are not in a position to overturn it. If we are talking about local authorities exercising the right to control specific circumstances, I am reasonably satisfied that to confer a power upon a democratic body, which is open to scrutiny, is the correct way of doing it, rather than conferring that power on any other body.

Scott Barrie: Paragraph 19 of the memorandum that you gave us talks about the core paths. You seem to be reflecting on some of the evidence that the Convention of Scottish Local Authorities gave on the power to prepare a core path plan, but not to implement it. You said that you are considering that issue and might bring it back at stage 2. Can you give the committee your thoughts about that?

Ross Finnie: The difficulty is the balance between the statutory requirement and its implementation. There is a statutory requirement to implement the provision for a core path plan, but inevitably, in this kind of legislation, we get caught up in financial provisions. It is difficult in statute to provide the statutory instrument—that is not the purpose and scope of the act. We are considering what COSLA and the local authorities

have said to us about that. It is a question of how we do that, either by lodging an amendment or issuing guidance on the discharge of the duties and powers under the bill, following enactment. We stated clearly in the memorandum that we are considering that.

The Convener: I move to part 2 of the bill, on the community right to buy. I am conscious of the fact that some members have another meeting to go to. I will start with George Lyon and take other questions after that.

George Lyon: What are the Scottish Executive's general objectives in part 2 of the bill?

Ross Finnie: The objectives are to widen the opportunity for communities to have the right to acquire land and to extend the ownership of land in the wider community. They are to confer that right to those communities. As we stated in the memorandum, in the longer term that could change the balance of ownership in the community.

George Lyon: What impact do you believe that part 2 of the bill will have on the pattern of land ownership in Scotland? Do you think that it will have a substantial or modest impact?

Ross Finnie: It is difficult to predict. That will depend upon the individual circumstances of landowners and the extent to which they are disposing of land. However, the fact that we give the communities the right of acquisition will not only change the balance of land ownership over time, it will change the view and attitude of those who own those community plots.

George Lyon: We have heard from a number of individuals and organisations on that point. They believe that there are a number of ways for landowners to transfer land without triggering the right to buy. In reality, all we are offering communities is the right of pre-emption, in many cases possibly 200 years before they are able to use that right to buy. Are you concerned that the community right to buy will have little effect on giving communities the right to buy parcels of land?

Ross Finnie: Not necessarily. I am not going to agree with that slightly pejorative phrase. You have to go back to my earlier answer: I think it will depend on the circumstances.

In framing legislation of this nature, you have to have regard to other considerations—not least of which is the ECHR—and frame the legislation in a balanced way. It is not about nationalisation and redistribution of land; that is not the purpose or intent of the proposed legislation. It is giving rights to communities to register their interest and have an absolute right to acquire. That seems to me to be a reasonable and balanced judgment.

To go much further, as your question seems to imply, is to get into a different form of land acquisition throughout Scotland.

George Lyon: To follow up on that, in the Scottish Executive's view, what is the difference between crofting communities and communities, given that crofting communities will have an absolute right to buy and ordinary communities will only have a pre-emptive right?

Ross Finnie: Crofting communities are very different. They have a long history of community and statutory rights. Crofting communities manage their estates and common grazings. The historical position of crofting communities is very different in character and is not something that I have any intention of interfering with. I seek to strengthen crofting communities through part 3 of the bill.

George Lyon: Is the mechanism to be used for all scales of project? What do you envisage that it will be used for? Will it be for the purchase of, say, land for community halls, or will it be for the acquisition of larger estates? What is the Executive's view on how the community right to buy will be exercised?

Ross Finnie: Communities will have to meet the requirements of the test about the purpose for which the community is buying the land and they will have to define their interest in the land on which they are registering the interest. There is nothing in the proposed legislation that would prevent the land from being used for smaller or larger-scale activities.

Neil Ingram (Scottish Executive Environment and Rural Affairs Department): The intention is that the provisions will apply to whatever pieces of land a community is prepared to register interest in. Those could be small areas of land close to communities; alternatively, they could be more extensive areas of land such as substantial bits of estates or areas of woodland that might not be adjacent to the community. The changes on the lotting arrangements of land that we have made since the draft bill are designed to make it easier for communities to buy small pieces of land. If they register an interest in a fairly small area of land, they are now not faced with having to buy the whole of the land as lotted and then having to do something with the bit that they do not want.

