JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 9 November 1999
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
9th Meeting

CONVENER:

*Roseanna Cunningham (Perth) (SNP)

COMMITTEE MEMBERS:

*Scott Barrie (Dunfermline West) (Lab)
*Phil Gallie (South of Scotland) (Con)
***Christine Grahame (South of Scotland) (SNP)
*Gordon Jackson (Glasgow Govan) (Lab)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
*Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Tricia Marwick (Mid Scotland and Fife) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

THE FOLLOWING MEMBERS ALSO ATTENDED:

Dr Richard Simpson (Ochil) (Lab)
Mrs Margaret Smith (Edinburgh West) (LD)
Ben Wallace (North-East Scotland) (Con)

WITNESSES:

Mrs Micheline Brannan (Scottish Executive Justice Department)
Andrew Brown (Scottish Executive Office of the Solicitor)
Robin Callander (Land Reform Scotland)
Dr George Chalmers (Scottish Council on Human Bioethics)
John Deighan (Parliamentary Officer, Catholic Church in Scotland)
Alan English (Royal Institution of Chartered Surveyors)
Iain Hay (Royal Institution of Chartered Surveyors)
Dr Philip Howard (Scottish Council on Human Bioethics)
Mary Kearns (Chairman, Scottish Council on Human Bioethics)
Elizabeth Leighton (Scottish Environment LINK)
Mrs Joyce Lugton (Scottish Executive Justice Department)
Professor Robert Rennie (Law Society of Scotland)
Andy Wightman (Land Reform Scotland)

COMMITTEE CLERK:

Andrew Mylne

SENIOR ASSISTANT CLERK:

Richard Walsh

ASSISTANT CLERK:

Fiona Groves

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 9 November 1999

(*Morning*)

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

The Convener (Roseanna Cunningham): The committee is quorate. Although I am sure that other committee members will arrive in the next few minutes, I do not intend to delay proceedings until everyone is here.

Although the official reporters are recording this part of our meeting, the committee has agreed to let them have a small break for the first few minutes of the meeting while we discuss how we approach today's proceedings. If the official reporters stop recording now, I will advise them when to begin again.

09:34

Meeting continued.

09:50

The Convener: Members received the *Official Report* of the previous committee meeting only this morning. I tried to obtain it yesterday afternoon in advance of this morning's meeting, because the evidence that we took last week has a direct bearing on what we will hear this week, and it would have been helpful if members had had the opportunity to look through the proceedings from last week and to establish areas on which they might put specific points to witnesses today.

Unfortunately, the report was not available, and I know that that is because of the official reporters' current enormous work load. However, I do not think that the committee ought to accept the situation without making some protest. As Phil Gallie frequently points out, we have a very heavy work load: we are taking evidence on two bills and, from one meeting to the next, our previous proceedings will obviously colour how we approach the next set of witnesses. It is essential that we are in a position to examine carefully the evidence that we have already taken before we proceed with the next set of questions.

With the committee's agreement, I, as convener, want to write to the Presiding Officer, pointing out that the resource problems of the *Official Report* are now creating difficulties for the way in which committees work. It is an issue that needs to be resolved, whether by more staff in the department of the official report or whatever. I do not think that it is reasonable to continue in the fashion that seems to be developing. Do members agree that I should write to Sir David Steel along those lines?

Members *indicated agreement.*

Wafer Scottish Seal Directions 1999 (SSI 1999/130)

The Convener: We now come to item 2, on subordinate legislation. We have been asked to consider the Wafer Scottish Seal Directions 1999 (SSI 1999/130). I am grateful to the clerk for the helpful note that was attached to the statutory instrument.

The note was very clear. In my view, we probably do not need to discuss or debate the instrument at all. Is everyone happy with that?

Unless we do anything, the directions become law, and I can see no reason why they should not.

Members *indicated agreement.*

Maureen Macmillan (Highlands and Islands) (Lab): Fascinating.

The Convener: Fascinating, indeed. You learn something new every day, Maureen.

Adults with Incapacity (Scotland) Bill: Stage 1

The Convener: Item 3 is further evidence taking on the Adults with Incapacity (Scotland) Bill. I ask John Deighan, parliamentary officer of the Catholic Church in Scotland, Mary Kearns, chairman of the Scottish Council on Human Bioethics, and Dr George Chalmers and Dr Philip Howard of the Scottish Council on Human Bioethics to come to the table.

Scott Barrie (Dunfermline West) (Lab): Could I clarify how long evidence taking will last?

The Convener: Forty-five minutes.

Dr Richard Simpson (Ochil) (Lab): I wish to apologise in advance: I have to leave at 10.30 am.

The Convener: I ask the witnesses to introduce themselves to the committee.

John Deighan (Parliamentary Officer, Catholic Church in Scotland): I am John Deighan, parliamentary officer of the Catholic Church. I am grateful for the opportunity to express the Catholic Church's concerns on the bill.

Mary Kearns (Chairman, Scottish Council on Human Bioethics): I am Mary Kearns. I am a solicitor advocate, practising in Edinburgh. I am

chairman of the Scottish Council on Human Bioethics

Dr Philip Howard (Scottish Council on Human Bioethics): I am Dr Philip Howard, consultant physician, gastroenterologist, senior lecturer in medicine and fellow of the Royal College of Physicians of Edinburgh.

Dr George Chalmers (Scottish Council on Human Bioethics): I am Dr George Chalmers, former consultant geriatrician, clinical director at Glasgow Royal Infirmary and fellow of the Royal College of Physicians in Edinburgh and the Royal College of Physicians and Surgeons of Glasgow. I represent not only the council, but CARE—Christian Action, Research and Education—for Scotland and the board of social responsibility of the Church of Scotland, of whose executive I am a member.

The Convener: You will know that we heard evidence last week on the bill, and that many of our questions related directly to aspects of medical treatment, which is dealt with in part 5. We have asked you here because you represent organisations that are taking a rather different view from that advanced by the Scottish Executive as to the impact of some sections of the bill.

I propose to allow 45 minutes for this part of the committee's proceedings. I ask the witnesses to forgo making presentations. I assure them that all committee members have read the written submissions, and wish to ask questions on what has already been put forward. You may decide among the four of you who is best placed to answer the questions.

I ask Tricia Marwick to begin. You had specific concerns last week, which you put to the witnesses then, and you probably want to explore them now.

Tricia Marwick (Mid Scotland and Fife) (SNP): As Roseanna said, I was putting specific questions to witnesses last week. They concerned section 44, which refers to nutrition and hydration. I put it to the witnesses that some of your submissions stated that subsection (2) would allow doctors to withdraw nutrition and hydration. That might bring about the death of patients who were not already dying.

Those questions were answered by the Executive, but I would like to hear from you exactly what you think are the implications of that subsection.

Mary Kearns: The main concern is about putting nutrition and hydration under subsection (2)(b). The setting up of a feeding tube, peg tube or whatever is covered by paragraphs (a) and (c). The effect of putting nutrition and hydration in paragraph (b) is to make food and fluids themselves medical treatment as opposed to the tube or mechanism for delivering them. We are not so much concerned about doctors refusing that treatment as we are about section 47, which covers proxy decision makers refusing it. They have the power under that section to refuse medical treatment. If food and fluids are included in the definition of medical treatment, they are given the power to refuse them.

I will now pass you over to Dr Philip Howard, because he is a consultant gastroenterologist and has a particular slant on the question.

Dr Howard: The first thing to make clear is that there is no ethical obligation to provide food and fluids to a patient who is in the process of dying. It is usually not the practice in hospices, or with dying patients, to place drips or insert tubes, because it is normally regarded as unduly intrusive, unless it is to provide comfort to the patient.

The situation is completely different if the patient is not dying. If fluids are withdrawn from such a patient, it is not a question of whether that might cause their death—it will cause their death. Therefore, we are very concerned that the provision of hydration and nutrition, however administered, is to be regarded as medical treatment, in the sense that it can be refused. If it is refused to a patient who is not in the process of dying, it will cause their death. The denial of fluids to a patient who is not dying is, in my opinion and, I am sure, in that of Dr Chalmers, barbaric.

10:00

It is an uncomfortable experience to deny fluids and to cause a patient to become dehydrated. If any member of the committee does not believe that to be the case, do not take any fluids for two or three days—a normally hydrated person, if deprived of fluids, will take 12 to 14 days to die of dehydration.

Tricia Marwick: When I put those points to the Scottish Executive solicitors at last week's meeting, they said that the matter is currently dealt with under common law, by application to the Court of Session. It was their view that the withdrawal of nutrition and hydration—even after the enactment of the bill—would still be dealt with on petition to the Court of Session. Do you accept that? I see the witnesses shaking their heads.

John Deighan: It is clear from the bill that there is no such safeguard, nor is there an onus on anyone to go to the Court of Session. The bill explicitly says that, on the word of a welfare attorney, the medical practitioner must withhold treatment that he may deem to be necessary. Section 1 is supposed to offer protection against that; however, it offers only some protection in the

case of an action. In this case, we are talking about an omission and there is no accounting for omissions in the bill at all.

Mary Kearns: Section 47(2) shows that far from there being any safeguard, the reverse is true. Section 47 takes authority away from a doctor to treat a patient in a case where a proxy decision maker refuses consent. Subsection (2) goes on to say that, if the doctor disagrees with that decision, he can appeal to the Court of Session against the refusal of treatment by the proxy decision maker.

Tricia Marwick: I have one more point. It was suggested that all that the bill—or the act—will do is to regularise the existing situation and clarify existing practices.

Mary Kearns: No. I think that Dr Chalmers and Dr Howard have a view on that point.

Dr Chalmers: I wish to address the question of clarification as, far from clarifying the situation, the bill muddies the waters considerably.

Such decisions are not normally made in a vacuum. They involve discussion with welfare attorneys, relatives and members of health care staff. Decisions in most cases will not be contentious—the way ahead will be perfectly clear. However, in the most difficult cases, the welfare attorney—or whatever other proxy is envisaged—will be given the authority to refuse treatment that might well be considered essential by the medical people involved.

A specific example is of a patient who is terminally ill and who has been receiving good pain relief. That patient fractures a femur through an area of cancerous infiltration and is in extreme pain that cannot now be controlled. The only reasonable means of controlling that pain would be to carry out surgical fixation of the femur.

According to the bill, if either the patient, in an earlier statement, or the welfare attorney refuses that treatment, they are perfectly at liberty to say, "No. Surgery is not to be done. Anaesthetic is not to be given." If that decision were made, the patient would be condemned to pain that could be relieved almost completely within a fairly short time. That is a medical decision which I believe cannot be made by someone who is going either by the opinion of the patient or, indeed, by their own perception, which has heavy subjective and emotional elements. Only someone who has the knowledge, the experience and the judgment to know the right way forward can cut through the situation.

My main problem with the bill is that, in such decision making, responsibility will fall upon people who have least background upon which to draw in making a right and objective decision, as opposed to a subjective decision based on their own opinion or on the patient's previous opinion. That is my problem: the person upon whom authority rests has the least experience and knowledge, yet is given the responsibility for what I call the executive decision.

That is where I see a difficulty. If there is to be no responsibility upon that person, they will be answerable to no one except the incapacitated person who is, by definition, incapable of dealing with that answerability. While there is no duty of care on that person, a doctor has a duty of care and is responsible to the General Medical Council and, indeed, to the law. If a doctor makes a bad decision, he will have to answer for it. Is a welfare attorney answerable to anyone for such a decision? Will a welfare attorney have a duty of care?

