SUBORDINATE LEGISLATION COMMITTEE

Tuesday 29 January 2002
(*Morning*)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE
4th Meeting 2002, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

Bill Butler (Glasgow Anniesland) (Lab)
*Colin Campbell (West of Scotland) (SNP)
Murdo Fraser (Mid Scotland and Fife) (Con)
*Gordon Jackson (Glasgow Govan) (Lab)
*Bristow Muldoon (Livingston) (Lab)

*attended

WITNESSES

Ron Grant (Office of the Solicitor to the Scottish Executive)
Neil Ingram (Scottish Executive Environment and Rural Affairs Department)
Ian Melville (Scottish Executive Environment and Rural Affairs Department)
Bob Perrett (Scottish Executive Environment and Rural Affairs Department)
Murray Sinclair (Office of the Solicitor to the Scottish Executive)

CLERK TO THE COMMITTEE

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 29 January 2002

(*Morning*)

[THE CONVENER *opened the meeting at 11:27*]

Delegated Powers Scrutiny

Land Reform (Scotland) Bill

The Convener (Ms Margo MacDonald): Welcome to the fourth meeting in 2002 of the Subordinate Legislation Committee. I offer a particular welcome to our guests from the Scottish Executive environment and rural affairs department and the office of the solicitor to the Scottish Executive. It is always a delight to see them.

We welcome the chance to discuss the land reform bill with you—it is flagship legislation. Some people might argue that it is the sort of legislation that underpinned the arguments in favour of the Parliament. It is important that the legislation is constructed better than it might have been in the past, as that was part of the argument for the Parliament. The Subordinate Legislation Committee considers that it is our job to ensure that the legislation is as soundly constructed as possible. We are not niggling; we want to get it right.

The committee feels that the powers in section 4(1) and section 8(1), as drafted, are very wide. They give a blanket power to amend core provisions of the bill. We are not suggesting that anybody would want to do so, but such a wide power makes it possible to undermine the intention of the bill. Can you justify the drafting of those sections?

11:30

Ian Melville (Scottish Executive Environment and Rural Affairs Department): As the convener says, this is flagship legislation. In many ways, it is novel legislation.

There has been wide consultation over a number of years on the need for legislation on access and this is the response. It would be nice to think that, after all the consultation and detailed consideration, the Executive has got everything absolutely right and that when the new system of access is introduced there will be no problems. We suspect that that may be an optimistic view of the world. As I am sure members have picked up from the consultation, not everyone is confident that the measures will work in the way that is envisaged. That is why the bill includes proposals to take wide powers. Once the legislation is in place and the new systems are up and running, such powers will allow ministers to react to experience and, if necessary, to amend some of the provisions. That is why the powers have to be fairly wide.

The Convener: Yes. We anticipated that answer and most people will see the sense in that, but my learned friend has a point.

Gordon Jackson (Glasgow Govan) (Lab): We practise cynicism in the committee, because we always try to work out not what nice people will do, but what not nice people will do. Section 4(1) states that ministers

"may by order modify any of the provisions of sections 2 …"

Section 2(1) states:

"A person has access rights only if they are exercised responsibly."

Perhaps I am being ridiculous, but in theory someone could modify that section to state that a person has no access rights, responsible or otherwise. The power states that ministers can reverse the bill by statutory instrument. That is slightly unusual, to my mind. A statutory instrument usually deals with rules and regulations. The whole point of subordinate legislation is that it deals with the nuts and bolts. Here, ministers seem to have the ability, lawfully and legally, in effect to revoke the bill by statutory instrument without the usual need for parliamentary primary legislation. Maybe it is a great idea, but it seems unusual to state that everything could be reversed by statutory instrument.

Murray Sinclair (Office of the Solicitor to the Scottish Executive): We concede that the powers are wide. We considered long and hard whether we should take such wide powers. As Ian Melville said, the reason that we are doing so is that we are dealing with concepts about which members of the public are concerned. They are particularly concerned that we will strike the right balance on the responsible exercise of access rights. It is because of the possibility that we might not have got the balance quite right, at the margins of what is currently in the bill, that we felt the need to have this reserved power to change the law, if that were thought to be appropriate. I also concede that, because we are not certain of precisely where in the bill we might need to make the changes, we felt the need to give ourselves a great deal of flexibility so that we could modify sections 2 and 3 substantially.

On the question of whether that would ever be done, first there is the obvious political issue of whether the power would be used in that way. Any such exercise of the power would be subject to affirmation by the Parliament. Secondly, if we were to exercise the power in a manner that was clearly designed to frustrate the purposes of the act, there would be questions about whether that would be intra vires the power, notwithstanding the width of its terms. We would be open to allegations, with some substance, that we were exercising the power in a manner that Parliament could not have intended and that it was an unusual and unexpected exercise of the power. That could cause legal difficulties for us.

I made those comments to deal with a proposition that we would say is wholly theoretical. There is no intention that the power would be used in a manner that would frustrate the purposes of the bill, let alone effectively revoke it. All that we seek to do is to give ourselves the flexibility to ensure that we can deal with any future case where it is demonstrated that the balance that is struck in sections 2 and 3 has turned out to be not quite right.

The Convener: We accept that that is your intention; we are not absolutely sure that we can make it stick.

Gordon Jackson: I want to say two things. This committee has a slight abhorrence of provisions that grant huge powers about which people say, "They would never be used politically", as if the powers were qualified by such a phrase in brackets. If a power is never to be used and there is no political method to use it, why is that power given?

