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Official Report

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 2 June 2010

Session 3

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CONTENTS

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
14th Meeting 2010, Session 3

CONVENER

*Maureen Watt (North East Scotland) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Aileen Campbell (South of Scotland) (SNP)
*Karen Gillon (Clydesdale) (Lab)
*Liam McArthur (Orkney) (LD)
*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 ALSO ATTENDED:

Alasdair Allan (Western Isles) (SNP)
Roseanna Cunningham (Minister for Environment)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 2 June 2010

[The Convener *opened the meeting at 10:00*]

Crofting Reform (Scotland) Bill: Stage 2

The Convener (Maureen Watt): Good morning. I welcome everyone to the Rural Affairs and Environment Committee's 14th meeting of the year. The purpose of today's meeting is to consider amendments to the Crofting Reform (Scotland) Bill at stage 2. There is no other business on today's agenda.

Everyone—including Liam McArthur—should remember to put off their mobile phones and BlackBerrys, please, as they impact on the broadcasting system and their sound goes right through people's ears.

Members should have in front of them their copies of the bill, the marshalled list of amendments and the groupings.

I welcome the Minister for Environment and her officials to the meeting.

Section 1 agreed to.

Schedule 1—The Crofting Commission

The Convener: The first group of amendments is on Crown status of the commission. Amendment 51, in the name of Elaine Murray, is the only amendment in the group.

Elaine Murray (Dumfries) (Lab): Amendment 51 would delete the lines in schedule 1 that remove Crown immunity from the crofting commission.

In written evidence to the committee, Sir Crispin Agnew suggested that it is anomalous that a corporate body that does not have Crown immunity should continue to act as a tribunal

"where constitutional theory is that all justice emanates from the crown."

The Scottish Crofting Federation believed that the commission should have the power of tribunal in order to protect commissioners from possible legal action against them as individuals. That concern was raised in the committee's stage 1 report, but the Scottish Government argued that the commission would exercise administrative rather than judicial functions and would be a regulator rather than a tribunal. However, that does not adequately answer the concern that, should decisions of the commission be appealed to the Scottish Land Court and overturned, an award of expenses could be made against the commission.

I believe that the case for the removal of Crown immunity from the crofting commission has not been made, and amendment 51 would remove the relevant provisions. I am unable to see why it would be problematic for the crofting commission to retain Crown immunity. If something is not broken, why are we trying to fix it by removing Crown immunity?

I move amendment 51.

Liam McArthur (Orkney) (LD): As the marshalled list indicates, amendment 51 is supported by my colleague John Farquhar Munro. Elaine Murray has marshalled all the points that need to be made very well. It seems that there is a risk that, if we go down the route that the Government has suggested, the commission might be dissuaded or disincentivised from taking action. There has been a clear call from most in the crofting community, from which we have taken evidence, that they want a more proactive and activist commission.

The Minister for Environment (Roseanna Cunningham): The position is that the Crofters Commission is not a tribunal exercising a judicial function and it does not currently have Crown status of any kind. Therefore, there is misunderstanding of the current position and in respect of the provision in the bill simply being a clarification of the existing position, which is that the commission does not have Crown status. That is in accord with its actual status as a non-departmental public body. In effect, the amendment would remove the clarification but would not confer Crown status on the commission because it does not have that in the first place.

The debate is interesting. We believe that an attempt is being made to fix something that is not there in the first place. The commission is listed in the Tribunals and Inquiries Act 1992 and the Administrative Justice and Tribunals Council (Listed Tribunals) Order 2007. That ensures that the processes and procedures are fair and are subject to independent scrutiny by the Administrative Justice and Tribunals Council, and we are not altering that position. However, the fact that the commission is listed in those pieces of legislation does not make it a tribunal in the judicial sense of the word. It administers and regulates, but it does not take the kind of decisions that any judicial body would.

In our view, the amendment would simply remove a clarification of the commission's current status, and I ask Elaine Murray to withdraw the amendment because it is predicated on an

assumption that the commission has Crown status, which it does not.

Elaine Murray: That is a new argument against the amendment; it is not one that I have heard previously. I am prepared to withdraw the amendment at this stage in order to examine the matter further. If, after doing so, I consider that there is an issue about appealing the decisions of the commission, I will lodge another amendment.

Roseanna Cunningham: I am happy to discuss the matter with Elaine Murray over the coming weeks.

Amendment 51, by agreement, withdrawn.

The Convener: Amendment 52, in the name of Peter Peacock, is grouped with amendments 53 and 76. If amendment 52 is agreed to, I cannot call amendment 53, because of pre-emption.

Peter Peacock (Highlands and Islands) (Lab): Amendment 52 seeks to remove the power to charge crofters fees for regulatory applications. My view on this matter is well known, and I will not overly labour the points, as members have heard them before. However, we are all well aware of the complexity of crofting law. That complexity has been created over many generations by successive Parliaments. As a consequence of that complexity, crofters have to make quite a number of regulatory applications during their lifetime. Those are applications that no other member of society has to make. In addition, they might also have to make regulatory applications that every citizen might have to make, such as those for planning permission. It seems to me to be wrong, in principle, that a crofter should be charged fees for being regulated that others in the agriculture sector are not charged.

Until this bill, no fees have been charged to crofters for the same regulatory applications. At a time of economic challenge, it does not seem to be appropriate to be starting to do that now.

Added to that concern is my belief that the commission is potentially underfunded. In that context, my fear is that the charges might be the thin end of the wedge. Who knows how the power that is granted by the bill might be used at some point in the future?

Ministers have made it clear that their policy is to use the power only for applications from which a crofter will derive a clear economic benefit. However, the legal power is not so limited. Further, I believe that, at the time when an application is made and a fee is levied, it cannot be clear whether the application will result in a financial gain. For all those reasons, I reject the requirement for the bill to contain such a provision.

Amendment 53 acknowledges that, depending on how the bill proceeds, we might be entering a new period in the life of the commission, with a large proportion of its members being elected. That being the case, I am prepared to accept that, if those democratically elected crofters thought that there was a case for such charges, they should—at their discretion—be able to consult crofters on the principle and the detail of the proposal and ask for ministers to consent, after a vote in Parliament, to new powers being given to the commission.

The minister might suggest that no democratically elected commission would ever seek to have charges placed on the electorate that it regulates. She might be right about that, which is one of the reasons why I would be entirely happy with such a provision.

I respect the democratic credentials of the new commission, and I hope that members will take the democratic route by trusting the new commission and supporting amendments 52 and 53.

Amendment 76 is a consequential amendment.

I move amendment 52.

Bill Wilson (West of Scotland) (SNP): When the Labour Government introduced the right to buy at 15 times annual rent, it gave crofters quite a strong benefit—and quite a reasonable one I think. However, it does not seem unreasonable that, if a crofter purchases land at 15 times the annual rent and then seeks to make a profit on it, they should have to pay charges to cover costs. I do not think that there should be charges for normal things on which a crofter is not making a profit but, if the crofter is making a profit, it does not seem unreasonable that the commission can recover costs. Unless I am very much mistaken, if a farmer made applications via the Scottish Environment Protection Agency, they would have to pay some of the costs of meeting the requirements. The situation is not anomalous; there is a straightforward comparison with similar situations in other walks of life.

Liam McArthur: I will not add to what Peter Peacock said. Bill Wilson has raised an interesting point in relation to SEPA, which rather confirms suspicions that what is proposed is the thin end of the wedge and that we will have a cost-reflective charging structure that is about financing the regulator. That is not what the minister is proposing through the bill, but the fear is that, over time, the situation with the crofting commission will become the same as the current situation with SEPA.

John Scott (Ayr) (Con): I share Peter Peacock's fears about underfinancing. That said, there is a clear difference between situations where there is the potential to make a profit and situations where there is not. Where there is the potential to make a profit, such as through

development, it is reasonable that people should be invited to pay a fee.

Roseanna Cunningham: We are all aware of the current economic circumstances and the challenges that the whole public sector will face over the next few years. We are trying to enable the future crofting commission to be as robust and fit for purpose as it can be. In my view, it is therefore only right that the commission be given the ability, when prescribed in regulations made by Scottish ministers, to levy a charge to process regulatory applications whose principal beneficiary is the individual, rather than the wider community, such as in the case of an application to decroft land or apportion a common grazing for their individual use.

Amendment 52 proposes to remove the commission's ability to charge altogether. If that ability is removed, the commission will not be able to recover any of its costs from people who benefit financially from its decisions. The alternative approach proposed by amendments 53 and 76 would require consultation with crofters as to the principle and scale of any regulatory charges to be applied by the commission. Although there should be some consultation with crofters about the scale of regulatory charges—of course there should—I do not think that crofters should be the sole determining factor as to the principle or scale of charges, as some might consider it unfair that wider society should bear the financial costs of the commission in respect of regulatory applications, rather than the individuals who are the principal beneficiaries of such applications. It is not about the commission making a profit but about its recovering some of the regulatory costs. As has been said, there are examples in the wider public sector of charges being imposed for regulatory procedures that are required by law.

I therefore strongly urge the committee to reject the amendments, as they can serve only to restrict the commission's future ability to be accountable and make best use of taxpayers' money. I should point out the Scottish Crofters Foundation's reply to the draft bill consultation. It is fair to say that the foundation has not been wholly supportive of the bill, but it said at that stage of the consultation:

> "The proposal to charge crofters for regulation is [only] acceptable in cases where the crofter will financially benefit from the transaction—decrofting the house site for example."

