JUSTICE 2 COMMITTEE

Wednesday 6 February 2002
(*Morning*)

Session 1

£5.00

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

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JUSTICE 2 COMMITTEE
5th 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

WITNESSES

Alan Blackshaw (Ramblers Association Scotland)
Craig Campbell (National Farmers Union of Scotland)
Richard Davison (Scottish Natural Heritage)
Stuart Drummond (Law Society of Scotland)
Alasdair Fox (Law Society of Scotland)
John Kinnaird (National Farmers Union of Scotland)
John Mackay (Scottish Natural Heritage)
Dave Morris (Ramblers Association Scotland)
Professor Jeremy Rowan-Robinson (Scottish Natural Heritage)
Malcolm Strang Steel (Law Society of Scotland)
John Thomson (Scottish Natural Heritage)
James Withers (National Farmers Union of Scotland)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Wednesday 6 February 2002

(*Morning*)

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

10:03

Meeting continued in public.

Land Reform (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): I welcome everyone to the fifth meeting in 2002 of the Justice 2 Committee. We have apologies from Duncan Hamilton.

The main item of business this morning is the Land Reform (Scotland) Bill, but there are a number of other matters on the agenda. Members will be aware that, as part of our evidence-taking process, we planned to make visits to Lewis and Gigha. I know that, because of the bad weather, the trip to Gigha did not take place. However, the members who were supposed to go managed to salvage the event. For the record, we will hear brief reports from members.

Bill Aitken (Glasgow) (Con): I was on the abortive visit to the island of Gigha. Unfortunately, the weather took a turn for the worse after having been comparatively calm when we set off. Having driven at high speed from Tarbert down to Tayinloan, we found that the ferry had been unable to get out of Gigha and that we were unable to make the trip. That was extremely disappointing, because we would have gained a lot from the visit.

In an effort to rescue the situation, we arranged a meeting with representatives of Highlands and Islands Enterprise and I put on record our appreciation of the co-operation that we enjoyed at that last-minute meeting. We returned to Lochgilphead and had a lengthy and detailed discussion, not only about the Gigha project but about other aspects of the bill. The meeting was very interesting. I was a little surprised by some of the evidence. One of the HIE representatives did not feel that investment by landowners would be inhibited by the inclusion in the bill of the crofting community right to buy. That is contrary to evidence that we have taken elsewhere. It was also interesting to hear views on the definition of communities and on how, from Highlands and Islands Enterprise's perspective, communities might be more clearly identified.

I think that we rescued some value from the trip. Once again, on behalf of those who were there, I express our appreciation to the HIE representatives for making themselves available so willingly and for providing a not insubstantial lunch at the last moment.

The Convener: All's well that ends well. George, I believe that you managed to visit Gigha on 1 February.

George Lyon (Argyll and Bute) (LD): No, we did not. Once again, stormy weather on Friday prevented Jim Wallace and me from getting across. The ferries were off for a good part of the day. The islanders were disappointed that members of the Parliament could not get across to look at what had been going on.

I will highlight some of the issues that are raised in the paper on Gigha. The fundamental problem with the Gigha buy-out was the lack of time to go through all the various processes. The biggest challenge that the various bodies involved faced was informing the community of its options. At our first meeting with the islanders, when I raised the idea of the buy-out, there was a great fear of the unknown. The islanders in favour were certainly not in the majority.

However, over the following six to eight weeks, we got a lot of information out. The exchange visit to Eigg was the turning point. On that visit, the Gigha islanders saw for themselves an example of a community that had taken control, was making a success of things and had undergone a huge change in attitude towards its ability to manage its own affairs. The visit reinforced for us all just how important the Land Reform (Scotland) Bill is, especially the part that delays a sale to allow all the necessary processes to be gone through—finding whether the community wants to go ahead, debating how to do things, deciding where funds will be raised and having a vote to confirm that a majority is behind the plan. That takes time, and one of the problems with Gigha was the short time scale.

The Convener: If there are no questions, let us move on to the visit to Lewis.

Stewart Stevenson (Banff and Buchan) (SNP): The group of us who went to Lewis saw many interesting things. We spoke to the local council about its attitude to the bill. In particular, we identified the fact that it foresaw a role for the council as the body that would register an interest in land. It believed that it would be useful to register an interest in land on the whole island. That runs counter to the proposals in the bill as introduced.

We spoke with the trustees of the Stornoway Trust, which is the longest-established of the community-owned enterprises. It is not a limited-liability company—which, under sections 31 and 68, is the only option that the bill provides for—but a trust, and the argument that a trust is a perfectly viable alternative to such a company seemed pretty compelling. There was some considerable food for thought in that.

The trust raised some access issues in relation to the running of commercial events on its property. We also learned that it is successfully developing salmon fishing, under its own aegis, on a small river. Those issues also relate to our consideration of the bill.

It is interesting to note that the community had had the opportunity to purchase the Valtos estate on the west coast of Lewis some 20 years earlier. At the time, however, the community did not have the confidence, skills or support to progress with an offer. Only in the past year or so, when a supportive landowner worked with the community to help them to buy the estate, has that purchase taken place—very successfully, I think we could say.

Finally, we visited a fishing estate in the centre of Lewis. The estate covers about 22,000 acres and a considerable number of rivers and lochs. It is owned by a consortium of private individuals and is focused around a sporting lodge. It was useful to sit down with people with fishing interests and discuss some of the concerns that had been raised elsewhere. We would probably conclude, at least from the evidence that we gathered in Lewis, that there would be little benefit to a community in buying into a given fishing. That is because the owners of the fishery would already work closely with the community, the traditional rights of grazing would remain accessible to the community and the community would be able to access the fishing anyway. Members on the visit felt that that situation was likely to map across to other cases.

On a related but different matter, I think that we were all appalled to discover that it costs £280 to fly to Stornoway, given that we can fly to Dublin, a similar distance away, for £10. That issue, however, was outside the remit of our visit.

The Convener: It is fair to say that that point was raised once or twice in various conversations with islanders. That is a concern for them and you are right to raise it.

Scott Barrie (Dunfermline West) (Lab): I will add a few things to what Stewart Stevenson has said. It was interesting to meet Simon Fraser, a Stornoway solicitor, whose firm had acted for the buy-outs on Gigha and Eigg. He gave valuable insight into the difficulty of determining what a community is in the context of the community right to buy. He said that, in his opinion and from his experience, it is more important that the community should be able to define itself. We touched on that question last week and it was useful to hear about it from Simon Fraser.

On a personal note, it was useful for me, as someone who comes from the central belt, to visit a place such as Stornoway and to see what goes on at the estates that we keep reading about. Both the Valtos estate and the Stornoway Trust, although they differ greatly in how they were formed, seem to be very successful.

As Stewart Stevenson said, we were reminded that the opportunity to purchase existed for people living in the parish of Stornoway and throughout Lewis before the Stornoway Trust was formed. However, even 20 years ago, people did not have the confidence to make use of the right to buy. That theme runs through our discussion of the community right to buy—the issue is not as straightforward as one might assume. It is important that communities feel prepared and able to take on the responsibility for landowning. It should not be forced on them, but the benefits of community ownership should be there for all to see and we should encourage it.

10:15

The Convener: Thank you for your report. Stewart Stevenson has something to add.

Stewart Stevenson: I failed to bring to the committee's attention an important point about our visit to Simon Fraser in relation to the articles of association of the company that bought Gigha. Sections 31 and 68 of the bill, which require particular provisions to be included in a company's articles of association, would prevent that company from being registered as a charity. The company that bought Gigha has a form of articles of association that permits it to be registered as a charity. That has considerable economic and practical benefits in relation to matters such as VAT and stamp duty.

The Convener: That was one of the points that I wanted to add. Simon Fraser made the important point that a body that registers an interest in land should be able to have all the advantages that go with that status.

Our visit to Lewis was excellent and gave members an opportunity to see in practice the effects and benefits of community ownership. I have no doubt that the part of Lewis that has prospered most over the years is the area that is managed by the community, through the Stornoway Trust. People are moving into that part of Lewis. If anyone had doubts about the benefits of the community right to buy, our visit to the Stornoway Trust should have put those to rest.

The trust is a superb example of how the right to buy can benefit communities with an interest in land.

Petition

National Trust for Scotland (Glencoe) (PE227)

The Convener: Item 3 on our agenda is consideration of a petition. The clerks have provided members with a note on the petition—paper J2/02/5/2.

The petition is quite old. I remember it coming before the Public Petitions Committee when I was a member of that committee and I am disappointed that it has not been dealt with before now. The petition has been referred to us because it may be connected with the Land Reform (Scotland) Bill. It has already been considered by the Justice 1 Committee, the Transport and the Environment Committee and the Rural Development Committee. Do members want to consider any of the specific issues that the petition raises or do they want simply to note it?

It does not seem to me to be within the remit of the Justice 2 Committee to investigate the National Trust for Scotland as a landowner or the particular case to which the petition refers, which concerns planning law and the fact that local people had numerous objections to developments proposed in Glencoe. However, I invite members to make comments if they so wish.

Stewart Stevenson: The Rural Development Committee noted that it would be able to take forward the issues raised in the petition in the context of other business. Specifically, the committee has plans to study sustainability. There will be more than adequate opportunities for the issues that are raised in the petition to be dealt with in that context.

Bill Aitken: The safest way of dealing with the matter is to leave it with the Rural Development Committee. The Justice 2 Committee does not have much input to make into the process.

The Convener: Do members agree to note the petition?

Members *indicated agreement*.

Land Reform (Scotland) Bill: Stage 1

The Convener: This is the fifth session of evidence on the Land Reform (Scotland) Bill that the Justice 2 Committee has taken. This session is in addition to those that were previously agreed. The Parliamentary Bureau has been notified of that and is happy with the short extension. We will hear from four sets of witnesses this morning.

I have been told this morning that the Rural Development Committee report will be published today and will be publicly accessible through the website. As we are the lead committee, we should have a chance to examine the contents of any committee report and I do not feel able to do that in this case. Therefore, I ask members to agree that I should write to the Procedures Committee to clarify whether it is appropriate for other committees to publish their reports in advance of the designated lead committee's report. Do members agree to that suggestion?

Members *indicated agreement*.

The Convener: I thank our witnesses for coming to the committee at extremely short notice. We did not hold out much hope that that would be possible, but we felt that it was important to try to squeeze in a final evidence-taking session.

We are going to hear from Scottish Natural Heritage. We will go straight to questions. If, after half an hour, we have not covered an issue that the witnesses wish to raise with the committee, I will give them an opportunity to comment at the end.

Stewart Stevenson: What is SNH's understanding of the law of trespass in Scotland?

Professor Jeremy Rowan-Robinson (Scottish Natural Heritage): Our understanding is that, if a person is on land without right or permission, they can be asked to leave; if they decline to do so, the landowner can seek the assistance of the courts. Public rights of way are very unsatisfactory at the moment. Provisions under the Countryside (Scotland) Act 1967 have worked only with difficulty. We do not think that there are other rights. We do not accept that there is a right to roam, although we know that some people argue that there is.

There is a certain amount of express permission, particularly in the context of permissive paths. It is also accepted that there is a certain amount of implied permission. However, it is difficult to know when implied permission is in operation. Moreover, implied permission is precarious—any form of permission is precarious, because it can simply be withdrawn. The unsatisfactory nature of the current rights and the uncertainty about permission led us to the view that that area of law badly needs reform and clarification.

Stewart Stevenson: On what legal statute or otherwise do you base the assertion that there is a law of trespass?

Professor Rowan-Robinson: On the common law. One must examine how the law has been interpreted. The two leading academic property lawyers in Scotland—Professor William Gordon at the University of Glasgow and Professor Kenneth Reid at the University of Edinburgh—have written substantial texts on property law and have analysed the common law. They take the view that trespass exists in Scotland, in the form that I have just described.

Stewart Stevenson: Would it be fair to say that, in coming to that conclusion, they are taking a balance of a wide range of conflicting case law?