I am much more interested in the ability that the power would give to revoke the purposes of the bill. I am out of my depth on the vires point that Murray Sinclair made—I am not being facetious—and I do not know the answer to it. However, given the fact that, on the surface, the sweeping power of section 4(1) seems to provide the ability to revoke the purposes of the bill, why cannot the bill spell out that the power is to deal with changing conditions? Notwithstanding Murray Sinclair's point—which might be doubtful—about the power not being able to be used in that way, why cannot that be spelled out? I ask only whether some method could be found of stating that, although the power could be used to change all kinds of things, any use of the power to revoke the purposes of the bill would be ultra vires. Is that technically possible?

The Convener: Could not the power be subject to the super-affirmative procedure?

Murray Sinclair: I do not think that the power could be subject to the super-affirmative procedure. Our line is that sufficient protection is provided by way of the affirmative procedure.

To answer the point that Mr Jackson made, let me explain that the gist of what I was saying is that section 4(1) would need to be read as being subject to the requirement that it was exercised for the purposes of the bill. The parliamentary intention is that section 4(1) could not be used to thwart the purposes of the bill. That proposition is supported by the terms of section 4(2), which state that the order

"may do so generally (that is to say in terms similar to those in sections 2 and 3 above as enacted)"

or that it may do so in a more particular way. The power could be used to do something similar to what is in section 2 at present; it could not be used to do something different from that.

You asked whether there is scope for making that clearer. Perhaps a qualification could be inserted to the effect that the section 4 power could only be exercised for the broad purposes of the bill, as encapsulated in the long title. We are prepared to talk to the draftsman about that. I think that he may say that those words are not needed, but we will at least explore that with him. If necessary, we will put our position on record at stage 1 or stage 2.

Gordon Jackson: If it is a good idea to put that on record, it would do no harm to do so, whether or not it is needed.

The Convener: I will let Bristow Muldoon ask a question, then I will ask again about why further consultation would not be required before the power could be used.

Bristow Muldoon (Livingston) (Lab): My question concerns the same subject that Gordon Jackson asked about. To some degree, I am reassured by the answer that the Executive will go away and consider whether wording that would reassure us can be inserted. Sections 2 and 3 are fundamental, because they provide individuals with access rights and impose obligations on landowners to allow people to exercise those rights. I would be reassured by any change to the wording that ensures that it is clear that the general thrust of sections 2 and 3 cannot be changed by subordinate legislation.

The Convener: Is the committee unanimous about that? Should we say that we want to see that, not simply that we would be reassured by that?

Gordon Jackson: The question is whether that can be done. I am not a draftsman. If the clarification can be made, I do not see why it should not be inserted.

Murray Sinclair: My only qualification is that the

question is ultimately for the draftsman. The way that the process works is that we tell the draftsman what we want in policy terms. I do not think that we would have any difficulty in saying to him that it is not our policy that the powers in section 4 should be exercised in a manner that would frustrate the purposes of sections 2 and 3. I suspect that he may say that the power provided already has an implied limitation to that effect, but we will put the point to him and convey the committee's thinking on the matter.

Bristow Muldoon: I recognise that, in the light of experience, the Executive may need to amend detailed parts of the bill, but could not that be done by amending the other sections that are covered by section 4(1)? Section 14 contains a lot of the detail on how landowners are expected to allow access. Section 9 deals with the restrictions on access rights. The power to amend those sections seems to address the requirement of the bill to be flexible enough to deal with things in the light of experience.

The Convener: If I interpret you correctly, you are saying that ministers could take care of the necessary changes by having the power to amend the other sections, such as section 14, which deals with prohibition signs, obstructions, dangerous impediments and so on.

Bristow Muldoon: It seems to me that it is important to have powers to amend sections 9 and 14, which contain a lot of detail about the responsibilities both of those who take access and of landowners. Those sections are more likely to be amended in the light of experience, rather than sections 2 and 3.

Murray Sinclair: One of the prime concerns in providing for this reserve power, which is there to ensure that the bill is sufficiently flexible, was to respond to the concerns that were expressed about the need to strike precisely the right balance on the key concept of the responsible exercise of access rights. That core concept is contained in section 2. The other sections to which Bristow Muldoon referred are supplementary to what is in section 2. For that reason, we felt that we needed to focus in on sections 2 and 3 but also, because of their supplementary nature, refer to those other sections. Our position is that, if we limit the section 4 power so that it would not allow modifications of the provisions about when a person is exercising access rights responsibly, that might actually take away the flexibility that we and others think might be needed.

Ian Melville: Bristow Muldoon is absolutely right that, in practice, the section 4 powers would mainly be used to modify some of the detail in the later sections. However, sections 2 and 3 lay down what is responsible exercise of access rights and what is responsible land management to comply with those access rights. Perhaps there is a need to go back and modify sections 2 and 3 to make specific provision about why something is a responsible exercise of access rights or why it is responsible land management.

The Convener: I want to ask again about consultation. As there was such an extensive consultation to establish the agreed core principles of the bill, and as you agree that it is possible for those principles to be changed under section 4—always accepting that the change would need to be made by subordinate rather than primary legislation—I would like to know why you do not agree that any such change should be subject to the super-affirmative procedure. That would mean that consultation would be built in. Why is there a resistance to requiring that there be consultation first?

Murray Sinclair: We did not mean to suggest that there would be no consultation. In accordance with the Executive's ordinary practice, we would expect to consult widely and for a reasonable period of time—the general guidelines within which we operate allow for three months—so we envisage that there would be widespread consultation before the section 4 power was exercised.

The Convener: I know that you are nice people, but the bill does not say that you need to consult.

Murray Sinclair: Quite often now, rather than have statutory requirements to consult particular bodies, we rely simply on our general guidelines. We concede that we create legitimate expectations that we will consult, which, in practice, could be enforced as a matter of law.