In my view, that principle is probably supported by a fair few crofters, even if they themselves do not really want to have to pay the charges. It belongs to that category of things that we all wish we could get for free, even though we all know that in fact such a wish is unreasonable.

10:15

Peter Peacock: Bill Wilson was right to refer to charges that SEPA would levy; indeed, as I said earlier, regulations also require planning fees to be paid. However, those regulations apply to every citizen, whereas crofting legislation applies only to crofters. As a result, one part of the agriculture sector would bear a higher cost than the others. As for John Scott's point about the ability to charge a fee and—as he said—the potential to make a profit, the weakness in the proposal is that at the time the fee is charged it will not be possible to know whether or not a profit will be made.

Nevertheless, the arguments are clear and there is a difference of opinion, so I will press amendment 52.

The Convener: The question is, that amendment 52 be agreed to. Are we agreed.

Members: No.

The Convener: There will be a division.

For

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

As the vote is tied, I will cast my casting vote against amendment 52.

Amendment 52 disagreed to.

Amendment 53 moved—[Peter Peacock].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

Again, the vote is tied. I will cast my casting vote against amendment 53.

Amendment 53 disagreed to.

The Convener: The next group is on commission: selection of convener. Amendment 54, in the name of Liam McArthur, is grouped with amendment 55.

Liam McArthur: Although the committee did not reach agreement on this issue at stage 1, I accept that it is not perhaps the most significant area of disagreement and that the arguments for the various positions are finely balanced. That said, there is general agreement about the bill's provisions supporting moves towards having a largely elected crofting commission. Although during our evidence-taking sessions there was sometimes quite strident criticism of the current Crofters Commission's performance over the years, it was difficult, if not impossible, to find anyone who wanted it to be abolished. Indeed, the commission was generally seen as part of the solution to crofters' concerns about the future of their way of life.

In that context, enabling crofters to elect the majority of commissioners has been seen as making the commission more accountable. I acknowledge concerns that the true effect of the change might have been overstated and, as with other parts of the bill, it is fair to say that expectations have been raised to a level that might be hard to meet. However, it is a positive move, and I think that it is important to reinforce it by giving commissioners more say over who should be their chair.

At stage 1, it was suggested that, for the minister to have a good relationship with any future chair, he or she would need to be in charge of their appointment. That is simply not credible. The argument that a chair who has not been appointed by the minister is any less accountable to Parliament is flawed. Accountability rests in statute and the responsibilities that all commissioners take on in their role.

However, where there is a mix of elected and appointed commissioners, who might well view their roles differently, the best means of ensuring cohesion and a good working relationship within the commission is surely to let commissioners at least reach agreement on who they wish to be their chair. Amendment 54 seeks to leave it to ministers to approve any such appointment and I see no reason why such a move should militate against the chair having a good working relationship with any minister.

Although I understand why Peter Peacock has framed amendment 55 in the way that he has, I fear that ministers would too often overlook the power to delegate. I am sure that he appreciates that my preference is very much for powers to be passed upwards, where appropriate, rather than handed down.

I move amendment 54.

Peter Peacock: Liam McArthur and I are in exactly the same territory with amendments 54 and 55. The Labour and Liberal members flagged up in the stage 1 report the fact that we felt that there was room for the minister to consider the matter a bit further, and the amendments follow on from that.

I can see a case for the crofting commission being able to elect its own convener, but my only problem with Liam McArthur's formulation in amendment 54 is that it could place any minister in a difficult position if they clearly did not agree with the commission's nomination. With amendment 55, I seek to take a slightly different approach to avoid that problem.

Current ministers have insisted that they will wish to appoint the commission's convener. That seems to derive from a view that, despite its democratically elected element, the commission will still be a non-departmental body for which ministers are accountable in Parliament and that, as the line of accountability will be through ministers, they should appoint the convener.

I understand that line of argument, even though it may run counter to the opinion of those who believe that the new, elected commission will be more accountable to crofters than to ministers. Liam McArthur touched on that view. It is not the view of current ministers, and I understand that, but it seems entirely reasonable to assume that, at any time in the future, ministers may feel that the responsibility to appoint the convener could be delegated to the commission. Amendment 55 allows that to happen by giving them discretion to delegate the power. In the circumstances, it seems a reasonable amendment.

I will move amendment 55 at the appropriate time.

Roseanna Cunningham: The Government considers that ministers should select the convener of the crofting commission as it is important that the minister has a good working relationship with the chair of any executive NDPB. It is also important for ensuring a proper chain of accountability. All NDPBs are accountable to the Scottish ministers and, through them, to the Scottish Parliament for the decisions that they take and the money that they spend. They are expected to operate in a framework that is set out by the Government—for example, by aligning their corporate and business plans to the national performance framework.

Therefore, I have concerns with amendment 54. I am not opposed to amendment 55 but, in my

view, the first convener of the new commission needs to be selected by ministers from among the elected and appointed members because we are moving from one way of working for the commission to another. I agree that, once I am satisfied that the commission is working in the way that we expect, ministers should have the option of delegating to the commission members the power to select the convener if experience shows that that approach would work.

If the committee agrees amendment 55, I may wish to tweak it slightly at stage 3 to make it clear that ministers could take back that function. In the event that, for example, members of the commission were unable to agree on a convener for any reason, ministers would have to select one. I hope that Peter Peacock agrees that that would be a sensible precaution.

I urge Liam McArthur to withdraw amendment 54 and support amendment 55 instead.

Liam McArthur: I will not add much. I recognise that Peter Peacock's amendment represents progress, albeit that I retain some scepticism about how the power that it introduces may be used in future. On the basis of his remarks and the minister's, I am happy to withdraw amendment 54.

Amendment 54, by agreement, withdrawn.

Amendment 55 moved—[Peter Peacock]—and agreed to.

The Convener: The next group is on commission: appointed member to represent landlords' interests. Amendment 64, in the name of John Scott, is the only amendment in the group.

John Scott: This amendment is about fairness, inclusion and setting policy direction so that there is full buy-in from all interests in the crofting communities. The proposal for the commission to produce a strategic plan setting out its policies on how it proposes to exercises its functions is, of course, welcome. It would be an important document in crofting regulation because the commission must have regard to the plan when exercising its functions—almost akin to a material consideration in a planning application. Failure to follow the plan could be a ground for an appeal to the Scottish Land Court against a decision of the commission.

The amendment would specifically require consultation on the plan to include representatives of landowners and crofters. The bill requires the commission to consult local authorities, Highlands and Islands Enterprise and

"such other persons or bodies as the Commission consider appropriate."

Given the importance of the issue—

The Convener: May I stop you? Are you sure that you are speaking to the right amendment?

John Scott: Yes.

The Convener: I am sorry to interrupt you, but the clerk thought that you might be speaking to the wrong amendment. Carry on.

John Scott: It seems logical that representatives of crofters and landowners would be consulted, and it would be beneficial to have that clearly stated in the bill.

Roseanna Cunningham: I am puzzled, because I understood that we were discussing an amendment that would include in the bill a requirement for ministers to appoint to the commission

"at least one person"

who

"represents landlords' interests".

John Scott's remarks seemed to refer to an amendment in his name that we will consider later.

John Scott: Thank you all for pointing that out. However, it is in the interests of fairness, inclusion and the production of balanced and fair policies and decisions that one of the appointed members should be a landowner. My preamble was relevant.

I move amendment 64.

Roseanna Cunningham: If we are discussing amendment 64, I can say that I am on record as saying that it is the Government's policy to use one of its appointments to ensure representation of landlords' interests, as part of a balanced board of the commission. I understand that some people would prefer that to be in black and white, because Governments and policies can change over time. Therefore, I accept the principle behind amendment 64. However, I ask Mr Scott to withdraw the amendment and to allow me to lodge a slightly different version of it at stage 3.

I will explain why. Given the changes that are being made in relation to who can stand for election, it is possible that a benign landlord whom all crofters love will be elected in the first place. Therefore, I would prefer to use a format that is similar to the one that is used in paragraph 4(1)(a)(ii) of schedule 1, which requires the Scottish ministers to ensure that there is at least one Gaelic-speaking commissioner. That means that ministers must appoint a Gaelic speaker if one is not elected. I propose to lodge an amendment that would require a representative of landlords' interests to be appointed if such a person was not elected. I suppose that it would be good if a Gaelic-speaking landlord was elected, because that would deal with both aspects.

I hope that John Scott accepts my assurance in respect of lodging an amendment at stage 3 and that he will therefore withdraw amendment 64. I accept the principle behind amendment 64, but we must be careful not to end up in a situation in which we must appoint a representative of landlords' interests although a landlord has already been elected.

John Scott: On the basis that you will lodge an amendment at stage 3, I am happy to seek leave to withdraw amendment 64.

Amendment 64, by agreement, withdrawn.

The Convener: The next group is on the election of members of the commission. Amendment 56, in the name of Liam McArthur, is grouped with amendments 57 to 62.

Liam McArthur: Amendment 56 is consequential on my amendment 61, which would make clear the preference of the majority of the committee for elections to the commission to be by proportional representation. Amendment 61 would put that view firmly into the bill.