Professor Rowan-Robinson: Yes. That is what lawyers are trained to do. It is possible to pick out one statement to support almost any viewpoint that one wishes. The law is about interpretation. Professor Gordon and Professor Reid have taken a wide range of statements and formed a conclusion as to what the law is. Until last year, I was a professor of law at the University of Aberdeen. I worked on this subject and I, too, take the view that that is the position on the law of trespass.

The Convener: You mention the common law and refer to Professor Gordon and Professor Reid. Surely you would agree that what they have said does not constitute the common law. Common law is constituted where there has been a court decision. The professors to whom you refer can only surmise what they think the law is.

Professor Rowan-Robinson: I am suggesting that Professor Gordon and Professor Reid have analysed the common law and put down their conclusions. Their book is not the common law, but they have analysed the common law and formed a conclusion about what it is.

The Convener: They do not formulate the common law, however. I would like us to be clear about that.

Professor Rowan-Robinson: No, they do not.

The Convener: You referred to Professor Reid and Professor Gordon as if they formulated the common law, but you agree that that is not the case. Is there any common law on trespass in Scotland?

Professor Rowan-Robinson: There have been a number of cases over the years on public rights of way and what might be described as public

servitudes, which is the nearest equivalent to the question of a right to roam that has been before the courts. On public servitudes, the courts have simply set their face against the argument and not accepted it.

The Convener: Are there any statutory provisions on trespass?

Professor Rowan-Robinson: Not that I am aware of.

The Convener: Are you aware of the Trespass (Scotland) Act 1865?

Professor Rowan-Robinson: Yes, but it does not purport to create a common-law right of access. That is not my interpretation of it.

The Convener: I ask because the committee is trying to establish whether there is any clarity. We might conclude that there is not. We are a bit unhappy with some of the evidence that we have heard in which people are definite that a law of trespass exists in Scotland. The public would probably say that they perceive there to be no such law. No one has mentioned any of the statutory provisions, which are the only law on trespass that exists in Scotland.

Professor Rowan-Robinson: I accept that there is much misunderstanding about the issue. Different people genuinely hold different views. I have seen some of Mr Blackshaw's work; it is very interesting, but I do not agree with his conclusions. It is partly because there is so much uncertainty that SNH's view is that the law is badly in need of clarification.

The Convener: Have there been any prosecutions for trespass in Scotland?

Professor Rowan-Robinson: Trespass is not a criminal offence, except if it is associated with the carrying of firearms or with poaching. There would not be a prosecution. There have been a number of civil actions for interdict, some of which have been successful.

The Convener: So what you are really saying is that, in your view, any law on trespass that exists is part of the civil law of Scotland.

Professor Rowan-Robinson: Yes.

The Convener: Does it matter whether we clear the issue up? If we have a commitment from the Executive that, in creating access rights, it will ensure that no one has any other rights taken away from them, it will be important to establish what those rights are.

Professor Rowan-Robinson: It is important for land managers, for people taking recreation and for the public agencies involved in public access in one way or another that the law should be clarified.

Stewart Stevenson: I want to pin the issue down. Can you confirm that there is no criminal offence of trespass in Scotland?

Professor Rowan-Robinson: Yes, except in the context of malicious damage and poaching, for example.

Stewart Stevenson: But that is not trespass; it is malicious damage or poaching.

Professor Rowan-Robinson: It would be associated with trespass.

Stewart Stevenson: Trespass is a necessary prerequisite to poaching and malicious damage, but in itself trespass is not a criminal offence.

Professor Rowan-Robinson: I agree.

Bill Aitken: You dealt with aspects of interdict. I am pretty certain that sheriffs up and down Scotland have granted interdicts to prevent the incidents that we envisage, but would not interdicts be applied for only when a continuum of incidents had occurred?

10:30

Professor Rowan-Robinson: An interdict could probably be sought if a difficulty were expected. It would be difficult to obtain and I suspect that a sheriff would be wary of granting it, but Bill Aitken is right that, in practice, that happens when a problem has been persistent.

Bill Aitken: It is fair to say that the committee has had some difficulty with that issue. What you say is helpful, and it would be more helpful if SNH gave examples from its experience of difficulties that it has sought to remedy through the law.

Professor Rowan-Robinson: Some work has been done on that. John Mackay can comment.

John Mackay (Scottish Natural Heritage): SNH would not act because it is an agency that has no land management powers in such cases. We recently produced a summary of current difficulties—primarily local authority cases. We made that compilation as a record to remind us that there are quite a lot of access problems out there. Some are quite tenacious, some continue for a long time and some cost much money to resolve. If it would help, we could make that information available to the committee.

Bill Aitken: That would be helpful. Will you cite one or two examples?

John Mackay: One well-known—perhaps notorious—case concerned rights of way near Newburgh. It involved an old cart road and took North East Fife District Council, and subsequently Fife Council, 11 years to resolve. I understand that the council's legal costs were about £50,000 and I do not doubt that the other side had to bear costs

of the same order.

That example is extreme, but it suggests why local authorities find the present legal remedies difficult to use. Council officers and committees feel that they have better things to do with their time and money. Such rights-of-way cases are often difficult to pursue. Adequate evidence must be collected, which often involves capturing advice and information from older members of the community.

Bob Reid of Aberdeen City Council mentioned a current case when he gave evidence to the Local Government Committee. For several years, the council has pursued a case about rights of way along the bank of the River Dee. It has spent a significant five-figure sum on legal fees. To my knowledge, that case has not been resolved.

The compilation will give members an idea of a range of such cases. I highlighted two rather high-profile cases.

John Thomson (Scottish Natural Heritage): I will add a slightly different, but relevant, point. One of our principal concerns about the law is that it is uncertain, which is a deterrent. If people do not know their position in relation to land, the majority will not wish to assert a right, because they will not feel confident that it exists. That applies particularly to enclosed land. The perception is widespread that people have a right or a traditional liberty to be on open hill land. Although conflicts arise on open hill land, there are relatively few of them.

The situation with enclosed land is different. The average person on the street would not say that they had a right to be on enclosed land, yet enclosed land has the potential to provide the greatest recreational opportunity for most of the population because, by and large, it surrounds major towns and cities.

George Lyon: You mentioned enclosed land, but would it be fair to say that most of the conflicts around access at the moment tend to be in and around the urban fringes rather than further out in the countryside?

Professor Rowan-Robinson: That is fair comment and is borne out by the work that John Mackay mentioned.

John Mackay: I agree with that comment. On the whole, problems on the edges of towns are not necessarily connected with peaceful open-air recreation but are often connected with social problems spilling out from towns. It is important to make that distinction.

George Lyon: Could one of you explain the role of the access code in relation to the bill? Once you have done that, we could go on to talk about the arguments that we have heard that a lot of what is in the bill should be in the access code instead.

Richard Davison (Scottish Natural Heritage): The job of the code is to set out what is meant by "responsible behaviour". When the consultative version of the code came out, there was no definition of responsible behaviour in the draft bill. The Scottish Executive has introduced a definition of responsible behaviour in the bill and the job of the code is to establish what that means in practice.

People will encounter a wide range of situations when visiting the countryside for recreational purposes. The code interprets a few sections in the bill to deal with a wide range of day-to-day situations. It tries to cover the responsibilities of land managers and allow them to deal with and interpret the responsibilities that are set out in the bill.

Professor Rowan-Robinson: The hope was that the bill could be kept small. Obviously, small is a relative term—the bill is small, considering what it sets out to achieve. The bill was intended to create a right of access, the details of which would be dealt with in the code.

George Lyon: How do you envisage land managers dealing with an individual whom they believe to be exercising irresponsible access? What would the sanctions be?

Professor Rowan-Robinson: We recognise that there is a problem. There is no instant solution for a land manager facing a problem at this point. If a person does not leave when the land manager asks them to, all the existing remedies, inadequate as they may be, come into play. The new regime would provide better support for land managers who have a persistent problem. In the first place, there would be preventive mechanisms. The code should ensure that people who exercise the right of access will be much better educated. There will be a better managed network of paths under the core path network. That should be helpful to land managers.

The local authorities should set up local access forums whose function is to mediate if there are persistent problems. They have the power to appoint rangers in the area to which the right to access applies. They can make byelaws to regulate responsible behaviour. They can make section 11 orders if there is a problem that requires a particular focus of attention. There is good general support, particularly in the context of persistent problems.

The difficulty remains that, if a land manager is faced with a problem, a local authority officer cannot be instantly beamed up to solve it. It is to be hoped that one would be available to provide support, but that would not be any immediate help.

Richard Davison: SNH and the access forum have always thought that the bill should have some sort of evidential status so that the responsibilities in the code would be regarded as being important and could be translated across into promoting responsible behaviour. The bill tries to do that to a large extent. That sort of evidential status has been used in other types of code, for example, the highway code, the Disability Discrimination Act 1995 and other pieces of recent legislation. That provides a framework for setting out responsibilities of users and land managers fairly clearly, which is not the case at the moment.

George Lyon: I return to dispute resolution, in which the access code will play a large part. When one goes to the access forum, will the measures that any local authority is able to use be employed against an individual who is alleged not to be using access rights responsibly or for an area of ground that a land manager might seek to exclude from access rights? Can both be done?

Professor Rowan-Robinson: I think that both could be done. If byelaws have been breached, the local authority could prosecute the person who has breached them. If an area of land is subject to persistent problems of vandalism or hooliganism, the local authority could focus attention, through a section 11 order, on that piece of land and try to resolve the problem by exempting it or certain conduct on it from rights of access.

George Lyon: Is the local access forum the first port of call in any dispute? Would the local authority deal with it after that?

Professor Rowan-Robinson: The forum would not have to be the first port of call, but I hope that it commonly would be.

George Lyon: It is hoped that that is how the system would operate in practice. The dispute would be dealt with through the local access forum first and foremost before the local authority was asked to take action against the individual or on the piece of ground.

Professor Rowan-Robinson: I do not know whether the access forum would have a role in a case involving a particular individual.

George Lyon: The forum would have no role?

Professor Rowan-Robinson: I am not saying that it would not have a role. I do not think that it would necessarily have a role if only one person was causing a problem. It would be more likely to have a role if there were a persistent problem.

John Mackay: For specific problems, the first port of call in seeking help would be the local authority. That might be difficult and we acknowledge that it might be difficult for individual incidents happening on the ground, as Professor Rowan-Robinson said. The local authority will have the management powers and background. In applying them, we would obviously want the local authority to involve the forum in addressing the dispute or problem, depending on scale and frequency of occurrence.

Stewart Stevenson: I have a small point to make. Section 11 requires local authorities to establish local access forums and lists people whom it must consult before passing byelaws. Local access forums are not included. Do you believe that the list should include them?

Professor Rowan-Robinson: Yes, I think so.

George Lyon: Some of the recreational bodies have put forward the view that part of what is in the bill should be in the code and some of the restrictions in the code should not be in the bill. What is your opinion of that? I suspect that we are going to hear about it shortly.

Professor Rowan-Robinson: Our view was that some of what is in the bill could have been in the code.

George Lyon: Will you be specific?

Professor Rowan-Robinson: We thought that access to golf courses was a management issue, which could be dealt with in the code. We acknowledge that there is a difficult balance to strike.

George Lyon: Do you think that other restrictions should be in the code?

Professor Rowan-Robinson: Nothing else immediately occurs to me.

John Mackay: A number of issues could be included in the code. Using or having a metal detector is one example. That is a small-scale point that is probably covered by other legislation anyway. It might be that some small points could be in either the bill or the code. The decision whether to include them in the bill or the code involves a degree of judgment about the weight of the problem and about whether people would prefer and be comfortable with the matter being included in the bill as opposed to the code.

Stewart Stevenson: I leave section 9(2)(a) to one side, because that refers to commercial access and is of a different character. Do you think that section 9(2)(b) onward could be put more appropriately in the access code than in the bill? Section 9(2)(c) refers to people "taking away anything", which would appear to prevent people from taking wild berries. Surely that could be dealt with more appropriately in the code than in the bill.