A whole range of people would need to be consulted. We could not list them all, because there are too many, so we would end up with one of those provisions that says, "Scottish ministers shall consult such persons as they think fit before making the order." If we could not be trusted—although of course we can—that would not amount to anything, because we could say, "We think it fit in this context not to consult anyone." That is why we would be against adding a statutory requirement to consult.

11:45

Colin Campbell (West of Scotland) (SNP): I realise that there is a difficulty in deciding how many organisations to consult. As you said, "as they think fit" could mean that ministers could talk to nobody. However, if there was a requirement to consult interested parties, and if that requirement was advertised, that would take away any lingering suspicion that people might have that something might happen—as Gordon Jackson said earlier—if the bad guys were in charge.

Murray Sinclair: There would have to be some qualification on who the interested parties are. I say that from experience. It is a worry if the phrase "interested parties" is used but is not defined, because it is difficult for us to ensure that we satisfy that requirement when we consult. That is why we tend to qualify such provisions with "such interested parties as appear appropriate to the Scottish ministers." "Interested parties" on its own is not much help. However, we could go away and give further thought to the issue.

The Convener: I would be satisfied if you did. We accept that there is good will all round, but sometimes we have to tie a knot in things.

Section 11 is interesting. We have been hinting that you have taken wide powers in relation to the ability to change the core principles of the bill. Under section 11, it appears that you are willing to tell local authorities that they can do exactly the same without even a by-your-leave to the minister of the day. Could we have a fuller explanation of how that might work?

Ian Melville: Yes. During the early consultation involving Scottish Natural Heritage and the access forum, it was realised that decisions on access should be taken locally, taking into consideration local circumstances and local pressures. The proposal that emerged was that the legislation should provide for the local management of access and that the appropriate bodies to undertake that management would be local authorities.

Section 11 allows for local authorities to react to local pressures or local problems by order, either by taking land out of access rights or by excluding certain conduct from access rights in particular locations. That is often done temporarily, as a result of a particular need over a short period. The bill, as members will have seen, provides for a period of 30 days, but anything longer than 30 days requires confirmation by ministers.

There may be longer-term requirements. There is a provision in the bill to take out of access rights any land where, in the past, a charge has been levied for 90 days in any year, but that measure is purely historical.

There is a centre at Carrbridge called Landmark, with which some of you may be familiar. If someone were to set up a new Landmark, there would have to be some provision to deny access to the land to allow Landmark to charge for access, because the land would not be excluded by any sections of the bill dealing with curtilage or anything else. Therefore, we envisage that the commercial organisation would go to the local authority and have the area of land excluded from access by order, which would allow the commercial organisation to charge for access for the services that it offers.

Gordon Jackson: You said that a period of exemption of 30 days or more would require confirmation by ministers. Forgive my ignorance, but what does that mean? Does that mean that the minister simply writes back saying, "Okay lads" or does it mean a process?

Murray Sinclair: It means a process. Usually, when we confirm things such as byelaws, which we confirm quite a lot, we do so by sealing the confirmation on the byelaw. The byelaw is made by the local authority and given to us. I would expect the same procedure to be followed in this instance. Usually, the order will be submitted in draft and we will make comments and suggest modifications. When we are content with the order, it will be sent to us, we will affix a seal and a minister or an official on behalf of the minister will sign it.

Gordon Jackson: At the back of my mind is the fact that the process does not involve the rest of us. In other words, a local authority—with the connivance, collusion or agreement of the minister—could simply exempt any piece of land from access rights, whether the Parliament liked it or not.

Murray Sinclair: Not quite.

Gordon Jackson: Forgive my cynicism.

Murray Sinclair: Section 11(2) states that before making any order, whether it extends beyond 30 days or otherwise, the local authority has to

"(a) consult the owner of the land … and such other persons as they think appropriate; and

(b) give public notice of the intended effect of the proposed order,

inviting objections to be sent … within such reasonable time as is specified".

Section 11(5) makes it clear that if any objections are raised in pursuance of that procedure in the case of an order that requires to be confirmed, the objections have to be sent to the Scottish ministers. Under section 11(6), ministers must consider objections or representations that are sent to them and can cause a public local inquiry to be held on them. That is similar to many other instances where objections are raised and there is a procedure involving the Scottish ministers and, if necessary, a local inquiry at which those objections can be heard.

Gordon Jackson: But the bottom line is that the power to restrict access to land will be delegated by this Parliament—rightly or wrongly; I am not saying—to local authorities, with the connivance or collusion of the minister, without even as much as a statutory instrument saying, "From now on,

access to this land is being restricted." Nothing comes through us at all. Maybe that is right enough.

Murray Sinclair: The procedure is, in essence, local in character. It is likely to be of limited effect and to apply to particular activities in particular areas with only a local interest, but it is possible that that might not always be the case. I should have said that not only will many of the orders be local, they will be of limited time duration—they will be transitory—but where that is not the case, there is the procedure involving ministers. Public notice should be given to those in the locality who need to know about the issue and who would have a legitimate interest in objecting. If those objections merit it, the Scottish ministers will have to consider whether it is appropriate to have a public local inquiry.

The Convener: That all makes sense, but we will draw the issue to the attention of the lead committee anyway.

Colin Campbell: This is a theoretical question. What is the upper time limit for which a local authority could exempt an area of land, and how big an area could it exempt?

Murray Sinclair: It could be indefinite.

Colin Campbell: And it could be huge.

Murray Sinclair: The provision is limited to

"a particular area of land specified in the order"

so that specification would have to be stayed within, but we concede that

"a particular area of land"

could be quite a big area of land.