My opting for the alternative vote method rather than the more genuinely proportional single transferable vote system should not be misconstrued as a conversion to AV that has been brought about by the signing of the coalition agreement at United Kingdom level. Rather, the choice of AV reflects the recognition that if a single commissioner is to be elected from each of the six crofting counties, an STV election will become a de facto AV election.

Although I acknowledge that the minister has intimated the Government's support for such an approach and for the position that was adopted by the majority of committee members, I thought that it was important to set out the position more clearly in the bill.

10:30

Matters to do with the elections are undoubtedly a good deal less clear cut in relation to how the boundaries of the crofting constituencies should be drawn up and who should be eligible to vote. My amendment 62 recognises that fact and, although the minister has already indicated that she is prepared to consult on the size and shape of the constituencies, I believe that there is also a case for using that consultation to seek views on who should have the vote in the elections. Karen Gillon's amendments 57 and 60 identify one aspect of that debate that she has steadfastly pursued through stage 1, but there are wider issues about, for example, how young people are encouraged to take an interest and stake in the future of crofting. Interestingly, if Karen's amendment 59, which I support, is agreed to, it will be possible for someone who is 16 to stand for election but highly unlikely that they or their peers can vote. That cannot be right if we also accept that there is a challenge to be faced in the future age profile of crofting.

I move amendment 56.

Karen Gillon (Clydesdale) (Lab): The minister is no doubt aware of my long-standing interest in the franchise for elections to the commission. It was an area of debate during our stage 1 considerations.

Amendment 59 aims to widen the category of those who are eligible to stand for election to anyone who is 16 or over and who has been nominated by a registered crofter. One issue that has arisen during our discussions is the potential gender imbalance in those able to be elected to the commission. Amendment 59 enables that particular issue to be resolved. As Liam McArthur mentioned, it would also allow younger members of the crofting counties to stand even though they are not the registered crofter, bringing into play a range of people with new experience and new ideas about how crofting should be taken forward. Ultimately, who is elected will be a matter for the electorate, but amendment 59 would widen the pool from which people could be nominated.

Amendment 60 seeks to widen the franchise. In changing the name of the commission from the Crofters Commission to the crofting commission, the Government has explicitly stated that the commission is responsible for crofting as a whole. In our stage 1 report, all bar one member of the committee agreed that the Government should look again at extending the franchise to the spouse, civil partner or cohabitant of the registered crofter. Amendment 60 gives effect to that proposal and therefore deals with some of the issues that we encountered related to gender imbalance in the electorate.

If we are serious about the role of the crofting commission and the future of crofting, it is important that we encourage as many people as possible to participate in its activities. It is implicit for people that they will be able to participate in the democratic election of those who will regulate them. If we agree to amendments 59 and 60, we will go a long way to addressing some of the issues that came up in our stage 1 report.

I am happy to support Liam McArthur's amendments. Amendments 57 and 58 are consequential on the others.

John Scott: I have a deal of sympathy for Karen Gillon's amendments. My only problem is with reducing the voting age to 16, which I think would be a mistake. I would have been happy to support them otherwise because, as she said, widening the franchise is essential. I will perhaps

wait to hear what the minister has to say on the matter.

Roseanna Cunningham: The amendments relate to the election of members of the commission, and I propose to address them by subject.

Amendments 56 and 61, lodged by Liam McArthur, are linked, and I will respond to them together. Amendment 56 would remove the Scottish ministers' ability to specify in regulations the voting system to be used in the election of members of the commission. Amendment 61 provides that the election process for electing members of the crofting commission must be conducted on an alternative vote system, although that is not defined anywhere. The Scottish Government has already accepted the committee's majority view that the alternative vote system should be used for the crofting elections. We have indicated that we will include provisions to cover that type of electoral system in our draft election regulations, and we will consult on them. On the basis of what I have just put on the public record, I ask Liam McArthur to withdraw amendments 56 and 61 and allow us to prepare draft regulations, which I assure him will include the alternative vote system. Regulations, not primary legislation, are the place in which to spell out what the alternative vote system is.

Amendments 57 and 60 were lodged by Karen Gillon. I have an enormous amount of sympathy with what she is trying to do, but we should not seek to put that type of detail in the text of the bill; it should be in draft regulations on which we can consult.

The Government currently considers those who are directly subject to the regulations to be the ones who should be eligible to vote. The amendments are perhaps unfair, as they would allow a greater say in the composition of the commission by crofters with partners, which could amount to less favourable treatment of single crofters.

Karen Gillon is, in effect, trying to use the franchise to fix a bigger crofting problem, which is the gender imbalance in crofting itself. That issue is better approached through dealing with issues around access to crofting. Trying to change the franchise will not change the situation with regard to registered crofters.

I urge the committee to consider carefully the impact of amendments 57 and 60, the possible debates that might arise, the wider implications of proceeding on that basis and the wider impact of vote-loading on the democratic process. I ask committee members not to support those amendments.

Amendments 58 and 59 were also lodged by Karen Gillon. The Scottish Government indicated in its response to the committee's stage 1 report that it agrees that there may be other people who are not registered crofters but who command the confidence of crofters and who crofters may wish to represent them on the board of the crofting commission. The Government has agreed to relax the requirement for a person who represents a crofting constituency to be a registered crofter. On that basis, I support amendments 58 and 59, but I propose to address technical drafting matters at stage 3 to ensure that the provision operates as intended.

Amendment 62 was lodged by Liam McArthur. In response to the committee's stage 1 report, the Government agreed to a public consultation on the draft regulations that relate to the election of members of the crofting commission before laying them before the Scottish Parliament under the affirmative procedure. The consultation will include consideration of the boundaries of the constituencies for the crofting elections and the persons who are eligible to vote. I hope that it comforts Karen Gillon somewhat to know that the franchise will form part of that consultation.

I support amendment 62 but, again, I propose to lodge a technical amendment at stage 3 to address some minor drafting issues if amendment 62 is agreed to by the committee.

Liam McArthur: I am pleased that the minister supports Karen Gillon's amendments 58 and 59, which also have the committee's support. I acknowledge her misgivings about my amendments 56 and 61, but it is helpful that she has put on record her intentions in relation to the regulations and her support for an alternative vote system.

It would be helpful to see those draft regulations ahead of stage 3, if possible; perhaps we can discuss that after the meeting. I am pleased that the minister has taken on board amendment 62, and I acknowledge the need to tidy the amendments up at stage 3. I will not press amendment 56.

Amendment 56, by agreement, withdrawn.

The Convener: The next group is on the commission and offences relating to the election of its members. Amendment 2, in the name of the minister, is the only amendment in the group.

Roseanna Cunningham: Amendment 2 provides that any regulations that the Scottish ministers make in relation to the election of members to the commission may make provision on

"offences relating to such elections".

Those offences include the usual ones that might be committed at any election, such as impersonation. The Subordinate Legislation Committee identified the omission in its stage 1 report, and amendment 2 seeks to correct it.

I move amendment 2.

Amendment 2 agreed to.

Amendment 57 moved—[Karen Gillon].

The Convener: The question is, that amendment 57 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

Again, the result is a tie. I use my casting vote against the amendment.

Amendment 57 disagreed to.

Amendments 58 and 59 moved—[Karen Gillon]—and agreed to.

Amendment 60 moved—[Karen Gillon].

The Convener: The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Scott, John (Ayr) (Con)

Against

Campbell, Aileen (South of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 60 agreed to.

Amendment 61 not moved.

Amendment 62 moved—[Liam McArthur]—and agreed to.

The Convener: The next group is on local assessors. Amendment 63, in the name of Elaine Murray, is the only amendment in the group.

Elaine Murray: The Scottish Crofting Federation argued in written evidence that the role and responsibilities of assessors should be clearly set out in legislation. The committee noted that there is some statutory definition of the role of assessors but that it is not set out in much detail, and that some assessors are elected by grazings committees under informal arrangements. The SCF wanted assessors to be elected in addition to commissioners. Although the committee wanted the process of appointing assessors to be as transparent as possible, we were not convinced that a formal process of election was necessary. We recommended that in future the commission should set out the roles that it expects assessors to perform, the support that they are entitled to receive from the commission and the process of selection, to ensure that it is open, participative and democratic. The Scottish Government accepted that recommendation.

Amendment 63 seeks to put the recommendation into effect by requiring the commission to publish details of how assessors are to be appointed and the role that they are expected to undertake, and it will oblige the commission to provide that information to crofting communities and to keep the methods of appointment and the roles of assessors under review.

I move amendment 63.

Roseanna Cunningham: I am happy to support amendment 63, as I agree that there needs to be greater transparency on the appointment of assessors and the roles that they perform.

There are some minor drafting errors that we propose to address at stage 3, which relate principally to the wording. We talk about the functions that assessors exercise, rather than the roles that they perform, but that is just a minor semantic detail.

Elaine Murray: I am pleased that the minister accepts my amendment in principle, and I look forward to seeing the drafting amendments at stage 3.

Amendment 63 agreed to.

Schedule 1, as amended, agreed to.

Section 2—General functions of the Crofting Commission

10:45

The Convener: The next group is on the functions of the commission. Amendment 65, in

the name of Peter Peacock, is grouped with amendments 66, 67 and 75.