10:45

Professor Rowan-Robinson: A number of conducts that are dealt with in existing

legislation—up to a point, that is—could equally well be dealt with through the code. As John Mackay has indicated, using metal detectors is one example. Other issues include:

"(c) taking away anything in or on the land … damaging the land or anything on or in it"

The land manager could, at present, take action over

"(f) wilfully interfering with any drains, ditches, fences, gates or other means of land"

Another example that existing legislation deals with is

"(g) being responsible for a dog or other animal which is not under proper control"

In the case of

"(h) bathing in non-tidal water in contravention of a notice of prohibition displayed with the approval of the local authority",

if an existing byelaw backs up the notice of prohibition, a sanction would exist already.

I am not familiar with the British Waterways Board legislation

"(i) in respect of canals, swimming, diving, sailing and wind surfing".

Stewart Stevenson: It covers it.

Professor Rowan-Robinson: It covers it. Quite a lot of those conducts could be dealt with through the code. It depends what level of reassurance members feel is appropriate for land managers.

The Convener: Does George Lyon have further questions?

George Lyon: Yes. I have one further point, but Mr Thomson has something to add.

John Thomson: In our original advice to Government, we envisaged that the land on which crops would be grown should be dealt with in the code rather than in the bill. In our comments on the bill, we do not suggest that we should return to that position; we will live with the suggestion that crops should be excluded. However, there are arguments for dealing with the crops issue through the code rather than in the bill. The crops issue requires quite detailed management guidance and that cannot be included in the bill.

George Lyon: That leads on to the issue that I want to raise. It seems to me that the definition of crops, especially grass—when is it and is it not a crop—is going to prove difficult. How will the definition of crops be implemented? At what stage does grass become a crop and when is it defined as grass?

Richard Davison: The question involves a more fundamental issue, which is that there is no difference between what was proposed by the access forum and what is followed under Scandinavian legislation. The bottom-line responsibility for people is that they should not to trample crops.

People should not go to an area where there are crops, but in practice that is difficult to implement. The countryside is almost like a patchwork quilt of fields in different types of use. How is someone who wishes to exercise their access rights going to get from A to B? In fields where crops are grown, the field margins are important. We have tried to cover that issue in the code.

John Mackay: The question about grass is quite tricky. That is particularly the case in the spring, as we do not always know whether a bit of grass is going to be allowed to grow on for silage or whether it has not yet had beasts put into it for grazing. There will always be uncertainty about the definition of grass as a crop. We could include some advice about grass in the code, but it would be difficult to translate that advice into what it looks like on the ground.

George Lyon: I move on to an issue that has been raised a number of times—the issue of liability. We have a paper from the Law Society of Scotland, in which it argues that section 5(2) of the bill does not deal with the issue of liability to its satisfaction. As I understand it, the Law Society believes that, by conferring the right of access on to individuals, a different status of legal person coming on to the land is created. That increases the duty of obligation for landowners. The Law Society also argues that many more people will walk through landowners' land. What is your view on that issue?

Professor Rowan-Robinson: It is clear that the duty of care that a landowner or occupier owes to people coming on to their land will apply to people who are exercising the right of access. If people are able to go where previously they could not, or if more people come on to the land than previously came on to it, the duty of care will be enlarged in that way and the risk of liability will be increased.

Whether that will turn out to be the case in practice is anybody's guess. We do not expect an explosion of access as a result of the bill. We do not think that there will be hordes of additional people coming on to the land. However, I can understand the occupiers' concern and I doubt whether the provision in the bill goes far enough to assuage that concern. One further step that could be taken might be to make it clear in the bill that people take access at their own risk.

There is a well-established common-law principle that people take access at their own risk and may do so in certain cases. That would be helpful, but it may not go all the way. The difficulty is in establishing what risk people are taking

responsibility for. Generally, people take responsibility for any risk arising from their own activity, but are they taking responsibility for injury arising from the activities of land managers? That is a difficult question. If such a provision were to be included in the bill, it would have to be made very clear.

George Lyon: So it would have to be very specific?

Professor Rowan-Robinson: Yes, I think so.

The Convener: I have a few questions about the access code. Page 37 of the code deals with where to get help and information at a glance. The first paragraph is headed "Dealing with irresponsible behaviour". Further down the page it says:

"if the person persists in behaving irresponsibly, the land manager can ask the person to leave and seek the assistance of the local authority or the Police".

The words that concern me are "or the Police". I do not see how the police would have a locus in assisting a landowner where no crime has been committed. Why is that in the code?

Professor Rowan-Robinson: It probably covers the sort of situation—which I hope would be unusual—where the prospect of assault arises in connection with the dispute. It need not necessarily be a physical assault; it might just be verbal.

The Convener: Would the police normally come out if you called them to say that someone is about to assault you? Is that what you would have to say?

Professor Rowan-Robinson: It would probably have to be more specific than that before the police were prepared to intervene. The reference is to an exceptional circumstance, but some disputes can be fairly aggressive.

The Convener: I think that you need to be clearer about that. There is no locus for the police. If there were, we would have to ask the police to come along and talk about the resource implications of the bill. No one has so far suggested that we do that.

Professor Rowan-Robinson: We are not suggesting that there would be any new locus for the police that they do not already have.

The Convener: I am suggesting that there is no locus at all for the police. This is a civil piece of legislation. Unless there is a breach of an interdict—

Professor Rowan-Robinson: If there were a breach of the peace, the police would have a locus, but I hope that that situation would not arise very often.

The Convener: The first bullet point on page 37 of the code uses the phrase:

"if someone is behaving irresponsibly".

Behaving irresponsibly is not a crime.

Professor Rowan-Robinson: No, it is not.

The Convener: Nor does behaving irresponsibly constitute a breach of the peace. My difficulty with the code is that there exists the potential to abuse the police service, by getting the police involved in a dispute between a landowner and a person exercising his or her right of access. I appreciate that someone needs to resolve such disputes and that that must be thought through, but I do not think that the code has been thought through, to be honest. It is quite a big jump to move from a dispute involving irresponsible behaviour to calling the police.

Professor Rowan-Robinson: Perhaps what the code suggests is out of proportion to reality. I suspect and hope that calling the police would be happen only exceptionally, but the worry is that irresponsible behaviour might escalate in certain circumstances.

John Thomson: There was general agreement in the access forum that we did not need any new criminal offences—criminal offences exist that cover the really unacceptable activities that might take place in the countryside. The problem is that the existing criminal law on those offences is not always enforced.

The access forum and Scottish Natural Heritage were trying to provide a package of measures that brought benefits to all parties, which—as far as enforcement of the existing criminal law was concerned—includes land managers. Regardless of whether it is expressed correctly in the code—if it is not, that can be sorted out subsequently—the fundamental principle is that we have an overall package within which there is a place, albeit probably quite a small place, for more vigorous enforcement of existing criminal law.

Professor Rowan-Robinson: The reference to the police in the code could be deleted because such behaviour is covered in the following bullet point.

Richard Davison: An important distinction must be made. There is a mistake in the drafting of the code. If we compare the consultation draft with the current draft of the code, we see that a change has been made. The line that was taken in the consultation draft was that if behaviour is irresponsible but not criminal, that is for the local authority to deal with as much as possible, apart from the fact that the individuals involved must talk to each other. If the behaviour is criminal, the police will be brought in—that is the police's locus. The code tries to summarise much of what

constitutes irresponsible behaviour that is not criminal. It also lists criminal behaviour. As is clear in the annexe to the code, many criminal sanctions are available for various types of irresponsible behaviour. However, there is still scope for clarification of that point.

The Convener: I agree. It would make more sense to remove from the code the reference to the police. Otherwise, people might just lift the phone to call the police in civil disputes. I would not be happy with that. If we are not going to create a criminal offence, the police should have no locus at all. That should be the case unless a crime has been committed. As Professor Rowan-Robinson said, the next bullet point makes the situation clear. The code does not, however, include a corresponding right to call the police for a person who believes that he or she has been denied access rights.

I am afraid that we will have to wind up. George Lyon obviously has a burning question. Can you make it brief?

George Lyon: I just want clarification on the exclusion of commercial activities from the right of access. Last week, we heard in evidence from the Minister for Environment and Rural Development that the Executive's view is that, although those who use land for commercial activity are excluded from access rights, that exclusion would not interfere with current practice between commercial groups and land managers. Is that your understanding of how the exclusion will operate?

Professor Rowan-Robinson: That is the hope, but the fear is that some land managers might take the opportunity to close down existing opportunities.

George Lyon: I am concerned about your use of the words "hope" and "fear", which drives a horse and cart through some of the claims that were made last week.

Professor Rowan-Robinson: If commercial access is excluded, hope remains that land managers will allow such access. That is all that it amounts to. Ministers could give guidance, but land managers would be free to choose whether to follow that guidance. Many would, but the fear is that one or two might not.

George Lyon: Is it your view that the exclusion would need to be revisited if it were used to bar many current activities?

Professor Rowan-Robinson: Yes. That proved to be the most intractable problem for the access forum. We tried to get agreement on a pragmatic approach, to the effect that the effect of commercial activity—indeed, of any group activity—would be judged on its impact rather than on anything else. However, land managers hold to a point of principle that if commercial access is included in access rights, people will be able to profit from exercising their right of access on the manager's land.

The Convener: Are there any issues that you feel have not been covered and that you would like to mention to the committee in conclusion?

11:00

John Thomson: One issue that we would like to mention is the question of the interaction between people and animals in the countryside, which is of legitimate concern to many people. We in SNH have had research done on that issue, which we can make available to the committee. However, I wish to make the point that there is a danger that the issue is being exaggerated. South of the border, there is an extensive rights-of-way network that includes livestock areas. The incidence of problems in those areas is small. That experience proves wrong the suggestion that it is impossible to combine recreational access and livestock rearing. There is a need for careful management, for guidance and for education of the public about livestock issues, but the problem is not insuperable.

Professor Rowan-Robinson: I wish only to emphasise a point that was touched on earlier, which is that assured access to low ground in Scotland is woeful compared with England and Wales. Much of the debate on access tends to focus on hill land, but there is a serious problem with low-ground access. That is part of our reason for suggesting the package of reforms.

The Convener: Thank you for your evidence this morning and for coming at such short notice. We are grateful.

Our second set of witnesses is from the Law Society of Scotland. I welcome Malcolm Strang Steel, who is the convener of the Law Society's rural affairs committee; Alasdair Fox, who is a member of the society's rural affairs committee; Michael Clancy, who is the director for parliamentary liaison and Stuart Drummond, who is the law reform officer of the Law Society. [*Interruption.*] I have just been informed that Michael Clancy will not join us this morning.

Thank you for returning to the Justice 2 Committee to give evidence and for doing so at such short notice. This will be our last evidence-taking meeting and we want to ensure that we have covered all the issues of concern. We will go straight to questions, for which we have half an hour. I will ask you at the end whether there are other points that you wish to make to the committee.

The issue that we have been discussing this

morning is whether there is a law of trespass in Scotland. We have your paper, which has been extremely helpful. Would it be fair to say that the view that the Law Society has given on the law of trespass in Scotland refers to a civil wrong and not to a criminal wrong?

Malcolm Strang Steel (Law Society of Scotland): Before I answer any questions, for the sake of good order I say that my wife and I are involved in a farming enterprise, and that in the course of my business I am an officer for various companies that are involved in farming and land management. However, that has nothing to do with the Law Society. The society does not comment on policy matters; it comments merely on the law and how proposed legislation might interact with it.

As Professor Rowan-Robinson said, legal authorities—I quoted three or four of them in the letter that we sent to the committee—are unanimous that there is a law of trespass. We need to be careful when using the word "trespass", because it means different things to different people.

I start from the other end of the argument. The law says that people are entitled to exclusive use of their property. From that, it follows that they are entitled to exclude other people who do not have some right or permission to use that property. In that sense, there is a law of trespass in Scotland—

The Convener: I will stop you there. What do you mean,

"there is a law of trespass in Scotland"?

