RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 10 February 2010

Session 3

£5.00

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
3rd Meeting 2010, Session 3

CONVENER

*Maureen Watt (North East Scotland) (SNP)

DEPUTY CONVENER

John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Karen Gillon (Clydesdale) (Lab)
Liam McArthur (Orkney) (LD)
*Alasdair Morgan (South of Scotland) (SNP)
*Elaine Murray (Dumfries) (Lab)
*Peter Peacock (Highlands and Islands) (Lab)
*Bill Wilson (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Rhona Brankin (Midlothian) (Lab)
*Jim Hume (South of Scotland) (LD)
Nanette Milne (North East Scotland) (Con)
Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Sir Crispin Agnew
Dr Jean Balfour (Scottish Rural Property and Business Association)
Marina Dennis (Scottish Crofting Federation)
Simon Fraser
Keith Graham
Jonathan Hall (NFU Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

SENIOR ASSISTANT CLERK

Roz Wheeler

ASSISTANT CLERK

Lori Gray

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 10 February 2010

[THE CONVENER *opened the meeting at 10:01*]

Subordinate Legislation

Snares (Scotland) Order 2010 (SSI 2010/8)

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2010 (SSI 2010/9)

The Convener (Maureen Watt): Good morning, everybody, and welcome to the committee's third meeting of the year. Please remember to switch off all mobile phones and BlackBerrys as they impact on the broadcasting system.

The main purpose of today's meeting is to take evidence on the Crofting Reform (Scotland) Bill. This will be the committee's second evidence-taking session on the bill. We will hear from a panel of legal experts on the bill followed by a panel of stakeholders.

I intimate that we have received apologies from Liam McArthur—Jim Hume is substituting for him—and from John Scott.

Agenda item 1 is consideration of two instruments under the negative procedure: the Snares (Scotland) Order 2010 and the Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2010. The Subordinate Legislation Committee commented on the snares order and the relevant extract from that committee's report has been circulated to members as paper 3. No member has raised any concerns on either of the orders and no motion to annul has been lodged. Do members have comments on either of the orders?

Members: No.

The Convener: Do we agree not to make any recommendation on the SSIs?

Members *indicated agreement.*

Crofting Reform (Scotland) Bill: Stage 1

10:03

The Convener: We move to item 2 and the evidence-taking session. I welcome the panel of legal experts—Sir Crispin Agnew QC; Simon Fraser, who is a solicitor in Stornoway; and Keith Graham, former principal clerk to the Scottish Land Court.

Peter Peacock (Highlands and Islands) (Lab): Welcome, gentlemen. One of the big changes that the bill proposes is the establishment of a crofting commission, which would be in part directly elected. Nonetheless, it would be a regulator that had to operate the law on crofting, which is complex, as you know better than we do. What difference would elected members make to the commission compared with the current situation, given that they will have a precise and strict body of law to administer?

Sir Crispin Agnew: As I state in my written submission, the Crofters Commission is also a tribunal under the Tribunals and Inquiries Act 1992, so we are going back to the American principle of electing judges. I do not see any particular harm in that, but there is a constitutional issue that needs to be addressed regarding the precise status of the Crofters Commission. It is really a regulatory and administrative body. It should operate on that basis and cease to be a tribunal. If it is an administrative tribunal that regulates process, it is in the same category as licensing boards and licensing committees in local authorities, which are elected. They have a clerk, and the Crofters Commission has solicitors who give it legal advice, so if we can get over the constitutional issue of the election of judges, I do not see it as a problem if the commission remains a tribunal, provided that it has legal advice available to it.

I made the point in my submission that no one seems to have considered the relationship between landlords and crofters, particularly when the Government is encouraging community buyouts or crofting community buyouts under the Land Reform (Scotland) Act 2003. The dynamic that exists between a private landlord and crofters is different from the dynamic that exists between a community landlord and crofters. That issue needs to be addressed. A community company that has bought land has obligations to run things with a view to sustainable development and a variety of other issues that are set out in the 2003 act, yet the commission has functions in relation to crofters, so there will be tension between those two roles.

It seems to me that if the commission is to regulate the crofting communities, it should have on it representatives from the landlord side. If there are to be elections, representatives should be elected from the landlord side so that the commission is a representative administrative body, particularly when more and more crofting estates are likely to go into the hands of community ownership if the Government's aims under the 2003 act are met.

Simon Fraser: Like Sir Crispin, I am quite agnostic about the notion of a regulatory body being elected, but leaving that aside, I entirely agree that those who are appointed or elected to the commission need not have any expert knowledge of the law, as they will be guided on that by their own people. I entirely concur with Sir Crispin that if we have selection by sector—it would seem that what is proposed in the bill is selection from a body of crofters—there ought to be representation from the two types of land-owning body, by which I mean private landlords and those on the community side.

Peter Peacock: In discussions about an elected commission, an underlying assumption that one hears is that because it is elected it will have more discretion than the current commission has. Given that we are talking about a regulatory body, I find it quite difficult to fully work out the extent of the discretion that it might have. Would you like to comment on that? Will the fact that members of the commission will be elected rather than appointed mean that the new commission will have more discretion than the present commission has?

Sir Crispin Agnew: People who are elected have a constituency. From my experience in licensing, I often had a suspicion that the licensing board's decision was made partly with a view to its constituency and that the board would leave it to the sheriff to put the matter right on appeal.

I would have thought that someone who is not elected might be freer to be independent, whereas someone who is elected has a constituency to represent. Equally, someone who is not elected and does not have a constituency will perhaps not bring the experience of their local membership into the decision-making process. It is a question of balance.

Alasdair Morgan (South of Scotland) (SNP): Before we move on, I would like us to deal with the issue of landlord representation. As has been said, there are at least two types of landlord: community landlords and non-community landlords. One does not yet know whether the relationships that those two types of landlord will have with their tenants will differ. Are you saying that both interests must be separately represented on the proposed new crofting commission? If so, how on earth does one work out who will represent them? I would have thought these groups to be fairly heterogeneous.

Sir Crispin Agnew: It is a difficult issue, but if you are seeking to regulate crofting, you have to realise that there are two sides to take into account, particularly with regard to community landlords. In certain cases, the crofting community might have bought out the crofting interest or, as in South Uist, the whole estate, which will include a number of crofting interests. The Land Reform (Scotland) Act 2003 requires a community company to have certain aims and objectives, which are similar to those given to the Crofters Commission. However, tensions will arise. Given that, as it seems to me, most modern private or community landlords tend to develop their crofting estates for the local community's benefit, the landlords' interests should be represented on the body that will regulate crofting. If that does not happen, crofting will be regulated entirely from the crofter's perspective, which might well be at odds with the Government's land reform objectives of ensuring community ownership and development.

I am looking forward to the first attempt by a crofting community that wants to go in a different direction from the community purchase to buy out from their community landlord. Admittedly, the minister would have to give consent to such an application, but the fact remains that there are tensions and if the regulatory body is elected only from one constituency, the landlord's interest, which will perhaps become more and more a community interest, will not be represented. The bill has not addressed that issue.

As Professor Hunter said, no one has gone back to the fundamentals with this bill. What is the Government trying to achieve in the crofting counties? If it is trying to achieve a social objective, why is it narrowing its focus to the 15,000 crofts spread around six counties? We need to look at the broader picture. How, for example, do the crofting community's rights to buy fit in with the continuation of crofting? That issue has not yet been tackled on a larger scale but nevertheless, even within this bill, it can be addressed in a small way in the make-up of the crofting commission.

Karen Gillon (Clydesdale) (Lab): Simon Fraser says in his submission that crofts in the name of one tenant are often regarded as family properties held in trust. One tension that is emerging from a lot of the evidence that we have received relates to who can be nominated to sit on the commission and who can take part in the elections. How should people be elected to the commission and who should have the right to vote?

Simon Fraser: I have not given a great deal of thought to the matter. I do not particularly support the concept of elections to a regulatory body but, if

they are to happen, a number of constituencies will have to be established. As Sir Crispin has suggested, the constituencies of the community and private landowners will have to be addressed as much as the constituency of the crofters. I suspect, though, that they will have to be herded into districts and I wonder whether people will be bothered to engage in the process at all. The voting process will have to be made very easy, perhaps with the use of a postal voting system, but I imagine that it could be arranged on an area basis.

10:15

Karen Gillon: When we spoke to Government officials last week, we found that if a croft is registered in the name of one person only—a husband, say, but not his wife—it was not clear whether the wife could be nominated to stand for election. It was also not clear who would be able to vote in an election. Has either of the other witnesses given any thought to those issues?

Sir Crispin Agnew: That goes back to the question whether you want only crofters to qualify. In that case, there is only one registered crofter or one owner-occupier for each croft. An owner-occupier can be a husband and his wife, because title is usually taken in joint names. If that is so, however, do they both get a vote? A tenanted croft has only one tenant.

The question is what we are regulating. Should the whole community be able to vote for who represents it on the crofting commission to regulate the crofting part of the community? If you are electing a body that oversees the regulation of crofting in the interests of the whole community, surely everyone who is on the electoral roll in the crofting counties should be entitled to elect a representative, not only the crofters or the landlords. Maybe the area should be divided into broad districts. That would mean that the public interest would be regulating crofting as part of the overall public interest. Saying that it should be crofters only means that 15,000 people are electing 10 commissioners, which means 1,500 people for each seat on the board.

The Convener: There will be six commissioners.

Sir Crispin Agnew: Or six, or whatever the number is.

Keith Graham: I agree with Sir Crispin that everyone in the crofting counties should be able to vote. There are many instances of a croft being in someone's name because it suits the circumstances. I can think of one case in which the croft was transferred into the wife's name because the husband took a job with the Government. That chap continues to be the crofter; he works the croft and the wife does not. So I agree that everyone in the crofting counties should get an opportunity to vote.

Simon Fraser: There is a precedent in part 3 of the 2003 act under the crofting community right to buy. It is not solely the crofters who have the vote, although the majority of the crofters must vote in favour; the whole community has a vote.

The Convener: We move on to talk about the register of crofts.

Elaine Murray (Dumfries) (Lab): I have a couple of questions about the current situation because the proposal is to move away from that. If someone inherits or is assigned a croft, how easy or otherwise is it for that individual to find out the boundaries of their croft?

Keith Graham: I have had a lot of experience of boundary disputes in the Scottish Land Court and my short answer is that it is very difficult to find out what the boundaries of a croft are, unless the crofter is in the fortunate position of having a landlord who has map-based records, or the previous tenant has shown the new crofter the boundaries—whether they assigned the croft, or they were the new crofter's father or something like that. The current register of crofts will not show the croft's boundaries. It will show what the acreage or hectarage is or should be, but that does not always match up to the situation on the ground.

Sir Crispin Agnew: I agree with Keith Graham. Boundaries are really just folklore that is handed down from one person to another. Disputes often rumble away, and nobody really takes issue.

A map-based register of crofts is essential. All land in Scotland goes on to the land register, and it seems anomalous that crofting titles do not appear on that register. One can look at the land register, which will have mapped an area of land, and find no reference to whether there are crofting rights over that land. That seems anomalous.

There will undoubtedly be some pain in getting everything on to the land register, but it is important that that is done in due course. Whether the right way to go about things is the way that is suggested in the bill is a different matter. There is a lot to be said for the Scottish Crofting Federation's suggestion in its submission that things could be done area by area. Local crofters could work with a mediator—the federation suggested a local assessor. Somebody should try to get everybody together, map the whole township, and find out how much agreement exists. The whole township map, including the common grazings map, could then be presented for registration. One approach might be using a mediator to get as much agreement as possible in a local area.