Peter Peacock: Amendment 65 derives from my firm view that the crofting commission should retain a role in the development of crofting. If the amendment were to be accepted, that would be stated under the general functions of the commission, which would be more permissive than would be the case if the bill did not require any specific or immediate actions on the part of the commission.

It seems paradoxical that, at the very moment when the commission is becoming a democratically elected body, at least in part—and the very people who will be elected by crofters will therefore have the development of crofting in their make-up—we should remove that development function from the commission. It also seems odd that, at the moment when we are developing a democratically elected commission, the function of developing crofting should pass to a non-democratically elected development agency that does not have a single crofter on its board, as far as I am aware.

That said, Highlands and Islands Enterprise has always had an important development role in relation to crofting communities. However, that should not prevent the crofting commission having a general function of developing crofting, in partnership with HIE and other public and voluntary sector agencies. Amendment 65 does not require the taking back from HIE of any functions that have been given to it; rather, it seeks to empower the commission to develop crofting as well as regulating it.

Over time, that general function could be given effect and spelled out in the strategic plans of the commission, and ministerial approval could be given—or not—at various points. It would be a shame, to say the least, if a future minister was unduly constrained in what they might wish the commission practically and sensibly to do.

I move amendment 65.

Karen Gillon: Amendment 66 would include in the bill the view that the general functions of the commission should include

"supporting population retention in crofting communities".

Members will be aware that, as we travelled around Scotland, the issue of population retention was raised time and again in the crofting communities. It was viewed as one of the key drivers facing crofting, and one of the key issues that people wanted to be addressed. If the crofting commission's general functions do not explicitly include support for population retention in crofting communities, we are in danger of not affording that aim the principal purpose and importance that it should have. We came across places where people have moved away from a particular area, and we learned about the impact of that loss of population on the whole of the community. Including the words:

"supporting population retention in crofting communities"

in the text of the bill is key to the debate.

Amendment 67 states:

"In exercising their functions under subsection (2), the Commission must have regard to the impact of changes to the overall area of land held in crofting tenure on the sustainability of crofting."

Another issue arose where people—for good reason—decrofted land, leaving less land available for those who wished to come after them. Such decisions might be made for a very good reason in a particular small area, but no one has an overview of the impact of small designations on the amount of land that is held in crofting tenure for future generations. If that function is placed on the commission, it can monitor the cumulative effect and impacts of designations, decrofting and any changes that occur to the natural environment. The impact of climate change on agriculture will include crofting—that is another area where we should examine how changes impact on the overall area of land that is held in crofting tenure.

I hope that the minister can support amendments 66 and 67, which do something to support the future of crofting and address some of the issues that have been raised with us in evidence.

Liam McArthur: I will offer a couple of comments on amendments 65 and 66, which are helpful amendments. They do nothing other than clarify positions that the minister herself supported at stage 1.

I do not think that amendment 65 seeks to revisit the issue of the transfer of powers to Highlands and Islands Enterprise, but it acknowledges the role that the crofting commission will retain in the development of crofting.

Amendment 66 raises an issue that the minister has said on numerous occasions lies at the heart of crofting: the importance of sustaining and maintaining populations in some of our most remote and fragile areas and communities. To set that out explicitly in the bill is a progressive step.

I hope that the minister will be able to support the amendments.

John Scott: I particularly want to support Karen Gillon's amendments 66 and 67. I agree with her and Liam McArthur that it is absolutely essential to retain people in remote and fragile areas in a

sustainable way. The amendments are welcome and worthy of support. I am not quite sure whether Peter Peacock's amendment 65 seeks to revisit the transfer of powers to HIE. Perhaps he will clarify that in his summing up.

Roseanna Cunningham: The Government transferred crofting development to Highlands and Islands Enterprise administratively on 1 April 2009 and transferred resources in last year's autumn budget revision. It agreed with the committee of inquiry on crofting that that function was being crowded out by the commission's primary function of regulating crofting. It considered that crofting communities would benefit more if the function became the responsibility of the agency whose primary responsibility is the social and economic development of the Highlands and Islands as a whole.

That is not to say that the crofting commission will not have a role in crofting development. Many agencies, including Government, local authorities and crofters themselves, have a role to play, but the principal responsibility will lie with Highlands and Islands Enterprise, which will be able to utilise its expertise on community development and integrate crofting into the sectoral work that it does in areas such as food and drink and tourism to benefit crofting communities.

The Government believes that the commission can best contribute to crofting development through ensuring that crofting is regulated properly and that croft land is occupied and used. I remind Peter Peacock, as I did at stage 1—in an off-the-record discussion, rather than an officially reported discussion—that the commission will continue to have a duty under section 2(1)(b) of the Crofters (Scotland) Act 1993

"to collaborate so far as their powers and duties permit with any body or person in the carrying out of any measures for the economic development and social improvement of the crofting counties".

That would include collaborating with Highlands and Islands Enterprise. On that basis, I encourage Peter Peacock to withdraw amendment 65 and not to move amendment 75, which is consequential on it.

I turn to the other amendments. It is a bit difficult to argue with amendment 66, as crofting legislation first provided tenants with security of tenure precisely in order to keep people in these areas. There are different pressures these days, but a key function is still to support population retention. I did wonder whether restricting the amendment to "crofting communities" was a bit too narrow and whether it should have referred to crofting counties and new crofting areas, as the commission has the power to constitute land as croft land on an application from a landowner. Therefore, it can work to support population retention in crofting areas more generally, rather than just in crofting communities, which are defined in the 1993 act as townships. Either way, I am happy to support amendment 66. If Karen Gillon wants not to move it and lodge another amendment at stage 3 that refers to the crofting counties or any area designated under section 3A(1)(b) of the 1993 act, I will be happy to support that instead.

I cannot argue with amendment 67 either. I am happy to support it in so far as it will require the commission to have regard to the sustainability of crofting when considering the cumulative impact of decrofting. It complements our proposals that allow the commission to consider the sustainability of crofting when considering individual decrofting applications.

Peter Peacock: On the point that John Scott raised, I do not agree with the administrative transfer of the power to Highlands and Islands Enterprise, but I accept that that has happened and that HIE now has that role. Amendment 65 seeks not to reverse that, but to ensure that the commission is not in future fettered in its ability to take part in development activities and to perform the general function of developing crofting.

That said, I hear what the minister says about section 2(1)(b) of the 1993 act. I will have a look at that provision to satisfy myself that it covers all the points that I wanted to cover. On that basis, I am happy not to press amendment 65. Equally, I encourage the minister to consider whether, in that spirit, it would not also be possible to agree to the amendment if I brought it back at stage 3.

Amendment 65, by agreement, withdrawn.

Karen Gillon: In view of the minister's comments, I am happy not to move amendment 66 and to lodge another amendment at stage 3 with a wider area of impact.

Amendment 66 not moved.

Amendment 67 moved—[Karen Gillon]—and agreed to.

The Convener: The next group is on the duty to produce a plan and related consultation. Amendment 68, in the name of John Scott, is the only amendment in the group.

John Scott: I will have another go at this one.

Amendment 68 would specifically require that consultation on the plan included

"representatives of crofting landowners and crofters".

As presently drafted, the bill requires the commission to consult local authorities, HIE and such other persons or bodies as the commission thinks appropriate. Given the plan's importance, it seems logical that representatives of crofters and

landlords alike should also be consulted. It would be beneficial to have that clearly stated on the face of the bill. Clearly, if the commission is balanced in its composition, it should take a balanced view of the plan. However, even if the commission includes a landowner representative, there is no guarantee that such a person will be fully representative of all land ownership interests.

Given the tight timescale that requires the plan to be produced within six months of the commission's election, a full-scale public consultation on it is perhaps impractical, but there needs to be inclusion in developing the commission's policies so that everyone can buy into them.

I move amendment 68.

Roseanna Cunningham: The election process for the commission is designed to ensure that crofter interests are fully represented. As John Scott mentioned, the commission will have only six months to prepare its plan after its election. Frankly, that would not allow for a huge consultation exercise. In my view, any such exercise would then immediately be criticised for not having been extensive enough. Unless people are seriously suggesting that we extend the amount of time that is allowed to the commission to produce its plan, the timescales involved make such consultation quite difficult.

Given that I have already committed to making the new commission representative of both crofting and landowner interests through the election and appointment of its members, I do not believe that amendment 68 is necessary because its objectives will be met through the election and appointment process, which in itself—I refer in particular to the elections—is a fairly significant form of consultation.

For those reasons, I ask John Scott to withdraw amendment 68.

John Scott: In light of the minister's comments, I am happy to withdraw amendment 68. I have concerns about the timescale and about consultation, but perhaps further consideration can be given to that.

Amendment 68, by agreement, withdrawn.

Section 2, as amended, agreed to.

After section 2

The Convener: The next group is on duties in relation to planning and development of inby land. Amendment 69, in the name of Elaine Murray, is grouped with amendments 70, 74 and 77.

Elaine Murray: During the committee's evidence taking in Shetland, we observed examples of croft inby land being zoned for housing when adjoining common grazing that was of lesser crofting agricultural value was exempt from development. The Scottish Crofting Federation has argued that there should be a presumption against development of inby land, and its concerns are shared by the NFU Scotland and committee members. The committee agreed that the presumption against development on croft inby land should be similar to the presumption against development on prime agricultural land. Of course, that would not mean that no development could ever take place, but that development should be permitted only for an essential purpose or to meet an established need.