George Lyon: How many buy-outs do you envisage will arise from the community right to buy? What implications will that have for the Scottish land fund?

Ross Finnie: I will take the latter question first. Obviously, we must have regard to the position of the land fund each year, to ensure that there is still some facility. It is dangerous to try to get into anybody's mind. I can say "to the best of my knowledge", but what is my knowledge and how

do I prove it? I do not have a crystal ball that enables me to see what people are going to do. I hope that the right to buy can be exercised and will make a difference, but I am in no position to speculate about the number of buy-outs. If substantial transfers are exercised under the act, we will have to consider the position of the land fund.

George Lyon: The concern that has been expressed is whether the scope for community right to buy is limited by the £10 million that is in the Scottish land fund. If many extra bids come in, what does the Scottish Executive intend to do about it?

Ross Finnie: The £10 million land fund is certainly not putting an inhibition on transfers. We will consider that problem if and when it arises.

Roseanna Cunningham: I have to go to another meeting, so I will not be able to stay for the rest of your evidence. No disrespect is intended.

Ross Finnie: Or implied.

Roseanna Cunningham: Before I go, I want to press you harder on some of the issues that George Lyon raised about the bill, which you described in your opening comments as "ambitious and groundbreaking". Those were your precise words. I was struck by them and wrote them down. The evidence before the committee—some of it is quite objective evidence—is that effectively only about 3.5 per cent of privately owned rural land changes ownership per year and, of that 3.5 per cent, well over half changes hands in ways that would not trigger the right-to-buy provisions. That means that only a tiny percentage of land has the potential to trigger the right to buy and is up for sale and it might or might not attract community ownership. Do you still want to use the phrase "ambitious and groundbreaking" in connection with that tiny 1.5 per cent of land?

Ross Finnie: The issue is whether that is necessarily the case. It is not everyone's ambition to own land. Some people own it for rather quaint commercial reasons and people were given rather curious tax breaks by Her Majesty's Government to acquire land in Scotland. Consider the generality of people who are seriously interested in acquiring a piece of land that is of real benefit to the community. We cannot tell whether establishing the right to buy will create genuine interest in acquiring the land—as opposed to there being no interest in the land for any purpose—because the community may generate a value and an interest that was not previously there. By conferring the right to buy, we are introducing a new element into the equation of a buyer and a seller.

Roseanna Cunningham: With respect, the point is that it looks as though that right could only be triggered in relation to less than 1.5 per cent of privately owned rural land in any one year, based on the figures for land that comes up for sale.

Ross Finnie: That is in the absence of a community having expressed a willingness to engage in the community right to buy.

Roseanna Cunningham: It is the current position. Those are the objective facts about how much land passes for sale. I have to assume that those figures are well known and available to your officials. First, assuming that tiny percentage to be the case, why are you only considering allowing tenant farmers a potential pre-emptive right instead of considering, according to them, the same rights that are being accorded to crofting communities? Secondly, why was there no consideration of other triggers to the right to buy? Did any of your officials consider the potential for triggering the right to buy on inheritance, for example?

12:30

Ross Finnie: On your first point, I remain of the view that the nature of crofting communities—the historical ethos and land management and use——can be readily distinguished from any other form of land ownership in Scotland. It seems to me that we are introducing a clearly definable interest of people willing to buy into the equation of the likelihood or otherwise of persons selling. I am not sure that we can conclude that the level that you cited will necessarily obtain.

I recognise the fact that there are two sides to the argument and I am not claiming that one is more valid than the other. I am suggesting that we are definitely introducing a clear, willing buyer who was not previously present from a community or any other point of view. Creating an absolute right to buy in every circumstance would introduce a very different element. If someone has rights in arranging their own private affairs, it is difficult to remove those rights in ways that would still remain ECHR compliant. That is a much more difficult area. I hear what you say, but I do not think that that is the route that I want to go down.