Colin Campbell: I have an area of land in mind—Clyde Muirshiel regional park, which is in the west of Scotland. I do not think for a minute that anyone would consider exempting that area, but it would remain technically feasible for the local authorities involved and the minister, if they so desired, to exempt the area without consulting Parliament. That is the problem. It is a big area.

Murray Sinclair: That would be "a particular area" within the terms of the provision, so it could be done, but there is protection by way of public notice objections. If the exemption were indefinite, it would have to come to ministers. If objections so merited, they would cause a public local inquiry to be held.

The Convener: That is the difficult point, with all due respect: if the status is changed indefinitely, is not that changing a primary, core part of the legislation?

Murray Sinclair: Once again, we do not envisage the power being exercised in that way. The fact that any order of indefinite duration has to be monitored by ministers, and the fact of public involvement, should provide sufficient safeguard against anything being done that is in any way inappropriate.

The Convener: But there is nothing in the bill that says that if an indefinite order is put on an area, that order will be reviewed every so often. There are no belts and braces here, Murray.

Murray Sinclair: That is right. There is no sunset clause.

The Convener: Perhaps you could have a wee look at that matter.

Talking of sunset, I was interested by section 11(1)(d), which states that the local authority can exempt land from

"the exercise of access rights or exclude from them the carrying on of such activities during such times … as the 'hours of darkness'."

Come on! That would allow the local authority to drive a coach and horses through all the innocent things that might go on on accessible land during the hours of darkness.

Ian Melville: As you are probably aware, representations have been made in evidence to other committees that access rights should apply only during the day, not during the hours of darkness. The Executive sees no reason for applying access rights for daylight hours only, but it does not rule out that, in particular circumstances, there might be a case for excluding access at night. That was the reason for the provision in section 11(1)(d), which was not intended as a general provision.

The Convener: It was in case folk step on traps.

Bristow Muldoon: At certain times of the year, the hours of darkness could be from 4 o'clock or so in the afternoon. Is it intended that the provision should be applied at sunset? If not, will the provision be applied, for example, at a particular time in the evening?

Colin Campbell: The provision could apply to sunrise and sunset.

Ian Melville: It is difficult to respond to that without knowing the particular circumstances. If there were a good case for excluding access rights for the period between sunrise and sunset, that would be fine. If there were not a good case for doing so, there would have to be public consultation. There is also a provision to consult ministers, who must be satisfied before they agree to an exclusion from access rights.

Murray Sinclair: We provided local authorities with flexibility in all the provisions, because we think that that is a good thing.

Ian Melville: If we could anticipate all the problems and local difficulties that might arise, we would provide for them, but we are not confident that we can do that. That was one of the difficulties that we tried to provide for by providing the powers to ministers in section 4 and the powers to local authorities in section 11.

The Convener: I appreciate that it is difficult for the bill to marry up provision with local circumstances. One would think that it would be common sense for as much as possible of the decision making to be done as close as possible to the ground—or the land. However, one can envisage situations in which local authorities might exercise political judgments. The bill and the subordinate legislation give local authorities the power to exercise political judgments that might run counter to the spirit of the bill as it has been constructed. We should ask the lead committee to look into that matter.

Am I correct in thinking that Murray Sinclair gave an undertaking on that matter?

Murray Sinclair: I was just going back to clarify that for my own purposes. I do not think that I gave an undertaking. I intended to say that we have to concede that there is no self-imploding mechanism for any of the orders. We do not normally use such mechanisms, but it is fair to say that there are provisions elsewhere in the bill for reviewing byelaws. We can go away and consider whether a review mechanism would be appropriate.

I say that with qualifications, because I do not necessarily want an automatic public local inquiry every two years for something that is working perfectly well and with which everyone is happy. We do not want a review requirement that turns out to cost more money and create more hassle than it is worth. However, we could at least consider calling for a review for an order that extends, say, beyond a year.

The Convener: I see that Gordon Jackson has left us, but I assume that he has not gone for good. Do the other members of the committee agree with me that Murray Sinclair's suggestion is fine?

Members *indicated agreement*.

The Convener: Members have no further points to raise on section 11.

Section 30(2) is about the definition of registrable land. We understand and agree with the notion that primary legislation is not appropriate in this case because settlement boundaries will inevitably change fairly frequently and you want the bill's provisions to be able to respond quickly and flexibly to such change. However, we are concerned that section 30(2) proposes to do that in a way that is not as good as it might be. Once again, we considered that the provision in section 30(2) might be better dealt with by the super-affirmative procedure. What are your thoughts on that matter?

12:00

Neil Ingram (Scottish Executive Environment and Rural Affairs Department): I note from the committee's letter that you accept that primary legislation is not the best way to set up and amend the maps of urban settlements. We said, in the consultation on the draft bill, that we would define urban Scotland as that part that lies within settlements with a population of more than 3,000 and that everything else would, therefore, be defined as rural. We said that we would not include that definition in the bill, but put it in an affirmative order that would be based on maps that are produced by the General Register Office of Scotland. The maps are based mainly on census and other data that the GROS produces, which give us an objective definition of an urban settlement.

We think that it is appropriate that definitions of urban settlements should be subject to the affirmative procedure, because that will give the relevant committee the opportunity to ask questions, in particular about the GROS methodology for drawing up the maps. The committee can also ask why we have chosen a cut-off population figure of 3,000. Using the affirmative procedure will also enable us to make changes whenever the GROS updates its data, which is about every two years. In line with what Murray Sinclair said about part 1 of the bill, we would expect to consult on the draft orders, in particular to get views about the concepts that have been used in drawing them up and the cut-off figure that has been used to define urban and rural areas.