The Convener: Do you want to come back in, Trish?

Tricia Marwick: No, thank you.

Dr Simpson: Would your point be answered if the principles of the bill included a general duty of care, that any decision to give or withhold treatment should be beneficial to the patient—or that such treatment should be the most beneficial, as often more than one treatment is available? At the moment, the bill says only that it should not be restrictive.

Mary Kearns: That would not be sufficient to answer our general point, as the issue of benefit has been slightly clouded by common law. That is where the Law hospital and Bland cases are probably relevant. In those cases, it was viewed as a benefit to deny food and fluids and to cause the death of patients in a persistent vegetative state by starvation and dehydration. The application of the common law definition of benefit on its own is now problematic.

However, a duty in relation to omissions could be inserted—I think that that is the main problem with the bill. Such a duty to do or to consent to what is necessary in the circumstances to safeguard or promote the physical and mental health of the adult could be inserted. That duty is incumbent upon the doctor, in terms of the bill. The problem with the bill is that the power to make medical decisions is being taken away from the doctor and given to someone who does not have that duty. That is the issue.

The Convener: Does anyone want to pick up on that point?

Maureen Macmillan: Many of the points that I was going to raise have been covered.

Do the witnesses agree that they are worried not only about the refusal of food and fluid? Do they think that there might be other implications? Medical treatment could be withheld, and there

could be a delay because the doctor and medical authorities would have to go to court to allow certain treatments to proceed. Do the witnesses want to see that reversed? They seem to prefer the welfare attorney having to go to court if they want their wishes to be followed.

Mary Kearns: We have tried to come up with amendments that give patients the same or similar protection as that which they have at the moment, so that the protection available to incapable people is not reduced.

Maureen Macmillan: Would not putting everything in the hands of the doctors create a new problem, as the person appointed by the adult with incapacity would have no say?

Mary Kearns: One would not need do that, as the best approach is a team approach—the doctor, the carers and the welfare attorney would all be involved. However, someone with no responsibility should not be given the power to overrule someone who otherwise would have had that responsibility.

Maureen Macmillan: How would you like the procedures to develop?

Mary Kearns: We drafted amendments that we thought would cover the point that there is no duty of care.

Maureen Macmillan: Could you talk me through those amendments?

Mary Kearns: Yes—they are in our main submission. We have tried to be as least obstructive to the general principles as possible. We have accepted the idea of proxy decision makers, but they should be subject to appropriate safeguards. That is at the root of the problem. Our first proposal is to remove the reference to nutrition and hydration from section 44(2)(b).

The Convener: I ask members to guard against getting too involved in discussing potential amendments, as we are not yet at that stage of the bill. At this stage, we are required to draft a report on the principles of the bill. We will come back to an examination of potential amendments, which I do not want us to get too bogged down in if we can avoid it.

Scott, we have begun to talk about proxies and liability. I think that you wanted to come in on that area, as did Ben Wallace, and that it is time to bring you in now.

Scott Barrie: In the papers that the witnesses kindly submitted, they highlighted their feeling that there are deficiencies in sections 73 and 74, in relation to what they call power without responsibility. Will they talk us through that point and highlight what the issues are?

Mary Kearns: Yes. However, I will cover section 1 first, which was mentioned by other witnesses who gave evidence. I have only looked quickly at their evidence, so I apologise if I misquote them. However, I understand that those witnesses said that the general principles in section 1 would protect incapable adults. I think that they were talking about section 1(2), which John Deighan alluded to earlier and which states:

"There shall be no intervention in the affairs of an adult unless the person responsible for authorising"—

in our case, that would be the proxy decision makers—

"or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention."

Our problem with that subsection is that an intervention is not defined in the bill. An intervention is defined in the dictionary as an action. The explanatory note for the subsection refers to anything that can be done—or something to that effect. We are talking about protection against actions that will not benefit the incapable person. There is no protection in the general principles against refusals, or decisions not to act, that will not benefit the incapable person.

We do not think that section 47(6) contains sufficient protection, because we cannot envisage that it is likely that doctors in busy psychogeriatric wards in Inverness will be able to go to the Court of Session. [*Interruption.*]

The Convener: Please clarify which subsection you are talking about. I cannot see a section 47(6).

Mary Kearns: I beg your pardon. I am referring to section 47(2).

Ben Wallace (North-East Scotland) (Con): Part 5, section 47(6)—is that right?

Mary Kearns: No, section 47(2). I beg your pardon. I quoted the wrong subsection number.

Phil Gallie (South of Scotland) (Con): It is an amendment that you proposed.

The Convener: Are you referring to your own amendment?

Mary Kearns: No. I am referring to section 47(2) of the bill.

Ben Wallace: It is in part 5 at page 29.

Mary Kearns: Section 47(2) is in part 5. It states that doctors may go to the Court of Session if they do not agree with a welfare attorney's decision or that of another proxy decision maker to refuse treatment.

Dr Chalmers: May I comment on that?

The permission to apply to the Court of Session may well inhibit the doctor concerned from pursuing a course of action that will undoubtedly

be expensive and time consuming. He may feel it easier and less disturbing for his department, as well as for his staff and even for other people, simply to collude with a decision with which he does not necessarily agree completely. It is easier to agree than to take difficult action. It is time consuming and expensive if the only redress is to apply to the Court of Session. I think that many doctors, being human, would prefer to avoid that action.

Ben Wallace: I agree. There is a conflict in the duty of care if the doctor has to go to the Court of Session. As a remedy, would you suggest that it should be the other way round—that, if the proxy or the welfare attorney disagreed with the doctor's duty of care or medical prescription, that person should have to apply to the Court of Session?

10:15

Mary Kearns: Our view is that proxy decision makers should be made responsible for their actions by being given a duty of care. If that is done, proxy decision makers will have an obligation to seek medical advice from a doctor.

Dr Chalmers: And additional medical advice, if necessary.

Mary Kearns: As they would be subject to a duty of care, if they did not agree with the medical advice, they would have to seek other such advice.

Ben Wallace: When things break down and end up in court, would you rather that the doctor had the right to appeal against the word of the proxy decision maker?

John Deighan: We would like the burden placed on the person who disagreed with good medical opinion. If they went to court and were scrutinised, they would have to show why they acted in the face of medical advice.

Ben Wallace: That is subsection (2) reversed.

John Deighan: Yes.

The Convener: Good medical advice will not always be in accord with the principles that you would presumably wish to espouse. When we began our consideration of the bill, some committee members, such as Tricia Marwick, expressed concern about the fact that the bill would take away the right to make decisions from family members and so on. Paradoxically, you seem to be saying that you want that as well. You want the doctor to be in the key position, but a doctor will not always give the advice that you will want to hear.

Mary Kearns: In our amendments, we did not propose changing that provision, as we think that it is sufficient to propose a proper duty of care and leave it to those involved to sort it out. If somebody has a duty of care, they will have to take medical advice in order to make a proper decision.

The Convener: If the medical advice to switch off support, for example, is not morally acceptable to an individual, there might be a conflict. The medical advice and the moral imperative will not necessarily be the same.

Mary Kearns: Whether an intervention is of benefit would be covered by the general principles. Ventilation—which is an intervention—would be covered adequately by the bill; we do not have a problem with that.

Dr Howard: As doctors, we are concerned about who is accountable for medical decisions. Because of our knowledge and because of our experience of making such decisions, we are in a good position to make decisions. In civil law, and according to our professional code of conduct, we are liable and accountable for our decisions.

Whatever decision is made about the care of mentally incapacitated persons, whoever makes it should be as responsible and accountable as the doctor. In practice, that means that if an attorney disagrees with the doctor—as he might—it is up to him to prove that his refusal of treatment is medically appropriate.

The Convener: Or his insistence on treatment.

Dr Howard: Or his insistence, as this will—as you rightly say—work both ways. Some attorneys will refuse treatment for the patient. We are concerned about nutrition and hydration, but there are other forms of treatment, such as insulin for diabetics. We are also concerned that attorneys may insist on over-zealous or relentless treatment. Because of a doctor's experience, his knowledge of medicine and of the patient's condition, he will be in a good position to make such decisions, especially because, as a professional, he is detached from the patient.

However, an attorney or a family member—particularly if they are dealing with sudden or terminal illness—may be emotionally involved and not in the best position to make such a decision. If I, as a doctor, make a decision, that is my personal, professional and civil responsibility. However, an attorney who makes a decision that is perceived as causing or leading to the death of a patient is in a difficult position, in so far as they will have to live with that decision for 20 or 30 years. There may be criticism from other family members.

Pauline McNeill (Glasgow Kelvin) (Lab): You said that you wanted a duty of care attached to the attorney so that they could make the decision in that knowledge. You are now saying that the doctor is more qualified to take the decision. Who

do you want to take the decision?

Dr Howard: Because of his qualifications and experience, the doctor should decide what—in medical terms—is in the best interests of the patient. Whoever decides whether the treatment takes place should be accountable and responsible for that decision.

Pauline McNeill: Who should that person be?

Dr Howard: If the attorney has that responsibility, he must be held accountable if he goes contrary to medical advice and opinion.

Pauline McNeill: Who would you prefer to make that decision, the doctor or the attorney?

Dr Chalmers: We return to the concept of how a decision is made. The idea around this room seems to be that one person will make a final decision. That is not how medical care works. The first procedure is to find out the facts, which may include the perceptions of relatives, the preferences of the patient and a range of issues other than the condition and its treatment or the cessation of treatment. The decision is not simply taken by one person.

Pauline McNeill: We understand your point that information should be taken from a number of sources.

Dr Chalmers: An executive decision must be made.

Pauline McNeill: I am trying to understand who you would prefer to take that decision. In other words, who should give consent in the place of the incapable adult: the doctor or the attorney?

Mary Kearns: Doctors can make decisions. If a patient chooses to appoint an attorney, the attorney can, under the bill, make decisions. We do not have a problem with that. It is imperative that attorneys make decisions for which they are responsible. To do that, they need to take medical advice. If they do not agree with the medical advice, they can seek other medical advice—there is nothing to prevent them from doing that. The decision should be a properly informed and they should be responsible for it. Could I return to an earlier point?

Pauline McNeill: No, not yet.

You talked about hydration, and I think that Dr Chalmers referred to situations in which consent is needed for an operation. Those are two different scenarios—medical treatment and sustenance. Do you think that applying the duty of care, as you have described, would solve problems that could arise in both those situations?

Mary Kearns: Yes. I was asked to talk about protection and did not get as far as section 73, which covers the duty of care. Shall I explain why I think that the section does not give a duty of care and why it would make all the difference? I do not have a problem with the concept of asking a friend or relative to make medical decisions. The difficulty is that the duty—as there would be on the doctor—is not spelled out, so what we would be giving power without responsibility.

Section 73 deals with limitation of liability. It is back to front—not the way that one would expect to see a provision on liability. It says:

"No liability shall be incurred"

by a proxy decision maker

"for any breach of any duty of care"—

which is not spelled out in the bill—

"or fiduciary duty owed to the adult if he has . . . acted . . . or . . . failed to act"

reasonably and in good faith.