Richard Lochhead: Last Friday I was asked to visit a tenant farmer in the north-east of Scotland. He told me that he had just been served an eviction notice by his landlord who lives in England and has never visited his farm. The landlord was given the estate as a present by a rich relative. The farmer and his family must leave in just over a year's time. If the intention behind the bill is to change the pattern of land ownership in Scotland and to help to stop Scotland's land being sold like sweeties in a shop, why have you offered that

tenant farmer and other tenant farmers in Scotland nothing, although—for good reasons—you have offered the crofters and communities the right to buy their land?

Ross Finnie: I am not aware of the specific circumstances that you cite. I have every intention of lodging amendments to reform the Agricultural Holdings (Scotland) Act 1991, as that is the appropriate place for those changes to be made. There have to be quite specific circumstances, even under the existing agricultural holdings legislation, to trigger an eviction of the kind that you have described. However, it is not appropriate for us to go down that road.

We will offer different forms of tenancy and reform some of the current arrangements, and I am considering whether we can produce a form of wording that would give some pre-emptive right to buy. All those matters are interlinked in relation to agricultural tenancies, and that will be the thrust of the bill that I hope to introduce in April or May. That bill will deal with a range of tenancies. I am giving active consideration to the pre-emptive right to buy and to some anti-avoidance provisions that might be necessary within the existing rules. That is a serious subject that is not forgotten by the Executive, but the appropriate place to deal with it is through amendments to the agricultural holdings legislation.

Richard Lochhead: For the record, does this bill present no opportunities to help tenant farmers?

Ross Finnie: I do not think that it does. The agricultural holdings legislation is complex and old and requires to be dealt with on its own. I hope that the committee will find it helpful when we bring forward provisions that extend the range of tenancies and deal with practices that have sought to obviate the provisions of the legislation. As I say, I am actively contemplating a provision for a pre-emptive right to buy. In terms of relating that to the existing legislation and to how it changes, I suggest that the appropriate place to do that will be in an agricultural holdings bill. It could form part of a series.

Stewart Stevenson: As all my questions relate to community bodies and the question of what a community is, I will roll up a number of related questions so that we can make slightly faster progress.

In sections 31 and 68, there is a requirement that a community body be a limited company. Furthermore, we have been given evidence that the provisions that are required to be included in the memorandum and articles of association of the limited company would exclude that limited company from qualifying for charitable status. Are you still open to considering other forms of community body, such as trusts and partnerships? There appears to be a weight of evidence with regard to the registering of interest—as distinct from exercising a right to buy—that the present proposals are rather restrictive.

Considerable evidence has been given to us that the present definitions of community will create difficulties. For example, the suggestion that polling districts be used would mean that a community that included Eigg would also include Rum, Canna and Muck, which have little to do with the proposal to buy Eigg. A counter-proposal to base the community on a postcode area has, at a later stage, been shown to have difficulties as well. Are you still open to a proposal that communities should be allowed to propose for themselves what constitutes their community and that the minister, by a statutory instrument, would agree to that definition? Do you have another suggestion for a process that might be less prescriptive, more flexible and more easily adapted?

Ross Finnie: I am attracted by the idea of having a body that would be more open to public examination so that people could be assured that what had been registered was a community interest. I hear what you say about the evidence that you have been given regarding the memorandum of association and charity law and we will have to examine that situation. However, as the body is not going to be a trading entity per se, we do not think that there would be a problem. I understand that you have had evidence to that effect, but our evidence suggests otherwise.

The problem with the suggestion that the community body could be a trust or a partnership is that there is no requirement to make the membership of such bodies public. The positive advantage of registering under the Companies Act 1989 is that there is a requirement to lodge with the registrar the names of the 20 persons required to show the interest. The name and address of a registered office must also be provided.

Bodies will be transparent for a relatively modest cost. I do not believe that registering a company for between £100 and £200 would be more expensive than taking advice on establishing a trust or a partnership under the Partnership Act 1890.

I am fairly persuaded that there are good reasons for public transparency and that by that simple mechanism, an individual or MSP who was concerned about who such people were, whether they were genuinely local and what was going on could go to Companies House and find out who the 20 members, the directors and the registered secretary of the company were. An address would be provided for official correspondence. That is an advantage.

Stewart Stevenson: Will a register not be published?