I strongly support having a register, not only for the benefit of crofters, but for the benefit of conveyancers in the crofting counties. Missives guarantee that areas are not subject to crofting or that something is not a croft, because people do not know. I have been involved in a number of cases in which people have owned a house and a garden. In one case, people had owned the village shop and petrol station since 1910, but when they came to sell it, somebody came along and said, "Actually, that's part of my croft." No claim had been made to that since 1910. There is an on-going case on Coll in which a local crofter has claimed that a lot of the garden grounds that are attached to the houses were put on the common grazing. Those grounds have been there for generations and nobody has ever made that claim before, but there is a Land Court case on the matter now. That, among other reasons, is why I think that a register is important. However, it seems to me that the best way to deal with things is to do so area by area, and to get local people involved in order to find out how much can be agreed. People can then go to the Land Court with intractable cases.

Bill Wilson (West of Scotland) (SNP): You seem to be saying that a major concern is simply identifying the crofting interest so that people will know what it is. Would it be possible, for instance, to identify the crofting interest area without being overly concerned about the precise boundaries within the crofting interest of a particular croft, which might produce disputes?

Sir Crispin Agnew: There are two issues, one of which is what the outer boundaries of the croft land are. In its submission, the Scottish Rural Property and Business Association suggested that landowners should be responsible only for outer boundaries, because they do not really know what is going on inside them. If we are going to have a register, we will probably ultimately want to register each croft as well in order to provide clear measures of them, because crofts have value, and we do not want to end up with disputes. There are always on-going disputes. There will be pain in getting disputes sorted out once and for all, but it would be a good thing if the register took the approach that is taken with the land register so that, once boundaries are registered, they will be the defined boundaries. Perhaps we could start with outer boundaries and work inwards.

Elaine Murray: You have both referred to current disputes and the problems with the current system. Do you agree that the bill as it stands seems to underestimate the problems of resolving some of the issues about boundaries? The policy memorandum refers to the mapping of common grazings, which will throw up a whole raft of other boundary issues because of the ways in which common grazings can fluctuate between seasons, and so on.

Sir Crispin Agnew: I agree that the bill underestimates that problem. There are a lot of festering disputes that people just live with. One person says, "That 5yd is mine"; someone else says, "No, it's mine." Then everybody just gets on with it.

Elaine Murray: If it is going to be on a map and registered—

Sir Crispin Agnew: The moment that it is put on a map, there will be an issue.

Something that people also forget about maps is the fact that, at the scale at which the mapping is likely to be done, the black line on the map can represent 1.5m to 2m in width on the ground and, depending on the accuracy of the map, it can be displaced 5m either way. Unless a boundary is defined as this stone to that stone and so on, even a map-based register can give rise to issues within what might be described as the 7m gap—which is often what boundary disputes are about.

Mapping the common grazings will include mapping the boundary of a croft against the common grazing. So, if there are 20 crofts backing on to a common grazing, the boundary will be defined as the back line of those crofts.

Simon Fraser: I was an administrator of a number of crofting estates in Lewis and Harris, where the vast majority of the crofts do not have any records. Most of the Lewis records disappeared in a fire in 1918 and nobody has bothered to replace them—nobody could. Sir Crispin's point about the folklore surrounding croft boundaries is important. When a case comes before the Land Court and it tries to fix the boundary of a croft, it looks for the man with the longest and greyest beard in the village. However, that folklore is starting to fade—a lot has disappeared in the past generation. We have new people coming in who simply do not know those things, and that information is starting to fade.

I have a set of plans for some crofts in the south of Harris that show the boundaries as they were originally drawn out. They were drawn with absolutely no regard to the topography of the land—they go up and down cliffs and everything—with the result that, when people come to fence them, they fence what they can fence and just ignore the rest, which fades into common grazing land. The boundaries often come as a revelation even to long-standing crofters.

What I am getting at is the fact that, although there is a big problem with all this, I do not think that the proposed register is the way to go about solving the problem. It will be enormously elaborate and complicated, and the process will

engender a great deal of difficulty. The Scottish Crofting Federation's recommendation has a great deal to recommend it. The participative process that the federation envisages could catch the remainder of the folklore, bringing all the necessary information together, and it would not rely on an almost adversarial, first-past-the-post system such as is proposed in the bill. We would end up with a map-based register, but one that people could sign up to and that would be achieved not within a couple of generations—which might be the case with the current suggestion—but in a far shorter period of time. The process and its cost would require to be supported, but I suspect that, on a croft-by-croft basis, it would be infinitely cheaper than the system that is proposed.

If we are to go with the register, for goodness' sake you should have a care about the triggers for registration. I assure you that, if registration must take place on the transfer of an estate, we will never again see the transfer of a crofting estate to the community. The cost and the process will be so enormous that it will simply not happen.

Crispin Agnew: And divisive.

Simon Fraser: It will be incredibly divisive. It will take a generation. A lawyer could be employed for the rest of his life to do it.

Peter Peacock: You could do it

Simon Fraser: I could not face it.

Peter Peacock: You are smiling, Sir Crispin.

10:30

Sir Crispin Agnew: Thanks to Derek Flynn, we recently came across the Inland Revenue's valuation for the whole of Scotland for 1910—every holding was described, valued and mapped. That map-based register of all holdings in 1910 is sitting in the National Archives of Scotland. It could be a start for all this. Since the discovery, the information has been used quite often in boundary disputes and so on. If somebody were to dig out the information, it would be a good start.

Simon Fraser: Since the Crofting Reform etc Act 2007, the Crofters Commission has begun to build up map-based information on its register. It now has a mapping section and is building up a level of expertise. I congratulate the commission on the quality of mapping that it is beginning to produce. That could be the beginning of the sort of thing that the federation is suggesting.

Keith Graham: I welcome the general principle behind a definitive map-based register, but I, too, have serious reservations about using the various triggers to effect a first registration. Let us say that, age 20, I become the tenant of a croft and I do nothing to trigger a registration, nothing is done until I die aged 80. In that instance, the croft would not appear on the register for 60 years.

A better approach would be to have a system of complete mapping for each township and associated common grazings. That also might be cheaper. I have concerns about the requirement for any application for registration to be advertised. Nowadays, the cost of an advertisement can be in the region of £300 to £400. I see no reason for the requirement to advertise, given the requirement under the present scheme for all adjacent proprietors, tenants and so forth to be notified of the application for registration.

Jim Hume (South of Scotland) (LD): In his submission, Simon Fraser says that a register would be

"too elaborate ... almost unworkable"

and

"could take a lifetime".

Sir Crispin Agnew says that a register would be welcome, because disputes happen often, whereas Simon Fraser says that there are seldom disputes. There is some confusion—

Simon Fraser: I did not say that there are seldom disputes. I was advocating—

Jim Hume: The submission says "Disputes seldom arise".

Simon Fraser: At the moment.

Sir Crispin Agnew: They sort of fester.

Simon Fraser: They are not necessarily brought into a forum where they can be resolved, because of the hassle, complexity and cost of doing so. With a register, all disputes would be brought to the surface and all would have to be dealt with.

Jim Hume: I think that we are getting into two camps. Sir Crispin, you have mentioned twice that some pain will be involved. Simon Fraser says that it "could take a lifetime". I think that you are saying, Sir Crispin, that it should be done. If so, do you agree with Simon Fraser that it could take a lifetime for the lawyers to sort out?

Sir Crispin Agnew: I think that Simon Fraser is saying that it will take a lifetime because of the triggers. Keith Graham mentioned that, too. If somebody is in a croft where there is no trigger for a long time, it will take a lifetime. That is the context. At present, people live with their boundary disagreements because it does not really impact on them greatly.

Before fishings had to be put on to the land register, when there were disputes about fishing pools, local landowners would say, "We'll fish it Monday, Wednesday and Friday and you fish it

Tuesday, Thursday and Saturday." That all worked very amicably, but the moment that fishings had to be put on the register, people had to dispute the issue because of the potential value.

That is why Simon Fraser and I favour the Scottish Crofting Federation's idea of proceeding crofting township by crofting township, holding township meetings and bringing in mediators of some sort—perhaps local assessors or others with mediation skills. That would allow everyone to sit around the table, to mediate a solution and to come up with an agreed map that could be sent to the register. If there were one or two intractable issues between people, they could be resolved in the Scottish Land Court.

If we proceed croft by croft, when the process is triggered for crofter A he will notify his neighbours. When the croft's boundaries are determined, one neighbour's left-hand boundary and the other neighbour's right-hand boundary will be determined, but those neighbours' other three boundaries will not. That raises the issue of what is meant in the bill by ranking. I cannot discern that, unless it means that someone's boundaries will be inviolable because they got to the register first. If so, the next person who comes to register may find that he has lost some of his land.

The Convener: Your comments are helpful, as they back up evidence that we received in the Western Isles.

Alasdair Morgan: Leaving aside the methodology of how we get there, do we all agree that we want to get to a definitive and accurate map-based register?

Sir Crispin Agnew: Yes.

Simon Fraser: Yes.

Keith Graham: Yes.

The Convener: Are there any further questions about the register?

Peter Peacock: I have one small point. The witnesses' comments have been extremely helpful; this is one of the few moments of consensus that we have experienced in taking evidence on the bill. Sir Crispin Agnew made a point about the level at which land is ultimately mapped, whether by a community process or individually. Are you suggesting that the current proposals are at too high a level, and therefore boundaries will not be sufficiently accurate?

Sir Crispin Agnew: I mean that a map-based register is not necessarily enough and that we may also have to describe the boundaries. A line on a map has a width on the ground. Depending on the accuracy of the map, the line can be displaced one way or the other. At the moment, one of the triggers is succession. We are in a real guddle about the way in which succession will operate under the bill, linked to the Succession (Scotland) Act 1964, which gives people only a year in which to find a successor before they lose the right to do so. Simon Fraser has more to say on the issue, which causes a lot of problems. If succession is to be a trigger point, it will come at a time when everyone is vulnerable. There may not be a new tenant for up to a year—perhaps longer, if everyone agrees to lengthen the timeframe.

Bill Wilson: That is a convenient introduction. Simon Fraser has made some interesting comments on wills. I invite him to highlight for the record some of the main points that he wanted to make.

Simon Fraser: There are a couple of points. For example, there is on-going uncertainty about whether people must refer to the croft specifically in a bequest of a croft or whether it can be wrapped up in a general bequest of their estate. I think that an appeal on the issue is going to the Court of Session.

My main problem with wills is what I call inadvertent intestacy. If someone does not word their bequest absolutely correctly and it is not intimated within the tight timescales, the bequest falls. However, it falls not into the residue of the estate, as it would in any circumstance other than one that is subject to agricultural law, but into intestacy, which can give rise to a result that is completely different from that intended by the person who made the will.

In the past, those issues were resolved by landlords and their agents and crofters and their agents papering over the cracks in the system. However, since January 2008, all cases have been administered by the Crofters Commission. I am afraid that it spots all such difficulties, which are now coming to the fore and are pretty insurmountable. For instance, if a crofter dies intestate and there is no nomination within a year, the landlord can apply to have the tenancy terminated. It is as bad as that. If someone in a semi-detached house in suburban Scotland does not have that issue attended to within a year, they will not lose their house, so why should it happen with a croft? It is ridiculous. Further, as I say in my written submission, the system is full of dangerous and unnecessary traps for the unwary. If ever there was an area of crofting law that required a bit of sensible and sensitive attention, it is the area of succession.