Malcolm Strang Steel: I am trying to explain that. A landowner is entitled to exclude people from his land if those people do not have permission to be there or if they do not have some other right, such as a public right of way. You asked whether that was a civil or a criminal matter. Undoubtedly, it is a civil matter.

The Convener: Other than by taking out a civil interdict, can landowners enforce the right that you say they have?

Malcolm Strang Steel: If somebody is on land without right or permission, land managers are entitled to require that person to leave that land. There is some authority to say that such force as is reasonably necessary can be used. However, the use of force might not be practicable, because in doing so one could land oneself with a criminal charge.

The Convener: What is the Law Society's position on that? Does the law of trespass amount to a landowner being able to say, "I want you to leave my land"? You have said that it amounts to more than that, in that some force can be used, if necessary.

Malcolm Strang Steel: I can supply the committee with a passage from Professor Kenneth Reid's contribution to "The Laws of Scotland: Stair Memorial Encyclopaedia". That would not make the matter clear—the law is not clear as to how far one can go—but the passage describes the parameters.

The Convener: I doubt that people would disagree that the law is unclear, but your submission seems to be clear that there is a law of trespass. As you said, we perhaps need to qualify precisely what we mean when we use the word "trespass". Do you agree that, if trespass is an offence, it is not a criminal offence but an offence under civil law?

Malcolm Strang Steel: A person's being on somebody else's ground and nothing more would not come under criminal law. Of course, over the years, particular activities have been made criminal. For example, poaching and other offences under the Trespass (Scotland) Act 1865 are criminal matters, as are many others of which the committee will be aware.

The Convener: Your submission does not seem to refer to the Trespass (Scotland) Act 1865.

Malcolm Strang Steel: If it does not, we certainly referred to the act in a previous submission. The Trespass (Scotland) Act 1865 certainly exists.

The Convener: The committee is trying to discover whether there is any clarity on or agreement about the law. Part of our difficulty is that each time we ask what the current legal position is, no reference is made to the only statute that exists. Your submission refers to institutional writers and people who have an opinion about the law. We are never referred to any proper law. I would have thought that it would be important to refer to statute.

Malcolm Strang Steel: The 1865 act is not relevant to plain trespass, because it deals with lighting of fires near woodlands and with camping on enclosed grounds. Both those actions are made offences in certain circumstances under that act. However, plain trespass is about person A walking onto person B's ground without B's permission or without any other right.

The Convener: That is your perspective. What surprises me is that I never get a clear answer when I ask the objective question, "What is the law of Scotland?" We are clear that there is such a thing as the Trespass (Scotland) Act 1865. However, although various writers have given their opinion, we are unclear about what the law of Scotland is.

Malcolm Strang Steel: As I said, the Trespass (Scotland) Act 1865 is not relevant to a

straightforward trespass in the sense of a person going on to somebody else's ground without permission. If they do not have that permission or some other right—a right of access to get to a house, for example—they are not entitled to be there if the landowner objects to their presence and asks them to go. That is the position.

The Convener: Although that is the Law Society's opinion, an awful lot of people would disagree that that is the law of Scotland.

Scott Barrie: Let us explore the matter a bit further. I am not trying to debate points of law—I am in an inferior position to you in such matters. However, is not it the case that although it might not be illegal for somebody to be somewhere, what he or she does there could be illegal?

Malcolm Strang Steel: No. That is not what I said. The position is set out clearly in the letter that you all received from the Law Society. On page 7, we quote Professor Anton, writing in the then Scottish Rights of Way Society's publication of 15 or so years ago. He wrote:

"a person who strays from a right of way or uses a track which is not a right of way is not exposed to an action of damages arising from the mere fact of deviation. But if requested to do so he must leave the ground and if he refuses to go the landowner may use reasonable force to eject him."

There might be some discussion about that, but there is no doubt that if person A goes on to person B's ground without person B's permission, person B is entitled to say, "I do not want you on my ground. You must go." It is not the Law Society of Scotland that says that, but Professor Reid, Professor Gordon, Professor Anton and various others. It is the standard legal view.

The Convener: That is not what Professor Gordon says—it is your interpretation of what he says.

Stewart Stevenson: I am sorry but I am going to challenge Malcolm Strang Steel strongly on this.

In your initial remarks, you made the observation that a landowner has the "exclusive"—I stress that word—right to use their property. The references that you cite are the writings of various law professors. I accept that they understand the law extremely well—certainly better than I or any other member of the committee. Nonetheless, in the absence of specific reference to statute, I invite you to agree that their assertions are based on interpretation of the common law and case law.

I put it to you that, if the common law is anything at all, it is the belief of what the law is that is commonly held among the people of Scotland. It is clear that—irrespective of how many legal authorities' opinions you care to quote—the commonly expressed belief of the people of Scotland is that, although trespass might exist as an activity when person A steps on to person B's land, there exists, nonetheless, a right for person A to do that. In effect, the right to use the land is not exclusive. The benefits of the land that accrue to the owner are exclusive; however, when another person exercises a right that takes no rights away from the owner, it is perfectly proper—under common law—for a person to assert that right.

Malcolm Strang Steel: I do not think that the common law—which is derived from principles of Roman law, as you probably know—as interpreted over the years by the courts, which are the ultimate arbiters of what is or is not the law, would support your argument.

Stewart Stevenson: Let me put it to you thus, as a layman to a lawyer. From what source does the common law derive if it is not derived from the shared belief and experience of the common man and woman, to the effect that there exists a right to access?

Malcolm Strang Steel: That is erroneous. The common law derives from principle. I have stated the principle. To use the words of the standard textbook, by Gloag and Henderson, which I quoted in—

Stewart Stevenson: I am sorry, but I will interrupt you at that point. The textbook is fine, but presumably it draws on some underlying principle, rather than being the principle.

Malcolm Strang Steel: Yes.

Stewart Stevenson: We need to understand what underlies the interpretations that the textbook to which you refer gives us. At the moment, we fail to understand that. That might be our fault; it might be yours. Please lighten our darkness.

11:15

Malcolm Strang Steel: In the words of Gloag and Henderson, the underlying principle is that

"the owner or owners of a subject have an exclusive right which enables them to prevent others from interfering with it."

That applies to land, to the water bottle in front of me—if it happens to be mine—and so on.

Stewart Stevenson: You said:

"prevent others from interfering with it."

In other words, the exclusivity relates to the use of land by an owner not being affected by the activity of a person—for example, someone who exercises access. The exercising of access in itself does not deprive the owner of anything. It is only when the owner is deprived of something that a problem in law begins to exist.

Malcolm Strang Steel: The interpretation of the courts over the years and of subsequent institutional writers is not with you.

The Convener: You have cited only one case. Is it not fair to say that no body of common law supports your position? It is only supported by the opinions of professors and institutional writers, who do not base their opinions on court decisions. We have the opinion of Lord Trayner in Wood v North British Railway—that is the only court decision that we have.

Malcolm Strang Steel: The common law is derived from principle as interpreted by subsequent writers and the courts. In a court case in 1899, a judge pointed out that the notion that there is no law of trespass in Scotland is "loose and inaccurate". I have expanded on that in my—

The Convener: Was that in Wood v North British Railway?

Malcolm Strang Steel: Do you want the full quotation?

Stuart Drummond (Law Society of Scotland): If the committee wishes, we can compile a list of the cases on which our comments are based. Although we have a list in front of us, I do not think that the committee would find it useful if we simply read out the cases one by one. We can compile a paper in which we list the cases that the opinions are based on and have been based on over the years.

The Convener: With respect, the whole basis for our examination of the issue is that there is a dispute about whether there is a law of trespass in Scotland among the people from whom we have taken evidence. You say that there is such a law. When you wrote to us, you cited one case.

Malcolm Strang Steel: There are more cases than that.

The Convener: That is the evidence that you have chosen to submit, which is not convincing us.

Malcolm Strang Steel: The books contain a wealth of footnotes with references to various cases on which the views of professors who are much more learned than me are based.

George Lyon: I find your evidence interesting. I will not argue about whether the learned gentlemen who have interpreted that there is a law of trespass are right or wrong. Clearly, you argue that there is a law of trespass. We have heard that from other witnesses. Fundamentally, we are dealing with a civil matter. The key issue is that a landowner may use reasonable force to eject someone from their land. In practical terms, that is where some of the confusion lies.

I take it that—rightly or wrongly—if the landowner asks the person to leave and that person refuses, there is precious little else that the landowner can do. In practical terms, the person can walk on regardless as long as he or she does not stray into criminal activity while on the land. Is that the practical position?

Alasdair Fox (Law Society of Scotland): That is perfectly correct. However, the landowner would still be entitled to ask the person to leave, because he would be doing so as of right. Unless the person had the owner's permission to be on the land, he would be there without any right.

George Lyon: I understand that, but that is almost unenforceable. The landowner could not ask the police to escort the person from the land.

Alasdair Fox: That is true, unless they were causing a nuisance.

George Lyon: Or a breach of the peace.

Alasdair Fox: Yes. That would be an entirely different matter. Of course, the landowner could raise an action of interdict against a person if he had a reasonable apprehension that that person would persist in walking over his land. The action of interdict would be available whether or not the person had damaged property or had misbehaved; it would arise simply because he was persistently there.

However, in any action of interdict, the courts might well apply a de minimis rule. It is not easy to secure interdicts on that particular ground, but the right to take such an interdict exists.

George Lyon: I return to the practical reality of the matter. A landowner who sees Mr and Mrs Bloggs walking through his fields on a Sunday afternoon might well ask them to leave his land, but if they refuse to do so, they will probably just walk on. In the real world, it is unlikely that the landowner will rush to the courts to seek an interdict to prevent those people from walking across his fields. To all intents and purposes, the law of trespass is largely unenforceable.

Malcolm Strang Steel: I will reinforce that point with a sentence from Professor Reid's contribution:

"Nonetheless in practice landowners are often left without a suitable remedy as interdict is not always available or practicable."

George Lyon: Exactly. That is the key issue.

Alasdair Fox: However, the fact that the basic law is unenforceable does not alter it.

George Lyon: I am not arguing that the law does not exist. I am suggesting that it is practically unenforceable, except in extreme cases.

The Convener: We will now consider the access code.

Stewart Stevenson: As the bill runs in tandem with the access code, the two have to relate to each other closely. The balance of the evidence that we have received so far is in favour of slimming down the bill and moving some of its provisions to the code. What is your view on that? If you think that material should be moved in either direction—from the code to the bill or vice versa—which particular areas would you identify?

Malcolm Strang Steel: I do not have a view on whether the bill should be slimmed down, as the question verges on matters of policy on which the Law Society of Scotland does not wish to comment. However, I will say that the code has only evidential status, which means that a person can breach the code without necessarily being irresponsible. Equally, in theory, a person could comply with every syllable of the code and still act irresponsibly. The code is neither conclusive nor binding. As a result, if you want to make particular provisions binding in all circumstances, in all places and on all people, either the provisions will have to go in the bill or you will have to make the code conclusive. As drafted, the code contains a lot of material that is more advisory than anything else, which means that it would not be appropriate to make the code conclusive on the question whether someone has been responsible or irresponsible.

If you want something of universal application, the bill is the right place for it. If it is a matter of form, put it in a schedule rather than in the code. It is not for the Law Society to comment on what those provisions should be.

Stewart Stevenson: From what you are saying, I take it that although the code cannot be held to define all forms of irresponsible behaviour, it can document deviations from responsible behaviour. However, the bottom line is that it is what the bill describes as responsible access that will cause the courts to take action. The code, which will have been passed by Parliament, will help the courts to understand and interpret what is in the bill. In itself, it creates no new definition of responsible or irresponsible behaviour.

Malcolm Strang Steel: Yes, I agree with that.

Bill Aitken: Liability is also a vexed question. When the Minister for Environment and Rural Development gave evidence to the committee, he said, in reply to a question that I asked, that the bill does not increase liability on a land manager. Have you any comment on that?