Ross Finnie: Yes, but the requirement will help me to do that satisfactorily. Bodies would also breach legislation if they did not make known changes to their details.

Stewart Stevenson: If Alasdair Morrison were here, I am sure that he would ask you to agree that the Stornoway Trust, which has operated for many years in a community body role, is a successful example of a body that is not a limited company but which exercises the role that the bill describes.

Ross Finnie: My answer concerns the difficulty in choosing from a range of options. I am not criticising or denigrating trusts and partnerships per se, but I advocate a relatively simple mechanism that has the benefit of obvious transparency. That is not to suggest that the Stornoway Trust does not buy land in an entirely beneficial way, but we cannot rely on such behaviour. No statutory provision requires a trust to do that. In general, the provision will be helpful.

Stewart Stevenson talked about the definition of a community. I listened to the example that he cited of Rum and Eigg, but it would be unsatisfactory to allow self-definition in the bill. We must at least prescribe mechanisms, because otherwise, we could end up in endless dispute.

Section 31(4) provides for the use of polling districts. We did some modelling before the provision was drafted and considered using postcodes. Stewart Stevenson cited one example, but by and large, some certainty is required. If it is clear that the polling district will not work in a particular situation, section 31(4) will allow ministers to "otherwise direct". That would allow us to use postcodes, for example. It is clear when that will happen and how that issue will be resolved.

The Convener: I will return to the type of body that can register an interest. The bill is good. It contains far-reaching provisions, and the Executive should go further on some aspects. The bill may have an intended objective, but the practical effect is what matters. I am concerned that restricting the provisions to a limited company will mean less chance of registration. I would like the maximum opportunity for the registration of land, so that more land changes hands. I take on board the minister's point that any body to which he would give such authority should be identifiable and easily contactable, but I suggest that the provisions are drawn narrowly and may have the unintended consequence that fewer bodies will register.

Ross Finnie: I acknowledge what you say. We are dealing with a serious issue in terms of a community showing in earnest that it wants to take advantage of the bill and register an interest. It is not fair of me to be flippant about the matter because I used to deal in company law, but I am certain that when the bill is passed, companies whose memorandums and articles of association have been tailored to the requirements of the bill will be acquirable almost off the shelf, because there are people who arrange such things. It will be possible to acquire off-the-shelf companies for between £100 and £200; I do not believe that to require 20 people to part with such a sum would be a serious impediment.

The requirements on the community body are not a serious impediment, but they give the community body a degree of credibility as the genuine representative of the community. I am persuaded that the bill provides a mechanism for anybody to check, for example, that the people who announced the intention to buy still live in the community and that the community is still being represented in the people who represent the community body.

The procedure sounds rather cumbersome, but I hope that the reality of what it entails will not in any way be an impediment.

12:45

Mr Hamilton: I will trim my question to the basics. It is on valuation. We have heard evidence suggesting that it is unlikely that improvements to a piece of land would be made, on the ground that the cost of that improvement would not be recovered in the valuation price. No doubt you have followed the debate in the committee on that subject. Will you put on record your view of whether that is correct?

Ross Finnie: On the advice that we have had after extensive discussions with experts in the field, we have taken the view that the appropriate and proper price is the market value. That is the normal way. I read the evidence to you that suggested that the market value might not reflect recent investment. The difficulty with that argument is that if some investment has improved the inherent ability of a piece of land to earn a return, it is logical that that will be reflected in the market value of the land. Some investments might be of a slightly different nature, but in general, the improved nature and quality of the asset ought to be reflected in the market value.

Mr Hamilton: I have a related question that concerns what happens once the valuation has been done. You will be familiar with cherry-picking—that is, a community choosing a particular piece of land and leaving a remnant piece, which leads to a need for compensation for loss of value because the whole is of greater value

than the sum of the parts. I understand that the compensation would come from the community. Is that sustainable? We could be talking about sizeable amounts of money. Would that not act as an impediment to communities using the rights proposed under the bill?