Since the passing of the Crofting Reform etc Act 2007, and since the Crofters Commission took over administering the system, even the intestate death of a man and the croft passing to his wife has to go through the system. The commission must give its approval before she can take over, and the change has to be advertised in the local

press and all the rest of it, which people find highly intrusive and unnecessary. I suspect that that was unintentional. I have heard on the grapevine that the measure was not intended to be that way, but that is how it ended up.

I ask for attention to be given in passing to the area of succession, perhaps with the guidance of the committee's adviser. Consideration should be given to whether all those barriers and pitfalls are absolutely necessary—I maintain that they are not. We should come up with something a little more in keeping with the general law of succession.

The Convener: We move on to the issue of crofters living and working on their crofts.

Alasdair Morgan: How is absenteeism currently detected or defined? How will the 16km provision in the bill work? How will the crofting commission decide that somebody is not resident in their croft and is outwith the 16km limit? If the commission comes to that determination and tells a person that they have to rectify the situation, how will the person prove that they have complied with the direction?

Simon Fraser: Crispin Agnew will perhaps enlighten us as to where the 16km limit—it was originally 10 miles—came from. Perhaps it comes from how far people could walk or cycle in those days—goodness knows. I think that it comes from the days before cars were common.

Sir Crispin Agnew: It was introduced in the Small Landholders (Scotland) Act 1911.

Simon Fraser: It is entirely haphazard and anomalous. I know of a chap who has a croft that is 27.3 miles by road from Stornoway but 8.5 miles as the crow flies. He does not fly as the crow does, but he is not an absentee, because strictly speaking he is only 8.5 miles away. That is a bit ludicrous, but it shows how inappropriate that random method of measuring is. I suspect that a more sensible approach must be taken that is to do not only with distance but with what happens on the croft.

Sir Crispin Agnew: The issue goes back to the principle that an agricultural tenant was required to live on their holding. That was the situation under the Crofters Holdings (Scotland) Act 1886. Until the Agricultural Holdings (Scotland) Act 2003 came into force, most agricultural leases had a provision that the tenant had to reside on the holding. When the 1911 act was introduced, certain holdings came under it that were not already crofts, provided that the person lived within 10 miles of the holding at the time. The intention was to bring those holdings under the 1911 act, with the expectation that, thereafter, people would be required to live on their holding. However, a Court of Session decision in, I think, 1917 said that the 1911 act was drafted in such a way that somebody did not have to live within 10 miles of their holding. I think that Professor Hunter referred to that. Either people should be required to live on the holding and operate it or no distance should be specified and decisions on whether the person is an absentee and whether they are working their croft should be based on all the facts. It seems entirely anomalous and of no point whatever to have any distance restriction.

10:45

Alasdair Morgan: Are you effectively saying that it is more a question whether the croft is being worked, regardless of where the tenant resides?

Sir Crispin Agnew: There seems to be no point in specifying a distance. Either the person has to live on their croft or they do not have to live on their croft, in which case they must still manage it properly. If they manage it properly, does it matter whether they live in Edinburgh or 3 miles down the road, as long as they go there sufficiently often? If someone has a job in Edinburgh, for instance, they can drive up to any of the crofting counties—except this winter—on a Friday night, do their work on the croft and come back to work on the Monday morning. Is that person an absentee or not? You need to consider what you are looking to the owner or occupier of the croft to do.

Alasdair Morgan: If we took that to its logical conclusion—if everybody who was a crofter did that—crofts would be empty from Monday to Friday.

Sir Crispin Agnew: Quite possibly, but my point is that the law either says that the person has to live on the croft or within 2 or 3 miles of it—I appreciate that some crofting—

Alasdair Morgan: But what is the difference between 2 or 3 miles and 16km? I know what it is physically—[*Laughter*.]—but I am talking about the principle.

Sir Crispin Agnew: You have to decide what the distance seeks to achieve. Does the mention of a distance mean, effectively, that the person must live on and work their croft, although we accept that their house might be a certain distance away because of the geography of the area? A logical reason must be established for specifying a distance. Then, you can select what that distance is. However, simply having an arbitrary distance is illogical. You have got to decide what you are seeking to achieve. If you want somebody to live in the community, perhaps you should say, "You have to live within the boundaries of the crofting township," or, "You have to live within 2 miles of the crofting township's boundaries, because we expect you to live on, work and operate your croft."

If you are concerned not with the person but with the croft being worked, kept up, kept tidy and used for a beneficial purpose, does it matter if the person lives in America and flies across on his private jet every Friday night, does what he needs to do on the croft and goes back to New York on the Monday morning to make his fortune on Wall Street? We should not get hung up on 5 miles, 10 miles, 50 miles or whatever—you have to decide what the purpose of the living restriction is. Then, perhaps, you can fix a parameter.

Simon Fraser: I can illustrate the point with another example. I consider that there are good absentees and bad absentees, but it is a real challenge to find them. I have an example of a good absentee: a man who has the tenancy of a croft in Harris but who lives in Inverness. The Crofters Commission sought to take action against him as an absentee, but he was able to demonstrate, with the support of his fellow crofters in the township, that he was the only one with a sheepdog, that he came back every time there was a gathering of the hill and that, but for him, the township could not operate. He was regarded as a good absentee, and the commission sensibly left him alone. A bad absentee is the likes of an individual who lives abroad or hundreds of miles away and does not come near the place for many years. You can understand how one is good and the other is bad. One should be left where he is and the other should not. There is your challenge.

Alasdair Morgan: If you decide to use some sort of qualitative assessment—using whatever criteria—to determine whether an absentee is good or bad, there could be an issue with regard to the system of elected representatives. Is there a danger that someone who provides some service and whom the elected representative happens to know and get on with very well could be assessed as a good absentee, whereas someone with whom the elected representative has fallen out could be assessed as a bad absentee?

Sir Crispin Agnew: The Shucksmith committee suggested that such decisions should be delegated to local areas. Perhaps the local area should make representations to the commission about whether a particular individual is a good absentee and a member of the community who happens to be working away but comes back as often as he can.

I suggest that you think about what you are trying to achieve. To talk about a 10-mile rule, or whether someone is an absentee or not, is neither here nor there. If you are trying to ensure that people live and work in the community, the 10-mile rule might be sensible. If you are trying to ensure that croft land is worked and that everybody who owns that land is involved in the community in some way or another, does it matter where they live? They might come back only at the weekends—they might commute to Edinburgh to be an MSP, for example—but by working away, they are earning money that they are reinvesting in their croft. They might therefore be a better person to run the croft than somebody who is forced to live entirely locally, and who cannot generate any income to invest in the community.

I am not grinding one axe or another, but it appears that the distance rule is not entirely linked to the purpose. Once you have decided on the purpose, you can set the distance. The original purpose was that an agricultural tenant was expected to live on their holding, and that was a fundamental principle of Scots law on agricultural tenancies, under whatever regime.

The Convener: If we turned the question round and said, “How would we prove that someone was an absentee?”, what would your view be?

Sir Crispin Agnew: Currently, anybody who lives more than 10 miles away is theoretically an absentee. Is an absentee somebody who takes no interest in the community apart from using the croft as a holiday home? It is a difficult issue.

The Convener: Do any of the other witnesses have a view on the definition of an absentee?

Keith Graham: A short definition would be somebody who is not working his or her croft. That would be the test of whether they were an absentee.

Alasdair Morgan: Do you mean someone who did not work the croft personally or who did not have it worked?

Keith Graham: Someone who did not have it worked.

Bill Wilson: So a person might never be present at the croft, but as long as someone else worked it, that person would not count as an absentee.

Keith Graham: Yes.

Sir Crispin Agnew: Someone would have to work the croft on the person’s behalf, rather than that person just allowing someone else to work it. That happens on many crofts—one farmer farms the whole lot under some dubious arrangement without any subtenancies or whatever. It is to do with economies of scale, but a person who had the croft worked for their own benefit—in other words, they derived the income from it even if they paid someone to do some of the work—would fit in with Keith Graham’s definition.

Bill Wilson: You are welcome to correct me if I am wrong, but that suggests that you both believe that neglect, not absenteeism, is the issue, and that you are not that bothered about absenteeism.

Keith Graham: The main thrust behind the provisions in that part of the bill centres on the question of misuse or non-use of crofts, in an attempt to ensure that crofts are used as much as possible. One way of doing that is to say that the crofter should be

"resident on, or within 16 kilometres of,"

the croft. There are other aspects to it. The commission can step in when there is an absentee or a croft is not being used.

Bill Wilson: That takes me nicely to my next question, which is about misuse. Proposed new section 5B(4) of the Crofters (Scotland) Act 1993 states:

"where the crofter, in a planned and managed manner, engages in, or refrains from, an activity for the purpose of conserving—

(a) the natural beauty of the locality of the croft; or

(b) the flora and fauna of that locality,

the crofter's so engaging or refraining is not to be treated as misuse or neglect as respects the croft."

Are you familiar with those provisions, Sir Crispin?

Sir Crispin Agnew: Yes.

Bill Wilson: If you were not, there would not be much point in my firing questions about them at you. Will the approach make it difficult to demonstrate legally that a croft is being misused, or will that not be a problem?

Sir Crispin Agnew: If a croft looks neglected, the crofter's defence will have to be that that came about

"in a planned and managed manner".

That will throw the onus on the crofter to show that he planned and managed what happened.

Bill Wilson: What will happen if a crofter "refrains from" activity? Let us say that I planned not to graze my croft, which was all that I had ever done with it. Would that constitute acting in a planned and managed manner?

Sir Crispin Agnew: You might have planned that because RSPB Scotland told you that it wanted the land to be kept wet because it was useful for waders. You might have planned with the RSPB for the croft to go into a state of total neglect, because it was good for birds.

Bill Wilson: I am not a lawyer, but the bill does not seem to say that a conservation body or other body must have indicated that it would like the crofter not to graze. Would anything in the bill prevent a crofter from simply planning not to graze their croft in the interests of conserving the flora and fauna of the locality?

Sir Crispin Agnew: I was just giving an example—

Bill Wilson: I understand that. In the scenario that you described, the position would be clear, because the crofter could say, "Ah, but the RSPB said that this is of value." I am thinking about situations in which no one has said that. Would the crofter legally have a defence in such a situation?

Sir Crispin Agnew: The situation might well present evidential problems, one way or another.

Bill Wilson: Should the bill specify that a conservation or Government body must have said that the croft can be left ungrazed?

Sir Crispin Agnew: Perhaps the provision could be amended to read "with the consent of the Crofting Commission" or something similar, so that crofters would have to explain their plan and management proposal. Perhaps a crofter should have to lodge their plan with the commission and add it to the register. That might be a way round the issue that you raise. The commission could ascertain whether the plan and management regime were appropriate for the croft and perhaps take advice from Scottish Natural Heritage.

Bill Wilson: The crofter would have to lodge their plan before deciding not to graze, rather than afterwards.

Sir Crispin Agnew: Yes. I had not considered the issue, but you have made a valid point. Perhaps it would be wise to say that if a crofter wished to refrain from activity, they would have to lodge their plan with the commission, which would have the opportunity to accept or reject it. That would have to happen before the crofter set out on that route.