That is insufficient, as it limits liability for breaches of duties that are not spelled out. The problem is that, if there is a criminal omission under criminal law or negligence under civil law, before somebody can be prosecuted or sued for a breach of duty, it has to be proved that they have a duty in the first place. Under the bill, somebody could not be prosecuted for refusing or omitting treatment—or omitting to make a decision about treatment—as there is no duty that they could be sued or prosecuted for breach of. The bill removes the protection of civil and criminal law. That is why, in our amendments, we have tried to turn it round and say—

The Convener: Can we avoid getting into the detailed amendments? You would like a duty of care put into the bill—we understand that general principle, even if at this stage we are not into the business of discussing detailed ways in which we might achieve that.

Christine Grahame (South of Scotland) (SNP): I wish to clarify some points. Dr Chalmers, you referred to withdrawal of nutrition and hydration. Do you think that that should be done only if somebody is dying?

Dr Chalmers: I think that it was Dr Howard who raised that point and I would prefer to pass it to him.

Dr Howard: If a patient is dying from a terminal illness, the provision of food and fluids may not be appropriate and may even be regarded as intrusive. When a patient is not dying, the withdrawal of fluids in particular will lead to the patient's death.

Christine Grahame: I understand that, but are you saying that hydration and nutrition should never be withdrawn from people who are in a persistent vegetative state?

Dr Howard: The withdrawal of fluids, even in the case of PVS, is done with the intention of causing the death of the patient.

Christine Grahame: Should it never be done?

Dr Howard: It should never be done with the intention of causing the death of the patient.

Christine Grahame: I see. It is an area in which definitions—dying, for example—are difficult. On the general principles, section 1(4) says that account shall be taken of certain factors in

"determining if an intervention is to be made".

Intervention has not been defined; are we accepting that it means the administration of nutrition and hydration by artificial means?

Mary Kearns: Yes.

Christine Grahame: Section 1(4) says that

"account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained".

I take it that your view is that, if I were to make it clear that I do not wish to be given fluids and so on if I am ever in a persistent vegetative state, you would still believe that I should have fluids and so on administered.

John Deighan: The Executive has stated that it does not wish euthanasia to be introduced. The scenario that you have described represents euthanasia.

Christine Grahame: The bill says that the wishes of the adult should be taken into account. Are you saying that in no circumstances should the removal of feeding by artificial means—

John Deighan: To deem it to be of benefit to remove hydration and nutrition is the Law hospital scenario, but—under the bill—without the court scrutiny.

Christine Grahame: I asked a straight question. Are you saying that in no circumstances should hydration and nutrition be withdrawn?

John Deighan: I would say that in no circumstances should they be withdrawn. However, that scenario has been presented under common law and, in the particular situation that you describe, they can be withdrawn. To deem the removal of hydration and nutrition to be of benefit is the Law hospital scenario but—under this legislation—without the court scrutiny.

The Convener: Is your general problem that you see common law going in one direction and you want the bill effectively to stop it going where it looks like it is going?

Mary Kearns: The position is that Law hospital—in a difficult case; no one denies that—introduced the prospect of passive euthanasia for PVS patients. The trouble is that it established the principle that it was all right to starve to death an incapable person who was not otherwise dying. As John Deighan says, the bill enables that principle to be applied to any incapable patient.

10:30

The Convener: I will take that as a yes.

Mary Kearns: Yes.

The Convener: You would like the bill to be amended to stop the common law going in the direction in which you think it is going.

John Deighan: To stop it going further in that direction.

Tricia Marwick: Do you think that removing nutrition and hydration from the definition of general medical treatment would go some way to removing the problem that you perceive?

Mary Kearns: It would go some way to doing that, but it would still not make proxy decision makers accountable or responsible for their decisions.

Tricia Marwick: Would giving proxies that duty of care and removing hydration and nutrition from the definition of medical treatment go some way to allaying your concerns?

Mary Kearns: Yes.

Dr Howard: The definition of medical treatment in the bill is all-embracing. It includes medical, optical and nursing procedures and treatment. We would distinguish between medical treatment—medical, surgical and dental procedures and treatment, which are designed to safeguard the health of the patient—and nursing care. In the bill, nursing care—whose function is to promote the dignity of the patient through such things as hygiene and cleanliness, and to safeguard their well-being and comfort through such processes as hydration, psychological support, palliative care and so on—is included in medical care.

We strongly believe that there is a standard of care—broadly speaking, nursing care—that ought not to be refused patients. There is a standard that every patient, even incapacitated patients, has a right to expect and that nurses have a duty to provide. Ambiguity is caused by lumping together medical and nursing care.

Phil Gallie (South of Scotland) (Con): Your organisation contains a large number of doctors and others who are closely associated with the medical profession. Your submission describes the current position and suggests that doctors have to follow strict rules on the treatment of incapable adults. Is it your view that we should stick with the status quo rather than pursue this

legislative process?

Your document says that the proposals could allow an unscrupulous or inexperienced doctor to collude with others. Given that you recognise that there could be unscrupulous doctors, are you suggesting that the status quo could advantage unscrupulous doctors—perhaps with a view to experimentation?

Mary Kearns: We are trying to propose amendments that do not damage the general principle of asking other people to make decisions on one's behalf but that put in safeguards to allow that principle to operate safely.

I think that the second point was on whether there are unscrupulous doctors.

Phil Gallie: Your document says that there could be unscrupulous doctors.

Mary Kearns: I went on to say that we recognised that the vast majority of doctors, relatives and carers and so on would be completely scrupulous and would want only the best for the incapable person. The purpose of legislation is to deal with people who do not rise to that standard. It is true that there are some unscrupulous people.

Dr Chalmers: In any profession.

Phil Gallie: Is it fair to say that you are, in general, in favour of the bill, but that you want an added level of responsibility injected into it?

Mary Kearns: Yes, we want it to safeguard and protect incapable people to the same extent as they are protected now.

Dr Howard: That said, there is a lot to be said for the status quo, not least because cases rarely come before the courts—the public must be in broad agreement with the way in which the profession behaves. Our concern is the responsibility and accountability for decisions, regardless of who makes the final decisions.

As doctors, we are also concerned with the practicalities. For example, when a patient comes into hospital with a head injury, the doctor has to make a decision. An anaesthetist managing an intensive care unit has to make decisions several times a day—day or night. Neurosurgeons or consultants in intensive care may do ward rounds once or twice a day and have to make daily decisions. Will the bill mean that the surgeon, anaesthetist or physician must contact the attorney every time a decision is made? As for responsibility, a consultant on duty has to have a bleep and be available; will the bill mean that an attorney, too, will have to make himself available, attend ward rounds and meet doctors frequently?

Phil Gallie: I accept that medical opinion must reign supreme in emergencies. There is no question about that and I do not think that that is what the bill is trying to address.

Given the advance in technology, do doctors feel comfortable with the role that is expected of them in making judgments about sustaining life where some might say life is not sustainable?

Dr Howard: Medicine is becoming very complicated. It seems that you will place a very onerous responsibility on attorneys. I am trained in gastroenterology and general medicine, but would feel uneasy about making decisions about neurosurgical, burns or trauma patients, for example. Attorneys, who will usually have no medical responsibility, will have to make such decisions, which are not only professionally but emotionally demanding for doctors.

To turn the question around, are we prepared to allow such an onerous responsibility fall on the shoulders of attorneys? We need to bear in mind that practical consideration.

Ben Wallace: I want to come back on a point made by Christine Grahame. Section 1(4)(a) talks about the past and present wishes of the incapacitated individual. If we introduce your duty of care for the proxy or the welfare attorney, there will be a conflict. In cases where the adult has expressed their wishes, what is the overriding factor—section 1(4)(a) about the past wishes of the individual, or the duty of care, which currently the doctor has, but which, under your amendments, the welfare attorney would have?

John Deighan: The living will was deliberately taken out of this bill. If individuals' wishes are to take precedence, living wills should be re-introduced. If that is the case, let us say it, rather than have it hidden behind the legislation.

Ben Wallace: I am just asking you about this. At present, there is no priority in the bill. Simply inserting a duty of care for the welfare attorney will create a conflict unless priority is specified. Which would you like to be the priority—the duty of care or the present and past feelings of individuals?

John Deighan: The duty of care.

Mary Kearns: There is a serious problem. An incapable patient is by definition incapable of making a decision on their present wishes about the treatment on offer. Could I refer quickly to a case?

The Convener: Very quickly, as we are running out of time.

Mary Kearns: It is the case of Marjorie Nighbert in Florida in 1996. I have a cutting about the case that I can leave with you—I was worried about copyright so I did not copy it. Marjorie Nighbert appointed her nephew, I think, as her welfare attorney. A few years previously, while watching a

television programme showing someone being tube fed, she had said to her nephew that she did not want to be tube fed. When she had a stroke and was taken into a nursing home, and a decision had to be taken, the welfare attorney refused consent to feeding. At one point Mrs Nighbert clutched the arm of a nurse and begged to be fed and given food and water. The case had to go to court to decide whether she had the capacity to overrule her previous directive. The court decided that she did not. I will leave the cutting with you.

Pauline McNeill: I am not happy about this—I realise that it is now on the record. The bill would not allow such a situation to arise, so it is misleading to mention it. I am not happy that that is left on the official record without some comment.

The Convener: It is on the record because it is the evidence that the witnesses wish to give.

Pauline McNeill: I want to put on record that I do not accept that, as the bill stands—

The Convener: Pauline, we cannot dictate to witnesses that they can give only the evidence that we want to hear. People may not like what they hear or consider it appropriate in the context. We will a take decision on that.

Dr Chalmers: We are not trying to establish priorities for one person over another. We are trying to give to each person concerned an equal responsibility for their decisions. If one takes into account—as one should and as, medically, one does—the feelings, opinions and perceptions of the patient, relatives and everybody else, one must weigh them in relation to the situation as it is. If there is any priority, it should always be the patient's welfare and best interests, the promotion of their health and the maintenance of their comfort and dignity. We need to get that right. We are not setting one person against another; we are seeking to concentrate the care of medical and non-medical people on the person.

The Convener: The problem is, of course, that people have different definitions of what is in the best interests of patients. This discussion is about those differing definitions of what might be considered appropriate.

Dr Chalmers: My concern is—

The Convener: I did not put that as a question.

I want to wind up this part of the meeting. I appreciate that people may want to say further things. You are at liberty to follow this up with further written submissions. The *Official Report* of last week's meeting is now available, so you can read the evidence that was given then. The evidence that you have given this week will be part of the *Official Report* of today's meeting and will be taken into account when we produce our draft report, as will written submissions.

10:45

Christine Grahame: Could we ask others to comment?

The Convener: We could write to them and ask them to comment. It would be helpful if we could direct them to the *Official Report* of last week's and this week's meetings. Clearly, that is a practical difficulty that needs to be overcome.

You are suggesting that we should see the British Medical Association, the Royal College of Nursing of the United Kingdom and Professor Sheila McLean.

Christine Grahame: And someone from the Court of Session—for example, a delictual judge, who might see the issue from the point of view of the role of the courts. Matters have been raised—for example, what would be done in an emergency—that mean it would be good to have input from the judiciary.

The Convener: Can we agree that we will write to those organisations and individuals and ask them to comment in writing on some of the issues that have been raised?

Christine Grahame: We should put it to the rest of the committee to ask how members feel.

Can we have a break?

The Convener: No, we do not have time.

Is anyone concerned about asking for those submissions? We will write to them and ask them to respond as quickly as possible.

Phil Gallie: I do not want to keep going over the same ground.

The Convener: Do not do it, because you have said it already.

Phil Gallie: Christine makes a valid point.