The Convener: Fundamental judgments are being made here. Do you want to comment, Gordon? Are you satisfied that the mechanism will be sensitive enough?

Gordon Jackson: I am not so bothered about that. It does not seem to go against the purpose of the bill. I hope that I am not being too sanguine—that would not be like me.

The Convener: I am not as cynical as you are. I did not think that any of section 30(2) was meant to go against the purpose of the bill. The issue is whether the provision in section 30(2) could be inadvertently exploited.

Gordon Jackson: That is what I mean. I am not cynical about anyone who is present or alive; I am just cynical.

The secret of legislation is to read it with a long-term view, because problems have been caused by legislation that, years later, does not work. There is something to be said for seeing how legislation will work in the future, in so far as that is possible. That is all I ever do.

Colin Campbell: Your attitude is less one of cynicism and more one of caution that is born of experience, history and law, is it not?

Gordon Jackson: Absolutely.

The Convener: If you are satisfied that there would be enough—

Gordon Jackson: Perhaps I am not following the discussion, but I presume that we are dealing with the power to work out what is excluded and what is registrable land. That is right, is it not?

The Convener: Yes. Such definitions will be changed by subordinate legislation and—this is important—the bill's core principles are involved, so perhaps there is an argument for using the super-affirmative procedure. That involves consultation, which Gordon Jackson is usually keen on.

Gordon Jackson: I could be super cynical and say that it is never going to get to Govan, no matter how you change it.

The Convener: Well, after that declaration of interest—[*Laughter.*] Would there be anything against having more structured consultation? Or would that be difficult, because you anticipate the order being changed often?

Neil Ingram: We expect to consult whenever the order requires to be changed, which is likely to happen fairly frequently. As usual, we will consult interested parties. Although there will be a lot of interest in the first order, there should be less interest in subsequent changes, as long as the basis on which the order is drawn up in terms of population densities and the basis on which it is determined by GROS and others is clear.

Gordon Jackson: Once the policy decision has been made that the cut-off point is 3,000, drawing up the map is a matter of fact.

I am moving off the subject slightly but, out of curiosity, will the map that covers the whole of Scotland and shows what is in and what is out every two years be changed as people move about?

Ron Grant (Office of the Solicitor to the Scottish Executive): Yes.

The Convener: We will see how such a big undertaking works out. Are people able to object if the definitions of rural and urban are changed?

Neil Ingram: We will consult primarily on two definitional matters, the first of which is the population densities that set up the settlement. As GROS has carried out that work for many years, there is a lot of background to that issue. The other matter is our choice of 3,000 as the cut-off point. We have already partly consulted on that because it was in the consultation paper on the draft bill, although it was not written into the draft bill. We received a fair number of comments on whether that was the right cut-off point. Some people wanted it to be higher and others wanted it to be lower.

The Convener: I am probably betraying the fact that I am very much a townie. Section 39 might be used to alter drastically the community right to buy. How and when does the Executive expect the power under section 39 to be used?

Neil Ingram: The section gives ministers powers specifically to amend sections 37(4), 37(5) and 38 in part 2 of the bill which set out the transfers that are exempt and therefore would not give rise to the community right to buy. They also define what constitutes an action taken with a view to transferring land, which is where we effectively define putting land on the market.

As for the circumstances in which we would use the power, once the act has been in force for some time, we may find that the way in which it operates in respect of our definition of a sale rather than the kind of transfer between family members that we have excluded from triggering the right to buy might not be working quite as we had intended or as people had expected. Section 39 gives us the power to adjust those categories.

The Convener: I know that this is a hypothetical question, but you must have worked it out in such a way. Section 39 gives you the power to adjust the categories. What are the categories and how would you adjust them?

Neil Ingram: The categories are set out in section 38, which also defines who constitutes a member of the same family, as we have stated that transfers between family members are excluded. Section 38 sets out in detail the definitions of those categories. Terms such as family members and relationships are defined elsewhere, mainly in UK law. In future there may be changes in, for example, the law on marriage and who constitute family members. If changes to UK law were made on those matters, the powers under section 39 would give us the opportunity to adjust the act in line with those changes.

The Convener: Would you require to change the definition of family relationships only in those circumstances—if there were changes in what we might call family law at a UK level?

Neil Ingram: It would be that sort of thing.

Gordon Jackson: Does section 39 not also apply to section 37(4)?

Neil Ingram: It applies to parts of section 37(4).

Gordon Jackson: Yes, and there is all the business of when section 37(1) does not apply, such as when a transfer occurs for reasons other than for value and occurs within the same family. It applies to quite a lot of other circumstances.

Ron Grant: The categories could also be amended if it was found that a certain exemption was being abused or if another class had to be created.

Gordon Jackson: I have the impression—I may be wrong—that this is one bill where to an extreme extent the Executive or people like yourselves have taken the view that this is new and requires a belt-belt-belt-and-three-pairs-of-braces job to provide the power to change the legislation in future. I am not being provocative. Am I right in saying that such an approach has been taken to a greater extent than it normally would? It seems to be an extreme case of saying, "We can change every single thing in this act if we think we need to change it in future." I am not suggesting for one minute that it is an abuse of subordinate legislation, but it does seem to be an extreme use of it. Is that a fair comment?

Murray Sinclair: As responsibility for the bill is divided between part 1, for which Ian Melville and I are responsible, and the other parts, I can only speak for part 1, in relation to which the answer to your question is yes. Although we began with draft provisions that defined the bill's core concepts, we reached the view that such an approach might be inflexible, because in some way that we could not foresee, people who want to exercise access rights or landowners might act in a manner that is not objectively responsible.