Simon Fraser: When I first read proposed new section 5B(4), I thought that it would provide a reasonable exception, for example for someone who excluded an area for scrub regeneration, as part of a rural stewardship scheme. With scrub regeneration, we do absolutely nothing; we leave the area alone, with no grazing whatever. The provision would exempt someone who engaged in such practice from being regarded as not doing anything. However, I wonder whether the provision would offer an easy way out for someone who had just abandoned their croft. I agree with Sir Crispin that a step must be taken to establish that what is happening is a management practice before it can be excused.

Keith Graham: My reading of new section 5B(4) has always been that it refers to managed and planned activity, such as a plan not to graze the croft. The crofter could not just let the croft lie, with nothing happening to it; they would have to have taken a conscious decision and agreed with conservation bodies or whoever not to graze the croft, for a particular reason.

Peter Peacock: The bill, in part, seeks to equalise the burdens on both owner-occupiers and tenanted crofts. A couple of weeks ago, Government officials told us that they are considering equalising access to grants for owner-occupiers and tenants, but they have not yet decided to do so. Do you have any observations on the bill's current definition of owner-occupier? Secondly, what would be the purpose of one's remaining a tenant if everything, including access to grants, were to be equalised?

11:00

Sir Crispin Agnew: There would be no good reason to remain a tenant.

Keith Graham: In one scheme—I cannot remember which—tenants were entitled to grants, no questions asked, but I think that I am right in saying that owner-occupiers had to be means tested to qualify. In that case, remaining a tenant had its attractions over becoming an owner-occupier.

Peter Peacock: So, could removing such barriers and making grants equally accessible have the unintended consequence of spelling the end of a tenanted system of crofting, or am I overstating the point?

Sir Crispin Agnew: What is the point of preserving a tenanted system? The Irish land acts set out to get everyone into owner-occupation. It seems anomalous that when people buy their croft they have to decroft their croft house to be able to access money from the bank. That is why I, among others, suggested standard securities over the crofting tenancy, but that measure does not seem to have been taken forward through the bill. As I said, people tend to buy their croft house to raise money for other things, although the argument against such a move is that they then drop out of the grant regime.

As I asked at the very beginning, what are you trying to achieve with the bill? If there is a social policy objective, it should be applied to everyone concerned, not just those who happen to be tenants or owner-occupiers. That seems to be anomalous.

Peter Peacock: I guess that in my mind I wanted to explore whether in some unintended way the new definition of owner-occupier—and, indeed, any policy change that might be made on access to grants—might precipitate the kind of speculation that the bill is partly supposed to be stopping. If, for example, a person decided that there was no advantage in being a tenant and became an owner-occupier, might not the person apply for a whole croft decrofting? Might not a whole township do the same? Would not that bring about the kind of completely free market for crofts that people have vehemently argued we should not end up with?

Sir Crispin Agnew: If the owner-occupier were to be subject to exactly the same burdens as the crofter, that might put a stop to speculation, particularly if the Whitbread loophole is closed and the 10-year lease provision is enforced. My impression is that, unlike the present situation, the proposed crofting commission will not take any action against owner-occupiers to require them to re-let, provided that they continue to live on the croft and do something. Of course, the obligations on owner-occupiers are much less onerous than those on the crofter. If both are going to be brought into the same onerous regime, both should be entitled to the same financial support, which is, after all, designed to keep people in the community.

Simon Fraser: At the moment, the main disincentive to purchase is that the purchaser becomes ineligible for the crofting counties agricultural grant scheme and housing assistance. In my part of the world, though, very few people buy, because there is no particular need to do so.

The current system is not all that bad for transferring crofts from generation to generation and so on. I suppose that one slight disincentive is that it is necessary to go through conveyancing for future transfers. Beyond that, the only real disincentive is, as I have said, the grant system.

Peter Peacock: That is helpful. So—none of you has a problem with the way in which the new owner-occupier provisions are drafted. You are quite comfortable with them, are you?

Simon Fraser: No. Every time the Crofters Commission writes to absentees—which I have responsibility for—the first thing the crofter does is lift the phone and say that they want to buy their croft. They imagine that that will somehow get them out of the system. I tell them that the Crofters Commission has powers. The bill will certainly close the gap.

Peter Peacock: In what way? Do you mean it will close the gap between expectations and reality?

Simon Fraser: I beg your pardon. It will close the gap that currently exists in that the commission has certain powers, but they are not particularly strong.

The Convener: If no other member has a question on that, Karen Gillon has a question on the Whitbread case.

Karen Gillon: Crispin Agnew mentioned the Whitbread case. I am interested to hear your views on the extension of the clawback period to 10 years, how it will manifest itself and the impact it will have.

Sir Crispin Agnew: I will explain the Whitbread loophole. The 1993 act says that if the crofter who has bought his croft sells it on for development within five years, he will have to give 50 per cent of the uplift back to the landlord. That got human rights backing when it was brought in in 1976 because it was felt that if a crofter bought the land for a knock-down price, and immediately sold it on for a profit, the landlord should share in that profit. If the landlord resumed the land, he had to give the crofter 50 per cent of the uplift that he got. There was a balance.

However, the legislation also said that the crofter could take title in his own name or in the name of a nominee. That was so that the title could be in the name of the crofter and his wife, or because the Government of the time thought about the old conveyancing thing where the nominee was the bank, which then granted a standard security. The Court of Session interpreted that provision to mean that the crofter could nominate anyone.

In the Whitbread case, the crofter bought part of his croft and had already done a deal to sell it to someone else for a large sum as a housing site. Because it was taken in the nominee's name, the crofter got the full price and the landlord did not share in the profit. So, a crofter can sell on and speculate immediately. If a croft has development value, the crofter can nominate a developer straight away and walk away with the full sum. There is no disincentive to doing so.

If the crofter takes title in his own name and sells the croft two or three years later, he has to share the profit, which is a disincentive to selling the croft on. If the clawback period is lengthened and the loophole of an immediate sale to a nominee is closed, that will discourage speculation in croft land. I produced for the committee the Hansard report of the Scottish Grand Committee at which the minister made it quite clear that the intention was not to do what happened with Whitbread. I do not know what others feel, but I think that the loophole being closed and the clawback period being increased to 10 years will discourage speculation.

Simon Fraser: The extension of the five-year period to 10 years was not in the bill as introduced. I understand that it was proposed as an alternative when the provisions on the obligation to live on decrofted land were removed because it was seen as being one way of discouraging speculation in croft land. That will work to a certain extent, but the single thing that will discourage speculative decrofting and the selling on of sites on croft land will be the closing of the Whitbread loophole.

It is interesting to note from reading the written submissions that there is unanimity on the point among the Scottish Crofting Federation, the Scottish Rural Property and Business Association and the NFU Scotland. It is interesting that a large number of my clients who are community landowners and whom I have canvassed have come across the issue and believe that it is anomalous and incorrect. They are all of the view that the loophole ought to be closed. People in areas where land is worth more than it is in other parts also share the view that closing the loophole is the single measure that can go the furthest to prevent speculation, decrofting and the selling off of house sites.

Keith Graham: I agree that speculation could be cured by closure of the Whitbread loophole. I should say that I claim some responsibility for Whitbread as I wrote the original Scottish Land Court decision.

The Convener: The bill seeks to strengthen the protection of croft land from resumption by the landlord for development and from decrofting. It would do that by adding additional grounds whereby the Scottish Land Court may refuse an application to resume croft land and by allowing the commission to refuse to grant a decrofting direction. What are your views on that? How would it work in practice? The provisions are in sections 26 and 27.

Sir Crispin Agnew: I have no strong views one way or the other, except in the context of community buyout. For community landlords who want to resume land for use within the community or for a community purpose, the bill simply creates an additional hurdle for them to get over. Landlords tend to seek to resume land because there is going to be development in the area, be it housing or something else, which will probably benefit the community. If we are trying to ring fence croft land and say that it should not be taken out, we should by all means have a strict regime, but we should bear in mind that the increasing number of community landlords often need to get land back for good community purposes that benefit everybody rather than individual crofters.

The Convener: Does that not go back to your point about individual crofters' having some redress against the community owner when they do not agree about what is happening?

Sir Crispin Agnew: It goes back to my point that I do not think that anybody has addressed the issue of the balance. The Land Reform (Scotland) Act 2003 went one way, and without any consideration of that, we are ploughing on with legislation on crofting. We have already had a crofting act and now we have another crofting bill. It seems that nobody has thought how the two should intermesh. Landlords have to go to the Scottish Land Court and satisfy it on all relevant matters in order to be allowed to resume land. That system exists with a view to ring fencing croft

land, but it might impact on community landlords in an unintended way.

The Convener: Do you have any other comments, gentlemen?

Sir Crispin Agnew: As I state in my written submission, I am concerned about the stated case procedure. I do not know where it came from. It is a 19th century procedure that has been steadily dropped from wherever it has been used. It has usually been used to enable arbiters to state a case to a court and get a direction on the law. When an arbiter is not sure about the law, he will say, "I've got so far, but I do not understand what the law is. Will you please give me guidance?" The court gives him guidance and then he applies the law to his facts. In that situation, it works. The use of stated case procedure by tribunals or administrative bodies such as the Scottish Land Court has steadily been dropped since the beginning of the 20th century, so I do not understand why it has been reintroduced by the Scottish Government. The procedure was introduced for the Licensing (Scotland) Act 2005, but it is not working in respect of that act and has been the subject of a lot of criticism.

11:15

Stated case procedure is just not working in the crofting context. As I mention in my submission, I have just revised a stated case that relates to the resumption of a small bit of land in Assynt in May last year. My three-word suggested revisals will now have to go round the other eight objectors. I suspect that we will get to the Scottish Land Court in a couple of months and we might then have a Land Court hearing some time after that. My submission sets out paragraph 18 of schedule 1 to the Civic Government (Scotland) Act 1982, which is a model that has been used many times for appeals from administrative bodies. The appellant asks for a statement of reasons and most appeals are based on that. Evidence might need to be taken occasionally, but not very often. If we just got rid of the stated case procedure and introduced something similar to paragraph 18, with a requirement that appeals be lodged within 42 days, that would make life so much easier, cheaper, quicker and all the rest of it.

I do not know what Keith Graham, who has experience of being at the receiving end, thinks about that suggestion.

Keith Graham: As someone who has processed stated cases for the Land Court, I could not agree more with Sir Crispin Agnew that the procedure is cumbersome, time consuming and very expensive. I whole-heartedly endorse his proposal to use the procedure in the Civic Government (Scotland) Act 1982, under which appeals are made to the sheriff. That would be a much more workable and cheaper option.

Sir Crispin Agnew: We do not mean that appeals should go to the sheriff but that we should use a similar procedure.

Keith Graham: Just substitute "the Land Court" for "the sheriff".

Simon Fraser: I concur. I am in the middle of a stated case that started months ago. It is nowhere near the Land Court yet and I see no prospect of an end in sight.

The Convener: I thank our witnesses very much for their attendance. If any other issues occur to them that they wish to share with the committee, please forward them in writing to the clerks.

Sir Crispin Agnew: Equally, if committee members have any questions on which they would like us to comment, I am sure that the clerks could forward those and we would be happy to respond.

The Convener: I am sure that we will. Thank you very much indeed.

I suspend the meeting while the panels change over.