Ross Finnie: There is a real difficulty. If land is in lots, anybody, not only a community, would prefer to ensure that they could simply acquire what was deemed to be the best bit. The problem is how to arrive at a fair valuation for the person who owns the whole piece of land. Should that valuation reflect the value of the whole piece of land or do we give a fair value for the delineated piece, leaving the owner with a piece of land the value of which has been reduced substantially? I am rehearsing ground that you have probably covered in a previous meeting.

Mr Hamilton: Let us assume that the latter is the case and that a loss of value has taken place. The valuer makes an estimate of the amount of money that has been lost as a result of the transaction, and the community then picks up the tab, as I understand it. Will that prospect act as an inhibition to purchase?

Ross Finnie: It may. Let me make clear why we have had to make that provision, which we discussed at some length. It may discourage purchase, but it is not enough for us simply to prescribe that an owner receives fair value for a plot of land. Under the ECHR, we are obliged to offer that person compensation if it can be demonstrated, and the valuers agree, that the value of the residual piece of land has been diminished. That is an ECHR requirement.

Mr Hamilton: It is useful to have that on record. Should communities pick up the tab for compensation, or should the Scottish Executive do it?

Ross Finnie: If there is diminution in the value of land, that is the result of communities exercising the right to buy on a cherry-picking basis. From that a slightly rhetorical question arises: if those communities do not pay compensation, who does? If a transaction is taking place between a so-called willing buyer and a willing seller, under the ECHR the seller is entitled to recompense for that transaction.

Mr Hamilton: So you do not foresee a role for the Executive, in any of its functions, in picking up part of the additional cost.

Ross Finnie: That raises the different issue of whether the Executive or any Government should be engaged in providing compensation as part of such transactions. That is a very difficult issue. I hope that such compensation would not be needed in every case, but it is a serious problem that arises from the absolute requirement under the ECHR for owners to be compensated for the entire land transaction.

Mr Hamilton: I have one other question.

The Convener: I am afraid that I must stop you. The minister is running over time and we still have to ask him questions about the crofting right to buy. I want to deal with issues such as the compulsory nature of the proposals, the requirement for support to be given to crofting bodies, investment decisions by landowners, and salmon fisheries.

George Lyon: The question that I want to ask has already been asked in relation to the community right to buy. Why have you introduced a compulsory purchase mechanism for crofting communities, rather than a right of pre-emption as in part 2? I am not clear why you view a crofting community differently from an ordinary community.

Ross Finnie: In the vast majority of cases, land has for a very long time been managed and used by crofting communities. Over a long period, they have established a very different structure of management and, in some cases, ownership. There is also a long history of statutory provision for crofting communities. For that reason, I believe that the differences between part 2 and part 3 are wholly justified. Crofting communities are of a very different scope and nature from other communities. There is a need to continue to support the rights of those communities. Previous legislation already gives crofting communities a right to buy—that is an established position. It is difficult to start redefining that at this stage.

George Lyon: How widely do you expect the new crofting community right to buy to be exercised, compared with the existing crofting right to buy? Will there be greater take-up?

Ross Finnie: That is very difficult to predict. It is correct and appropriate that, in addition to the rights that they currently enjoy, crofting communities should have a community right to buy. It will be for the communities concerned to decide how they exercise that right—it is not for me to dictate to them. It is proper and appropriate for the Executive to confer on those communities a right to buy.

George Lyon: You must take some view on whether that provision will help you to meet your broader objective of securing a more diverse pattern of ownership.

Ross Finnie: I could take a poll of all crofters, but none of them would tell me precisely what they intend to do. However, in their evidence to us crofting communities made it clear that they saw the provision as a useful addition to their armoury in their attempts to extend community ownership. The existence of the crofting community right to

buy will encourage more negotiated sales of land by owners to communities. However, until that right is on the statute book, it is almost impossible to gauge precisely how many communities will take it up.

The Convener: Will you explain why you have introduced a compulsory purchase mechanism in part 3 rather than the right of pre-emption that exists in part 2?

Ross Finnie: I have just spoken about the character and nature of crofting communities, the way in which the land is managed, the whole crofting ethos and the rights that crofters already have. Crofting communities have an absolute right to buy under different legislation. It would have been quite perverse to have embarked on a crofting community right to buy that was in different terms to crofting communities' existing rights.