In order to address those potential difficulties, we needed to take very wide powers. In the event that we faced such difficulties, we did not think that it would be appropriate to wait for the opportunity to introduce primary legislation. It would be much better—more appropriate and in the public interest—if it were possible to make the changes clearly and efficiently, subject to the views of the Parliament and after consultation. As we think that we are in an unusual situation, we are going wider in terms of part 1 than we would normally expect to go.

Ron Grant: I echo those thoughts for parts 2 and 3. Although the concept of community right to buy may be simple, members will know from the bill's provisions that it has turned out to be complex, particularly in relation to trying to fit it into the current conveyancing system in Scotland and protecting owners and sellers. As a result, we have taken fairly wide powers to accommodate what might be defects in the bill.

Gordon Jackson: We should probably draw that particular exchange to other people's attention, as it refers in some ways to what is almost a policy decision. However, we can discuss that matter.

The Convener: Yes, in private.

Gordon Jackson: In private, but not at night in a rural setting. [*Laughter.*]

The Convener: No.

Gordon Jackson: We could exclude the local authority.

The Convener: As far as the wider powers are concerned, we understand the difficulties in part 2 and we will mention the matter in passing to the lead committee.

I have written down that section 59 concerns compensation. I am always keen to find out whether people can get at the money. Is there room for a bit more direction, such as guidelines or hints, on how the power in section 59(5) might be exercised? Section 59(5) more or less just says that there will be compensation.

Gordon Jackson: How do you envisage that the provision in section 59(5) will operate? Will you put flesh on its bones and give us a hypothetical wee scenario of what you think that the provision is about?

Neil Ingram: Section 59(1) defines, under four headings, the circumstances in which people would be entitled to compensation from ministers. Some of the circumstances are specific, such as in section 59(1)(b) which mentions

"A failure by a community body to comply with an order of the Lands Tribunal."

Under section 53 the Lands Tribunal for Scotland has powers to address failure or delay by either party when a community purchase is going through. If the LTS issues an order with which the community body does not comply, the owner of the land, who is disadvantaged because the sale is going through slowly or because the community body might not eventually go through with it, is entitled to compensation.

12:15

Gordon Jackson: Why will ministers provide compensation? I am trying to understand section 59. I understand why we should pay out compensation for some things, but why should the fault of X, which causes loss to Y, be compensated for by Z? Compensation usually comes from the people who cause a loss. What will ministers—or we—pick up the tab for in this respect?

Neil Ingram: Section 59 will, in part, reassure landowners and those whose sale proceedings are disturbed by the right to buy that if the right to buy does not go exactly as the bill sets out because things happen, they are entitled to compensation. As ministers propose to set up the right to buy, they should be responsible for providing such compensation.

The Convener: Those are the old principles of nationalising and not compensating or nationalising and compensating.

Gordon Jackson: It is not compensation in terms of the value of the land, but compensation for somebody's failure to do something.

Neil Ingram: It is compensation in relation to other things that happen as a result—

The Convener: Of a policy change. The people who change the policy are held to be responsible if someone is disadvantaged because of that change. That is quite socialist, is it not? It is quite a good idea.

Gordon Jackson: I suspect that, whatever else section 59(1)(b) may be, it is not socialist.

The Convener: Are we content with section 59, or would we prefer to see some guidelines about how the regulations would work?

Gordon Jackson: I do not yet have a feel for how the legislation would work in practice. I presume that the order would simply set out the method of compensation.

Neil Ingram: Yes. The order will set out a basis for compensation. The kinds of things for which compensation will be payable will be broadly similar to that which exists for compulsory purchases, although the business of compulsory purchase is itself under review at the moment.

Gordon Jackson: Perhaps we might want to see the instrument before we have gone too far down the tracks.

The Convener: Yes, I think so.

Neil Ingram: Do you mean a draft of the regulations?

Gordon Jackson: It has been quite common for the committee to receive a draft of how the Executive proposes that such things would work in practice. I must say that such an approach has been helpful. The Executive has tended to undertake to provide by stage 2 a draft of anything that has worried us. Perhaps the Executive will not be as helpful this time but, historically, when various committees of the Parliament have asked, they have tended to get a draft of the regulations that might be made under a provision that has concerned them.

The Convener: It seems to be important that we should get a draft of the regulations.

Murray Sinclair: When we have been asked, we have generally been prepared to come forward with drafts. As it would be for Ron Grant to draft the regulations—

Gordon Jackson: I would like the committee to receive a draft because I do not have much of a feel for this provision.

The Convener: Is it possible that we could get sight of a draft, Ron?

Ron Grant: I do not see any difficulty with that. The general principle is that nobody should lose out by the exercise of the right to buy, or by the failure to exercise that right after it has been commenced. To tell the truth, I do not think that there will be anything fancy in the regulations. They will simply give the methodology of the calculations. I am quite happy to provide a draft.

Colin Campbell: It would be good for the committee to know what the regulations might be.

The Convener: I thank Ron Grant for that.

On the face of it, section 75(1) provides ministers with the ability to challenge the power of the Scottish Land Court.

Bob Perrett (Scottish Executive Environment and Rural Affairs Department): Section 74 provides that, in assessing any application to buy additional land, the Scottish Land Court must undertake various tests, which are set out in section 74(3). It is proposed that there should be a power to amend those tests. As far as we are aware, the whole area that is covered by section 74 is a completely new concept, which is not covered by the Scottish Land Court at the moment. The tests that are set out in section 74(3) are fairly strict.