11:17

Meeting suspended.

11:25

On resuming—

The Convener: I welcome our second panel of witnesses, which comprises Dr Jean Balfour, the chair of the crofting group of the Scottish Rural Property and Business Association; Richard Blake, the legal adviser to the SRPBA; Jonathan Hall, the head of rural policy at NFU Scotland; and Marina Dennis, the vice-chair of the Scottish Crofting Federation.

We move directly to questions. What do the members of the panel think is the right geographical level for the regulation of crofting?

Dr Jean Balfour (Scottish Rural Property and Business Association): I am not sure what you mean. Are you asking about how many voters there should be or how big an area the crofting commission should regulate?

The Convener: The committee of inquiry on crofting proposed that the Crofters Commission be dissolved and replaced with seven to 10 crofting boards. Earlier, I asked the first panel about what the composition of the crofting commission should be.

Dr Balfour: We did not support the idea of getting rid of the Crofters Commission or the

setting up of area boards. We are generally satisfied with the proposal to elect some members and appoint some members, but we believe that one of the appointees should be a landlord. I was glad to see the previous panel acknowledge that crofters can and should work together for the general benefit of crofting communities. On previous occasions we have also suggested that there could be arrangements whereby the crofting commission could, if it wished, devolve some regulatory decisions to a properly constituted grazings committee that would work with landlords, with the commission as an arbiter. That would bring decisions down to a local level.

Jonathan Hall (NFU Scotland): I hope you will allow me to be rude enough to change your question slightly and say that the issue is not about the right geographical level for the regulation of crofting; it is more about the right level of regulation to ensure that crofting can continue to deliver in the many ways that it does. Like the SRPBA and the SCF, the NFUS is opposed to the idea of area committees and welcomes the suggestion in the bill to have more democratic accountability in the crofting commission by having six or nine directly elected members. We believe that the bulk of those members should be active crofters but I acknowledge the arguments about having some sort of landlord representation in there as well.

I would go a wee bit further on the elected representatives in the crofting commission and who would be that body's chair than was outlined this morning. My understanding of the bill is that the status quo would remain and that the chair would continue to be appointed by the Scottish ministers. Our crofting and Highlands and Islands committee considers that the members of the board should elect the chair from among themselves, as that would be even more democratic.

11:30

Marina Dennis (Scottish Crofting Federation): The SCF was totally opposed to area committees. We see geographical areas—half a dozen, for example—which is more or less what the Crofters Commission had a few years ago when representation was geographical, and we would like to see that again. If there are to be six elected crofters on the board, they should come from those geographical areas, and one should come from the new crofting areas.

The elected members of the board would be elected by their community. Indeed, some may be assessors. There are assessors in each crofting county—I think the number is about 83—and some of them would be very well placed to serve, if their community decided that they were appropriate to stand as board members. They are already elected by their communities. There is a democracy out there in the crofting areas. We would like a greater role for assessors in the new crofting commission.

The Convener: Could they remain as assessors if they were elected to the board?

Marina Dennis: Probably not. I am not sure how that would work out, but that is quite fine detail. Assessors have vast experience of regulation and their township. They know not only about crofting but about the social structure of their community.

Jonathan Hall: I concur entirely. That is a very sensible way to go. In our submission we said that we do not want any erosion of the current network of assessors, who play an important function on the ground in knitting together many crofting interests.

Jim Hume: I declare that I am a member of NFUS and SRPBA—indeed, I am a past director of NFU Scotland—but there are no crofting interests in the South of Scotland region.

Does the Scottish Crofting Federation think that the commission should have a representative of landlords? Should it have Government appointees in addition to elected members? What balance should be struck between elected and appointed members? Who should be eligible to vote? Do you envisage one vote per croft? If, for example, two names are on the title of a croft—a husband and wife, for example—should each be given a vote? I have put two or three questions, one of which is specific to Marina Dennis.

Marina Dennis: To do with landlords?

Jim Hume: Yes.

Marina Dennis: We would probably have no objection to that. It would bring an important extra dimension to the board of the new commission. The proposal would probably be helpful in making some regulatory decisions. On balance, the answer is yes.

Jim Hume: Just.

Marina Dennis: Gosh, that was difficult.

Jim Hume: It was.

Marina Dennis: Only crofters who are registered with the commission should be entitled to vote. If the croft has joint owner-occupiers—a partnership or husband and wife—I think that there should probably be one vote per registered croft. One person from the croft would cast the vote for the croft. It would skew things considerably if we were to have a mix of voting entitlement.

Jonathan Hall: We agree with that. Our submission states clearly that, for the process

properly to represent active crofting, we would suggest that tenant and owner-occupier crofters be on the commission's register of crofters who have the single vote, as it were. We discussed the issue of individuals who hold a number of crofts and manage a number of crofts. That immediately kicks out the idea of one croft, one vote. In our opinion, someone with three, four or five crofts should not get three, four or five votes, because that would distort the democratic process. We concur with the SCF on that.

Jean Balfour: I agree with what Marina Dennis and Jonathan Hall have said. An additional point is that the election procedure should be in primary legislation and not left to secondary legislation, so that we all know exactly what is proposed.

Jim Hume: I also raised a small point about Government appointees.

Jean Balfour: I am sorry. I think that the proposal is for six to be elected and three to be appointed. Obviously, the chairman might or might not be one of the appointed members. I think that that is quite a sensible balance.

Jonathan Hall: The previous panel discussed how you encourage an active interest in the election process. Postal votes have been mentioned. An issue that concerns us, to a degree, is that once you have defined the eligibility for voting and so on—there was a discussion earlier about how you might define everyone in the crofting counties or even in crofting communities—a cost is associated with elections. We would put a question mark against its being a cost-effective approach to ensuring that we have proper representation. That issue must be borne in mind although it will probably be addressed through regulations.

Karen Gillon: We have been exploring equalities because any legislation the Scottish Parliament passes must provide for equalities and comply with equalities legislation. Our understanding is that, at the moment, the majority of registered crofters would be men, even when there are women who are active crofters. One concern is that the bill would not deal with equalities issues in respect of ensuring that women are able to stand for election if they are not the registered crofter because the husband is the registered crofter; although the wife may be an active crofter she is excluded because she is not the registered partner or crofter. Have you considered that?

Jean Balfour: I certainly take the point that is being made. As you may guess, I am a strong equality person myself, but the issue is that there is nothing to prevent a woman from having a croft and there is therefore not really any discrimination. The fact that at the moment most crofters are men is just how succession has worked, but there is nothing to prevent a woman from being a crofter. Therefore, as I see it, there is not discrimination.

Karen Gillon: The issue for me is who can stand for election. If only one person on the croft can be the registered crofter and the succession has determined that the registered crofter is the male member of the family, as the bill is currently drafted the woman is excluded from election, despite the fact that she may very well be an active crofter. Only one person is allowed to be on the register.

Marina Dennis: If you are a tenant; if you are an owner-occupier and you are a Mr and Mrs, the woman would be eligible for election. The past three tenants on my croft have been women. That is just how it has happened. There are quite a lot of women crofters, who seem to be more active and feistier than some of the men.

Karen Gillon: Indeed—that is why I do not want us to lose them as potential candidates.

The Convener: We should note that the NFUS crofting working group's convener is a woman, too. She is sitting in the audience.

Karen Gillon: Can I take it from what Marina Dennis says that she does not support electorates—not those who can stand—being determined on the basis of the township or crofting community?

Marina Dennis: Are you talking about area committees?

Karen Gillon: No. The previous panel suggested that if the members of the crofters commission were to be truly representative, it would make sense for them to be elected by the whole crofting community rather than just registered crofters. I am interested in your views on that suggestion.

Marina Dennis: Absolutely—representatives must come from their community or township. The Highlands and Islands cover a huge area, so one area would include many townships. A system would have to filter who put themselves up for election as a board member, after which the elections would take place.

I am not sure how the electoral ballots will work. If Skye, Lochalsh and Lochaber were treated as one area, it would contain many townships, which would have to decide together who might be a suitable person from, say, Ardnamurchan and Strontian.

Bill Wilson: The question is how the electorate would be comprised. Would it comprise just people who were registered crofters or everybody who lived in an area? That was what Karen Gillon asked.

Marina Dennis: The electorate would definitely have to be registered crofters.

Bill Wilson: The earlier suggestion was that everyone in a township should be able to vote, whether or not they were registered crofters.

Marina Dennis: Electors would definitely have to be registered crofters—tenants or owner-occupiers.

The draft bill proposed six area committees with 12 members each, which would have involved quite a lot of people. The worry for crofters and our members was that some of those people might not be crofters—they might just come from the township. Our members absolutely desire the people who will be elected to be crofters.

The Convener: So the people who were eligible for election would be crofters but voters could be all those in townships.

Marina Dennis: I thought that we said that only registered crofters should be eligible to vote. Some people who live in a township will not be crofters.

The Convener: Yes, but we have heard evidence that suggests that the voters should be all those who live in townships, rather than just crofters.

Marina Dennis: That would muddy the waters.

Jonathan Hall: We concur—it is registered crofters who should be eligible to vote. The vote is to elect people to the crofting commission, which will have the important function of regulating crofting. Its influence will be on the crofter rather than the non-crofter in a community.

There must be a strong overlap between crofting and non-crofting interests in any locality but, given that we are talking about elections to the crofting commission and given the functions and powers that the Crofters Commission currently has—which could be strengthened further for the crofting commission under the bill—the registered crofter should have the entitlement to vote rather than somebody who would be indirectly affected at best and probably would not be affected at all.

11:45

Karen Gillon: That has the potential to raise even bigger equalities issues because an active crofter who was not the registered crofter would be prevented not only from standing but from voting in the elections to the crofting commission. Last week, the officials raised with us the potential that everybody in the household of the registered croft who was ages to vote could be eligible to vote—so a son, daughter, wife or husband could also be eligible to vote—but if only registered crofters were able to vote we would reinforce the potential for discrimination because somebody who was not the registered crofter but was crofting would not even be able to participate in the election, never mind be able to stand.

Marina Dennis: It is difficult to differentiate. When you talk about crofting, it is really a son or a wife helping on the croft. Only the registered crofter, if he is a tenant—this has been the case since 1886—

Karen Gillon: That does not make it right.

Marina Dennis: But it is what we have and what we have to deal with in the present circumstances. The situation has always been that the tenant is only one person and that applications for a grant or the single farm payment—whatever it is—are made by only that person. That permeates all aspects of agriculture grants and the Scottish rural development programme.

Karen Gillon: If I was a stay-at-home wife in Lanarkshire and my husband was the registered person for the purposes of council tax, for example, no one would suggest that I was not eligible to vote in an election because I was not the person who applied for a grant or the one on a register. Perhaps I am just not getting it, but I am concerned that we are in danger of excluding people who are crofting.

Jonathan Hall: I recognise the point that you are making but the election about which we are talking is not equivalent to a local or Scottish Parliament election. We are talking about elections to a body that will have direct influence only on crofting and crofting matters rather than matters in wider society. I agree entirely with Marina Dennis.

We could turn round the argument on equality: if a single person who manages two or three crofts on their own got one vote whereas a couple with three grown-up children in one croft got five votes, would that not skew it the other way? We have to get the balance right, and the existing register of crofters is the most defined position on who is crofting and who has the most direct interest in the functions that the crofting commission will have.