Mr Hamilton: Although it will take us slightly backwards to the need for registration, I want to ask about sustainable development. In our previous evidence session, Jim Hunter from HIE was asked about the criteria for registration. Section 35(1)(b)(ii) refers to the need for sustainable development. In your response, you gave us the understanding that you had not really come to a conclusion about how it would be decided whether the acquisition of land by a community would substantially favour sustainable development. Will you tell us what that process will be? HIE did not know. Will the evidence that you use to make that decision be made publicly available?

Ross Finnie: I have been reflecting on that. There will be a range of elements. It will not be a precise science—there is no question about that. In the interest of the community, we must consider whether the aspiration of ownership and the arrangements that are put in place for that might lead to grief. Bluntly, that is the usual economic definition of sustainable. Although the ambition to buy might be laudable, economic consideration will be necessary to assess the degree of funding that might be required. We are bound to take account of such factors.

Section 79 indicates that we will be required to give reasons for our judgment as to whether an acquisition of land meets the necessary criteria. The reasons for our decision could therefore be tested in appeals. On the basis of the range of information and facts that is put before them, ministers will have to exercise a reasonable judgment about how the community proposes to make the acquisition and go forward.

Mr Hamilton: Do you distinguish between giving a reason—such as the fact that, in your opinion, an acquisition was not economically advantageous—and allowing a community or a group of individuals to examine how the sums stacked up? Jim Hunter said that, with a few exceptions, he was in favour—in principle—of such information being in the public domain. Should not just the decision, but the detailed process that you went through—whom you consulted and the figures that you used—be publicly available?

Ross Finnie: Given that the reasons that are required under section 79(1) could properly be tested on appeal, a minister who did not have a case that was publicly answerable would be in serious danger.

Mr Hamilton: I am not talking about appeals. I am asking whether that information would be available as a matter of course.

Ross Finnie: The minister would certainly have to give the reasons for their decision.

Mr Hamilton: I am talking about the rationale—not just whether the minister thinks a particular acquisition will work. Will that information be made available as a matter of course and not just on appeal?

Ross Finnie: I know what I would do, although I cannot bind other ministers. If I turned down an application from community that had submitted all that information, I would feel obliged to recite the elements of that evidence I had used to come to a conclusion and to name those persons from whom I had taken advice.

Mr Hamilton: Should that requirement be built into the bill?

Ross Finnie: There is always a danger in reciting administrative procedures in the body of a bill.

One must accept that no two cases would necessarily be the same. Requiring ministers to give their reasons for a decision would place a serious onus upon them. If ministers were required to explain those reasons in detail, Mr Hamilton would be the first person to say that the reason was only a decision. If ministers had to explain their reasons, they would be open not only to judicial criticism, but to a range of questions from parliamentary committees or the Parliament. Ministers would be foolish if they did not discharge reasonably their responsibility to give reasons for their decision by providing sufficient information to allow people to understand how they had arrived at the decision.

The Convener: I would like to end on the high note of salmon fishings, but two members want to ask questions first. I ask them to make the questions brief, as we are still running over time.

Rhoda Grant: My short question is not on

salmon fishings, but concerns the size of the crofting community company that would be set up. The bill states that a crofting community company should have 20 members. The same requirement applies to ordinary community bodies, but ministers have the discretion to allow the company to be smaller, if that is in the public interest. Could that discretionary power be extended to apply to crofting community bodies, given that an awful lot of crofting townships have fewer than 20 adults?

13:00

Ross Finnie: The exemption that you want is in section 68(3)(b), unless I am wrong.

Rhoda Grant: That seems to refer only to the rest of section 68(3), which talks about the definition of a crofting community, and not to the whole of section 68.

Ross Finnie: Because of the time constraints, I will note that interesting point and respond to you on it at a later date.

The Convener: That would be helpful.

Stewart Stevenson: I want to ask about sustainable development in relation to the acquisition of salmon fishings. The overwhelming weight of the evidence on salmon fishings that was brought to this committee and the Rural Development Committee stated that a well-developed and well-managed salmon fishery does not, as such, earn money. The salmon fishery is an infrastructure that enables other businesses to earn money. Therefore, if a community had reasonable access to a fishing and the minister applied the sustainability test that is required before a proposal to buy is approved, would the community's proposal fail that test if it wanted to buy a developed fishery that would be a financial drain on the community?