Alasdair Fox: In a way, there are two answers to that. Land managers will still be bound by the Occupiers' Liability (Scotland) Act 1960. That act applies a test of what it is reasonable for occupiers of land to do to prevent injury, for example. They take a reasonable man test.

That is fine in legislation. However, as we were saying earlier, it is then interpreted by the courts. The courts have interpreted the 1960 act by applying different levels of responsibility to different classes of person. For example, if someone invites an unaccompanied child on to their land, they have a higher level of responsibility towards that person than they would to—dare I say it—a trespasser, who is there without their permission. That is one way in which the act has been interpreted in a way that distinguishes what a reasonable person would do in the circumstances.

The other interpretation relates to whether a hazard lies close to or a long way from a public place. For example, if a landowner has a quarry that lies right next to a public road, they would have a higher level of responsibility to prevent people from straying into it and injuring themselves than if it lay 25 miles, or even 10 miles, from a public place. If there is a reasonable expectation that people are going to visit the quarry or will be in the vicinity, a landowner will have a higher level of responsibility than if it lies where they would not expect people to go.

It is our submission that the Land Reform (Scotland) Bill will change the position in two ways. It will introduce a new class of person who will be entitled to have access to land. That person will be the person who is exercising their access right. It will also change it in that the land manager can expect the person who is exercising their access right to be anywhere on his land.

It is our contention that the practical interpretation of the law on occupiers' liability does not sit easily with a statutory right of access. There will be a new class of people who do not fit in with the existing law and those people can be anywhere on anyone else's land.

We think that that is exacerbated by the ability of people to access land at night. In our submission, I say that at the moment it might be reasonable for a farmer to leave a plough in a field overnight, because he would not expect people to be there. However, when the bill becomes law, it would be reasonable for him to expect people to be there at night. If someone fell over and injured themselves on the plough, the farmer might be liable.

George Lyon said that our concerns about these proposals were based on fears about an increase in the number of people accessing land. That is not the reasoning behind our position. We are concerned about the proposals because they will increase land managers' responsibilities.

11:30

Bill Aitken: If the minister's statement is considered to be correct, there needs to be a provision in the bill making clear that people

access land at their own risk. That would enable a defence of volenti non fit injuria to be made.

Alasdair Fox: That is correct. The minister may say that it is intended that people should exercise the right of access at their own risk, but that is not what the bill says. If that is the intention, section 5(2) must be written differently to express that.

Bill Aitken: In your view, under the bill, if someone went on to land containing a quarry and fell into the quarry, the landowner could not lodge a defence of volenti non fit injuria.

Alasdair Fox: I do not think that he could. The defence of volenti non fit injuria applies when someone accepts a risk voluntarily. Under the proposed legislation, people would be exercising a right.

Bill Aitken: The clear remedy would be to say in the bill that people accessing land do so at their own risk.

Alasdair Fox: If that is Parliament's intention, it must insert such a provision in the bill. The bill as written does not meet that intention.

George Lyon: If such a provision were written into the bill, would it remove all responsibility from the landowner to take due care?

Alasdair Fox: In our submission, we recommend that it should not remove entirely that responsibility.

George Lyon: At issue is how far we should go and where the balance of responsibility should lie.

Alasdair Fox: The responsibilities of landowners should be balanced with the responsibilities of those accessing land. We have suggested that the Parliament should follow the Countryside and Rights of Way Act 2000 and exclude

"dangers which are due to anything done by occupiers (a) with the intention of creating that risk, or (b) being reckless as to whether that risk is created."

George Lyon: So those words should be added to the bill.

Alasdair Fox: We recommend that.

The Convener: That is a helpful suggestion.

I want to put to you what the minister said last week on that subject. He said:

"I say expressly to the landowners that the duty of care that they have under the Occupiers' Liability (Scotland) Act 1960 remains in place."—[*Official Report*, *Justice 2 Committee*, 30 January 2002; c 979.]

The minister has stated his intention clearly, but you do not think that that is enough.

Alasdair Fox: I will not comment on a policy decision. The intention may be to pass liability for risks from the land manager to the access taker, but the bill does not do that. The bill reapplies existing legislation in circumstances that will be totally different once the bill has been passed.

Malcolm Strang Steel: Section 5(2) is somewhat ambiguous. It can be read as re-emphasising the duty of care to different categories of people. If that is what it is doing, it is imposing a higher duty of care on the landowner, as there is a higher duty of care to someone who has a right of access than to someone who has no such right.

George Lyon: To go back to your paper, I accept that the bill creates a new class of access taker and that there is a strong argument that the question of liability must be dealt with, but I am less convinced by your other two arguments. First, you say that because a hazard is closer to where the public might be, there is more chance of the public being damaged or the hazard causing them harm. Surely if something is hazardous, it does not matter if it is one mile or 20 miles from the road. A landowner cannot prevent people from roaming across his land at the moment, and he would still have a duty of care to ensure that something is not hazardous to someone who happens to walk by. I do not understand your logic on that point.

Alasdair Fox: That might be one view, but it is not the view that the courts in Scotland have taken. The courts and the judges who will interpret the legislation have taken the view that if a site is remote the risk is remote.

George Lyon: What is the definition of remote?

Alasdair Fox: There is no definition of remote. It depends on the circumstances.

George Lyon: I understand that.

Alasdair Fox: We are saying that the chances of a piece of land being remote are a good deal less if people have a right to walk over a particular farm or estate than they are at the moment, when people do not have that right.

George Lyon: The Law Society's view is that there is a great unmet demand and that, if the bill is passed, hundreds more people are going to pour on to land that is currently remote. Is that what you believe to be the implication of the Land Reform (Scotland) Bill?

Alasdair Fox: No. It is a question of foreseeability; all the law of negligence is based on foreseeability. It is foreseeable that, because people will have the right to walk over a person's land or through their farm, injury may be caused. There is greater foreseeability when that right is exercised than when there is no right in the first place.

George Lyon: That is something on which we need further clarification.

Bill Aitken: I turn to the concerns that you expressed regarding night access to land. We seem to be constantly in pursuit of that elusive legal entity, the reasonable man. Would the courts not take the view that anyone wandering around unilluminated areas of land, where there is the possibility of falling into big holes and all sorts of things, would not be acting reasonably, and as such the landowner would have a defence?

Alasdair Fox: The reasonable man test is applied not to the person taking access, but to the landowner. The test of reasonableness applies to the landowner or the land manager; he has to act reasonably to prevent injury or damage taking place. If people are accessing land at night, the landowner or land manager will have to act just as reasonably to prevent injury. In fact, one could almost say that the landowner will have to act more reasonably because if it is dark, it is more foreseeable that injury will be caused.

Bill Aitken: Surely the land manager could be reasonable by default. We could not have a situation where a land manager would be expected to floodlight large areas of hillside and moorland. I have a funny mental picture of Rannoch moor being illuminated by the kind of floodlights one would find at Hampden park. I am sure that there could be no requirement on a landowner or land manager to do that.

Alasdair Fox: They would only have to act reasonably.

Bill Aitken: Therefore, perhaps your fear that there would be a substantial increase in liability is somewhat exaggerated.

Alasdair Fox: You may think that. Time will tell. I cannot say how the courts will interpret the legislation. All I can say is that there might be greater risk as a result of that specific provision.

George Lyon: This is an important point. Will the Law Society give us examples of prosecutions of landowners under the Occupiers' Liability (Scotland) Act 1960? How many such prosecutions have taken place? We should have a baseline against which to measure any increase.

Malcolm Strang Steel: I am not sure that the Law Society is the right body to provide that information. Why not ask the Scottish Landowners Federation or the National Farmers Union of Scotland? They probably represent more landowners that anybody else.

The Convener: Fair point. We have to conclude. I offered you the opportunity to raise at the end any points that you felt had not been included. Would you like to say anything in conclusion?

Malcolm Strang Steel: One thing on which I had expected to answer questions, but about which you have not asked me, is business use. We agree with the concern that Mr Stevenson expressed. The example of the mountain guide with two people behind him has been commonly used. Such a guide might be caught by the provisions on business use. As is so often the case, it is difficult to draw lines.

When I reread the draft access code, it occurred to me that you might have to reconsider one particular line. Under section 4, the land manager has to act responsibly. Paragraph 3.46 of the draft access code says:

"it is expected that activities undertaken by guides … which would otherwise be covered by the rights, will continue to have the consent of land managers."

It occurred to me that a guide who is aggrieved because he has been refused consent might consider getting a declarator from the sheriff, under the procedure that is set down, that the land manager has acted irresponsibly in refusing access. I suspect that it is important for the code to be flexible: what may be reasonable in one place and in one circumstance may well not be reasonable in another place or in another circumstance. I leave that thought with you and hope that it is helpful.

The Convener: Thank you for giving us a dynamic session. Your evidence has been very helpful. Thank you for coming at such short notice.

I suggest that we have a five-minute coffee break.

11:42

Meeting suspended.

11:56

On resuming—

The Convener: Welcome to the second part of the meeting. We continue to deal with the Land Reform (Scotland) Bill and I welcome our third set of witnesses. We have with us John Kinnaird, Craig Campbell and James Withers from the National Farmers Union of Scotland. Thank you for coming along at such short notice. We will go straight to questions. You may make any points at the end that you do not get a chance to cover during questions.

Stewart Stevenson: We have been considering the balance between the code and the bill. I know that the NFUS left the access forum on the basis that the code was becoming a large document, whereas your preference was for something quite small. Today and on other occasions you have heard much of the evidence on the balance in the

code and it is a subject on which you have commented in the past. In the light of what other witnesses have said, will you expand on your previous remarks? In particular, have you given further consideration to whether the NFUS might rejoin the access forum?

John Kinnaird (National Farmers Union of Scotland): We are actively considering rejoining the access forum.

Stewart Stevenson: I am delighted to hear that.

John Kinnaird: The access forum has not met for some time. We expect to rejoin the forum when it holds its next meeting.

On the balance between the code and the bill, it is important that what is mandatory and what is suggested as a "must" in the code should be included in the bill. Any matter that is left to the access code should be for guidance only.

Stewart Stevenson: I want to pursue that. My understanding of what was intended—if not necessarily what has happened—is that where the word "must" is used in the code it would, in effect, refer to a legal obligation that exists in statute, although not necessarily in the Land Reform (Scotland) Bill. A distinction is made through use of language, but should that be the case? Is that the case, or are you pointing to particular parts of the code that use "must"—or a similar formulation—but which do not pertain to statute?

12:00

John Kinnaird: It is important that there is a clear link between the code and the bill. At the moment, the code is purely evidential, which is something that we would like to be tidied up. It is important to have clear guidelines, because such clarity would benefit the access taker and the access provider. All along we have sought legal certainty and clarity.

The Convener: Are there any specific parts of the code with which you are unhappy?

John Kinnaird: In certain instances, there is conflict between the code and the bill, which needs to be cleared up. If that were cleared up, it would solve many of the problems. I say again that if action to which the code attaches the word "must" is incorporated into the bill, the code would be a lot simpler and easier to understand.

The Convener: I note what you say, which could be described as the reverse of the position of some organisations that feel that more should be included in the code. Whatever your line on that is, I am keen to know whether you have any difficulty with, or objections to, any specific parts of the code.

James Withers (National Farmers Union of Scotland): The generality of the code makes perfect sense, but there are questions about clarity and about how the code refers to the bill. The paper that we submitted suggests a link along the lines of that which exists between legislation and the highway code—a comparison that has been drawn a number of times. The highway code is well respected and has legal standing. We have considered the view that, by including much of the code's contents in the bill, the provisions concerned might be difficult to amend because that would require primary legislation, but if the link between the Land Reform (Scotland) Bill and the access code was similar to the link between road traffic legislation and the highway code—which is provided for under section 38 of the Road Traffic Act 1988—that might clarify the code's status, if not its content.

The Convener: So if the access code were given the same status as the highway code, you would be reasonably content to keep it as it is, but with a link to the bill.