11:00

The committee recommended that the crofting commission should be empowered to ensure that local authorities zone inby croft land for development only when that is appropriate in a crofting context, and that in the crofting counties the crofting commission should be a statutory consultee on applications that fall outwith the local plan. The Scottish Government agreed that planning policy should protect the most valued croft land and proposed that that would occur through the commission using its influence as a key agency and engaging actively with authorities at strategic level.

Although the intention behind amendments 69, 70 and 74 is similar to the intention behind Liam McArthur's amendment 74, my amendments are not in conflict with his. Amendment 69 seeks to place the commission under a duty, when advising local authorities on the development of local plans, to protect as far as is reasonable inby land from development and, in that respect, provides a definition of inby land.

Amendment 70 seeks to place a duty on the commission, if it is notified by a local authority in the crofting counties of an application for development that falls outwith the local plan, to submit views on the application to the authority, or to notify it why it is not submitting any such views.

Amendment 77 would do the reverse by requiring local authorities to notify the commission if the proposed development or use of land in an application might affect land in crofting use or fall outwith the local plan. Moreover, under the amendment, the authority would not be able to determine any such application until it had received the commission's views or notification from the commission that it did not intend to submit views, and would be required to take account of any views that the commission might submit.

Amendment 74 seeks to require ministers to include in their policies a presumption against

development on inby land. I believe that that is complementary to my amendments and therefore I support it.

I move amendment 69.

Liam McArthur: I have very little to add. Elaine Murray touched in particular on evidence that the committee took in Shetland, but the same views came through in the other written and oral evidence that we received at stage 1. It must be made clear that such a presumption would not prevent all or any development on inby land; however, such a move would certainly establish safeguards that would address the concerns that were raised with us.

As Elaine Murray said, amendment 74 is complementary to amendments 69, 70 and 77. I know that the minister has expressed concern about the framing of amendment 74, but I hope that since our last discussion she has been able to bottom out those concerns to some extent. I will listen to what she has to say before I decide whether to move it.

John Scott: I agree with the sentiments that are expressed in all the amendments in the group and feel that they are certainly worthy of pursuit. However, I am open to advice as to whether they are the best vehicles for delivering on such sentiments.

Roseanna Cunningham: I have listened carefully to the intentions behind amendment 69. I fully understand the value of protecting inby land to ensure that wherever possible the best-quality croft land is protected. Indeed, I have considerable sympathy with the intentions across the board behind this group of amendments.

However, in requiring the crofting commission to act in a particular way, amendment 69 would effectively fetter its discretion in its decision-making role as the crofting regulator. The amendment is also unnecessary because section 27 already provides the commission with sufficient powers in determining decrofting applications to protect inby land from inappropriate development where that would be detrimental to

"crofting in the locality of the croft ... ; the crofting community in that locality ... ; the landscape ... ; the environment ..."

or indeed

"the social or cultural benefits associated with crofting."

Of course, on some occasions, development on inby land will be in the community's interests. For example, hill and rough grazing land might be unsuitably remote for a new village hall or primary school.

I expect that Parliament will not want well-conceived development to be blocked by an oversimplistic approach. The commission, in acting in the interests of crofting, will want to ensure that inby land is protected from speculative or ill-conceived development, but the bill already allows the commission to address those issues on a case-by-case basis and to determine whether any potential development will benefit crofting and be in the public interest. I therefore ask the committee to reject amendment 69.

I recognise the intentions of amendment 70 and strongly support the commission's engagement in the planning system. However, consultees on planning applications are presently required to submit views to the planning authority within 14 days. Amendment 70 contains no such timescale, which would result in inconsistency in the treatment of consultees in the planning system, and in the commission having the power perhaps to scupper the system completely. We accept the principle of amendment 70, but the approach will be best delivered through amendment of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008, rather than by amending the Town and Country Planning (Scotland) Act 1997. That will provide a consistent approach to the consultation process and safeguard the existing planning system. I therefore ask Elaine Murray not to move amendment 70, in favour of the Government's undertaking to address the issues through amendment of the development management procedure regulations.

Amendment 74 would require the Scottish ministers to revise their policy statements to establish a presumption against developing inby land and to direct what should be contained therein. In my view, primary legislation should not direct the detail of policy and nor can a policy statement direct what must be established in any planning application. I fully recognise the value of protecting inby land to preserve crofting and I agree that development plans need to reflect that. However, the Scottish Government's planning policy already indicates that the country's best agricultural land should be valued in planning decisions. As I have said, there might of course be occasions on which development on inby land will be in the interests of the crofting community; for example practical, environmental, financial or other sound planning reasons might preclude hill and rough grazing land as a site for a new village hall or primary school. That is the kind of thing that might happen.

Shetland Islands Council and Comhairle nan Eilean Siar have raised the issue of protecting crofting areas, particularly their most productive land. The Government's planning officials have already offered to work with those local authorities and any others to develop plans to protect the best croft land from inappropriate development. We will draw on those experiences to inform the next

review of Scottish planning policy. It is vital that the commission, Government planners and local authorities work in partnership to achieve what is best for local circumstances. I therefore ask Liam McArthur not to move amendment 74, in favour of an undertaking by me to address the issues through that partnership approach.

I accept the intentions of amendment 77, which are to ensure that planning authorities consult the commission when proposed development or land use might affect land that is in crofting use. However, the amendment goes too far in requiring authorities to consult the commission on any such application, which would be burdensome on the commission's administration budget. It is important that the commission focus its resources on the key issues that affect the future of crofting and on the more significant applications that affect crofting, rather than on, for example, those that relate to a garage, conservatory or other extension, simply because it is in respect of a croft house.

The proposed new section 38(3A)(a) that amendment 77 would insert into the 1997 act would result in the commission being consulted on proposals that might affect

"land in crofting use or within a crofting community".

That proposes that the commission should consider development or use of all land in the crofting community, even non-croft land, which is outwith the commission's remit as a crofting regulator. Also, proposed new section 38(3B) would prevent a planning authority from determining such a planning application until the commission submitted its views or notified the authority that it would not submit views. As with amendment 70, no time limits are applied to the provisions, which could result in unreasonable delay in the planning process. It is usual for a statutory consultee to have 14 days to consider a relevant planning application.

As with amendment 70, we accept the principle of amendment 77 but—again—I suggest that its intention can best be achieved by amending the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 in order to achieve consistency with the provisions for other statutory consultees. That will provide greater clarity for developers, planning authorities and communities. I believe that amendment 77 is reasonable in principle, but I ask Elaine Murray not to move it in favour of the Government's undertaking to address the issues through amendment of the aforementioned regulations.

To be clear, and to conclude on the group of amendments, I ask members to seek to withdraw or not to move their amendments not because I disagree with them but because I believe that there are better ways in which to ensure that inby land is protected. In respect of amendments 70 and 77, I have given an undertaking that the Government will address the issues through subordinate legislation. I hope that that will be the preferred method of achieving the goal.

The Convener: I invite Elaine Murray to wind up and say whether she wishes to press or withdraw amendment 69.

Elaine Murray: I seek a bit of information from the minister about her proposed amendments to subordinate legislation. Are those amendments likely to be made during the current session of Parliament?

Roseanna Cunningham: Can we return to you on that? We have to deal with the matter jointly with the planners and it would be unwise for me to make a commitment that I am unable to keep to at this stage. I will come back to the committee to advise it of the likely timescale.

Elaine Murray: I am not convinced that amendment 69 would act in the way that the minister suggests, which is that it would prevent town halls or primary schools from being built close to communities. As I said in my introduction, the intention is not to ensure that no development takes place but to ensure that only appropriate development is permitted. That said, if the intention of the amendments can indeed be better achieved through subordinate legislation, I am happy to withdraw amendment 69 and to not move amendment 70, given the minister's assurance that action will be taken.

I appreciate that the minister cannot bind a future Government on the matter, but if the changes are not made before the end of the current session, I am sure that our successor committee will be interested in how they develop in the next session, because we all share the desire to ensure that important agricultural land in crofting communities is protected.

Amendment 69, by agreement, withdrawn.

Amendment 70 not moved.

The Convener: Before we move on to the next group and Alasdair Allan's amendment, we will have a five-minute break.

11:13

Meeting suspended.

11:18

On resuming—

Before section 25

The Convener: The next group is on acquisition of croft land: limitation of crofter's ability to nominate disponee. Amendment 1, in the name of Alasdair Allan, is in a group on its own.

Alasdair Allan (Western Isles) (SNP): Dealing with what is now sometimes rather unfairly dubbed the Cunningham loophole, amendment 1 would insert a new subsection in section 13 of the Crofters (Scotland) Act 1993 to clarify what is meant by a crofter's nominee.

During consultation on the bill's provisions, respondents raised the issue of a perceived loophole created by the case of Whitbread v Macdonald and a number of people sought that the Crofting Reform (Scotland) Bill address the issue.

Amendment 1 was also prompted by a number of my constituents, who contacted me about the unfortunate effects of the loophole on many crofting communities. The consequence of the loophole is that some inby land in Scotland has passed into the hands of property developers as a matter of speculation and has been lost to crofting. The Scottish Crofting Federation went as far as to describe the practice as "despicable" in its response to the committee's call for evidence.