The provision in section 75 is basically a recognition of the fact that we have no feel for how the process in section 74 will work in practice. If the provision was not working as the Parliament had intended, we would expect the court to draw that to ministers' attention. Clearly, if the court felt that the provision was not workable, it would tell us. The assumption is that, if that happened, we should have the opportunity to do something about it. The use of the power in section 75 would be uncommon and would occur after extensive prior consultation had taken place.

We intend the test in section 74 to work in a way that allows additional land to become available to crofting communities without the test being applicable every time that a crofting community applies to acquire additional land. The test might not work on the basis that has been set out, which might prove to be too strict or perhaps too simple.

The intention behind section 75 is to get that balance right.

The necessity for the powers in section 75 will become obvious over time, but it will be quite a long time. We will not be using those powers in two years' time. We are talking about something that might happen 10 years down the line, once we have had real experience of what happens in practice.

Gordon Jackson: Do you anticipate—I know that you do not know this, but I do not have any feel for crofting at all—that there will be a lot of applications to the Scottish Land Court?

Bob Perrett: For additional land? No. That is one of the reasons for my saying that use of the powers in section 75 is a long way away. Although a number of applications might be made to buy croft land, the number of applications to buy additional land will be more limited.

The Convener: With all due respect, you cannot judge that now, so the manner in which section 75 is set out is very important.

Your explanation was interesting. You have included section 75 because you are not sure how section 74 will work. No provision has been made for consultation. You said that there would be consultation if anyone wanted to buy additional land.

Bob Perrett: There would be no consultation on the issue of somebody buying additional land, because the person would take up that matter with the Scottish Land Court. Existing provisions provide that that court would deal with the matter. There would be consultation on any proposal to change section 74(3). Consultation would be conducted on the issue on which we are taking the power to make an order. If we intended to make an order, we would certainly consult. Far-reaching changes could not be made without consultation.

The Convener: Is Gordon Jackson concerned about the fact that this can be done by subordinate legislation?

Gordon Jackson: I have some sympathy for this provision. It would be a pity if, 10 years down the line, the Scottish Land Court came back to the Executive and said that the purpose of the bill was to allow purchase of additional land but that there was a loophole so the criteria would have to be modified slightly. That is not all that likely—the criteria look all right—but you never know. If there was not a procedure in place to do such modification by means of a statutory instrument, time would have to be found for brand new primary legislation, or else the whole thing would be snookered.

I am not without sympathy for a power that would allow such modification to be done by statutory instrument. Unlike the provisions about which I expressed concern at the beginning of the meeting, the power is not designed and could not be used to knacker—to use a legal term—the purposes of the bill. Fine-tuning of the criteria is required to make it work.

Bob Perrett: This is a subsidiary purpose, in a sense, as additional lands are an extra. It is intended to be an extra opportunity.

Gordon Jackson: Section 75 does not undermine the bill. I cannot see how it could be used to undermine the purposes of the bill. It enables the bill to be fine-tuned so that it works. Others may feel less comfortable with the provision.

The Convener: My concern is about the principle of being able to transfer land under an order. If the provisions in section 74 were not working to your satisfaction, you could effect a big change.

Gordon Jackson: It gives the court slightly different criteria to apply. The power would be required only if the court came back and said that the procedure was not working.

Bob Perrett: The provision in section 75 cannot create a situation in which the Scottish Land Court would not be involved. It would be used only to change section 74(3), which contains the criteria that the Scottish Land Court uses. The provision does not change the basis on which the means of dealing with this aspect of the bill operates. It could change the criteria that apply when that procedure operates, but the procedure is unaffected.

Gordon Jackson: It is to allow fine-tuning that is a long time away.

Bob Perrett: That is correct.

Gordon Jackson: I am most cynical about things that are said to be a long time away, but I see the sense in this provision, more than I do in others.

Colin Campbell: I always have a residual suspicion about how something may go wrong, but I accept what Gordon Jackson says, as this is not a potential attack on the principle.

The Convener: We will leave that one for now, in that case.

Is the Executive confident that the exercise of the power in section 87(6) would be competent in relation to the state aid rules?

Bob Perrett: One could seek to exercise the power in a way that would run into trouble with state aid rules, but the Executive's intention is that we would ensure that we complied with state aid rules. We would have to ensure that any proposal

for a grant scheme complied with state aid rules before we developed the proposal.

12:30

The Convener: So you are saying that you do not need to state that; it is taken as read.

Bob Perrett: We take it as read if we are going to give grants to organisations. We expect that we can frame a grant scheme that will comply with state aid rules, but we would have to ensure that that was the case.

The Convener: Are you content with that, Gordon?

Gordon Jackson: Yes.

Colin Campbell: It sounds like hours of work for lawyers.

The Convener: It is the sort of thing that gets really screwed up, but I am not sure that an anti-screw-up section can be written into the bill.

Are there any other issues?

Gordon Jackson: The session has been helpful.

The Convener: Indeed. I thank the witnesses for their attendance and for the information that they have provided today.

As I said before the meeting started, if we are not satisfied with the information and justifications that we get from the Executive, we have the option of asking the Executive to report back to us. We have still got time to do that, if we do it next week. Whether we need to do it I do not know, but I am sure that we do not need to ask the minister to come to see us.

Gordon Jackson: The same applies to today's witnesses.

The Convener: That is what I think as well.

Gordon Jackson: They were quite helpful.

The Convener: I thought that they were trying to be very helpful. Is there anything that members wish to pick over, or do we have enough information for our report?

Gordon Jackson: Obviously, Alasdair Rankin will draft the report. I want to highlight to the lead committee the exchange that I had with two of the witnesses, who both conceded that they were taking incredibly sweeping powers. I floated the idea that what they were doing was much more extreme than usual, and both said that that was the case. That might be right or it might be wrong—it might or might not be justified—but the witnesses openly admitted that they are going right over the top with subordinate legislation powers. That exchange in particular should be provided to the lead committee almost verbatim, and we should say, "That is what they are doing."