The Convener: Yes.

Phil Gallie: Other people could give evidence, so why impose a time scale?

The Convener: The time scale is imposed on us; it is not of our choosing. We need simply to deal with it. Because of the extensive consultation that has gone into the production of both the bills that are before us, there is less requirement for us to take evidence. However, we can address that issue in future. I appreciate the points that are being made—they are being felt by everyone—but we have to move on and do the best that we can, given the circumstances.

We will write to all those organisations and ask them to respond as quickly as they possibly can. The responses will be circulated to everyone

immediately.

Committee members should bear in mind that it is legitimate for them to follow up matters individually, as well as doing so officially via the committee. If members wish clarification on particular issues, they are free to seek it.

Christine Grahame: If you are happy that individual members of the committee do that, then we shall. I find the subject to be a difficult one because it raises a lot of ethical questions. I would like to hear more practical information from the RCN and the BMA, and also from the medical ethics council.

The Convener: I remind everyone that, when the bill comes back to us for stage 2 consideration, we will look at it in great detail. At that time there will be the opportunity to revisit what we have discussed today. Members should bear in mind the fact that we are preparing a draft report on the principles of the bill. I think that we are beginning to psychologically prepare ourselves for the amendment stage, but we are not at that stage yet.

Phil Gallie: Can you confirm that when we move to stage 2 we will not be seeing witnesses?

The Convener: It is not planned that we will see witnesses, but we can address that issue. Undoubtedly, many submissions will provide background information to the amendments.

We need to move on, because time is slipping.

Abolition of Feudal Tenure etc (Scotland) Bill: Stage 1

The Convener: I see that everyone is here. We have Mrs Joyce Lugton and Mrs Micheline Brannan from the civil law division of the Scottish Executive justice department, and Norman Mcleod and Andrew Brown from the Scottish Executive office of the solicitor. Welcome to you all.

The general comments remain the same for this bill as for the Adults with Incapacity (Scotland) Bill. We are considering the principles of the bill, not specific details and amendments. We will return to specifics at a later date. I know that it can be difficult to separate the two, but I fear that occasionally we start going down a line of questioning that is best left until stage 2.

We will press on to questions because of the time constraints. I have some indication of the issues that members wish to raise. There are general issues that members are concerned about. Christine Grahame, who is trying to open her papers, wished to raise a point about absolute ownership, which you will be aware is of concern to many organisations, because by removing the feudal superiors and taking the ultimate owner out of the equation, a system of absolute ownership is being introduced. Christine, you wanted to talk about the role of the Crown.

Christine Grahame: Yes. I am beginning to think that this meeting is like a Kenneth Reid tutorial. He is a professor in the faculty of law at the University of Edinburgh and has an interest in conveyancing, which was not my strong point.

With regard to the Crown, several of the submissions that we received raised questions with regard to the dangers of abolishing the ultimate superiority of the Crown, and the matter of the Crown acting in the public interest. Do you think that those fears are unfounded, can you provide clarification on the Crown's role in the feudal chain, and how much of that role will be removed by the proposed act?

Mrs Micheline Brannan (Scottish Executive Justice Department): At the moment, the Crown has a conceptual role as the ultimate feudal superior, but how much that role leads to practical consequences differs from case to case. The bill specifies that the Crown's feudal rights will be abolished while leaving its prerogative rights untouched. The approach that was taken was to treat the Crown like any other superior; therefore, the bill specifically abolishes the feudal rights of the Crown, except in the case of enforcing maritime burdens because there was no other way to ensure that somebody would be able to enforce them.

It is difficult to see how, in practice, the Crown could represent the public interest in relation to land. It might mean the creation of significant public rights, in relation to which the Crown's role would be one of enforcement. That could have resource implications. Concerns about the Crown probably largely reflect concern about the use of rural property. It is not clear why people want to argue about the Crown's role with regard to urban property, for example, tenement flats, which are affected just as much by the feudal system as are rural estates. In any case, throughout the country, owners' use of land is already limited by planning laws. The planning system creates conditionality about the use of land and, in our view, preserves the public interest.

Christine Grahame: So you see no role for the Crown, given that we now have planning authorities and so on to act in the public interest?

Mrs Brannan: It is hard to see what the role has been that we will be losing.

Christine Grahame: I may get into a quagmire with this question, but could you tell me what the Crown's prerogative rights are?

Mrs Brannan: Prerogative rights are, for example, the right to confer peerages and to give

royal pardons.

Christine Grahame: I wish I had not asked that question.

The Convener: Does anyone else wish to contribute on the role of the Crown?

Maureen Macmillan: Christine covered what I wanted to know. Perhaps we should question the people who are advocating the retention of feudal rights for the Crown because we already know the position of the present witnesses.

The Convener: Pauline, I think that you had concerns about when the provisions were coming into force.

Pauline McNeill: Could I ask a question that follows on from Christine's questions?

The Convener: Yes.

Pauline McNeill: I did not want to leave this issue without raising a point of my own. Like Christine, I have been impressed by the submissions that say that no one will be acting in the public interest. The contention is that, by not having the Crown or someone acting in the public interest, the position of landowners will be strengthened, but one of the concepts behind land reform is that it should be done in the public interest. Surely there must be another idea that we can think of that would invent a public interest at the same time as abolishing the feudal system. There is a desire for that.

Mrs Brannan: We can understand that desire, but on that matter I will make two points. First, in looking at the feudal system as it is now, it is not clear that the Crown has an existing role as ultimate feudal superior in preserving the public interest. It is hard to find where that role is exercised and to find examples of it, except possibly the maritime burdens, which the Scottish Law Commission has made recommendations about.

Secondly, in so far as the Crown carries out public activities in this country, it is usually through the activities of public authorities such as the Government, local authorities and so on. The planning system—the public law system whereby the use of land is regulated—is not affected in any way by the bill.

The Convener: Do you wish to follow up that point?

Pauline McNeill: No.

The Convener: You indicated to me that you had questions about the timing of when the act will come into force.

Pauline McNeill: I wish to raise that issue during the submission from the Royal Institution of Chartered Surveyors.

The Convener: When is it anticipated that feudal tenure will be abolished, because it is not in the bill? Evidence was given to us that, effectively, there would be a two-year waiting period before the actual abolition. Is that still the case, and why was it decided that no date should be set out in the bill?

Mrs Brannan: There are a number of reasons. The bill refers to the "appointed day", which is the day on which the feudal system will be abolished. The bill gives Scottish ministers the power to fix that date. That is partly to provide some flexibility. If one specifies a day in the bill, which then becomes primary legislation, and one gets the day wrong, it is more difficult to remedy the situation because there would need to be another bill to change the day. If a statutory instrument is used to specify the day, there is more flexibility to work out when the abolition can be achieved.

The Scottish Law Commission recommended that at least two years should elapse between royal assent and the appointed day. The reason for the time lag is to enable necessary arrangements to be made by people to adapt to the new law. In many cases, superiors will be able to reserve certain rights by registering a notice or an agreement and, in some instances, they may need to make application to the Lands Tribunal for Scotland.

It will be necessary for all superiors, including public bodies such as local authorities, to examine their estates to decide which rights they wish to preserve. In fact, we have had some representations that two years is too short a time; for example, the Law Society of Scotland feels that the time is too short. There are views on both sides of the argument.

The Convener: From what you say, if this bill is passed in its current form, there will be uncertainty about when the date for abolition will be. You are effectively admitting that, even if a date is agreed upon, it might change, which introduces a level of uncertainty into the proceedings, does it not?

Mrs Brannan: This matter can be re-examined during the stage 1 debate when ministers are present, and in the course of the committee's detailed consideration of the bill. Even if we are not able to commit ourselves now, a better indication may be given later.

11:00

The Convener: With the caveat that, as long as it is not in the bill, the date can be changed in the future?

Mrs Brannan: There is always a risk of change. However, I am sure that ministers would want to

choose a date that was feasible, and would not choose a date with the intention of changing it. That would not be good practice.

Tricia Marwick: Would it not be possible to put a line in the bill to say that, on the day that the bill is enacted, the appointed day will be two years hence?

Mrs Brannan: Anything is possible in primary legislation, provided that it is within legislative competence. It is open to debate whether that would be the best way in which to proceed.

Tricia Marwick: That would at least give us an opportunity to debate whether two years from the enactment of the bill would be an acceptable target date. If there is no mention of a date in the bill, there can be no debate.

Mrs Brannan: Ministers might still want to make a statement of their intentions, which would allow members to debate the issue. However, the question of whether a date should be prescribed in the bill still requires to be discussed.

Phil Gallie: Section 65 of the bill introduces a prohibition of leases for longer than 125 years. Do you think that any restrictions will follow from that for the development of land, considering the strict environmental laws that now exist, and responsibilities for contamination?

Mrs Brannan: I am not an expert on contaminated land, but I can say that, although the bill contains a provision for the prohibition of commercial leases that are longer than 125 years, soundings are still being taken on that issue. On the period of time, there is room to come and go.

Phil Gallie: Where is that room to come and go? Does responsibility for that rest within the setting up of the bill, with the Scottish Executive and the civil service, which are deliberating, or with members of this committee?

Mrs Brannan: The bill sets the period of 125 years. Amendments to the bill could be lodged on that subject. Representations would still be received.

Phil Gallie: Will the Scottish Executive make recommendations on that in due course?

Mrs Brannan: Through our advisory process, we will make ministers aware of all the different views that have been expressed.

Mrs Joyce Lugton (Scottish Executive Justice Department): That is one of the specific issues on which the policy memorandum invited the views of this committee. It is an area that was highlighted for further debate.

Euan Robson (Roxburgh and Berwickshire) (LD): What is meant by the continuation of the feudal system by other means? Papers that I have read suggest that that should be avoided. What is the problem with that, in practice, if contracts are entered into in a free and open manner?

Mrs Brannan: I shall begin to answer that question, but will invite my colleagues to contribute, as the issue is rather technical. It is possible to lease land on a long lease, such as 999 years, although, in practice, nobody foresees the possibility of the lease reverting to the landlord. The conditions that are imposed by the landlord are therefore the all-important aspect of the lease. It is not the ultimate repossession of the land—the length of the lease is essentially regarded as perpetuity—but the conditions that are imposed by the landlord that matter. The situation is therefore almost like feudal tenure. Feudal tenure is selling in perpetuity, but subject to conditions that can still be enforced by the original granter and his successors. I invite my legal colleagues to chip in at this point.

Andrew Brown (Scottish Executive Office of the Solicitor): It would certainly allow the landowner to keep very tight control of what happens on the land. There are other parallels with the feudal system. Under a lease, as under the feudal system, there is very often a right of irritancy written in favour of the landlord. That means that, if a condition is breached, the landlord can take back the property. If the tenant has carried out development on the property, that would amount to a windfall to the landlord.

Euan Robson: If, in the breaks in the lease in which renegotiation takes place, one created an opportunity to renegotiate the conditions—

Andrew Brown: I am sorry to interrupt, but a contractual right for the tenant to say to the landlord that they want to rewrite the lease is very rare.

Euan Robson: I am trying to establish how many instances of long leases you think there will be. Do you think that they will develop dramatically, or is this a de minimis matter; in other words, will there be very few instances? The preference in Scotland is for freehold tenure. Are we inserting into the legislation something that does not need to be included, because it will happen very rarely?