James Withers: That would certainly address some of our concerns, but our overriding concern is that if something is mandatory under the code, there seems to be no reason why it cannot not be included in the bill. The link between code and bill is important, however.

Craig Campbell (National Farmers Union of Scotland): It is not a general point of principle, but there are details in the code that do not easily transfer to the detail of the bill. I refer in particular to matters concerning wild camping. That is more of a tidying-up issue.

Bill Aitken: The definition of curtilage is causing some excitement. Do you feel that the bill provides adequate protection for your members' privacy?

John Kinnaird: It does up to a point; the matter of curtilage is vital. If a field comes right up to someone's house—a dwelling place in the countryside—is that field included in the curtilage? Such questions need to be clarified, but we are quite happy with what is in the bill in that regard.

Bill Aitken: I will pose another question regarding potential difficulties. People walking through the countryside perfectly lawfully could enter fields in which there are animals—for example bulls that are in a certain state of excitement. Should there be some provision in the bill to restrict access in such circumstances?

John Kinnaird: There would be no need to restrict such access if a core path network was set up. That would allow people, whether simply taking access or going about their legitimate business, to gain safe access at no risk to themselves and with no risk to or from animals or machinery.

Bill Aitken: Forgive me if the NFUS has already expressed an opinion on my next question. Do you have any views on policing of a core path network?

John Kinnaird: If a core path network is set up under the bill, we will be able clearly to differentiate between people exercising their rights and people exercising their liberty. That would remove much of the liability risk that we envisage arising from the bill as drafted. If the wording on liability that we have suggested is included, many problems would be addressed and clarity would be provided to the access taker and—to some extent—to the access provider.

Bill Aitken: I am happy to say that the vast majority of people who will seek access to the countryside will behave responsibly and will, by and large, adhere to the core paths. However, when the irresponsible minority fail to follow their obligations, how might the core path network be policed?

John Kinnaird: That is a grey area. We heard from two witnesses earlier about the difficulty of determining what constitutes trespass. There is an opportunity for the bill to clear that up for everyone. One advantage of a core path network is that it will allow for clarity, which would remove the risk of conflict.

Craig Campbell: What is in the bill as drafted does not tally with what was in the policy memorandum. The bill omits the obligation on local authorities and other public bodies to create and maintain the paths, other than those that are established under a path order. That link needs to be sorted out, lest we be faced with a situation in which local authorities say that they are not obliged to create and maintain the paths, but simply to produce a list.

Bill Aitken: Let us turn to the question of liability. You will have heard the earlier discussions on the subject. I know that the NFUS has insurance connections. Have you raised the matter with insurers?

John Kinnaird: Yes, we have. I presume that you are alluding to NFU Mutual.

Bill Aitken: Yes.

John Kinnaird: We have not consulted only NFU Mutual. Any insurance company from which we have taken opinion has been concerned about its increased risk of liability through a right of responsible access. That is why we suggested in our briefing document a wording that makes it clear that someone who accesses land does so

"at their own risk and will have no claim against the occupier of ground for personal injury or other loss however sustained whilst exercising the right unless it results from a malicious or reckless and wilful act or omission on the part of the occupier"

of the land. We believe that that would go a long way toward addressing many potential difficulties with liability.

James Withers: We welcome the fact that there is clearly a political will and a policy intention not to increase landowners' liability. That is an important point. As members have heard this morning in other evidence, there is a question about whether the bill as drafted meets the policy intention. The form of words that we suggest is generally accepted by other groups as the best way in which to define liability. In some way, it describes the current status of liability in law.

Bill Aitken: We will follow that up. Are the underwriters concerned because liability will be increased, or because the increase in the number of people who access land is likely to result in an increase in the number of accidents and a potential increase in liability? Is that the source of their concern?

John Kinnaird: The simple answer is yes. As soon as an individual is given a right of access, the occupier of the land—tenant or landowner—will have an increased duty of care. That will automatically involve an increased risk, which is why it is very important to have a core path network. We must be able to distinguish clearly between the two.

Bill Aitken: I want to be clear on this, as it is an important issue. You are saying that the problem relating to liability is not the extent of the duty and liabilities that will now devolve on property owners and land managers; rather, it is the fact that many more people will have access to the land, which will cause an increase in instances of access and introduce questions about legal liability.

John Kinnaird: Yes, but that would happen even without an increase in the number of people who take access. The duty of care in itself would increase the risk. I emphasise that the biggest risk and the biggest potential increase in liability will come in relation to enclosed land rather than open hill land, with which we have no difficulty. We have concerns about that.

Bill Aitken: You appreciate that you are at some variance with the ministerial opinion that was expressed last week.

John Kinnaird: Yes.

Stewart Stevenson: Is it your understanding and/or intention that your proposed redefinition of the way in which liability should be dealt with in the bill would exclude the occupier from liability that might arise from entirely natural hazards, such as cliffs, gorges and the like?

John Kinnaird: Yes. That should be the case, otherwise areas would have to be fenced off and people would be denied access to places that they would like to go. That is why it is important that we have a path network of some description. People who live in the countryside and who make their living in the countryside know and understand the everyday dangers and potential hazards. Those who take access—however frequently or infrequently—do not. That problem must be addressed. It is of major concern.

Stewart Stevenson: However, your understanding is that liability for certain natural hazards currently lies with the occupier.

John Kinnaird: Yes—at the moment.

Stewart Stevenson: Are you, in effect, proposing to change and rein in liability.

John Kinnaird: No, we are trying to get clarity. In many respects we are trying to protect access takers so that they are not put in positions of potential danger.

George Lyon: Before I ask any questions I should declare an interest as an NFUS member.

You are strong on the need for a core path network, but the NFUS position is not to oppose people being able to access enclosed land, or is it?

John Kinnaird: The NFUS position is not to oppose access, but quite the opposite. We openly welcome people to the countryside. It is important that people can come into the countryside. People are many generations away from those who made their living in or lived in the countryside, so it is important to get people back to the countryside. That would allow us to let people see what goes on in the countryside, how their food is produced and how the countryside can be enjoyed. Above all, however, that must be done safely and without risk to people, animal welfare or safe food production.

The Convener: From your previous emphasis, my impression was that you are not keen for there to be access to enclosed land.

John Kinnaird: No, that is not the case. We would have no problem with access to enclosed land provided that that access is managed within a path network. That is vital. We encourage people into the countryside because it is a wonderful place to make a living and to visit, but there is a risk to people who take access—and to those who make their living there—from animals, machinery or whatever. That is why the correct way to proceed is with a core path network, so that people who live and work in the countryside and those who access it can work in harmony, and not be in potential conflict.

I re-emphasise that we welcome people. We will have difficulty with access to enclosed land if there is no core path network, because people will be exposed unnecessarily to the hazards that exist in the countryside. The Health and Safety Executive already acknowledges that agriculture is a hazardous occupation.

George Lyon: Therefore, your key concern is the safety of those who access the land. As we heard earlier from the Law Society of Scotland, although a law of trespass applies in Scotland, it is unenforceable. In reality, people are free to wander the land. You must have evidence on the amount of risk. How many incidents have there been in the past 10 years and how many claims have there been on the public liability insurance of individual landowners and farmers?

John Kinnaird: We do not have that information, but I am sure that we could get it. We could get information from NFU Mutual, for example, providing that it is willing to release the figures. If the committee wants information on civil cases, I am sure that the Scottish Law Commission could supply evidence of civil actions.

George Lyon: Could you supply facts to back up your claims?

Craig Campbell: We could ask the Scottish Law Commission.

John Kinnaird: We would be happy to do that.

George Lyon: Do you dispute the evidence that SNH provided from south of the border that indicated that the problem was minimal?

John Kinnaird: I dispute that evidence. It is important to distinguish what can put an access taker in great danger. South of the border, a fair core path network and rights of way exist.

James Withers: That issue is crucial. As SNH said, current provision for path networks around enclosed land—particularly close to urban areas—is woeful in Scotland. I agree that the problem does not arise much south of the border, where rights of way and the path network are strong.

As for the number of times when liability has become an issue for people accessing enclosed land, we agree that one accident would be one too many. Paths will provide reassurance. The public will still have the liberty of access to depart from those paths into enclosed land, but the paths will provide absolute reassurance of the safest route through enclosed land.

12:15

George Lyon: The key issue is liability. Do you agree with the Law Society's view on the source of the increased liability?

John Kinnaird: Yes. That is why we believe that the situation needs to be addressed. That could be done through a core path network.

George Lyon: The committee has discussed dispute resolution. How would that operate? Is it a practical way of addressing problems that farmers or landowners might have with walkers or with bits of land that they wish to be excluded from access rights?

John Kinnaird: The proposals would lead to conflict. That would be of no benefit to the access taker or provider. A path network would solve the problem and remove the need for remedy.

George Lyon: What is the logic behind your thinking that a core path network would improve dispute resolution?

John Kinnaird: If a core path network is established, people will know the position. We will have knowledge as access providers and they will have knowledge as access takers. I am also a walker, so I take access. The network would give people clear guidance about where they can go and where they can go safely. That is of paramount importance.

George Lyon: A network would not preclude people's taking access to inby land, so disputes might still arise.

John Kinnaird: That would not alter the current situation.

James Withers: The paths would provide reassurance. People would still have the right to access enclosed land, but they would be reassured if they were on paths that their access would not be open to challenge by anyone.

George Lyon: The point that I am trying to get to is that the bill contains dispute resolution measures. Local authorities will establish local access forums and people will be able to go to the law, if necessary. Are you happy with those measures? The core path networks are a side issue and do not feature in such measures.

John Kinnaird: The proposed dispute resolution measures are cumbersome and would benefit no one.

George Lyon: What do you want instead?

John Kinnaird: Our proposals would provide clarity and give people some security and safety.

The Convener: I will push you further on that point. I hear what you say about the reassurance that a core path network would give access takers and landowners. However, if walkers did not stick to the core path network, what would happen? Would landowners be able to take sanctions against such people, or would only guidance be given?

Craig Campbell: Difficulties would arise if someone misbehaved on enclosed land. Are they exercising the proposed right or are they exercising the liberty that the bill will not extinguish? It will be open to someone whom an owner cautions on whether his behaviour is responsible to say, "I'm not here using the right; I'm using my implied permit." That would return us to the present situation.

The Convener: You expressed concerns about increased liability. It would be useful to hear why you think that there would be a dramatic increase, or any increase, in the number of citizens accessing their rights.

John Kinnaird: If there is a right, there is an increased duty of care on occupiers of land; one goes hand in hand with the other. We would anticipate—

The Convener: I am sorry, but I think that you misunderstood my question. Why do you think that more citizens would access their rights to walk? Alternatively, do you think that there would be no difference in the numbers?

James Withers: There is no indication that, if the bill is enacted, millions of people who have never accessed the countryside will suddenly hit the road, access the countryside and go on to enclosed land. We are not lawyers, but our opinion is that, by creating a right, you thereby increase the liability. The issue is not the number of people, but the duty of care. We want more people to come into the countryside, but there is no indication that they will.

On liability, there is a belief that the duty of care will increase. There seems to be a substantial body of legal opinion to suggest that that would be the case. That is the issue.

Bill Aitken: I asked earlier what the underwriters say about the matter. Given that the normal premium component for the property owner's liability, which is part of a farmer's insurance policy, is minimal, do the underwriters think that there will be a significant premium increase?

Craig Campbell: That is a technical matter that I am not qualified to answer. The indication that we have had is that there would be an increase, but the underwriters have not put a figure on that. I guess that in other insurance risk situations they judge by experience. Again, I am not technically qualified to comment further.

Bill Aitken: Surely the underwriters would take the view that the risks that adhere to your trade are more likely to be in respect of fire and storm damage, for example, than is the case with a property owner's liability. They are probably not charging you much for that.

John Kinnaird: I suggest that the underwriters charge a lot for third-party liability. That large part of the premium will increase, not decrease. The underwriters have made plain that fact.

Bill Aitken: It is understandable that the premium would increase, but I question the extent of that increase.