Ross Finnie: One must step back slightly. It seems to me that there is a view that crofters are not up to running salmon fishings. I find that view rather offensive, to be absolutely blunt.

The minister would ask, first, what motivating factor the crofting community had for exercising its right to buy. Once the community had exercised that first right, which is the essential precursor, the minister would ask whether the community also wished to take advantage of the right to acquire a salmon fishery that was contiguous to the property on which it had exercised its first right.

I confess that I see crofting and crofting communities in a more positive light than others do. Crofting communities will want to exercise their right to buy because they genuinely want to benefit their community. They will want to exercise their second right—the right to buy salmon fishings—only if they believe that they can bring advantage and added value to their community. I have a great deal of confidence in them doing that. There are people who are part of crofting communities who are perfectly capable of running fishings. It is important that we make that point.

In the assessment of a proposal to buy a fishing, a judgment would have to be made on whether the proposal was well founded or whether it was simply an aspiration that did not have financial backing or other support. There would have to be serious discussion of that issue. The appropriate level of funding would be a difficult issue for ministers, and questions would have to be asked. People might wish to buy a fishing, but ministers would have to exercise some judgment. With reference to Duncan Hamilton's point, ministers would have to explain why they thought that a proposal was flawed, in terms of sustainability.

Stewart Stevenson: I was certainly not implying that communities would be unable to manage fishings.

Ross Finnie: I am sure that you were not, but a large number of people hold that view, which I find offensive.

Stewart Stevenson: Indeed, the acquisition of an undeveloped fishing by a crofting community might be a key opportunity to add value and develop sustainably.

Ross Finnie: Absolutely. That is why we wish to confer the right, and why we remain of the view that the right should be in the bill.

Stewart Stevenson: All that I was seeking was your view—if you wish to give it—on the circumstance in which a developed fishing requires continuing investment, and where the profit comes from the business that the fishing enables rather than from the fishing itself. There might be an arrangement for a community to have access to that fishing, but it is unlikely that it would be of economic advantage to the crofting community to acquire that fishing.

Ross Finnie: That is far too hypothetical a discussion for me to enter into. The Executive and I are absolutely clear that the right ought to be in the bill and that the right will be exercised responsibly. I am satisfied that the provisions are necessary.

The Convener: We will finish on salmon fishings, which is one issue on which the Executive is right to claim that the bill's provisions are far-reaching. The bill has quite a dramatic effect with regard to property rights, because—if the conditions are right—the bill will allow for the forced sale, with compensation, of a title deed to a salmon fishing. Has the Executive assessed the extent to which that provision might be used? It is a controversial provision, on which the committee

has received mounds of evidence from both sides. It would be useful to hear whether the Executive has assessed the impact of that change in the nature of property rights.

Ross Finnie: We have not conducted an assessment. Once again, the problem lies in trying to establish who might or might not exercise the right. Regrettably, there are not a huge number of fishings that are contiguous to crofting land. Nevertheless, in affording communities the opportunity to improve the economic development of their land by giving them the right to buy it, it seemed only reasonable to extend the right to buy to contiguous fishings.

I cannot elaborate on estimates of the use of the provision. We simply believe that it is perfectly rational and reasonable to extend the right. Just as people will exercise the right of community ownership on the basis of the added value that will be gained—there is a cost to be paid to exercise that right—the same responsible people will come to the same view on exercising the right to buy salmon fishings.

The Convener: The Rural Development Committee has spent some time examining the implications of the measures. I am primarily interested, at this point, in what we are doing about creating a new property right.

When the committee went to Inverness, it was suggested that, in some cases, there could be some confusion about the title of salmon fishings and that the title might be unsafe, because it is not always possible to ascertain exactly who has title to fishing rights. Do you have a view on that?

Ross Finnie: If I was advising a crofting community to exercise its right to buy, I would be suggesting that it did not hand over one penny before a solicitor had reassured it that it had good title. That seems to be a reasonable position to take. If people are challenging that, they must be doing so from their own perspective. We are not aware of any evidence to support that proposition.