Andrew Brown: I will have to be careful here, as I will probably end up expressing a personal view. However, if people can structure things in a way that is most favourable to them, there will be commercial pressure to do that. If people feel that they can achieve a control through leasing that they cannot achieve in another way, I suspect that there will be a temptation for them to choose that option.

Euan Robson: You use the word temptation. I do not accept that there is anything wrong with a

leasehold arrangement. The worry must be that there will be disparity between opportunity in England and in Scotland, because we will create two different kinds of framework. Is the Executive assessing whether any commercial disadvantage will result from the different arrangements that have been proposed for Scotland?

Mrs Brannan: It is fair to say that thinking has not totally crystallised on this issue. We are acting on the recommendations of the Scottish Law Commission, and we understand that the commission is starting to receive representations from commercial developers and legal interests representing commercial developers that were not as evident when it was preparing its report on abolition of the feudal system. There is some scope for thinking in this area to develop further. However, I go back to what Mrs Lugton said about the length of the long lease being a matter on which we specifically requested the views of the committee. I am sure that you will receive representations on that subject.

Euan Robson: I would like to return to this question with other witnesses.

The Convener: That is perfectly okay.

I have a general question. I remember that, at the informal briefing that we received at the end of August, there were expressions of concern about the possibility that superiors might rush to reclaim the last vestiges of whatever feuduty they thought they could get out of people. We were concerned to establish whether there had been an attempt to estimate the number of people who might find such bills dropping through their door. Were you able to examine that issue and to come up with an indication of what the position would be, particularly in the run-up to the appointed day, whatever that happens to be?

Mrs Brannan: I will refer the question to Mrs Lugton.

Mrs Lugton: Following the informal briefing, we discussed this with the Scottish Law Commission. The commission said that it had not done any specific research into the amount of feuduties remaining, but it believed that most of them related to tenement flats and that the sums involved were likely to be very low—in the region of £2 to £5 per flat. The commission thinks that most other properties affected will be premises occupied by businesses, which are likely to have been located there for a long time. However, there will be some individual houses for which feuduty has not been redeemed and which may well be occupied by elderly people.

The Convener: We were concerned specifically about the prospect of elderly people on tiny incomes suddenly getting bills through the door, as superiors attempted to catch up on unpaid feuduty that had not been claimed but was going to be collected before the appointed day. We do not have much clue about how widespread that may be.

Mrs Lugton: I am sorry, but I think that that is the case.

The Convener: If that is the case, that is the case.

Phil Gallie: There is evidence that that is happening at that moment.

The Convener: We were concerned that, once the implications of this bill for superiors became apparent, they would attempt to maximise their economic position where they could.

Christine Grahame: We have received submissions from a major commercial firm in Edinburgh, which raised interesting issues about commercial leases, although they were not the firm's business. The impact on commercial leases in Scotland has now been addressed. The firm argues strenuously that we should be examining the law on commercial leases in Scotland contemporaneously with this bill and with something called the title conditions bill, which I did not know about, but which the firm claims is linked to the other issues. If everything is linked together, it will be hard to consider the proposed legislation without having sight of the title conditions bill. What is the position on a proposed act on leases for Scotland? I have other questions, but no more on this particular area.

The Convener: I would like to add to Christine's point, which is a fair one. We are advised that this bill is one in a series of linked bills that will achieve the ultimate end. We have been told that we can expect not only a title conditions bill, but bills on real burdens, leasehold casualties and, as I understand it, the law of the tenement. Given that, how does everything fit together? Appearance is being given that this legislation is only the first piece of the jigsaw. I have a rather mischievous question. Is not the whole point of delaying the appointed day due to the fact that people know that other pieces of legislation will need to come into force, otherwise we will get in a muddle?

Mrs Brannan: I am happy to answer all those questions. There is a package, but I want to clarify the situation. Title conditions and real burdens are the same thing. The Scottish Law Commission published a discussion paper on real burdens, which are basically the conditions attached to the holding of land. The commission has now decided that, although the consultation was on real burdens, the name used for the report and draft bill will be title conditions, so the draft bill on real burdens will be called the title conditions bill. That reduces at least two entities to one.

The work that was done on the law of the tenement resulted in a report and draft bill before the general election. The Scottish Law Commission is not pressing us to implement the bill on the law of the tenement at the moment, because it feels that once it has finished the work on title conditions, it will be able to simplify the provisions that are being recommended for law of the tenement, which is really just a subset of the title conditions that can apply to any property. Tenements are just a particular kind of property, and have a particular subset of title conditions to do with common facilities and so on. We accept, therefore, that it is sensible to wait until the bill on title conditions has been published before doing anything about the law of the tenement.

The package consists of, first, a bill on the abolition of feudal tenure, then a bill on title conditions and, finally, a bill on the law of the tenement. Leasehold casualties are a slightly different matter. Nothing we do in those three bills interacts with leasehold casualties and nothing in the leasehold casualties bill will interact with the other bills. Having said that, however, leasehold casualties can be regarded as part of the package in the sense that the law of property in Scotland will be tidied up and cleaned of anachronisms only after the leasehold casualties bill has been enacted.

The Convener: I want to advise the committee at this point that I received a letter from the Minister for Justice this morning about the proposed member's bill on leasehold casualties. The letter says that the Executive would be prepared to support such a bill, which would be required to come to this committee. We will need to come to a decision on how we would deal with that, but we will reserve that for later.

Christine Grahame: I have other questions, but I wanted to ask about the law of leases. Will we address the problems that have been exposed by transfer of ownership from title to leasehold property in Scotland? There are so many ramifications that we cannot consider the value of the bill on its own without seeing the other adjacent bills.

11:15

Mrs Brannan: It would be helpful to hear from the Scottish Law Commission on long commercial leases. In its sixth programme, it will be considering leasehold, and I understand that it intends to consider long residential leases. However, I am not sure whether it was planning to consider commercial leases. Some of my colleagues may know about that.

Mrs Lugton: I think that it will not. We should perhaps step back a stage to the question about seeing the bill in the context of the programme. Property law is a large subject and a daunting one. That is why it was always assumed that this would be a staged project.

The Abolition of Feudal Tenure etc (Scotland) Bill, the title conditions bill and the law of the tenement bill are closely linked. They were always to be considered in stages because there is a great deal of administrative work to be done by property interests generally to secure an orderly transition from the existing state of the law to the new state of the law. For that reason, it was assumed that the feudal bill should come first to enable the necessary administrative work to be done before the title conditions bill is commenced. It is proposed that large parts of the feudal bill will not be commenced until the title conditions bill is also commenced. That is the programme that is proposed.

Christine Grahame: Are you talking about enactment at the same time?

Mrs Lugton: The feudal bill will be enacted first and parts of it will be commenced to allow the administrative work to start, but part of it will not be commenced until the title conditions act is also in place.

The Convener: It would have been helpful to the committee if the situation had been made clearer in regard to the three linked bills that are to be presented at various stages. We are proceeding on the basis of having to consider one bill, but we know that it will be part of a wider context that, so far, has not been presented to us, either in written or in oral form. That is unfortunate.

I now go back to my rather mischievous question, which may not sound at all mischievous now, but absolutely spot on. The bill is before us but a lot of it will not come into force. Do you agree that the reason for that is not so much technical as caused by the need to wait until other legislation slots in?

Mrs Brannan: That is partly fair and partly not. It is certainly true that this bill must wait for the title conditions bill, but that is not because we are inefficient and could have done it much faster.

The Convener: I am not suggesting that, but we are being presented with a bill that turns out to be not a bill in its own right, but one third of a set of linked bills for which there is an overarching programme and procedure that have not been presented to us before today.

Mrs Brannan: The alternative to proceeding in that way, which I agree is not ideal, would have been to delay the introduction of this bill.

The Convener: With respect, that is not the point that I am making. I understand the position that you are in. My point is that we have to discuss

one third of the whole thing with you telling us that there is a reason why this bill is being done this way now but that other things will also affect it and be affected by it. There has been no presentation from the Executive about the overall question, and that is our concern. We are concerned that we will have to deal with this bill knowing that there could have been a better presentation of where the bill fitted into the overall pattern of legislation.

We have to wind up the session with these witnesses very quickly. Does any member have any further questions for them?

Christine Grahame: The Royal Institution of Chartered Surveyors has raised a couple of questions about sections 17, 18 and 19 on converting feudal burdens into neighbour burdens. The body has concerns about the definition of "human habitation or resort" and the strict application of the 100 m rule to both urban and rural areas, which can be very different.

Secondly, on section 22 about the reallotment of real burdens and the conversion of feudal burdens into community burdens, the institution raises the question of whether 51 per cent is a reasonable majority to carry such a decision and suggests that a two-thirds majority might be better.

Mrs Brannan: There are two points to make about the 100 m rule. First, as that rule is a detailed provision in the bill, it is open to later debate. The Executive does not have a closed mind about any of the detailed numbers or quantities in the bill. Secondly, a procedure outlined under section 19 of the bill enables burdens that do not fall under section 17's precise definition to be preserved either by agreement between the superior and the vassal or by application to the Lands Tribunal.

The question about the 51 per cent or two-thirds majority is very detailed and could be debated later. However, we do not feel that it is a fundamental principle.

Pauline McNeill: What are the principles behind the issues of compensation in the bill?

Mrs Brannan: Two areas of the bill provide for compensation. The first is where the superior loses the right in future to demand feuduty. My legal colleagues will correct me if I am wrong, but I believe that the compensation formula that has been provided is based on the existing formula under which redemption of feuduty is compulsory for properties that have been transacted in since 1974.

Compensation is also provided for development value burdens. A superior might gift or considerably undersell a piece of land to the local authority on the condition that the land was used for a community centre. That local authority might later want to sell on that land to a developer for a housing development. The Scottish Law Commission has recommended that compensation should be paid to the superior for the development value that has been lost as a result of selling land for a particular purpose that is then sold on for a more lucrative reason. Such compensation is provided for in a different section of the bill.

Pauline McNeill: Do you agree with the suggestion that an allowance should be made for a feuduty that has not been collected for several years?

Mrs Brannan: Although that is not provided for in the bill, it is a detailed point that could be open for later debate.

The Convener: If there are no more questions for the witnesses, thank you for coming to see us again.

I invite the witnesses from the Royal Institution of Chartered Surveyors to come forward: Lynne Raeside, Iain Hay and Alan English. As we are pressed for time we will proceed directly to questions on the submission.

Phil Gallie: You say that

"feudal burdens can play an important role in maintaining the amenity of an area".

Could you expand on that?

Iain Hay (Royal Institution of Chartered Surveyors): There are instances where the superior has an obligation to do that. In one example, a citizen decided he wanted to apply to register his garden as a site for the registration of vehicles. As the superior's agent, I was called on to intervene as the deeds stated clearly that the superior had an obligation to protect the amenity of the community concerned.

Phil Gallie: Would that case not be covered by the 100 m rule?

Iain Hay: It might be, but that would put an obligation on the individual, which may be correct legally but a burdensome matter for the individual concerned, whereas the superior had an obligation at their cost.

Phil Gallie: What about aspects that are protected within feus in terms of planning? Should there be a handover period in which the feudal conditions should be part of planning conditions?

Iain Hay: I refer you to a case dealt with by the Lands Tribunal—Pender v Sibbald Properties Ltd—in connection with a building in Glasgow where there was a title prohibition against using the property as a restaurant. Planning permission was granted but the superior objected to it. The outcome was a brave decision by the Lands

Tribunal: that it could be a restaurant but not one that produced strong cooking odours. The planning system does not always cover all aspects.