We are not taking a position. I do not know what the convener thinks, on whether that is good, bad or indifferent but—

The Convener: I am not taking a position.

Colin Campbell: No, but we are clear about what the Executive is doing and why.

Gordon Jackson: We should be saying that the bill has hugely sweeping subordinate legislation powers. We should be under no illusions.

The Convener: It is important for the style of other bills that we put it on the record that we have asked the Executive witnesses questions, we have heard their explanations, and we will draw the issue to the attention of the lead committee.

Gordon Jackson: We need to watch that this new Parliament does not start to follow that trend. It may be legitimate for the Land Reform (Scotland) Bill to provide that everything can be totally changed by statutory instruments, but once draftsmen and legislators get into that habit, that might become the norm in every bill. That would worry me quite a lot.

The Convener: Given the fact that this is a radical bill, which is detailed and has wide-reaching effects, perhaps it is understandable that the Executive wants to be able to change so much by subordinate legislation. On the other hand, because the bill concerns people's basic rights over the use of land and access to land, there will be disputes.

Gordon Jackson: I can understand that. That is why I would like to change the bill to insert the rider or caveat that the purposes of the bill cannot be changed by subordinate legislation. I can understand why the Executive has done what it has done, but I worry slightly lest we set a precedent in our new Parliament and become huge over-users of statutory instruments. Perhaps not every bill will be like the Land Reform (Scotland) Bill, but the issue is of the sort that we should highlight to lead committees and to the Parliament. It is not for us to say whether the bill uses too many statutory instruments, but there is an issue about the extent to which statutory instruments should be used in legislation.

Colin Campbell: We should register our concern. Our criticisms of the bill should be given an edge.

The Convener: We would be concerned if the bill were to set a precedent. In this instance, we are prepared to accept that, because of the bill's complexity, there may be a need for maximum flexibility so that—to use the example that was given—we do not have the expense of a formal

public inquiry. Perhaps Alasdair Rankin could include those points in his report.

Gordon Jackson: The provisions of the bill are almost invariably succeeded by another section that says "We can change any of the above." Fundamentally, that is what the bill does.

The Convener: Sections 74 and 75 come to mind. When we asked why section 75 existed, we were told, "Well, we do not know whether section 74 will work."

Gordon Jackson: That is how the bill is structured.

Colin Campbell: It was very honest of the Executive officials. We can understand where they are coming from. Nobody has done this before.

The Convener: Okay, we have got the picture. Are we happy that our report should draw those points to the attention of the lead committee?

Alasdair Rankin (Clerk): Should the attention of the lead committee be drawn to the various undertakings that were given?

The Convener: Yes, it should.

Gordon Jackson: It was quite interesting that the one time that the witnesses were lost for words—I mean no disrespect to them—was when we asked how the compensation scheme would work in practice. Witnesses are normally very articulate and can tell you things, but on that occasion we had the goldfish scenario: there were no words coming out of their mouths.

Colin Campbell: They had not thought it through.

Gordon Jackson: They did not have a handle on how the compensation scheme would work in practice.

Colin Campbell: It was mildly embarrassing.

The Convener: Another scalp for the Subordinate Legislation Committee.

Gordon Jackson: That was the only issue on which they were not confident.

The Convener: They were uncomfortable. I think that they will go away and talk about that—which might be as much the purpose of today's exercise as providing us with information.

Executive Responses

Forth Estuary Transport Authority Order 2002 (Draft)

The Convener: For the next agenda item, I have information on the Executive's responses to a couple of the points that were raised last week.

The Executive has not conceded that "Forth Estuary" is a misnomer but—you never know—we are working on it. The draft order has been withdrawn today, as the Executive has accepted that the points that we made were valid.

Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Scotland) Regulations 2002 (SSI 2002/6)

The Convener: The difficulty with the regulations was about cross-border ownership between the two jurisdictions. The regulations are working in Scotland and there are regulations that are probably working in England, but the two sets have not meshed. The regulations are therefore being reconsidered.

The Executive's response states:

"Full account will be taken of the observations of the Committee in carrying out that review."

That is us. We got it right. We knocked it off.

Draft Instruments Subject to Approval

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2002 (Draft)

The Convener: No points arise on the draft regulations, although they contain a small typo.

Instruments Subject to Approval

Local Government Finance (Scotland) Order 2002

The Convener: Local government lolly. No points have been identified in relation to the order.

Instruments Subject to Annulment

Road Works (Inspection Fees) (Scotland) Amendment Regulations 2002 (SSI 2002/13)

The Convener: There was a mistake in the letter that was sent about the instrument, but there is nothing wrong in the instrument itself.

Motor Vehicles (Competitions and Trials) (Scotland) Amendment Regulations 2002 (SSI 2002/14)

The Convener: There is another small typo, but nothing else.

Local Authorities Etc (Allowances) (Scotland) Amendment Regulations 2002 (SSI 2002/15)

The Convener: More money for local authorities. No points arise on the instrument.

Instruments Not Laid Before the Parliament

Children (Scotland) Act 1995 (Commencement No 5) Order 2002 (SSI 2002/12)

The Convener: No points arise on the commencement order, but we should alert the lead committee that the instrument interacts with other instruments that it is considering and that we talked about last week.

I thank members for their attendance. I promise that we shall deal with small furry animals next week. We shall not take evidence from witnesses, but we shall receive written statements.

Gordon Jackson: Tally-ho.

Meeting closed at 12:40.

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