Amendment 1 would address those concerns by limiting those able to be a crofter's nominee under section 13(1)(a) of the 1993 act to family members. It is generally accepted that the intention behind the inclusion of the right to buy in the Crofting Reform (Scotland) Act 1976 was to provide security of tenure and the ability to pass the croft down through the generations, thereby benefiting the crofter, his family and future generations.

It is clear from the *Official Report* of the Scottish Grand Committee of 10 February 1976 that the Government of the day envisaged three categories of nominee: a member of the crofter's family; a lending organisation to whom title was being conveyed as security; and a subpurchaser, who might be a developer or some other person outwith the crofter's family. It is also clear from the *Official Report* that it was intended that in relation to the first two categories of nominee there would be no obligation on the crofter to pay the landlord clawback, but that in relation to the third category the crofter would be required to make such a payment if the land were transferred outwith the family within five years.

Clarification in the bill that nominees must be family members would close the loophole and disadvantage only crofters who want to speculate on croft land by nominating, for example, a developer. If we are serious about protecting croft land, we need to implement the safeguards and benefits that amendment 1 would offer.

If amendment 1 is agreed to, the bill will, first, make it clear that nominees must be family members within the definition of "family" in section 61 of the 1993 act. Secondly, the dubiety that has resulted from Whitbread v Macdonald will be removed once and for all. Crofters' right to buy was intended to benefit individual crofters and their families, with the low purchase price being linked to the value of the croft rent. It is important to stress that family transactions would remain unaffected under amendment 1. Finally, a two-tier approach to non-family transfers might provide an argument against the removal of land from crofting tenure, thereby contributing to the retention of as much land as possible in crofting. All that should reduce some of the pressures from speculation in croft land.

One of Scotland's most recent community land buyouts was by the West Harris Trust, which wrote to me recently to make clear the benefits of the approach in amendment 1. The chair of the trust, my constituent Murdo MacKay, said:

"The west side of Harris, as well as other remote and picturesque areas of the Highlands, have seen a dramatic rise in the number of second homes and holiday homes. Sites for houses (un-serviced) are selling for over £70,000. This is totally unaffordable for young families looking to settle in the area whether local or otherwise. West Harris Trust want to encourage young economically active families into the area but unfortunately most sites sold now are for second homes.

The amendment proposed to close the sale by nominee loophole would curb the worst excesses of speculative de-crofting. A crofter will still have his right to buy, so his rights are unaffected but the onward 'nominee sale' will be subject to clawback if the Bill as proposed is passed. This would be a powerful disincentive to speculative purchasers whilst still allowing a crofter to provide house sites for family members."

Mr MacKay has made the case eloquently.

I said that it was unfair to dub the current ambiguity, "the Cunningham loophole". That might have been unduly generous of me, given that when the Minister for Environment was an advocate she was involved in the 1992 court case that set the Whitbread precedent. However, the important point is that the ruling has since been used for ends that the participants in the case did not foresee and that the UK Parliament did not, I think, intend when it passed the 1976 act.

The ambiguity needs to be cleared up as far as possible, to protect crofting land from the effects of speculation. On that point, I hope that there is as

wide a consensus politically as there is within the crofting community.

I move amendment 1.

Peter Peacock: This is one of the few matters on which the committee encountered a unanimous view in the course of taking evidence on the bill. I cannot think of anyone who did not agree with the approach in amendment 1. Indeed, the committee unanimously recommended implementing the approach and the Government said that it would do that.

I am extremely disappointed that the minister did not lodge the amendment herself. I can think of no one who is better qualified to speak on the matter or who has such a deep and personal understanding of it. We could have heard why the loophole arose in the first place, and why it is now vital to close it. I look forward to what the minister has to say in her response to the debate; perhaps she can help to illuminate the subject.

Roseanna Cunningham: I am not entirely sure whether I should declare an interest at this point, since everyone else has declared it for me; perhaps we can just let that lie on the record.

I welcome Alasdair Allan's amendment 1, which would end once and for all the debate on the effects of Whitbread v Macdonald and close the loophole that allows some crofters to avoid paying clawback to their landlord following the purchase of their croft.

I make it clear in defence of the junior advocate who won the case—me—that it was an actual rather than a perceived loophole. It is an example of unintended consequences, which all of us who are involved in legislating should keep in mind.

As Peter Peacock said, the Government could have lodged the amendment, although it would have been a rather curious loop to have closed the loophole myself. Not doing so certainly spares my blushes with regard to my previous involvement in the case. Having said that, I support amendment 1 and I hope that everyone else will support it too.

Alasdair Allan: I press amendment 1.

Amendment 1 agreed to.

The Convener: The next group is on assignation of crofts. Amendment 71, in the name of Peter Peacock, is in a group on its own.

Peter Peacock: Amendment 71 is on a genuinely difficult issue, and I am interested to hear what the minister has to say on it. I have lodged the amendment partly to seek some clarity on how the clawback is calculated and the Government's view on that.

Underlying it is a deep-rooted principle attached to crofting, which is that a croft should be able to be kept in a family. Crofters down the generations have brought land into use and added value to it, and they have invested huge amounts of time and effort in it. Therefore, there is a strong attachment to a family croft, and anything that potentially interrupts that and affects the ability of crofters to maintain a family interest needs to be examined seriously.

The bill makes provisions for the new commission not to agree a family assignation. As I understand it, that is promoted on the basis of equal treatment for all parties in assignations. I understand the logic of that objective, but in seeking to address it the bill crosses an important line of principle.

The commission should not have the power to stop family assignations. I understand the argument for taking that step, which would remove the need to pursue someone who may be absent at the time of the assignation and may continue to be absent. However, the step goes that bit too far. If, after a family assignation, any on-going question of absenteeism arises, the commission has the powers to pursue that matter. In doing so, it may be possible to achieve a result under which the absence is deemed to be acceptable or that resolves the particular issues arising from the absence that are causing problems.

All the powers exist to do that, and the bill enhances them. I would rather that the new powers are used where a problem is identified and not to stop the family assignation itself. I hope that the minister understands that by seeking to correct an apparent anomaly in the consideration of assignations, another consequence arises, which is greater than the anomaly that the bill seeks to address. If there is a better way to achieve the objective that I seek, I am happy to consider it.

I move amendment 71.

Bill Wilson: It seems that there is a slight lack of logic in the proposal. We all agree that absenteeism is a problem, and we accept the need to retain the population—as Karen Gillon's amendments seek to do. Therefore, it would be slightly illogical to say that the crofting commission can deal with absenteeism but must accept an absentee as an assignee, if that is the correct word.

To take an extreme example, let us assume that a croft is assigned to someone who is living in Australia. The person may have no intention of returning, but nonetheless the crofting commission would be obliged to allow the assignation. Shortly afterwards, the commission would be saying to the person, "Are you thinking of returning?", to which they would reply, "No, I'm not"—and the commission would then start to pursue them as an

absentee. That does not seem to be a practical way to proceed.

Certainly, if a person who is to be assigned the croft tells the crofting commission that they will return in a couple of years, it seems logical to me to allow that assignation and to allow the commission some flexibility. However, to say simply that an assignation must be accepted, regardless of the fact that the person may not be living in the croft and may never have any intention of returning, does not strike me as logical given the other things that the bill is trying to achieve.

11:30

Liam McArthur: Bill Wilson sets out very well the counter-argument that was put during the stage 1 debate. However, I think that we intercede in assignations to family members at our peril. Even though in the case that Bill Wilson set out—and there will be greyer areas than that—the logical consequence is that the commission would be pursuing absentee tenants shortly after an assignation had taken place, the principle that Peter Peacock's amendment 71 is trying to safeguard is nevertheless important in the crofting counties and to crofting communities. If not through amendment 71, some way of preserving that principle needs to be found.

John Scott: I agree with the sentiments that Peter Peacock and Liam McArthur have expressed and declare an interest, coming from a farming line, as it were. It is important to try to ensure the right of succession, by assignation or whatever. It is a fundamental principle. If those to whom a croft is to be assigned do not wish to croft, they have the right of first refusal not to croft, but it is important that it is assigned to them. It may mean that another step must be put into the process, but the principle should be sacrosanct. Whether or not amendment 71 is the best way of addressing the issue, I hope that the minister will take on board our views.

Aileen Campbell (South of Scotland) (SNP): I know that I have come to the issue quite late on, but if we are trying to rejuvenate crofting communities to make them economically viable, I wonder how Peter Peacock's amendment 71 would allow new entrants into those communities. The amendment seems anomalous. Given what Bill Wilson said, I do not see the logic in perhaps blindly giving a croft to someone who lives somewhere else—further afield or in another country, for example. The proposal runs counter to the purpose of the bill.

The Convener: Bill has a quick comment.

Bill Wilson: Yes, on John Scott's point. I presume that a tenant farmer would not automatically be allowed to assign a tenancy to somebody else who is not present. If we are drawing a comparison, it is surely that a tenant farmer could not assign the farm to another person who is not living on the farm.

John Scott: It depends under which act someone is a tenant farmer, but they would be automatically allowed to assign the right to another tenant farmer. I am not sure of the act, so I do not want to quote it, but there is an automatic right in tenant farming.