In another very lengthy case, Ferguson v Burnside et al in Kilmacolm, the owner of the property was prohibited from building a house or allowing his hedges to grow higher than 5 ft. He allowed his hedges to grow higher than 5 ft and argued in the tribunal that, because of that, people who might be offended by his new house could not see it. Planning permission was granted for a house but the Lands Tribunal threw it out, saying that the conditions had to be adhered to. That illustrates the difference between planning conditions and the superior's conditions.

Phil Gallie: You have emphasised that there are advantages in the bill, but we must also consider the disadvantages.

Iain Hay: The Royal Institution of Chartered Surveyors has said all along that a review is necessary, but that the good parts must not be thrown away.

11:30

Phil Gallie: It is altruistic to suggest that redemption values should be dropped. Instead of a redemption rate of 20 times the current valuation, you are suggesting that it should be dropped to eight to 10 times that figure. Those figures are up for review in any case and can be changed as the bill proceeds, but what is your reason for suggesting that?

Alan English (Royal Institution of Chartered Surveyors): Let us look at this logically. A redemption rate 20 times the valuation figure represents, in valuation terms, a yield of 5 per cent. The majority of feuduties are very small sums of money that cost a great deal to collect. As we have heard before, there is concern that some feuduties have not been collected at all. Because the duties cost a lot to collect, anyone who wants to acquire a superiority with the feuduty will not throw a large amount of money at it because it will not provide a good return.

The 20-years' purchase, as we surveyors call it, is an historic figure that is completely out of keeping with the current market. Whole superiorities change hands at figures of less than half of that figure. That includes all the other potential rights and the bits and pieces that go along with the right to the feuduty. It therefore makes no sense for the vassal to have to pay 20 times the figure just to buy out the monetary item.

The Convener: What is your view of the issue that we heard being canvassed earlier about the length of commercial leases, which is covered by section 65? Do you have any comments or concerns about that?

Iain Hay: We have considerable reservations about the 125-year lease. The primary reason is that the developer needs to fund the development of offices, shopping centres or whatever and funding may not be granted. I think that 125 is a borderline figure. Anybody who suggested a 100 year lease would not get funding. I think that if there has to be a figure—we do not think that there needs to be one—150 to 200 years would be more appropriate.

I would like to make two other points. First, the people who are likely to suffer are not only the developers, but the institutions, which would affect pension funds. Secondly, there are many instances where contracts are in place to undertake development of land in phases. A development may have six phases and the developer will have agreed terms with the owners of the ground and their funding sources at, say, 150 years. There is then a trigger time at which those leases kick into place. If those times are after the act comes into force, there will be severe problems for developers. I suggest that that can be dealt with by legal means, but I caution against setting the term at 125 years, full stop.

Christine Grahame: You appreciate that, as we have been told by the Executive, some of the detailed matters about percentages that you have raised will be dealt with at another stage of the bill.

I want to mention a point from your submission that has not been raised before, and I would like you to give us a simple example to illustrate your point of view. I suspect that the kind of rights that would previously have belonged to the feu superior will turn into landlords' rights with the development of leases in Scotland.

Section 73, "Saving for contractual rights", states:

"As respects any land granted in feu before the appointed day, nothing in this Act shall affect any right (other than a right to feuduty) included in the grant in so far as that right is contractual".

Your explanation on page 7 of your submission states that you are concerned about

"potential difficulties in the contrast between saved contractual rights and obligations . . . and the superior's abolished rights and obligations".

You then give examples such as sheltered housing and developers or builders selling properties on particular estates. Can you give me an example of what such contractual rights and obligations in the deed of conditions would be? They could be quite onerous.

Alan English: Let us take as an example a development of sheltered housing where there is

an obligation in the original contract between the developer and the purchasers that becomes a deed of conditions or a community burden for the developer to provide services such as warden services. The developer builds the property and sells to the first purchasers to move in. He has a contractual obligation to those first purchasers and it is our understanding that that obligation will be retained after the passing of the act.

The problem arises when one, or the majority, of the original purchasers has sold. A community burden is then set up. Under the proposed legislation there will be an opportunity for all the people who have purchased to vary that community burden. For example, they may vote not to have a warden any longer. However, the initial purchasers still have a contractual cross-over with the original developer and that may create difficulties.

Christine Grahame: That explains the situation. Your submission also states:

"We cannot see an answer".

Should we perhaps leave it to the lawyers at the Executive to see an answer if they agree that there is a problem?

Alan English: Yes. [*Laughter.*]

Iain Hay: I am sure that we could assist, but we would want everyone to be dealt with on the same footing.

Christine Grahame: I can see what you are saying. The contract is a personal contract between the developer and the first purchaser and it does not pass to subsequent purchasers.

Iain Hay: That is correct. That situation prevails in many other areas of legislation connected with the feudal system, but this is the one that we particularly wanted to highlight.

Christine Grahame: Do you foresee an explosion of leasehold tenure in Scotland with the abolition of the feudal system? Will people buy 99-year leases in Scotland, as they do in England, rather than have freehold tenure?

Alan English: I do not foresee it exploding. The majority of long leases are ground leases and the majority of ground leases are leases by public authorities, which, for policy reasons, do not want to dispone ground.

Iain Hay: I agree. I do not think that that will be a problem.

Christine Grahame: My final question concerns another technical matter that should probably be dealt with later in the passage of the bill. Your submission points out that many landowners have a huge number of titles and that the time scale for putting in a notice after the appointed day is not appropriate. Is it your belief that, in cases that involve forestry or local authorities, simply detecting the titles that are held will be a massive undertaking?

Iain Hay: Yes. The Forestry Commission is a good example, and large local authorities put restrictions on use in shopping centres and industrial estates for good reasons, because management functions may not fall within planning legislation. In my view, those bodies have a duty to ensure that they are acting correctly, and they need time.

Alan English: One problem that has arisen from the bill is the risk that legislators may believe that the planning system will cover the abolition of the feudal burdens and feudal conditions.

Planning considers the public interest and the larger picture—whether something fits into a locality. In contrast, the feudal system deals with personal matters, which are perhaps not relevant to the public, but which are extremely relevant to the private situation.

Phil Gallie: I want to ask about the comments you made about sheltered housing. The number of housing complexes could present a real problem. One of the problems is the requirement to maintain services. A second problem is the loss of control—for those who live in the properties—over management costs. Do you have anything to say about linking the two things—to preserve services and control the costs?

Iain Hay: We are concerned that people who are less able to fight their corner, because of age or disability, should be protected and that those services should be maintained for them. As has been said before, we do not have an administrative answer to the problem. It is a matter that is worthy of considerable research and debate. We just want it to be resolved.

Pauline McNeill: Am I right in thinking that, currently, under the feudal system, a burden would exist in perpetuity?

Iain Hay: Yes.

Pauline McNeill: Are you concerned that that will no longer be the case?

Alan English: Either it will be abolished or it will be converted to a neighbour or community burden.

Pauline McNeill: Are we not dealing with the community burden in the neighbour burden?

Alan English: The community burden will not necessarily be abolished, but the proposed legislation presents an opportunity to amend it. Currently, amending a burden, or a condition in the titles for a group of properties in a development, requires 100 per cent agreement of all proprietors. That is a major problem. In my

management practice, I am aware of only one case in 30 years where such a change has been made. Once the opportunity to alter and amend those burdens under the proposals has gone, we will not get it back. We must be sure that it is worthwhile before we remove it. That is why we are concerned about a simple 51 per cent majority.

Pauline McNeill: You make many references to compensation in your document and you seem concerned about it in several contexts. Regarding the vassal paying back to the superior, we have heard that you would like the redemption factor to be based on a multiplier of between eight and 10. You then go on to talk about the instalment scheme and you are mindful of the burden that might fall on the vassal, particularly in cases of financial hardship. You recommend that, in cases where payments can last for 10 years, the period should be reduced to three years. That seems to be a big jump.

Alan English: Our concern about the 10-year period is that, in effect, the abolition will simply be deferred. There will never be a payment. It is almost like saying that, in 10 years' time, we will no longer pay feuduty. Someone being compensated for the loss of an income requires the payment of a sum. We agree that you cannot insist on that sum being paid all at once. We believe that if it were to be paid over three years, at half-yearly intervals—the way feuduty is currently paid—that would be reasonable. We should bear in mind that under the current proposals of 20 payments, a £1,500 payment is comparable to a £75 feuduty. A £75 feuduty would be attached to a fairly valuable piece of property. From that point of view, the repayment should be reduced from the proposed 10 years.

Pauline McNeill: The next point you make is about sales. You link that to the fact that the balance has to be paid within 42 days and suggest that that provision should be extended to cover the sale of a property by a vassal. Should the solicitor not have a duty to get that done? Someone who is selling their house has all sorts of things on their mind and 42 days seems too short a time.

Iain Hay: Yes, anyone would expect their solicitor to do that. I am sure that that is what happens in practice.

Alan English: Our concern is that the obligation to settle the monetary element of the feuduty on sale continues after the passing of the act.

Pauline McNeill: That is the case under the 1974 act. Is there a time limit on the payment of that duty? I do not think that there is.

Alan English: The current situation is that the duty should be settled at the point of sale.

Pauline McNeill: And you want to give people 42 days to pay.

Alan English: If an instalment has not been paid within 42 days, there is an obligation to pay the entire sum. In addition to that, we want the situation that applies at present to the point of sale to continue.

Pauline McNeill: I would like to ask you about part 3.6 of the report, which says:

"While such superiorities may have become dormant, perhaps due to collection ceasing, there must therefore be a fair method to deal with such cases."

What would be a fair method?

Alan English: We are concerned about this because, at the time of the local government reorganisation, there was a great deal of confusion about who owned what and whether ground burdens had been redeemed.

In some instances, ground burdens were due but local authorities refused to acknowledge that they were liable to pay them. There should be some kind of facility whereby those problems can be sorted out.

Iain Hay: As registration of title develops, so will the situation improve. It is amazing how many local authorities claim not to own a property when asked to pay feuduty on it and then, two years down the line, when they find out that they can build a hotel on it, claim that they do own it.

In the meantime, the superior, who might be trying to tidy up his feuduty situation, is left in a no-man's land. Improved land registration and improved information on property ownership will lead to the situation not being as much of a problem.

Pauline McNeill: You have some views on the time scale for the introduction of the bill, particularly in relation to converting feudal burdens to neighbour burdens. What do you think the time scale should be for the bill coming into force?

Alan English: We are concerned about the situation as regards large estates and large public authorities. They will have to go through all their titles and property holdings to identify where there are matters to be covered. Our concern is that two years could be insufficient time to do everything. It will be expensive and require time, legal and professional advice and the inspection of properties to ascertain whether anything relevant needs to be covered.

Iain Hay: We are not suggesting that the bill should not proceed; we are saying that there should be longer for such bodies to deal with the next stage. We heard some of the debate when the previous group of witnesses was here. When a superior, in connection with a developer, wants to

serve a notice to reserve a development right, that is also part of the exercise.

Pauline McNeill: You seem to represent mainly the interests of superiors. Other issues must be considered, such as those that concern vassals. People have suffered at the hands of superiors who have charged large sums of money for burdens. We must address those interests to balance up our consideration.