John Kinnaird: We are not qualified to answer on the extent of that increase, as Craig Campbell said. However, there will be an increase in the premium. A large increase in the number of claims would automatically increase premiums as well, probably disproportionately to the risk.

The Convener: That would be the case for any industry, if there were a high volume of claims.

John Kinnaird: Yes, but not every industry allows people access to its workplace. That situation is unique to farming. The bill will give people access to our place of work.

George Lyon: Surely the issue is the increased access and the increased liability because of that access right.

John Kinnaird: Sorry, could you repeat that?

George Lyon: You argued that not every industry gives people a right of access into the workplace. However, farmers currently do, as we heard in the Law Society's evidence. The Law Society said that the law of trespass exists but is unenforceable in Scotland. I want to clarify and quantify the extra risk that you think will be incurred. Surely NFU Mutual should be able to provide you with figures. Farmers are about to start paying their premiums for next year. As a farmer, I have not been advised that my premium will go up substantially because of the bill. It would be useful if you could seek clarification from NFU Mutual and provide that as evidence to the committee.

John Kinnaird: We would be happy to seek that clarification and provide that evidence. I take issue with the start of your question. The bill will give people a right that will not exist in other industries or manufacturing processes. That right will exist only in agriculture.

George Lyon: My point was that people currently access the workplace that farmers operate in. Unless there is great, unmet demand out there that is currently dammed, demand for access will not increase substantially. No one suggests, as you admitted, that it will do so.

James Withers: The difference is that the bill will create a right, which will increase the duty of care. There is not a large number of claims for damage against landowners, because of limited access. However, the concern is not the number of people accessing, but the fact that a right will be created, which, legal opinion suggests, means that duty of care will increase correspondingly.

The Convener: There is some dispute about that. The minister has said that it is not the Executive's intention to increase liability. However, the Law Society has told us that it does not think that the bill as drafted will meet that policy intention—the committee will take that on board. The Executive's position is consistent with your wishes, so the issue is to draft a bill that meets that policy objective.

I share George Lyon's view. We would have to hear evidence to support your claim that landowners' insurance liabilities will definitely increase before we could consider that in our deliberations.

John Kinnaird: We will be happy to supply that evidence if we can. That is why we suggest a change of wording. We agree with what the minister is saying and we welcome it. We are suggesting that a different form of wording will avoid the liability problem.

The Convener: What you have said will be acknowledged. Your point has been well made. We must conclude there. You now have the chance briefly to mention anything else that you feel we should consider.

John Kinnaird: Thank you for giving us the opportunity again to answer your questions. Producers need privacy and they need to be able to produce without putting themselves, their animals, their crops, food safety or—more important—access takers and visitors at risk. We believe that that risk will increase in relation to enclosed land. We must address that issue.

I reiterate my open invitation to committee members. It is important that committee members visit a farm with enclosed land and see where the risks are—where we believe that people could be in danger. We will let you see where we have difficulty and why we are concerned about the risk that people could be exposed to if there is not a core path network.

James Withers: Farmers have a lot to gain from part 1 of the Land Reform (Scotland) Bill. The provision of a right of access offers a real chance to get more people into the countryside. The provision of paths will be crucial to that.

The Convener: Thank you for your invitation. We have had a few offers over the past five weeks and we will have to decide which ones we can respond to. We are grateful for the offer that you have made and for the evidence that you have provided today.

John Kinnaird: Thank you.

The Convener: We move to our final set of

witnesses. We will hear from Dave Morris of the Ramblers Association Scotland, who is supported by Alan Blackshaw. I am sure that members, like me, are keen that we should conclude at 1 o'clock. If we can keep our questions focused, that will help everybody.

I thank you for coming here at short notice. From the *Official Report*, you will have gathered that we felt that we had to extend the evidence taking for a further week. Judging by what we have heard this morning, we were absolutely right to do so, although I am not saying that any of the issues are any clearer than when we started. We will go straight to questions and we will let you return to any points that you want to raise.

I shall begin the questioning. Perhaps this question would be more appropriately put to Alan Blackshaw. You will have heard the Law Society's evidence. Do you agree with the Law Society's position on the law of trespass? You may not have seen the paper that members received, which is based on some academic writings. The paper refers to one case—that of Wood v North British Railway, of which I do not know whether you are aware. The Law Society's submission cites "The Laws of Scotland: Stair Memorial Encyclopaedia" and says that there is at least a civil law of trespass in Scotland. You have heard the dialogue between the committee and the Law Society. Would you like to comment on that?

Dave Morris (Ramblers Association Scotland): Thank you for giving us the opportunity to appear here today. I will ask Alan Blackshaw to respond on the technical aspects of the issue. My main comment is that, like the majority of the population, we do not consider that there is a law of trespass. The reality is that people can take access to land and to water and the only thing that a land manager can do to restrict that is to seek interdict. As members will be aware, the public perception is that people are free to walk on land; that freedom has been recognised over many years. Alan Blackshaw may be best placed to answer the specific points in the Law Society's submission.

12:30

Alan Blackshaw (Ramblers Association Scotland): On the law of trespass, there is the question whether any law prevents someone from going harmlessly and lawfully on to land. Our position is that there is no such law, which is why it is the belief of everyone in Scotland that there is no law of trespass.

There were a number of appeals by landowners to get greater control of land. Those appeals started around 1800, but there were a number between 1920 and 1960. In 1938, a report in *The Scotsman* on one of those appeals said:

> "There is provided for these landholders, however, no law to which they can recourse in order to combat the simple act of trespass".

That remains the position. When the Scottish Landowners Federation says that there was a law of trespass when the Occupiers' Liability (Scotland) Act 1961 was passed, it cannot have been talking about a law of trespass in the sense that we understand it because there has never been such a law. In 1961, the SLF advised the Government that the law of Scotland appeared to recognise that access had never been the problem that it had been in England. Its submission to the Government, dated 15 September 1961, said:

> "There is no law of trespass in Scotland".

It went on to say that the remedy of interdict was a cumbersome legal process and that force cannot be used to remove "uninvited guests". That submission can be taken as a firm basis for our views. The Law Society appears to disagree with the SLF about whether there was a law of trespass at that time. That situation needs to be clarified.

The Convener: We seem to be clear about the fact that, apart from in the Trespass (Scotland) Act 1865, to which no one but you has referred, there appears to be no statute relevant to trespass. Other than that, we are discussing sources of information about what the law might be.

The Law Society submission quotes Professor Anton of Aberdeen University, who published a pamphlet entitled "Rights of Way—A Guide to the Law in Scotland", which says that a person who strays from a right of way or uses a track which is not a right of way must leave the ground if requested to do so and that

> "if he refuses to go the landowner may use reasonable force to eject him."

The submission also cites the second edition of Professor W M Gordon's "Scottish Land Law", which says:

> "it has sometimes been said, and is sometimes still said, that there is no law of trespass in Scotland, but as Lord Trayner pointed out in the course of the argument in Wood v North British Railway this notion is 'loose and inaccurate'. There is no doubt that a trespasser, that is, a person who has entered land without right or invitation or permission, may be required to leave."

The submission further cites the "The Laws of Scotland: Stair Memorial Encyclopaedia", which says:

> "Trespass consists of temporary or transient intrusion into land owned or otherwise lawfully possessed by someone else".

How would you summarise those sources, given that they are quite definite that such a law exists?

Alan Blackshaw: The Trespass (Scotland) Act 1865 is of the greatest significance because it was the first opportunity that Parliament had to introduce a law of trespass. If it had been the intention to make trespass an offence, that was the time to do it. Proposals were made to that effect, but a conscious decision was made to limit the provisions to encampment and fires, for example. The statutory position was settled in favour of the public back in 1865.

As for the use of force and the Law Society's evidence, as I said, until 1961—as the SLF agreed—there was no question of any use of force. That has developed more recently, through the reinterpretation of cases such as Wood v North British Railway and Bell v Shand, which were not thought to be important before that time. There is a great lack of case law. I would be pleased to comment on the particular cases if you wish.

The Convener: I do not think that we have time for that. You will note that the Law Society offered to provide us with the body of case law. My concern is that I would have liked to have known about an existing body of case law before now. If you can provide us with any information on whether such a body of case law exists, we would find that helpful.

Perhaps we can finish on this point—we could talk about the subject for a long time. The committee is perhaps no clearer about the issue than we were when we began. As lay people, we are trying to establish whether the law is unclear. Would it be reasonable to say that the Law Society has taken material from various sources to support its point of view, but that anyone could pull together a list of institutional writers to support a view either that a law of trespass exists or that it does not?

Alan Blackshaw: I agree. Of course, although the writers that the Law Society has quoted—Professor Reid and Professor Gordon—are people of great authority, they are not institutional writers; they are not authoritative in the sense that earlier institutional writers, until Hume, were.

The Convener: Is it misleading to refer to the common law in this context? The suggestion that what we are talking about is the common-law position has been bandied about all morning.

Alan Blackshaw: There are legal interpretations, but they are from the point of view of the law of property. When Tom Johnston wrote his letter about the liberty to go on land, he was talking not from the point of view of the law of property, but from the much wider point of view of public access to land. One cannot get at the issue by trying to extract opinion from books about the law of property; the committee needs a major statement on what the law on public access to land is. That is a different thing.

SNH believes that the law of public access derives from the law of property, whereas we would say that it derives from more general issues of law, such as civil rights and fundamental human rights. Most of the law about implied consent—the key theme that illuminates trespass in Scotland—over large areas of the countryside is part not of the law of property, but of the law of obligations, which is a different volume of the "The Laws of Scotland: Stair Memorial Encyclopaedia".

That illustrates one of the problems of relying on books on the law of property. Although Professor Reid's book has great authority, he interprets trespass as a civil wrong. In 1959, the Law Reform Committee for Scotland stated clearly and on the basis of strong judicial opinion that trespass is not a civil wrong. If the committee relies on Professor Reid on that narrow point—most of his book is about other things—it must allow for the fact that he believes that trespass is a civil wrong, which is not the view that we would take based on the statement of the Law Reform Committee. Members should bear in mind the fact that Professor Reid's opinion about the use of force would be different if he thought that trespass was not a wrong of any kind.

Bill Aitken: When was Lord Trayner's judgment made?

Alan Blackshaw: It was not a judgment; it was an aside. It is not in the record of evidence; it is in the summary at the beginning of the case. Lord Trayner said that the idea that there is no law of trespass is "loose and inaccurate". It is important to realise that the case was about a taxicab at Edinburgh Waverley station, which is subject to the railways legislation—specifically section 16 of the Railways Regulation Act 1840. The taxicab driver was arrested by the railway police under the provisions of that act. At issue was whether it was reasonable for the railway police to arrest him for a breach of the peace. Therefore, when you interpret what Lord Trayner said—as it is given in square brackets, it is not even clear that he said it in that case, and he may have said it somewhere entirely different—you have to have regard to the fact that the case was about commercial activity, within buildings and on operational railway land. No one is disputing that people can be trespassing in those circumstances, but that has nothing to do with harmless public access to land, which is what we are discussing and on which, so far as we know, there have been no cases.

Bill Aitken: That is clearly the difficulty. It appears that you are heavily reliant on the 1979 case of Malone v Metropolitan Police Commissioner. Lord Justice Megarry stated that what is not prohibited is permitted, but there do not

seem to be any contemporary Scots judgments.

Alan Blackshaw: This is another point about Professor Rowan-Robertson's comments. He said that freedom to roam was not upheld by judges; I do not think that there have been any cases on freedom of access in general. The case to which he referred was about a narrow strip of land at Seton House in Aberdeen. There is no case law. The Megarry principle is one of the three or four most fundamental principles of both English and Scottish law: it runs through the totality of the common law.

Bill Aitken: When was Lord Trayner's opinion—I do not mean legal opinion—expressed?

Alan Blackshaw: In 1899. As I said, Lord Trayner did not express the opinion in the case; it is an editing note. He may have expressed the opinion 20 years before about something else—we do not know.