As I have been invited to speak, let me say again that this is an important principle. There may have to be a further step in the process. If someone living in Australia does not wish to take up the land or is regarded as an absentee crofter, a new entrant may well be given the opportunity to have the land. However, as I said to begin with, the right of first refusal should go to the family member. If they are not prepared to take up the land properly, thereafter it will be a matter for the commission.

Roseanna Cunningham: What we have here is a clash of fundamental principles. In fairness to Peter Peacock, what he said is historically correct but, in equal fairness to the other side of the argument, if we are trying to tackle absenteeism we need to tackle it—and we need to tackle it in the cases in which it will patently happen.

One of the main aims of the bill is precisely that—to tackle absenteeism—but amendment 71 would undermine that by allowing assignations to take place even when a person has no intention of ever taking up residence on or near the croft. That happens—we cannot pretend that it does not—and it is a frustration to many communities and to the commission, which has to take enforcement action that could have been avoided.

I understand where Peter Peacock is coming from, but the psyche to which he refers belongs to an age when fathers passed their crofts to their sons, family members lived together or near each other or, if living away, returned to the croft soon after they inherited it to take it up. That is no longer the case. Nowadays, the son will have left; he will have gone elsewhere and will have no intention of ever returning, except perhaps to use the croft house as an occasional holiday home. Unless an assignee—family or otherwise—can give a commitment that they will become a resident crofter, the assignation should not be approved. I believe that the croft should instead be made available, possibly to a new entrant who is committed to living in the community and to working the land. Let us be clear: the idea that we should give first refusal to a family member is, in a sense, what will happen. If the nominated assignee says to the commission, "Yes, I have a plan that involves me returning at a certain point,"

the commission can take that into consideration. If it is satisfied with the proposal that it has been given, it can decide that the assignation can go ahead.

If that is not what we have, we are, in effect, telling the commission that it requires to go through two entirely separate regulatory processes and has to do so completely unnecessarily. It would have to process the assignation and, immediately thereafter, deal with the absenteeism issue that was foreseen and obvious at the point of assignation to everybody, including the assignee. What we are saying is that the commission can go to a proposed assignee and say, "What are your intentions?" If the assignee says that their intention is to return and that their plan for doing so includes ensuring that the croft is dealt with in the intervening period, I am sure that the commission could take all of that on board. If the individual has absolutely no intention of returning to the croft in any meaningful way, it is not sensible to make the commission go through the regulatory process for assignation and then have to go through another regulatory process to deal with the absenteeism. In effect, that is what we would be doing under amendment 71.

There is an inherent contradiction in Peter Peacock's desire to see new entrants into crofting and vibrant crofting communities and his determination to ensure that crofts continue to be assigned to family members, some of whom will have no intention of ever taking up residence on or working the croft. I do not believe for one single minute that that is what those who first introduced crofting legislation into this country had in mind when they thought about crofting. I also do not believe that it is what those original crofters had in mind. In fact, the premise goes against the entire principle of crofting.

I have argued strongly against amendment 71. I urge committee members to oppose it.

Peter Peacock: As I said at the outset, the issue is a difficult one. In speaking to the amendment, I rehearsed some of the arguments, which the minister has also rehearsed. Indeed, Bill Wilson also rehearsed them. Nonetheless, the debate on amendment 71 was worthwhile. As the minister said, a clash of two principles is involved. As Bill Wilson said, perhaps there is also a clash between logic and principle. That said, I do not underestimate the psyche to which the minister referred, which still runs deep in crofting. As Liam McArthur hinted, it is deep indeed. As a matter of principle, therefore, we should not do anything that runs against it.

I was interested in John Scott's suggestion that there may be a way of refining this a bit. In that spirit, I seek leave to withdraw amendment 71 with a view to trying to refine it and, having found a better balance in the matter, bring it back at stage 3.

Amendment 71, by agreement, withdrawn.

Section 25—Extension of period during which sum is payable on disposal of croft land

The Convener: Amendment 72, in the name of Peter Peacock, is in a group on its own.

Peter Peacock: This is another difficult and complex issue. The committee's stage 1 report reflected how unclear the aspect of the law in question appears to be. It is clear that there are different interpretations of how the clawback is to be calculated. I understand the policy reasoning for wanting to extend the clawback period—it is argued that extending the period over which a crofter would potentially lose a financial gain is designed to dampen down or reduce speculation. The argument breaks down into three parts.

First, would increasing the period during which a crofter loses and a landowner gains really reduce speculation? Would a determined and far-sighted speculator consider that waiting a further five years would make a huge difference to their actions? I doubt that the extension would deter a determined speculator. On the other hand, it would potentially affect a crofter who may want to realise an asset in order to reinvest in their croft, buy a tractor or re-roof a byre. That would not be a typical speculator.

Secondly, one's view might be affected by how the clawback is calculated. If it is calculated on the full development value, potentially enhanced by the value of a planning consent, say, it might be thought that speculation would be dampened if the landowner was given half of the development value. That would be particularly so now that the Whitbread amendment—amendment 1—has been agreed to. On the other hand, the landowner's right to get cash for what is, in effect, compensation for land that they will have had no effective rights over since the late 1800s would be extended, and I am generally disinclined to see more money going to landowners.

Thirdly, if the interpretation is that the land value is simply the difference between the value of the croft land at the time of the purchase and its value as agricultural land at the time of the subsequent sale, the sums involved could be minuscule and they would have no effect on speculation.

On balance, I do not believe that the measure would make a big difference to speculation. Determined speculators may sit things out for another five years if the sums involved are great enough, or, depending on how the development value is calculated, the sums involved may be negligible. In any event, I do not favour extending traditional landowners' rights to receive cash from

crofters; there is something just not right about that in light of the history of crofting in the Highlands and Islands. I believe that the other powers in the bill to combat speculation—for example, ensuring that the Scottish Land Court can have regard to the commission's strategic plan for the first time; the commission's right to refuse decrofting applications, even when planning consent exists; the various measures relating to planning in amendments that have been discussed; and the Whitbread amendment, which has been agreed to—will be far more powerful. Amendment 72 would remove the extension of landowners' rights.

I move amendment 72.

Liam McArthur: Peter Peacock has pointed out the misconception about the values that are being talked about in a lot of the debate. It is about the difference in value based on agricultural value rather than development value. Nevertheless, I think that extending the period to 10 years is, on balance, sensible, so I will not be supporting the amendment.

John Scott: There is confusion about agricultural and development values and where the clawback kicks in. I look forward to the minister's explanation of that. However, I am inclined to support the extension, not because I think that landlords should necessarily get more money, but because I think that it would reduce speculation, particularly in the current and foreseeable financial climate. Taken with the other measures in the bill that Peter Peacock mentioned, I think that it would nail things down and reduce speculation, but I would be disappointed if the effect were to stop a crofter redeveloping his own property, building a new byre or putting up new farm buildings, as Peter Peacock suggested could happen. Perhaps the minister could clarify matters in that regard.

11:45

Roseanna Cunningham: Removing section 25 of the bill, as Peter Peacock suggests, would maintain the status quo of having a five-year period within which clawback must be paid to the previous landowner as opposed to extending the period to 10 years.

Amendment 72 would be a backward step in addressing speculation on croft land. I am not sure that Peter Peacock recognises the contribution that section 25 will make to safeguarding the future of crofting.

Removing it will remove the disincentive to decroft land for speculative development, as an individual will know that any profit may be gained after only five years, as at present. Those wishing to speculate in order to gain financial benefits from a subsequent sale are likely to view the retention of the five-year period as a greater incentive to speculation than a 10-year period. With the longer period, there is unlikely to be the same desire to speculate.

If the proposal were simply to extend the clawback period from five to 10 years, I might agree that there was insufficient reason for a change. However, we are not dealing with the matter on its own. At stage 1, the committee heard Sir Crispin Agnew express the view that the closure of the Whitbread v Macdonald loophole and the extension of the clawback period to 10 years will combine to discourage speculation. In paragraph 494 of its stage 1 report, the committee acknowledges that that view was supported by Keith Graham, former clerk to the Scottish Land Court. In paragraph 493, it notes that even the Scottish Crofting Federation

"agreed with the extension of clawback to ten years".

Retaining section 25 in the bill, combined with amendment 1, which closes the Whitbread loophole and to which the committee has just agreed, will go some way towards addressing the key issues that are involved in speculative development of croft land. The provisions are a vital contribution to dealing with those who are simply out to earn a fast buck, with complete disregard for the future of crofting or of the crofting community in which their croft is situated.

I turn to the technicalities of the calculation. The Government's position is that the sum to be clawed back is the difference between the purchase price and the "hope" or development value. The 1993 act requires permanent improvements to be discounted. Such improvements must be suitable to the croft, but that does not discount the market value or other developments that are not suitable to the croft.

I hope that committee members will accept that, jointly, section 25 and amendment 1, which closes the Whitbread loophole, will deter further speculation, in so far as it is possible to do that. Peter Peacock said that he did not want to give more money to landlords. It is easy to ensure that landlords do not get the extra money and do not speculate.

Peter Peacock: I agree that if people did not speculate on the land, there would not be an issue. However, human nature being what it is, I do not think that that will determine the matter. Notwithstanding the minister's comments on the Government's view of how clawback should be calculated, the evidence that the committee heard indicated that there was still dispute about the matter. None of us can determine the issue finally until the courts have determined it.