Alan English: The Royal Institution of Chartered Surveyors, under a royal charter, is apolitical. We are obliged to serve the public interest. If you consider our paper, you will recognise that we believe that the vassals are already suffering and are having to pay too much to clear the monetary burden. At the same time, the superior—whether you like him or not—has an interest in land. In all fairness, that should be compensated for. The institution is trying to express a balanced view. We do not believe that we are expressing the superiors' view; we are trying to express a totally impartial view.

Euan Robson: You said that you do not believe that the leasehold commercial market will develop dramatically. Is there any point in section 65? Why not just leave it out? Are we worrying about something that will never be of real concern?

Iain Hay: I could accept that solution, as it would reserve the rights of the developer. I do not think that people will rush out and start granting leases instead of selling by the feudal system.

Euan Robson: Do you foresee any disadvantages in the property market if there is not that flexibility? Do you think that Scotland is at a disadvantage compared with England and Wales, which is what has been suggested in some of the submissions?

Iain Hay: It is possible that institutional investment in properties would diminish. I am not saying that it would, but that is a possibility. If an institution could lend on a 100 year lease or a 150 year lease, it would probably choose the 150 year lease, wherever it was.

Euan Robson: I understand that what you are saying about brownfield sites is that the longer the ground lease, the more attractive the site is. If it is restricted, and the market value falls, there is less chance of redeveloping a brownfield site. Is that correct?

Iain Hay: Yes. Fewer funding institutions would be willing to participate in the development exercise. There is an end-stop of a couple of hundred years, we believe. RICS Scotland believes that a lease of 200 years is not unreasonable. However, one of 999 years is just foolish.

The Convener: I must bring this discussion to a close. We keep getting involved in specific arguments, but we have identified that there is concern about the length of commercial leases. Although there may be debate about their length, the evidence—especially from you—suggests that it should be longer than 125 years. Thank you for coming to the committee today and for your written submission.

The Convener: I ask the witnesses from Scottish Environment LINK and Land Reform Scotland to come forward.

We are running behind time. Please bear in mind the fact that we are considering the principles of the Abolition of Feudal Tenure etc (Scotland) Bill and keep questions directed towards that. At stage 2, we will look at specific issues in terms of amendments.

I welcome John Digney and Elizabeth Leighton from Scottish Environment LINK, and Peter Gibb, Robin Callander and Andy Wightman from Land Reform Scotland. As we are extremely pressed for time, there is no possibility that all five witnesses will be able to respond to every question, so please designate one of your number to respond to each question.

Pauline McNeill: You suggest retaining the Crown as a way of protecting the public interest. When that point was put to the Scottish Executive, it replied that that would recreate the feudal system. What is your response to that? The Scottish Executive says that, in this context, the Crown serves no useful purpose and that it cannot see any point in retaining it. Can you convince me otherwise?

Robin Callander (Land Reform Scotland): I agree with the objective of the Scottish Law Commission's original report that the rights that the Crown shares with other feudal superiors should be abolished. The report specified those as the rights to create new feus, to exact payment of feuduties and, as a feudal superior, to enforce land conditions. The report stated that the Crown need not, having lost those rights, be called the paramount superior and that no other rights of the Crown, whether of feudal origin or not, should be affected.

My concern is that section 56, which is at best ambiguous, does not deliver those objectives; it abolishes all rights pertaining to the paramount superiority rather than the specific rights that the Crown as a superior shares with other feudal superiors. I suggest that the way of resolving the issue of the Crown would be for section 56 to specify the rights that are abolished.

When the Law Commission was asked what the other rights of the Crown were, it said in its report that it could not disentangle the rights that attached to the Crown by virtue of its paramount

superiority from those that attached to it by virtue of its rights sovereignty.

The Scottish Executive witness was fairly economical when asked what the other Crown prerogative rights were. The witness referred, for example, to peerages and pardons. In fact, the prerogative rights of the Crown include regalia rights and the ownership of the sea bed and foreshore. An awful lot of rights attach to the Crown within the Scottish system of land law. We should, therefore, make it clear that what is being abolished are simply the rights that the Crown shares with other paramount superiors, and that none of the other rights is affected. That was the intention of the Law Commission. Section 56 does not deliver that.

12:00

Maureen Macmillan: I want to ask about the idea of the Crown as absolute superior changing its role so that it can act as a public guardian of the land—I believe that you are interested in that idea. In the Highlands, there is great concern about land use and management. How would that concern by allayed by that new role for the Crown? According to the Executive, the Crown would not just be left as ultimate superior, but would have to be given a new role as a public guardian.

Furthermore, how would the change impact on urban areas? The control of land use might give rise to benefits in rural areas, but what about in the country as a whole?

Robin Callander: It seems that there was some confusion earlier. It is not being proposed that the Crown be given any new powers or burdens. The Executive witnesses were wrong to suggest that the proposal might involve expense.

Through the Crown, the public already hold the ultimate ownership of land in Scotland that is held under the feudal system. Therefore, there is already a public interest in all land. The bill should ensure—the wording should do it precisely—that ultimate ownership, the various other prerogative rights and rights that attach to either sovereignty or to the paramount superiority, which cover all land in Scotland, are not affected in the abolition of the Crown's rights as a feudal superior of particular lands. The role of the Crown to act for the public interest exists in the ultimate ownership of all land. This is not a question of creating new rights and thereby incurring expense in any way.

The previous witnesses talked about how the public interest could be served by planning permission or by statutory law. The significance of this issue in the longer term is twofold. First, if one abolishes willy-nilly rights that we cannot specify—there is no clarity in our legal system as to what rights would be abolished by abolishing all paramount superior rights rather than specific ones—there will be unknown consequences.

Secondly, the Scottish Office and the Law Commission were ambiguous in saying initially that they intended to create a system of absolute ownership. That was modified to say that the new system of land ownership that the bill would introduce would be one of outright ownership. The policy memorandum now describes it as a "system of simple ownership".

I am not sure quite what we are setting out to do. The danger of creating a system of absolute ownership is that, by getting rid of the Crown's ultimate ownership of all land in Scotland, we would abolish that public interest. That would expose us to an American-style situation in which, in cases relating to public interest legislation, people are in a far more powerful position to claim compensation from the legislature, which would mean that public interest legislation could be constrained in the longer term.

Tricia Marwick: I have a question for Elizabeth Leighton. Based on your briefing paper, it seems fair to say that you are disappointed with the bill. You claim:

> "The Policy Memorandum simply states 'The Bill has no effect on sustainable development.'"

Will you briefly explain your concerns for our benefit?

Elizabeth Leighton (Scottish Environment LINK): Our briefing outlines several points where we believe that the policy memorandum is thin on detail and does not include sufficient information for the committee to give the bill detailed consideration. The issue of the Crown is just one example.

The Scottish Executive is, as you know, required to take account of sustainable development as well as the impact of legislation on island communities and so on. The policy memorandum states, in one simple line:

> "The Bill has no effect on sustainable development."

I find that incredible. The bill is about Scotland's land—that means our natural resources, land or sea. Surely what we decide in this bill about how that land is to be owned and used will have a fundamental effect—positive or negative—on sustainable development in Scotland.

The Scottish Executive could be asked to provide further detail on how it came to its conclusion. If it is true that the bill has no effect on sustainable development, I wonder whether we want this bill. Do not we want bills that will foster sustainable development for our future?

The Convener: You made the specific point that

the bill may lead to the Government having to pay compensation to landowners—if landowners have to implement conservation measures, for example. Robin Callander alluded to the general issue of compensation, but how do you see that circumstance arising from the bill?

Elizabeth Leighton: As you can imagine from my accent, I have some experience of how the land ownership system works in the United States. There, the issue of compensation for private landowners who are affected by public interest regulation has reached the point where it has a stranglehold on Government bodies. That is true when the US Congress, state legislatures and federal agencies try to enforce, or even develop, legislation that will act in the public interest, whether for environmental or health and safety reasons. The system has become so expensive that it has limited the ability of public agencies and Government to introduce such regulation. The situation may even be exacerbated in the United States by a further strengthening of landowners' rights.

I think that it would be a mistake for Scotland to go down a similar route without first carefully considering exactly what kind of land ownership system it wants to create. That applies not only to this bill but—as we heard in the previous evidence—to successive bills that will fit together in the overall context of land reform.

The objective given in the policy memorandum is that the new system of land ownership will be simple and uncluttered. Is that sufficient explanation to tell us whether the new system of land tenure will deliver sustainable development?

The Convener: Does anyone from Land Reform Scotland want to comment?

Andy Wightman (Land Reform Scotland): The European convention on human rights allows the state to take certain measures if that is deemed to be in the public interest. That public interest test will be tested fairly soon in the courts in response to legislation emanating from this Parliament. It would strengthen the position of the legislature in Scotland if, rather than exercise public interest through statute and public law—as currently represented by the Crown—a clearly articulated public interest were embodied within the land tenure system.

The danger of getting rid of the Crown in this context would be that that public interest defence would be unavailable to the legislature, which will almost certainly want in future to legislate in various ways on how land is owned and used. A move towards a more absolute system strengthens the hands of those who have the rights under such a system, whether it be you or I with our private dwellings, or large estates or corporations. It is a matter of political principle that we should not throw away an important locus of the public interest within the tenure system—if we did, it may come back to haunt us.

Gordon Jackson (Glasgow Govan) (Lab): You are saying that, at the moment, land may be owned but the Crown has the ultimate superiority, and that the bill will remove that ultimate superiority. However, my instinct—it is only an instinct—is that the problem is more theoretical than real. Tell me where I am wrong and give me a specific example of something that you see happening—perhaps hypothetically—that will cause the huge difficulty.

Andy Wightman: There has been talk within the broader land reform debate about, for example, standards of land management and how bad landowners will have their land taken away. Clearly, that is not going to happen, but there will be instances when the legislature wants to take action to protect amenities, for example, or to increase the burdens on landowners to protect the environment. In such circumstances, the legislature will—quite naturally—be challenged by those whose interests are affected.

If the legislature does not have a public interest defence within the land tenure system—if it cannot say, "Excuse me; ultimately we are the owners and so can change the terms and conditions under which you hold title"—its case will be weakened.

The USA provides a pertinent example of what happens when a country has an absolute system of ownership—and that system has existed only for a couple of hundred years.

Gordon Jackson: But the United States is different, so I am not persuaded by the analogy. I find it difficult to envisage a situation in which someone could be blocked, at the moment, from doing something because of legislation, but in future the courts would say, "We can no longer block that because the Crown is not the ultimate superior."

Andy Wightman: Let us look at the 1980s legislation on sites of special scientific interest. Landowners demanded compensation for not doing things that, in some cases, they may not have been planning to do anyway. They demanded compensation because the Administration at the time was ready to concede that point. However, those demands would be less readily accepted by the courts if the legislature could say, "This action is in the public interest because there is a public interest in all land that is represented by the Crown." If that argument is not available, it will become more difficult for the legislature to enact legislation.

To an extent, that example is theoretical because we do not know what the detailed

consequences of the bill will be. The issue is: why throw out something of value simply because the drafting is a bit haywire?

Gordon Jackson: So how do you propose to express the public interest?

Robin Callander: May I attempt to clarify matters? In consideration of the principles of the bill, the issue that arises relates to the stated intentions of the bill. It is the stated intention of the Executive and the Scottish Law Commission in the draft report not to affect the rights of the Crown, other than the rights that it shares with other paramount superiors. The bill's wording does not achieve that. Those hypothetical questions need not be confronted—the bill can be reworded to make it accurately achieve its intentions.