Marina Dennis: The other thing to remember about crofting is that it is not farming; it has always been a part-time job. The crofter, his wife and his son or daughter—if they are grown up—will all do things other than crofting. It is important to remember that.

Alasdair Morgan: I will clarify something. There is a register of crofters, which could be used as an electoral register. There is also the electoral register that we use for parliamentary and local government elections. I take it that no other register could be used. If we went to any other franchise in between, we would need to create another register. Is that correct?

Marina Dennis: Yes, that is correct, and the register is held with the Crofters Commission.

Jean Balfour: I support what has been said. It is the commission that deals with crofting, so it is reasonable that those who are involved in crofting—we discussed landlords earlier; they are also involved—that is, for representatives on the commission, the commissioners and electors, to be crofting tenants or owner-occupiers. It seems sensible and it is relatively straightforward—insofar as anything is. We hope to see that in primary legislation but, to an extent, it is a policy issue that Government must decide on.

Elaine Murray: Some time back the network of assessors was mentioned. The SCF states in its submission that it would like the bill to decentralise the arrangements and a partnership that involved the crofting commission, which would be advised by what the SCF describes as

"a locally elected Assessor Network".

There are already minefields regarding elections to the crofting commission. What would a locally elected assessor network be? How would its members be elected? What are the views of the other panellists on that scenario?

Marina Dennis: It is in place already. It has been in place for 80 years.

Elaine Murray: How is it elected?

Marina Dennis: The assessors are elected by their township—by their grazings committee or by their community; it depends whether a grazings committee is in place. I am an assessor for the Crofters Commission in my area. We do not have grazings committees there, but the crofting community elected me. The assessors are elected by the crofters in the community.

Elaine Murray: Who is eligible to vote in the election for an assessor?

Marina Dennis: Crofters.

Elaine Murray: So that is just the people who elected the—

Marina Dennis: This will complicate things, but the people on a grazings committee are not necessarily all crofters. Some of them will be other members of the community. There will be people on those committees who have an interest in crofting, but who might not be crofters themselves. It will be a consensus of the grazings committee whom they vote for.

Elaine Murray: How does it happen? Is the vote carried out at a public meeting?

Marina Dennis: Yes, absolutely. All grazings committees—

Elaine Murray: You do not use an electoral roll of some sort.

Marina Dennis: No, it is done very democratically, within the community. Grazings committee meetings are advertised in the local post office or newspaper. They are regulated.

Elaine Murray: Thank you for explaining. I represent Dumfries and Galloway, so I have no direct experience of crofting or how such procedures work. Our consideration is indeed partly a matter of understanding how the arrangements actually work. Would you like to see those arrangements in the text of the bill?

Marina Dennis: Yes, and we would like the assessors networks' role to be expanded. I sit on a working group with the SCF and the current Crofters Commission, and that is what we are addressing at the moment; we are working towards getting more participation from the assessors in their own communities with regard to regulatory matters. Mediation training is also being considered, so that disputes do not become polarised.

Alasdair Morgan: Approximately how many assessors are there in the current assessors network?

Marina Dennis: Eighty-three.

Alasdair Morgan: So, the area for which each assessor is elected must be substantial—it must cover many townships.

Marina Dennis: Yes. In some cases—

Alasdair Morgan: So, how on earth do they get elected?

Marina Dennis: Through grazings committees and the crofting communities. When they come up for election, everyone knows about it. Several people may be interested in becoming an assessor, but people in an area will vote for who they want.

Alasdair Morgan: Are the areas predefined?

Marina Dennis: Yes.

Alasdair Morgan: Can you give me an example of a reasonable area that might have an assessor? Roughly how many assessors would there be in South Uist?

Marina Dennis: I am not sure off the top of my head. There might be eight or 10. I am the assessor for Badenoch and Strathspey, which is not a terribly big area. In Harris and Lewis, there could be up to 20 assessors—there are a lot in the islands.

Alasdair Morgan: So, the area that each assessor represents is laid down by the Crofters Commission at the moment.

Marina Dennis: Yes.

Alasdair Morgan: But some of the areas are so big that there could not be one meeting for the area to elect the assessor. I presume that, if there was, most people would not come.

Marina Dennis: The grazings committees in those areas would write out to the committee members and would advertise the meeting in the *Stornoway Gazette*.

Alasdair Morgan: I understand how each grazings committee meets, but how do all the grazings committees, between them, arrive at the election of one person?

Marina Dennis: Probably with great difficulty, knowing some grazings committees. It would be quite difficult.

Alasdair Morgan: The grazings committee that we came across in Benbecula was clearly fairly moribund. The chairman and secretary were there because there was nobody else to be chairman and secretary, and the meeting was held in the phone box. Is that fairly typical?

Marina Dennis: I would not say that it is typical, but that can happen. If the current assessor is not opposed, he will just continue. The chairman of the SCF, Neil MacLeod, has been an assessor for 30 years.

Alasdair Morgan: Is that fairly typical? Is it like the old county councils prior to 1975—once someone gets in, they are in it for life?

Marina Dennis: Maybe slightly.

Jonathan Hall: We do not think that there is an issue with the assessors network, which is performing an important role. It knits together the individual crofting townships and communities and the Crofters Commission. I do not believe that it is an objective of the bill to undermine or change the network in any way, shape or form. It seems to be working exceptionally well in its current guise. We would be extremely concerned if, as an unforeseen consequence of the bill, the assessors network were to be dismantled. We would have significant concerns about that because it does an important job on the ground, resolving issues and preventing disputes from getting blown out of proportion. It is the glue that binds together some crofting communities, and we would not want to see it undermined.

I understand the line of questioning—you want the assessors network to be accountable in the way in which it is established and so on.

Alasdair Morgan: It is not so much that. It has been suggested to us that the network should be given more powers and tasks; therefore, I want to know the foundations on which it is based before we write it into statute.

Marina Dennis: I do not think that it is about giving the network more power; it is about giving it an expanded role. It does not really have any power—it is an advisory panel of assessors.

12:00

Jean Balfour: We support the assessors network. As Marina Dennis says, its value is that it is lowish key, and it can therefore deal with a lot of things. One would not necessarily want it to be given any more formal powers than Marina Dennis has suggested. However, the present situation is valuable.

Bill Wilson: The financial memorandum contains a table that outlines the average costs to the Crofters Commission for the administration of regulatory applications. I will give some examples. Apparently, for apportionments, the average number of person days per application for the commission is 6.6, and the average cost per application is £3,485. For succession, transfer by executor, bequests, the average number of person days per application is one, and the average cost per application is £530. Do you think that the commission should be able to charge for dealing with applicants? If you do, what proportion of costs should be charged?

There is stunned silence.

Dr Balfour: Can we be clear? Are you talking about charges across the board for anything? Perhaps Marina Dennis understood the question better than I did.

Marina Dennis: As crofters, our members would be against any charges for any regulatory work. I understand why the provisions have been included in the bill, but we do not make much money out of crofting and we do not think that we are rewarded for what we do in retaining populations and the landscape, and for ensuring that our culture and heritage will be there for our children and grandchildren. We croft because we are passionate about our culture and about crofting, and because we enjoy it. However, there is really no money in crofting, and we would be hard pressed to pay charges for a simple apportionment, for example.

Jonathan Hall: On costs and charging in relation to the crofting commission's functions, NFU Scotland would not want to go down the route on which the Scottish Environment Protection Agency finds itself with its enforcement duties in applying regulations. That is the important thing. SEPA is under obligations because of the Water Environment and Water Services (Scotland) Act 2003, for example, to adhere to full cost recovery. Therefore, there are charging regimes for everything that it does, and that has created a nightmare. All sorts of things

happen on land that must be registered, licensed and so on. Such an approach would create a tier of bureaucracy for farmers and crofters and layers of bureaucracy for the agency in question—in this case, we are talking about the crofting commission.

If the bill is about enabling and encouraging the right environment and conditions so that people are incentivised to stay in active crofting, we must create an environment in which individuals are incentivised rather than deterred. That is the key issue. The previous panel discussed access to grants, and the view was given that owner-occupiers and tenants should be treated in the same way so that there is equal access. If a regime is all about full cost recovery for anything that the crofting commission does that relates to crofts, it would simply be another deterrent in many ways. I am not sure where that would lead, but I cannot see such a regime acting as an incentive. The very spectre of costs for operations and functions that the crofting commission might perform could be sufficient to undermine a lot of what the bill is trying to achieve.

The Convener: But if there would be a greater financial benefit to the crofter through apportionment, decrofting or whatever, why should that not be charged for?

Jonathan Hall: But will that always be the situation? The financial benefit to the crofter might be negligible.

Bill Wilson: Does that mean that we should differentiate between situations in which there will be a financial benefit and those in which there will be no clear financial benefit?

Jonathan Hall: That would be almost like having a two-tier system, whereby we would not charge when there was no financial benefit, but we would if there was. I return to my comment about creating bureaucracy and trying to balance the costs and benefits of any action. I am not sure that that is a sound way to proceed. It should be all or nothing, in my opinion.

The Convener: Should the taxpayer pick up the bill when in most cases, whether we are talking about subletting, decrofting a house site or whatever, it is more than likely that there will be a financial benefit to the crofter?

Jonathan Hall: But the taxpayer picks up the bill for payments under CCAGS, the less favoured area support scheme and various other grant schemes, the purpose of which is to enable people to continue to actively manage croft land, for all the social, economic and environmental benefits that that brings. I think that the proposed regime would be lumped into that category, but instead of acting as an incentive, it would in some ways act as a disincentive. Given the scale of the costs that we are talking about, it is perfectly reasonable for the taxpayer to pick up the bill so that the social, economic and environmental benefits of active crofting in crofting communities are preserved and such communities are allowed to thrive in the future.

Bill Wilson: What about decrofting? If that is your argument, should people be charged for decrofting the whole or part of a croft, on the ground that they are not maintaining crofting?

Marina Dennis: It would depend on what the purpose of the decrofting was.

Jonathan Hall: Again, that is when the crofting commission's functions on decrofting would have to come into play. It would be for the commission to determine whether allowing someone to decroft would be in the wider interests of the community landscape and so on—I cannot remember the exact wording in the bill.

Karen Gillon: But the Whitbread loophole allows a crofter to nominate someone and subsequently sell the croft. If I sell my croft, the croft is decrofted and I gain a significant financial sum from my nominee, why should the public purse not pick up £1,000 or £2,000 out of the £10,000 or £20,000 that I gain?

Jonathan Hall: Is that not more of a case for closing the Whitbread loophole than it is for creating a cost-recovery regime?

Karen Gillon: So you can see no reason why the public purse should be able to recover costs when there has been a financial benefit to a private party?

Jonathan Hall: In this particular situation, there is a financial benefit to an individual party, but that is the price that the taxpayer is paying at the moment, in many different ways, to help retain crofting communities and to enable them to prosper in the future.

Karen Gillon: But if decrofting is done for financial benefit and development, that does not amount to sustaining the croft for future generations.

Jonathan Hall: The commission must intervene and ask whether that would be in the interests of the crofting community. In many ways, the bill's purpose is to ensure that that happens, is it not?

Marina Dennis: We hope that in the future, there will be much tightening up on decrofting and planning. When an application is made, the commission will look at the purpose of decrofting. If the application is for a house site for a son or a daughter on the croft so that that young person does not need to buy a site but can live on their parents' croft, that is reasonable, but if it is an application by an absentee who wants to decroft

his whole croft and build 10 executive houses, that is totally unreasonable. Such an application should be refused.