Clearly, we would not wish such a problem to arise. The bill gives the right to buy and the people who exercise that right will be entitled, as is any purchaser, to good title. The matter would have to be considered on an individual basis, but we are not aware of any evidence to support the proposition.

The Convener: However, the provision has the potential to be quite dramatic, in that there could be a forced sale of title deeds to salmon fishings that belong to another owner. Is the Executive satisfied that that provision would not be a contravention of the ECHR?

Ross Finnie: Yes, we are quite satisfied. The essential requirement relates to compensation, and we have drafted the provisions on arriving at value with ECHR requirements in mind.

The Convener: It has been suggested that the risk of compulsory purchase is already discouraging investment by landowners. Have you any evidence of that, or do you have a view on that assertion?

Ross Finnie: That is an unfortunate postulation, which raises a number of questions of judgment rather than of law. I can only repeat my position. I do not think for one minute that crofting communities that wish to exercise their rights will do so in order to destroy salmon fishings. I have every confidence that a crofting community that wants to exercise its rights will do so because it believes that that is in the best interests of the community and will add value to it.

What is the implication of the suggestion that someone might not wish to invest because something dreadful is going to happen? You have to ask yourself about people's motivation for asking that question. The fears are unfounded. Anyone who wishes to exercise their right to buy will do so only if they believe that they have the ability and financial backing to add value to the community. I am confident that crofting communities are capable of doing that and I have difficulty in seeing that fear as genuine.

The Convener: George Lyon wants to raise an issue that has not been covered so far.

George Lyon: My question concerns issues relating to the right to buy and fishing. You were asked why you believe that the crofting community should have an outright right to buy but that an ordinary community should have only a right of pre-emption. You argued strongly that that was to do with the historical use of the land and the special ethos, and that crofting land had always been treated differently and the individual's right to buy had always existed. That does not seem to apply to fishings and rivers. How do you square that circle?

Ross Finnie: I do not think that it is a question of squaring a circle. It is a question of examining the contiguous ownership position in crofting communities. Once you have established the principle of a right to buy, it is difficult to divide that into individual elements of the crofting community's rights. Unless we have some integration of the package of land that is under consideration, that would be a serious impediment to extending community ownership in crofting communities. I am persuaded that a balanced package of acquisition rights is appropriate in those circumstances.

George Lyon: So the main reason for including the measure is for rural development; it is nothing to do with historical ownership.

Ross Finnie: I cannot agree with that. The community has to exercise its first right, which is to acquire the land, before it can exercise its second right. If we tried to separate the second right into a different package of legislation, we would not achieve our purpose.

13:15

The Convener: I apologise for keeping the minister for such a long time, but the matters that we are discussing are pressing. The minister's answers have been helpful, and I thank him and his team for their contributions.

Ross Finnie: Thank you, convener. I think that there are two matters on which I am obliged to correspond with the committee.

The Convener: Yes. That would be helpful.

We discussed whether to take additional evidence. To summarise, the committee feels that we need more information on the access code. Given what members have heard this morning, have their views changed?

Members: No.

The Convener: We will organise the additional evidence sessions and speak to the Parliamentary Bureau so that we have some flexibility. We will try to schedule the evidence for next week, but that depends on the availability of witnesses.

George Lyon: I will have difficulty in getting to the meeting next Wednesday before half-past 11 or 12 o'clock, because I will be on Mull the night before and the first boat is not terribly early in the morning. I am concerned that I will not be able to participate.

The Convener: What time will you be here?

George Lyon: About half-past 11 or 12 o'clock.

The Convener: We must find out about the availability of witnesses.

George Lyon: I just ask you to bear it in mind.

The Convener: We will do what we can to ensure that you are not excluded from the discussion, but that might not be possible.

I know that members have received information about offices that they might wish to visit. I urge members to do that soon, because we are getting to the stage at which we must think about drawing up our report into the Crown Office and Procurator Fiscal Service. I remind members that our next meeting will be on 6 February. The committee adviser, Pamela Ferguson, will speak to a paper that she has prepared on the evidence. Do members agree to take that item in private?

Members *indicated agreement*.

Meeting closed at 13:17.

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