Bill Aitken: You referred to taxicabs rather than hansom-cabs. I presume that that enables us to identify the period involved.

Alan Blackshaw: I think it was a hansom-cab. I stand corrected on that.

The Convener: We will move on to the access code.

Alan Blackshaw: I would like to add a comment. We talked about the law of trespass. There is clearly no law of trespass in the sense in which that term is normally used. On the rest of the civil law of trespass, there is no integrated law of trespass. It is a question of considering various other general aspects of law that are relevant to trespass. The most important is implied consent, which is in the law of obligations. That means that someone is a trespasser only if they go on land either unknown to the owner or if he effectively objects. Most people who go on land are not in those categories, so they are not trespassers. That is an important point. We take the view that most people on land are not trespassers; therefore there is a general freedom and because they are not trespassers they are on the land lawfully. There is no law of trespass in the common law, any more than there is in the statute law.

Stewart Stevenson: I am sure that the Ramblers Association Scotland would like to welcome, as I did, the willingness of the NFUS to continue discussions on the code in the access forum.

In the light of evidence that was given to various committees, which I know you have tracked, and of what has been said today, do you have anything to add to your previous comments on the balance between the bill and the code?

12:45

Dave Morris: I welcome the NFUS's willingness to rejoin the access forum and the shift in its views on the code. I mentioned to the Rural Development Committee that we should use the highway code as a model for the outdoor access code. The highway code explains clearly that the use of the terms "must" and "must not" is related to existing statutory provisions. I differ from the NFUS on the matter. We want the bill to state that responsible access is defined in the access code and that when the code uses the terms "must" or "must not", it refers to statutory provisions.

Stewart Stevenson: With the exception of section 9(2)(a), which is about commercial access, section 9(2) is an example of a provision that might be removed from the bill and put into the code. I invite the witnesses' comments on that section as an example of what might be removed.

Dave Morris: It is important to go through the bill line by line and take out measures that are, in our view, not compatible with the common-law position. From section 9(2), we would remove paragraph (a), which refers to business activities, paragraph (c), which refers to

"taking away anything on or in the land"—

I mentioned that paragraph at the meeting in Inverness in relation to picking blaeberries—and paragraph (e), which refers to

"damaging the land or anything on or in it".

We have queries about other paragraphs in subsection (2). We would like to suggest a possible amendment to subsection (2), which Lucy Burnett is working on and which would wrap up most of section 9(2).

Stewart Stevenson: Would you like to make similar specific suggestions about other sections?

Dave Morris: We want the powers that are given to local authorities by section 11 to be removed. Section 12 provides a byelaw-making power over all land, which is adequate for local authority purposes. Section 11 would be a huge burden on local authorities because land managers would pressurise them continually to consider whether areas should be excluded. Section 11 is unnecessary because it is sufficient for local authorities to have an advisory and management role, although we would like them to have a power similar to that given to SNH by section 26.

Stewart Stevenson: Local authorities will be obliged to establish local access forums. Would an overarching national access forum relieve local authorities of some pressures? A national forum could develop general principles, which could be applied by the local access forums.

Dave Morris: Yes. A national access forum is essential. We would like the bill to refer to that. It should be supported by SNH, as has been the case in the past. We are a little concerned by the minister's remarks in last week's meeting about the role of local access forums. We envisage those forums as strategic bodies that will discuss what is required for cycling, horse riding and walking—they will not be dispute-resolution bodies. Local authorities must be able to resolve disputes efficiently and effectively. They should not pass the ball on to the local access forums, which should have a strategic role.

The Convener: I keep meaning to ask whether there are any issues for cyclists and people using land for other activities, such as sledging and driving pony traps. Do you have any concerns about the access provisions for such activities? Does the bill hinder those activities?

Dave Morris: There is a serious problem in relation to cycling and horse riding. How people doing those activities will get through areas where there are farm buildings has still not been resolved. Farm buildings and steadings lie within the definition of curtilage. We accept that people may not wish to go through such areas and that diversionary routes need to be provided, but at the moment that is not likely to happen. No obligation is being placed on farmers to provide a diversionary route if they want people to go round farm buildings. For cyclists and horse riders, that is extremely important, because they have to use the farm tracks to gain access.

Sledging and cross-country skiing were mentioned when the committee met in Inverness. Golf courses are particularly important for those activities when they are covered in snow. An exclusion is built into the bill at the moment to say that people cannot use a golf course for recreational activity. We think that that should be corrected and the issue addressed satisfactorily in the code.

The Convener: We noted that point when you made it at an earlier stage.

I note what you say about farm buildings. That aside, is there any question in your mind that cyclists might be deemed not to be covered by the access legislation?

Dave Morris: It is always in our minds that activities such as cycling and horse riding are provided for in the bill.

The Convener: My next question relates to page 37 of the access code, which covers where to get help and information at a glance and is entitled, "Dealing with irresponsible behaviour". I asked the SNH witnesses about the line that says:

"if the person persists in behaving irresponsibly, the land manager can ask the person to leave and seek the assistance of the local authority or the Police".

I am interested in this question from the perspectives of both the person who is exercising their right to access and believes that they are doing so responsibly, and the landowner who may not think that the person is exercising that right responsibly. How is that conflict to be resolved?

I do not really think that there is a role for the police and I would not want anyone to interpret the bill as meaning that there was a role for the police in resolving such disputes, unless a criminal activity were taking place. I appreciate that disputes would arise in only a minority of cases. Do you agree that the reference to the police should be removed, except in cases involving criminal activity?

Dave Morris: It is difficult to remove that reference. As I said in Inverness, the reality is that the police will come out. I referred to a case south of Edinburgh, where I know that the landowner does not want the right of way used. That landowner simply rings up the police and the police come—on every occasion, as far as I know. The police tell me that they are there because the landowner has said, "I have an incident on my ground." The police have to come out and investigate that incident. As things are today, the police can be called out on to the ground. Of course, what action they then take is another matter. When they have turned up, I have told them that the landowner is wasting police time and that the police have no role in such a situation.

The Convener: Perhaps we should take this opportunity to put a stop to that. The police resource should not be used in those circumstances. There is no locus for the police to charge anyone where no crime is being committed. I suggest that that is an abuse of police resources. I want to try and roll back from that, but the fact that that sentence remains in the access code could encourage landowners to call the police in such situations. There is no corresponding right for the person who has been prevented from accessing the land. They cannot call the police, according to the code. Only the landowner can do that.

Dave Morris: If the access taker had a mobile phone, they could ring the police to say that they were being intimidated by the landowner. I did that during the Fife right of way case to which John Mackay referred earlier. When I was walking up the route and was intimidated by the landowner, I called the police and discussed it with them that evening. It works both ways.

The Convener: For the record, it is not stated in the code that the right applies equally to the citizen and the landowner.

Dave Morris: Maybe there is a case for the code saying that either the access taker or the landowner could call the police if they felt the situation deserved it, particularly if behaviour was becoming intimidatory.

The fundamental thing that will change is the situation where people have had a confrontation with a land manager who has been awkward. At the moment, the problem is that if they ring up the local authority the following morning to say that they have had that kind of difficulty, the answer will be, "Is it a right of way?" Even if it is a right of way, it is only a claimed right of way and they are into years and years of dispute.

We hope that the situation will transform completely. When people ring up on Monday morning, we want the local authority to say, "You were walking through those fields and you had some kind of incident. We will now investigate and go and speak to the farmer and we will use the code to discuss with the farmer why the situation arose."

George Lyon: In earlier evidence, you suggested that you wanted a national access forum to be set up rather than local access forums. Why do you think that? It seems to me that the local access forums have a greater chance of resolving local issues than any pronouncement from on high has. Our experience during the foot-and-mouth epidemic backs up that view, as we saw clearly in my constituency, where there were problems with landowners who refused to open up paths due to the restrictions. It was the local groups coming together that resolved the problem. The minister could stand in Parliament until he was blue in the face and say that landowners should lift restrictions, but it did not solve the problem. I am intrigued as to why you suggest that a national access forum would be a better proposition than local access forums. It seems clear to me that local access forums are pivotal.

Dave Morris: I am sorry—I do not think I explained myself correctly. I am not arguing against local access forums. I am saying that there needs to be a national access forum in addition.

I agree that when there is a crisis such as foot-and-mouth, the local access forum can be valuable. However, the real problem in relation to foot-and-mouth is that there is no proper protocol or guidance from central Government on how to deal with it.

The Convener: As there are no further questions, would you like to make a few brief statements in conclusion?

Dave Morris: I want to say something about the distinction between access taken under statute and that taken under liberty. That is relevant to the commercial groups issue.

This morning, we heard from the NFUS the idea that someone can be taking access on the core path under the statute, but when they walk off the path, they would be exercising access under the liberty. That is different from the NFUS's position in its original submission on the draft bill, which said that it would be irresponsible to walk off a path. That shows the difficulty. People would feel that they were under a lot of pressure if they were walking off a path. The same is true for mountain guides, who would feel under a lot of pressure if they were seeking access to the hills. They would have difficulty if they were told that they could not go somewhere because there is no right of commercial access.

13:00

If that issue is not resolved, the legislation will fall completely and be unworkable. As I said to the Rural Development Committee, we cannot have part of the population going on to the land, thinking that it is taking access under the statute, while another part of the population thinks that it is doing so under the existing liberty. It has to be the same for everybody. That is why the central part of our argument is that the common-law position first needs to be understood. That is, basically, that one can go on to all land—and water—and engage in virtually all informal recreational activities provided that one does not do damage. That has to be embedded in the statute, not eroded in any way.

My ability and right to walk along a core path should be exactly the same as if I wanted to walk down the margin of a field or down a tramline in that field to look at some standing stones in the middle of it. One's right has to be the same. It is then a matter of providing the detailed explanation of how that should be handled through the code.

Alan Blackshaw: You referred earlier to the Law Society's views, convener. In particular, there is viewed to be a presumption under the law that people cannot go on to other people's land. I wrote a note to the clerk about that. It would be very helpful to mention the legal cases in which that is stated. As far as we are aware, there are in fact no cases to that effect.

In 1892, the matter was debated in the House of Commons. On 4 March that year, James Bryce drew attention to the fact

"that there is no case in our law books of an attempt to interdict any person from walking over open moors or mountain, except of recent date".

The Solicitor General replied:

"The Hon Member has referred to the absence of ancient cases of trespass by way of interdict on uncultivated ground.

> But the law books of Scotland are just as silent on those cases in recent years. I entirely agree with them, because in Scotland there is not in any true sense a law of trespass at all".

It is because there is no law of trespass or any such presumption that that there are no cases—we are not aware of any cases at all.

As for the balance between the public and the landowner, Lord Dunedin made it clear in 1929 that there is a presumption that people must be expected to go on to land. He said:

> "A mere putting up of a notice 'No Trespassers Allowed' or 'Strictly Private' followed, when people often come, by no further steps, would, I think, leave it open for a judge or jury to hold implied permission."

That would not be trespass. I think that Lord Dunedin was saying that the normal state is for people to go on to land, but that it is open to the landowner to object to that. If he does so effectively, that is reasonable. As far as we can see, there is no presumption that people should not go on to land.

The Convener: I thank the witnesses for coming before the committee and for their evidence.

I wish to put one matter to the committee. I am interested in whether the police should be involved at all in cases where there is no criminal activity. I seek the committee's indulgence. I suggest that we write to the police organisations and ask them whether they have a view on whether any increased resources may be involved in that regard. Is that agreeable?

Members *indicated agreement*.

The Convener: Finally, I remind members that our next meeting is on Wednesday 13 February. We will give members a bit of slack for good behaviour and will not start at 9.30. I realise that the past five weeks have been quite an onerous burden on members—I thank you for all your hard work.

At that meeting, we will hear from Pamela Ferguson, who is our adviser in the Crown Office and Procurator Fiscal Service inquiry. It is important that we get back to that inquiry. I am also aware that we are trying to fix up visits, so I ask members to respond about that if they have not done so already.

Meeting closed at 13:03.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178