The Convener: We need to move on. Peter Peacock will ask about the register of crofts.

Peter Peacock: The bill proposes a new register of crofts, although the existing register will continue. Do you agree in principle with the proposal that there should be a map-based register? From your experience, how easy or difficult will it be to create the maps?

Dr Balfour: We support map-based registration in principle. However, as earlier witnesses said, we are concerned about the proposed trigger points for registration, particularly that of a whole-estate sale or bequest. It would be extremely difficult to manage if every croft had to become registered for such a sale to take place. The sale of a whole estate should not be a trigger or, if necessary, common grazings should be gathered together in one boundary and crofting townships collectively in another. If each individual croft has to be registered, it will take an unknown number of years and simply will not happen.

We support the suggestion from the SCF that individual crofts might be registered on an area basis with help from assessors and those who have knowledge of the area, such as grazing committees and the landlord. We are concerned about the impracticality of having a whole-estate sale or bequest as a trigger for registration. Of course, the crofts might already be covered in the land register.

Jonathan Hall: Everybody recognises that boundary disputes are inherently difficult to deal with and in many cases have a history of all sorts of issues. The NFU Scotland is firmly of the opinion that we need a definitive map-based register—there is no doubt that that is essential. However, we also recognise that there are issues about how quickly that can come about and the trigger points. We need to consider where we might be in five, 10 or 50 years. There is a lot of merit in considering a more systematic approach to deal with the issues.

I was struck by an issue that I think Jim Hume discussed with the previous panel of witnesses. Although there are lots of disputes out there, they are not live—they are latent, hidden or dormant. An unforeseen consequence of a systematic approach that moves from area to area to establish a mapped register of crofts might be to disturb some of those dormant disputes. That might create more problems, tensions and financial issues for individuals. In some senses, it might be better to let sleeping dogs lie. I just throw that in—it is not our position on the issue.

Alasdair Morgan: Surely you have to make up your mind. Either you want a register or you do not. If you want one, the only question is how you get it.

Jonathan Hall: My starting point was that we are unequivocal about wanting a map-based register. The issue is the process by which that is achieved and how long it takes. A particular process might trigger certain unforeseen effects. I agree totally that we need a fully functional and fit-for-purpose map-based register—there is no doubt about that—but the issue of how we get there needs to be considered carefully.

Alasdair Morgan: If there is a dispute lying dormant somewhere, we will come to it one or way or another, will we not?

Jonathan Hall: One day, yes, but it depends on when and other issues. I simply throw out the issue for thought.

Alasdair Morgan: We have been thinking about it.

12:15

Marina Dennis: The SCF strongly supports an effective crofting register. It is very disappointing and surprising that we do not have an effective one at the moment. We feel that the crofting commission, not the Registers of Scotland, is the place for the crofting register. We recommend strongly that it be produced through community mapping—through people in communities giving the information that they have. On my croft, the boundary was the big granny pines. The old people knew where the boundaries were. There will be disputes, but, mostly, people will reach an agreement.

The network of assessors will be able to help with community mapping. There is a file on every single croft at the Crofters Commission, and there is a wealth of information in those files, which go right back to 1955. Also at the commission are the landlords' returns from 1955, when the commission was set up. There is a vast array of evidence that will help with mapping crofts.

Without any shadow of a doubt, all crofts will have to be mapped, which is not as difficult as it sounds. We could take all the information that the commission has to the community and say, "Let's map this."

The Scottish Government has laid out a plan to map the common grazings using specialist staff at the commission. Surely those staff could extend their remit to help with the mapping of crofts out in communities.

Mapping all the crofts would be an absolutely fascinating exercise. There are probably some

crofts out there that just are not on the register. Mapping crofts would be an extremely worthwhile and valuable exercise, but please do it in the community and have the information at the commission. How is the commission going to regulate crofting if it does not have a register? The register will help the commission in its job of regulating crofting effectively.

Peter Peacock: I hear everyone's worries about the trigger for registration under the bill. I have to say that I am struggling to understand why we need a map-based register at all. If I were Crispin Agnew or a conveyancer in the Highlands and Islands, it would be nice if I could go to a shelf and pick up the definitive map, particularly if the crofters had paid for it and I did not have to pay for it myself. However, if you live on a croft on which crofters have lived in perfect harmony with their neighbours for the past 50, 100 or 150 years and you have no disputes or worries, what benefit is there in having a map-based register? The creation of the register and putting crofts on a map might bring to the surface a dispute that has been lying dormant and which nobody is terribly worried about, because there are no heritable interests attached to the croft. I am struggling to understand the benefit to a crofter in having their croft mapped and registered when they are living in perfect harmony with everyone else.

Dr Balfour: If you want to use your croft for security for borrowing cash, for example, you need to have the boundaries mapped.

Marina Dennis: If your neighbour next door decided to buy his croft, he would need to have a proper plan for title purposes.

Peter Peacock: But if your neighbour decided to buy their croft today and there was a dispute, they would go to the Scottish Land Court and have it settled. If we turned up to map your croft, or the common grazing and therefore a bit of your croft, and there was a dispute, you would have to go to the Land Court to get it settled, so what is the difference?

Marina Dennis: Hopefully, you would not have to go to the Land Court.

Peter Peacock: Ultimately, if you could not agree, you would have to.

Marina Dennis: Yes, you would have to go if you could not agree, but I am a huge believer in mediation and sorting problems out on the ground before they grow legs and run to the Land Court. In my time as a commissioner, I heard cases that involved disputes about crofts. The way forward is to unravel what is there and to reach a consensus through discussion and mediation.

Peter Peacock: That is helpful, and you have made clear why you think that that is important. Therefore, your only objection to the current Government proposals is to the proposed system. You would prefer a community-based system, as I think members of the previous panel indicated—it would be good if they could all confirm whether that is the case. You believe that the system should be set up by communities—with support—over time, in the hope of reconciling any disputes in the most amicable way possible.

Is that a fair description of where you stand? Does the SCF believe that the register could be adequately kept by the crofting commission rather than by the keeper?

Marina Dennis: Yes.

Dr Balfour: Another point concerns the trigger for a whole-estate sale—but perhaps I have interrupted the questioning.

Elaine Murray: The SRPBA and the NFUS both suggest that neglect of crofts is probably a bigger issue than absenteeism. Simon Fraser suggests in his written evidence that neglect arose mainly from problems with regulation and lack of incentivisation, rather than from anything else. He states:

"The carrot has all but disappeared but the stick just gets bigger."

What are your views on reducing neglect? Is it best dealt with by regulation or by incentivisation?

Jonathan Hall: We need to incentivise individuals to get them interested in actively managing croft land. We want crofts to be actively managed, for all the benefits that that delivers. We are far more concerned—as you rightly pick up—about neglect than we are about misuse. In our opinion, neglect is also a much bigger issue than absenteeism. Absenteeism per se is not necessarily a problem as long as the land remains actively managed in some way.

There was an interesting and healthy discussion with the previous panel about 16km rules, 10-mile rules and 2 or 3-mile rules, and what we want the distance to be. In some ways, it is not important where that arbitrary line is set, but there must be a trigger that will bring the crofting commission into play. On absenteeism, the key issue—which was not mentioned by the previous panel, but which we think is vital—centres on the three lines in the bill that refer to crofters who are "not ordinarily resident". We believe that some type of trigger mechanism is needed to start that procedure, so that a crofter has to make a case if he or she is living beyond the 16km limit for whatever reason—which is perfectly reasonable in the modern world, as was discussed earlier.

The key is whether the crofter can demonstrate that although he may be "not ordinarily resident", the croft is not neglected. It must be demonstrated

that the croft is being actively managed and meets the terms and conditions—the good agricultural and environmental condition standards—of cross-compliance. The misuse element must also be considered with regard to whether the crofter is managing the croft in a certain way—for example, whether it is being used for agri-environment purposes or the crofter is working it to produce a commodity such as store lambs.

The absenteeism element is important, because it creates a trigger, but it is not the be-all and end-all. The bill must address neglect and therefore—to go back to the question—it must address the question of how we create the environment for individuals to want to work on that croft. We need to combine the right framework of policy incentives with a degree of regulation that can sit behind it. If it is true that, as you quoted,

"The carrot has all but disappeared"

while the stick has got bigger, that must be addressed, and we hope that it can be.

Dr Balfour: Our view is not dissimilar. What is important is that the croft is properly looked after. Many crofters cannot live on their croft for part of the time because they are working and can get there only at weekends or less often. I have encountered perfectly good examples of people who have long connections with an area and hope to go back to live there. The crucial point is that if the person cannot be there they should make proper arrangements for the croft to be looked after in their absence.

I have been quite upset, because during the past two weeks the Crofters Commission has been sending letters to everybody on the basis of their addresses—sometimes on the basis of 10 miles as the crow flies. I find that quite objectionable. Crofts should be properly looked after, but absentees should not be hounded and the commission should not come up with mythical distances of 10 miles or whatever.

Elaine Murray: In its interim report, the Pack inquiry proposes that area payments be linked to land use capability classification. I understand that that means that for croft land the payment would be only about £15 per hectare, which I presume would be an insufficient incentive to a person to keep working the croft.

Jonathan Hall: Brian Pack himself said that the interim report is a bit of an Aunt Sally. What the situation will be with regard to single farm payments and less favoured area payments come 2013 and 2014 is anyone's guess. We could talk for a long time about that.

Crofters are probably more concerned about the rules that might come out of Europe on minimum areas for qualification for LFA and single farm payments. Currently, £385 is the minimum payment under LFA support—long may that continue. There are a lot of minimum-payment claimants. Of course, as soon as Brian Pack threw some numbers into the air, everyone started doing back-of-the-fag-packet calculations. Everybody thinks that they will be worse off, which makes me wonder whether the winners are hiding. That is my view, and not necessarily that of NFU Scotland.

If we are talking about £15 per hectare for croft land, the key point is that it will also be £15 per hectare for the neighbouring farm on the Isle of Mull or wherever. The issue is not whether the land is a farm, a croft or a smallholding, or whether it is an owner-occupied farm or a tenant farm: the key point is that we must ensure that support payments are targeted in the most appropriate way to bring about active management of the land. In most of Scotland, that will happen predominantly through keeping livestock, given that most of Scotland has limited agricultural options. The crofting counties have extremely limited agricultural options.

We must get right the keys that unlock the support payments, whether we are talking about a holding of 1 hectare, a common grazing or a 2,500 hectare holding that has an actively managed hefted hill flock. We must direct the support to where it is required and where it will deliver public benefits.

Marina Dennis: I agree with Jean Balfour and Jonathan Hall on absenteeism and neglect.

The previous panel talked about whether nature conservation might be used as an excuse for neglect. If a crofter says that the land is being set aside for nature conservation, he must have a plan that has been ratified by Scottish Natural Heritage, the RSPB Scotland or the SAC and which has outcomes such as, for example, an extra pair of lapwings or snipe on that piece of boggy ground. However, the commission should not be involved in that activity. It is not funded—and, indeed, does not have the expertise—to go around looking at nature conservation crofts.

12:30

Bill Wilson: What if large numbers of crofters decided to go to the SAC with their management plans and, as a result, there was no crofting activity or grazing in that particular area? Would the commission not have to have some input, even if it was only to agree with SAC that a certain number of crofts should be designated nature conservation crofts?