The principal issue is that the treatment of the Crown should be fair. The bill includes saving provisions for the Lord Lyon's powers, which are not even within the jurisdiction of the Parliament. The inclusion in the bill of a provision to the effect that the Crown's rights, other than those that it shared with other paramount superiors, were also saved would avoid the problem, which is now of widespread concern.

The Convener: Are there other questions?

Christine Grahame: I am trying to follow this, but it is a bit esoteric for me. Convention has always been a great mystery to me.

What you are saying is that, if the section were changed, the Crown would have an interest and title to appear in Scottish courts to assist on behalf of the Scottish people. Is that correct?

Robin Callander: No. We are not talking about introducing anything. You will know—and it is stated in the Scottish Law Commission's reports—that the ultimate ownership of all land in Scotland that is in the feudal system rests with the Crown. We are not trying to abolish the Crown's ultimate ownership, nor has that been the stated intention of the Scottish Law Commission, as far as one can tell. However, because of the way in which the draft legislation is worded, it could be construed that the intention is to abolish that interest.

The Convener: You are saying that we should be careful to ensure that it is stated explicitly that the Crown retains ultimate ownership, although we are taking away some of the rights that it would have had as a superior? Should that be done explicitly?

12:15

Robin Callander: Yes, to specify the rights that are being abolished. The Scottish Law Commission spelt out in its reports what those are. The Crown should no longer be able to create feus, enforce burdens or extract payment duties—that is what should be specified, then the rest is simplified.

Christine Grahame: I think that I understood that. The Crown would be left with the title and interest to intervene in court cases. It could represent the interests of the Scottish people.

Robin Callander: In theory, yes. I was slightly put off by your use of the word title.

Christine Grahame: Title and interest.

Robin Callander: The Crown does not, in a sense, formally have title to land.

Christine Grahame: I meant title and interest assumed in terms of the courts.

Gordon Jackson: Are you not basically keeping the feudal system and getting rid of only a few of the powers? The point of the feudal system is that everything is held from the Crown. What it does in between, and what the powers are, is all up for grabs. If the position of the Crown is left—as you want it to be—the feudal system is retained, albeit with some powers removed.

Robin Callander: No. The question of what the feudal system is could be debated all day. It has been in place for 900 years, and one might consider that all Scottish land is part of the feudal system. In section 1 of the bill, the Scottish Law Commission and the Scottish Executive have defined the feudal system as a superior-vassal relationship. In that sense, what is being said is, "Yes, let us get rid of the feudal system."

The Crown, no more than anybody else, should have a feudal superior interest in any particular property. At the moment, the Crown has certain rights to unowned property such as the foreshore and the seabed. Members may be aware of the Crown patrimony, by which the Crown has title to Holyrood and places such as this. The lawyers have not yet given us a clear indication whether that is part of the Crown's identity as a paramount superior, and which areas belong to the Crown by virtue of prerogative. When we abolish the feudal system, as we should, we must treat the Crown with particular care, so that we do not throw away anything that may be deemed valuable later.

Gordon Jackson: Why should the Crown have any right whatever over my half acre?

Robin Callander: The Crown should have certain rights over the whole of Scotland. It would not have rights in your half acre that were different from the rights that it holds on behalf of the Scottish people over all Scotland's land. The significance of that is that the sovereign rights about which we are talking—the prerogative rights as well as the paramount superior rights—relate to the identity of Scotland as a territory and the

jurisdiction of the Parliament. The Scottish people might consider that the Parliament, in its democratic role of representing them, should have a responsibility to protect its interest in the land of Scotland as a whole—not feudal rights in particular plots of land.

Gordon Jackson: Why can the Parliament not do that simply by planning the legislation that it chooses to enact?

Robin Callander: The exertion of statutory influence is within Parliament's power but, as has been explained, statutory legislation can result in compensation for landowners. If the landowners have relative ownership of the land, the proposals for the way in which land is owned will be undisturbed. However, if the Crown retains ultimate ownership, the balance of compensation will be different.

The point is not that something new should be introduced but, as the convener said, that the fundamental principle of the act as it relates to the Crown should specify exactly what is being abolished.

The Convener: I thank you for coming. We have had your written submissions, which made clear the areas that you were concerned about. Many issues that were raised today have been taken on board.

I ask Professor Rennie to come to the table. Thank you for coming. I am sorry that you have been kept waiting and that we are pressed for time. You are here on behalf of the conveyancing committee of the Law Society of Scotland. Would you like to take a minute or two to say something about the bill in general?

Professor Robert Rennie (Law Society of Scotland): The Law Society of Scotland is broadly in favour of the bill and its principles, which are to abolish feuduties in their entirety as land burdens, subject to payment of a redemption compensation.

We are also in favour of a system of ownership—call it absolute, simple or anything you like—that is not in strata.

We are in favour of the proposals to retain certain burdens that might be enforceable after the appointed day by a former superior who satisfies the criteria that are set out in section 18 and others.

Pauline McNeill: I presume that you heard the discussion before you came to the table. It was suggested that we spell out the rights that the Crown would retain, particularly in relation to public interest. Do you have a view on that?

Professor Rennie: Yes. We are dealing with a bill to abolish—I emphasise that word—the feudal system. It makes no sense to abolish the feudal structure and retain the paramount superiority of the Crown. If that happens, we will not have abolished the feudal system. The bill will have to be radically altered if that is the case.

Pauline McNeill: I am sorry, but I do not think that that is what was said. It was clear that Land Reform Scotland wanted to abolish the superiority rights, but the Crown would be left with prerogative rights.

Professor Rennie: That is not what I understood from the evidence that I heard. I understood that the superiority rights would be abolished in regard to individual properties but that the Crown would retain paramount superiority over land, which would give it some sort of public interest in land—an interest that does not exist under the feudal system at the moment.

At the moment, the Crown cannot intervene in a feudal dispute between a vassal and a superior in Bishopbriggs. One cannot appeal to the Crown, as it has no role to play in the current feudal system.

As I understood the discussion—I have to say that I might not have understood it all—a new and enhanced role for the Crown was proposed. That role would still be tied to some form of paramount feudal superiority.

Pauline McNeill: So you are not interested in retaining any aspect of public interest? Who would represent the public interest in land issues?

Professor Rennie: Currently, as feudal superior, the Crown does not represent the public interest.

The Convener: Are you saying that currently, there is no public interest, in that sense?

Professor Rennie: Not in the feudal system. The Crown exercises the public interest through the Government.

Maureen Macmillan: Can you see any practical benefits in Robin Callander's proposals?

Professor Rennie: Frankly, I cannot see any benefits.

Maureen Macmillan: What about the compensation for environmental legislation?

Professor Rennie: I could not see how the Crown was supposed to intervene. The Crown acts through the Government. Robin Callander seemed to suggest that the Crown would somehow oppose its own legislation or have some powers of intervention. I could not see how that was intended to work.

Gordon Jackson: I was trying to understand it, too. I listened to the idea of retaining the Crown, and I thought that it was a political argument, not a legal one. The idea behind it—right or wrong—was

that the people should be the ultimate owners of the land. That was wrapped up in an argument that, because of the American model, compensation would be affected. No one could give me a specific example, but apparently, if people had absolute ownership, Government proposals could somehow be blocked in a way in which they could not be if the Crown was still the overall superior. Could you see how that would happen?

Professor Rennie: That is the proposal as I understood it. I could not see how the fact that the Crown retained some sort of paramount superiority, with no rights to enforce any burdens, because the feudal structure below would have collapsed, would present the Crown as the owner of the land for the people. The Crown, as paramount superior, does not own the land for the people; the Crown owns it for the Crown.

The Convener: Will you comment on Elizabeth Leighton's evidence about America, where the idea of absolute ownership has meant that companies are able to extract compensation if environmental obligations are to be placed on the way in which they use the land? I realise that we are talking hypothetically, although in America it is no longer hypothetical. Further down the line, will a similar set-up develop in Scotland if that form of absolute ownership is introduced?

Professor Rennie: The Americans work under a completely different system of jurisprudence; I would not pretend to be an expert on that system. They have a written constitution that enshrines certain rights, such as the right to bear arms. We have no such constitution—there are no enshrined rights. We are fettered right, left and centre by laws relating to land use. I cannot see how some new right to compensation would arise if it were not already provided for in legislation because, instead of holding land from the Duke of Hamilton and thence from the Crown, we would have absolute, simple ownership. I cannot see why that change would make compensation claims more likely.

The Convener: Did you want to ask another question, Christine?

12:30

Christine Grahame: I wanted to ask about the other adjacent, or linked, legislation. Do we need to see the other bills before we can go back to the principles of this one? We have to consider the knock-on effect on commercial leases as well as the effects of the title conditions bill and the leases (Scotland) bill, and I do not know what those bills will say. What is your view?

Professor Rennie: I sat on the working party of the Scottish Law Commission when the abolition of leasehold casualties bill was drafted. That bill does not affect the feudal system, nor does it affect title conditions; it concerns leases and, in particular, long leases. When something goes wrong and somebody tries to get something from somebody else because of land, everybody blames the feudal system and says that it is time that we got rid of it, but the leasehold casualties bill is a separate matter.

The title conditions bill is closely linked to the Abolition of Feudal Tenure etc (Scotland) Bill. The Abolition of Feudal Tenure etc (Scotland) Bill looks backwards, at the feudal system as it used to be. The title conditions bill looks forwards, at the burdens and conditions and their status after the abolition of the feudal structure. With a feudal system, the superior is the focal point of ownership and of the enforcement rights. When the feudal superior goes, the new bill will have to consider who in future will have the right to enforce—be they neighbours in a neighbour burden or members of a community in a community burden.

One bill looks back and dismantles the old system. The new bill looks forwards. I see the benefits of taking the two together. The appointed day, whenever that is, must be carefully considered. Both bills should probably come into effect on the appointed day.

The Convener: Professor Rennie, you have managed to clarify how the bills work together and I thank you very much for doing that simply and briefly. If you will bear with us for a few more minutes, there are one or two small questions before we close the meeting.

Tricia Marwick: Professor Rennie has clarified the very point that I was going to ask about—whether it would be better to consider the backward-looking Abolition of Feudal Tenure etc (Scotland) Bill with the title conditions bill that will legislate on future arrangements.

Do you agree that some difficulties might be caused because it is only at this stage in our consideration of the first bill that we have discovered that there is to be a forward-looking bill? Would not it have been better to have had sight of that bill?

Professor Rennie: That would have been better. I have had the benefit of sitting on the working party with the Scottish Law Commission both on the abolition bill and on the title conditions bill. Indeed, we are to meet again in December, to consider the responses to the consultative document on title conditions or real burdens. In a sense, I have been living with both bills and it is therefore easy for me to have a broader view. It must be difficult to take the broad overall view that must be taken if one has seen only one bill, especially where the former superiors have

reserved rights to enforce the 100 m rule, for example.

Phil Gallie: You are the Law Society of Scotland's expert on conveyancing. Will the Abolition of Feudal Tenure etc (Scotland) Bill reduce solicitors' fees for conveyancing and will the title conditions bill add to them?

Professor Rennie: There is absolutely no possibility of solicitors' fees being reduced. [*Laughter.*]

The Convener: Thank you very much, Professor Rennie. We are extremely grateful for your brief appearance before us, which has been very useful.

You are free to go. The official reporters may also go, but I would like members to remain behind for five more minutes.

12:34

Meeting continued.

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