Marina Dennis: Obviously, the plan would have to go to the commission. However, an increase in biodiversity might be better than some of the outcomes from agriculture.

Bill Wilson: I understand that. I was simply wondering whether when you said that the commission should not be involved you meant that it should have no involvement at all, no involvement at the planning stage or whatever.

Marina Dennis: The commission should not be involved in monitoring or what we might call the professional side of nature conservation.

Bill Wilson: That is fine.

Jonathan Hall: Can I make a comment—

The Convener: Wait a minute. I ask Peter Peacock and Alasdair Morgan to throw two questions into the mix before you respond.

Peter Peacock: With regard to triggers for absenteeism, neglect and so on, although a distance of 16km might seem irrelevant in today's terms, it nevertheless has merit as a trigger point at which someone is forced to think about something. In that light, it is immaterial whether the distance is 16km or 50km. However, in the previous evidence session, Simon Fraser said that there are good and bad absentees and that although the whole issue is very difficult to define in law, it is not particularly difficult at local level because local people know who the absentees are. The implication was that the trigger should be the community, in the form of the grazings committee or whatever saying, "Look, we're fed up with this. We want some action to be taken." Would it be legitimate to do away with distances as a trigger and instead let the community's expression of dissatisfaction with a situation be the trigger for action by the commission—or might that not work because people would find it difficult to raise such issues at a community level?

Alasdair Morgan: My question is in the same vein, but perhaps takes things a bit further. The trigger is obviously for the commission to look at a situation and decide whether it is acceptable. If it is to include a distance, is the current distance not woefully short, given modern circumstances? Should it be longer? The current proposal, for example, will catch people we have met who at the moment travel from South Uist to Harris to manage a second croft. It just does not make much sense to us.

Jonathan Hall: We absolutely need a trigger but the distance that might be appropriate—if, indeed, we are going to use distances in this day and age—is very much open to debate. It is all about how we define absenteeism. If a trigger takes into consideration whether the person in question is justified in not being ordinarily resident on a croft, the decision then will hinge purely on whether the commission deems the croft to be neglected or misused. That is, after all, the fundamental issue.

Of course, any trigger will be arbitrary, but it has to be set somewhere. Thereafter, the issue is not absenteeism, but neglect. Earlier, we were talking about good agricultural and environmental condition; in that regard, Brian Pack has suggested in his report that minimum stocking requirements be brought into the equation. That might answer Mr Wilson's earlier point.

Peter Peacock: If you are suggesting that the distance trigger is about absenteeism and that a judgment then has to be made about neglect, does that not point to the need for the community to be involved? The community knows when there is neglect. Does that point to the community making decisions on the matter? You did not go quite that far, but were you heading in that direction? It is necessary to make a judgment about neglect, as opposed to residency. Who is better at making that judgment than the people who live in the community that it affects?

Jonathan Hall: How objective can a community judgment be? There may be other local issues of which others are not aware. An independent decision is needed.

Peter Peacock: Indeed. The trigger would be the community saying that matters need to be examined. I presume that it would be the commission's responsibility to make the judgment. I am suggesting a different way of triggering the process.

Jonathan Hall: I agree that it is a different way of looking at the matter.

Bill Wilson: If I understand Jonathan Hall correctly, he is saying that the issue is not absenteeism, in the sense that someone is not there, but whether the croft is neglected. Let us take an extreme circumstance: imagine an area with 40 crofts, in which 37 people are absent and three crofters are working. If those crofters are working all the crofts, no croft is neglected. In that situation, is not there a risk that new crofters will not be able to get into crofting because, although there are 37 absentees, those absentees are not being dealt with because the crofts are not neglected and are being worked by the remaining three crofters?

Jonathan Hall: I see the point that you are making, but I consider that to be an extreme example.

Bill Wilson: I agree that it is an extreme example.

Jonathan Hall: We suggest that the fact that 37 people were not resident would trigger an investigation, through the Crofters Commission. Those people would have to show why they should not be ordinarily resident. Given that such a high proportion of people—more than 80 per

cent—were technically absent from the area, the commission could decide not to allow them not to be ordinarily resident and either to require them to be resident or to take further action.

Alasdair Morgan: Would you regard that as the preferred outcome in such a situation?

Jonathan Hall: In an ideal world, we would like to maximise activity on the land. Part of that equation is maximisation of the number of people who are involved in management of that land, because the social construct of crofting and farming and all that goes with them is important. That is preferable to having one or two crofters crofting a vast area, which results in an extensive ranching-type system. There is a danger of that on some of our hill farms, because we cannot afford the number of men who are required to heft sheep properly and so on. The relationship between the level of activity and people is important. However, we cannot have a hard and fast rule, which we apply everywhere, to call matters to account simply because crofters are not present, although the land is being managed. A value judgment must be made. The triggers must enable the commission to make decisions on such matters.

Dr Balfour: We started by discussing neglect. Peter Peacock raised the issue of absentees and asked whether we can or should control absenteeism. It is quite difficult to do that. In my experience, communities are hesitant about saying publicly that someone is an absentee or is doing something that they should not be doing. The example of an area in Ardnamurchan in which only three people are crofting has been cited. That is partly a result of a lack of other employment in the area. People always forget that one reason for absenteeism is the fact that, in many places, there is nothing for people to do; crofting is part-time. We cannot achieve all the answers by controlling and legislating against people, probably at great cost. If we concentrate on neglect, the other matters may take care of themselves, over time.

Peter Peacock: How should that neglect be tackled?

Marina Dennis: As with everything in crofting, one size does not fit all. It is important to remember that what is happening in Unst is very different from what is happening in Badenoch and Strathspey and the mountains.

On absenteeism, if a robust community seeks to get young people interested in crofting, it will get the school interested through crofting connections and sort out both the neglect and the absentees in its township. I am thinking of Camuscross on Skye, for example. The enthusiastic, active community there wants to sort out the absentees and the neglect. In other townships, however, that is not the case.

The commission will have a list of absentees, and it needs to prioritise the matter and find out why those people are absent. If they have been absent for more than 10 or 12 years, they should be required to come up with a proposal and state what they are going to do with the croft. For example, are they going to come back in so many years when they retire? The matter needs to be worked through systematically.

As I said, one size does not fit all.

Peter Peacock: What you have set out is the current position, is it not? That is the status quo. The commission can do exactly what you said without any difficulty. It can take that action. The difference in the bill is that the only trigger is absenteeism. There is no trigger for neglect. Absenteeism is easily sorted because a distance can be specified. We can deal with absenteeism, but that is not the problem. The problem is absenteeism plus neglect. What is the trigger for neglect? How does the commission currently get to know about neglect? I visited Camuscross, which has been telling the commission about neglect. That approach works and it is fine, but it will not necessarily work everywhere, as you said.

Marina Dennis: The commission can ask its panel of assessors to have a look at their communities and, in a confidential way, tell it what is going on. The assessors are independent people even though they are from communities. They have good judgment and are well respected.

Karen Gillon: I am sure that many of you are aware of the Land Court ruling in the case of Inkster v Crofters Commission in relation to planning. The Crofters Commission decided not to decroft because planning permission had already been granted and it would therefore be acting as a second planning authority. That perhaps takes us back to the question that we asked about charging. The Crofters Commission has determined that, if the decision has already been made, it cannot decroft. The bill slightly changes that position. Does the bill give the commission enough power to protect land in those circumstances? If not, are there any alternatives that should be considered?

Secondly, should the commission be asked about individual planning applications before they are considered, particularly in relation to development on croft land that might result in an application for decrofting?

Marina Dennis: In the Inkster case in Ocraquoy, the recommendation to the Crofters Commission was to refuse decrofting, and the commission refused the application. The Inksters went to the Land Court, which overturned the commission's decision. We hope that the planners and the Scottish Government will advise local authorities

not to give planning permission on inby land or land that can be cultivated. It is important for the planning guidelines to state categorically that there should be no house building on land that can be cultivated. Most crofts have a rough area that cannot be used for cultivation but which could be used as a house site if necessary.

However, it is very important that the planning people work with the crofting commission, which should be a statutory consultee in all planning applications for croft land. That really needs to be tightened up. The SCF is hugely supportive of tightening up on planning, because that is really where the rot started both in Ocraquoy and in Taynuilt.

12:45

Karen Gillon: I see the NFS representative writing away furiously, because tightening up planning in the crofting counties might well have implications for farmers and for developments elsewhere.

Marina Dennis: My suggestion relates to all land—not necessarily croft land—that can be cultivated.

Karen Gillon: I understand that point.

Jonathan Hall: Yes, I was writing away reasonably furiously.

I endorse SCF's view pretty much whole-heartedly. Certainly, the opinion of our crofting and Highlands and Islands committee is that, given the scarcity of inby land and of land that can be cultivated in the crofting areas, the value of such land is absolutely huge. Not necessarily in capital or financial terms but in terms of the viability of crofts, such land is hugely significant so its rarity value is through the roof. As soon as such land is built on in any way, shape or form, the land is in effect lost. We agree that there should be a presumption against development on inby land or cultivated land. There might be exceptional circumstances, but those should be dealt with in planning decisions. We do not necessarily need a blanket ban on development, but there should certainly be a presumption against development.

To echo what was said earlier, planning in rural Scotland is an issue that needs to be looked at. Further scrutiny needs to be given not only to what the planning guidance and so on says but how the guidance is applied in different local authority areas. Different planning authorities take very different approaches to matters such as rural housing, farm diversification and development and the building of houses in crofting areas.

Dr Balfour: We certainly support the proposal in the bill that the crofting commission—and, more important, the Land Court—should take into consideration factors relating to land use, which was not the case previously. We believe that that is a good addition, which should be helpful.

The Convener: I have one final quick question. Are you glad that the standard security provision has been dropped?

Marina Dennis: Yes, very much so.

Dr Balfour: Yes.

Jonathan Hall: Yes.

Karen Gillon: The previous panel was unanimous about the need to close the Whitbread loophole, but the bill as introduced does not do that. Do you believe that the bill should close that loophole?

Jonathan Hall: Yes.

Marina Dennis: Yes.

Dr Balfour: Like my colleagues, I support the dropping of the arrangements relating to the Whitbread v Macdonald case.

If I may, I want to make another point about succession on assignation. Where a family bequest transfers a croft from one tenant to a family member, that can currently happen without let or hindrance. However, the bill proposes that that will no longer be the case. In the case of assignation as a lifetime bequest, up until now special conditions have applied to non-family beneficiaries that did not apply to a family succession. It seems to me that succession was the whole point of the 1886 act. Like colleagues in the SRPBA, I know from personal experience that many crofters have long pedigrees in their area. Apart from anything else, the provision in the bill will make them want immediately to go and buy their croft on the basis that their succession might otherwise be blocked. I hope that the committee will look at that area.

The Convener: Okay, thank you very much for raising that.

Karen Gillon: Sorry, would Dr Balfour prefer that the succession right remained as it currently is for tenants?

Dr Balfour: Indeed.

Karen Gillon: Is that Marina Dennis's view as well?

Marina Dennis: Yes.

The Convener: I thank the witnesses for their attendance. If any issues occur to them after this session—or as a result of this session or on further deliberation—they should share them with

the committee as soon as possible by sending a note to the clerks. Again, I thank them very much for their evidence, which has been most helpful.

12:51

Meeting continued in private until 13:04.

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