I still do not believe that section 25, in itself, adds a great deal to the many other provisions in the bill to combat speculation, which will be far more effective. I will stick to my guns and press amendment 72.

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gillon, Karen (Clydesdale) (Lab)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 72 disagreed to.

Section 25 agreed to.

Sections 26 and 27 agreed to.

Section 28—Requirements to submit proposals for re-letting crofts

The Convener: The next group is entitled "Limit on number of letting/re-letting proposals". Amendment 3, in the name of the minister, is grouped with amendments 4 and 34.

Roseanna Cunningham: Amendments 3 and 4 respond to concerns that, in the past, landlords have frustrated the Crofters Commission's attempts to let a vacant croft by submitting numerous knowingly inappropriate proposals that the commission is bound to consider. Amendment 3, therefore, limits letting proposals to a maximum of three tenants.

The Government is taking proactive steps to ensure that a landlord or owner-occupier crofter who is subject to the crofting commission's new enforcement powers and is asked to submit letting proposals cannot delay the commission's progress as they have been able to do previously. It is important to address the issue now, in advance of any potential increase in such frustration tactics once the commission has the new enforcement powers that the bill provides, to take action to address absenteeism and neglect.

The 1993 act currently provides a single deadline for the submission of proposals and the commission's decision. Amendments 3 and 4 provide separate timescales for the landlord and the commission. Letting proposals under section 23 will be required within two months, with the commission having a further month to intimate its decision. However, given the sensitivities surrounding intestacy, a longer, four-month period is permitted for submitting letting proposals in such circumstances.

Amendment 34 provides a similar process for owner-occupier crofters and is aimed at equalising the treatment of all crofters as far as is possible, irrespective of their status as tenants or owner-occupiers.

I move amendment 3.

Amendment 3 agreed to.

Amendment 4 moved—[Roseanna Cunningham]—and agreed to.

Section 28, as amended, agreed to.

Section 29 agreed to.

Section 30—Enlargement of crofts

The Convener: The next group is entitled "Enlargement of crofts: registration". Amendment 5, in the name of the minister, is grouped with amendments 6 and 7.

Roseanna Cunningham: Amendments 5 to 7 are part of the suite of amendments that relate to the crofting register. As the committee will discuss the main crofting register amendments next Wednesday morning, I ask committee members to support amendments 5 to 7 on the basis that there will be a fuller discussion of the substantive policy next week. I am not attempting to pre-empt the outcome of that discussion.

Amendment 5 provides that the crofting commission cannot grant a regulatory application that is made in relation to an unregistered croft unless an application to register the croft is made within six months of the regulatory application being made. It also provides that the commission does not have to consider the enlargement application until the registration application is made and cannot make a direction for the enlargement of an unregistered croft unless an application for registration is made within six months of the application for enlargement being made.

Amendment 6 provides that a direction enlarging an unregistered croft, or a croft that has been registered as a result of the application for enlargement, will take effect on the date of the direction or the date of entry under the tenancy of the enlarged area.

Amendment 7 is part of the suite of amendments that provide that changes to a registered croft, that are a result of a decision of the crofting commission, will take effect when they

are registered. It places a three-month time limit on the validity of a commission direction for the enlargement of a registered croft, unless an application for the registration of the enlargement is submitted within that period. If the crofter does not apply for registration within three months of the commission's direction being made, the direction will cease to have effect. The amendment also provides that the enlargement of the croft will take effect on registration.

I move amendment 5.

Peter Peacock: I accept what the minister says about the fact that, because of the order in which we consider the bill, the substantive debate on the register cannot take place until next week. That said, amendments 5 to 7—and, indeed, amendment 8, which stands on its own in the next group—would all require me to vote for a provision that I will oppose next week, so I do not intend to vote for it this week and so will oppose all the amendments in the group.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The vote is tied, so I use my casting vote for amendment 5.

Amendment 5 agreed to.

Amendment 6 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The vote is tied again, so I use my casting vote for amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

Again, we have a tie. I use my casting vote in favour of amendment 7.

Amendment 7 agreed to.

Section 30, as amended, agreed to.

After section 30

The Convener: The next group is on enlargement of common grazings. Amendment 8, in the name of the minister, is the only amendment in the group.

Roseanna Cunningham: Amendment 8 seeks to substitute a new section for section 51 of the 1993 act to align procedures for the enlargement of common grazings with those for the enlargement of crofts. The new section will require the landowner and the crofters to apply to the commission for a direction to enlarge a common grazing. When the commission makes a direction to enlarge an unregistered common grazing, the direction will take effect on the date of the direction or the date on which rights are first exercisable over the enlarged area by the crofters. That part of the amendment is not dependent on the suite of amendments that relate to the register.

Amendment 8 also provides that a commission direction to enlarge a registered common grazing cannot take effect unless an application to amend that registration is made within three months of the date on which the direction is made. The enlargement will take effect on the date of

registration. That part of the proposed new section of the 1993 act is part of the suite of amendments that relate to the register.

I move amendment 8.

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Aileen (South of Scotland) (SNP)
Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

Again, the vote is tied. I use my casting vote in favour of amendment 8.

Amendment 8 agreed to.

Section 31—Obtaining Commission approval or consent

The Convener: The next group is on succession to crofts. Amendment 9, in the name of the minister, is grouped with amendments 10 to 12, 15 to 17, 37 and 39.

Roseanna Cunningham: This group of amendments responds to issues, principally around inadvertent intestacy, that were raised during the committee's stage 1 evidence. Inadvertent intestacy occurs when a will contains a bequest that is invalid. Comments were also made about the rather insensitive nature of some of the public notification and objection provisions of the 1993 act as they relate to succession.

The main amendment in the group is amendment 17, which seeks to insert in the bill a new section to amend the bequest provisions in section 10 of the 1993 act. The amended section 10(1) of the 1993 act will provide for two types of bequests: the bequest of the tenancy of the whole croft to one individual; and the bequest of the tenancy of the croft to two or more individuals. Subsection (2) of the proposed new section will, therefore, remove the restriction that a bequest be made to "one natural person", which is contained in section 10(1) of the 1993 act, so that a crofter can, for example, bequeath the croft house to his wife and the remainder of the croft land to a member of his family. The bequest will be valid, provided that the commission consents to the necessary division of the croft, thus preventing the tenancy of the croft from being treated as intestable estate.

Amendment 17 provides for a simplified, single 12-month period for a legatee to give notice of acceptance of the bequest to the landlord, and to send a copy of the notice to the commission, which will replace the four months that section 10(2) of the 1993 act presently provides for, which may be extended by a further six months when there is "some unavoidable cause".

Amendment 17 will require the executor to apply to the commission to divide the croft when all legatees accept their bequests, and it provides for bequests to become null and void if commission consent is not given or an application for registration of the division of the croft in the crofting register is not made within three months. It provides that a legatee will take the place of the deceased crofter upon the application to the new crofting register, and that when there is more than one legatee of the tenancy of the croft, each legatee will be jointly and severally liable for the debts and expenses that relate to the tenancy and its administration. No distinction is made between bequests to the deceased crofter's family members or other persons. A bequest to two or more people is valid when the whole croft is bequeathed and the croft cannot be left to two or more persons jointly.

Amendment 39 is consequential on amendment 17. It simply seeks to remove the text that forms paragraph 3(9) of schedule 2 to the bill, which is now covered by amendment 17, which will, as I have outlined, insert a new section after section 31 of the bill to amend the bequest provisions.

12:00

Amendment 12 requires the commission to approve an application for division by an executor seeking the division of the site of the dwelling house from the remainder of the croft in order to give effect to a bequest under the new section 10 of the 1993 act. The amendment would result in a deceased crofters' wishes—for example, to bequeath the croft house to his or her spouse and the remainder of the croft to his or her child—being followed without the commission being able to refuse the application to divide the croft.

Amendment 11 is consequential on amendment 12, and obliges the commission to grant an application for division that is made by an executor and relates to the division of the site of the dwelling house from the remainder of the croft.

Amendments 9 and 10 recognise the sensitivities that are associated with succession, which Simon Fraser highlighted in his evidence to the committee.

Amendment 10 disapplies the public notification procedure in section 58A of the 1993 act, where an executor applies to the commission to divide a croft in order to carry out the intentions of the deceased crofter. It also removes the right in section 58A(4) of the act for parties to submit objections to the bequest and the commission's consideration of any such objections.

Amendment 9 is consequential on amendment 10, and is simply a cross-reference to the new provisions.

Amendments 15 and 16 provide that the public notification and objective provisions applying to applications for variations of conditions of commission approval and consent are not to apply where the applicant is an executor applying for division of a croft. That provides for a much simpler and less public process for variation of any conditions associated with an application from an executor to divide a croft following a bequest of the tenancy.

Amendment 37 replaces paragraph 2(2) of schedule 2 to the bill, relating to the Succession (Scotland) Act 1964. It also removes the requirement for the commission to consent to a transfer of the tenancy of a croft by an executor. It extends the ordinary time limit for the transfer of a crofting tenancy by an executor from one year to 24 months from the date of the crofter's death. It also repeals section 16(3)(b)(ib) of the act, in consequence of the repeal of section 10(3) of the 1993 act. The effect of amendment 37 is to reduce the burden on executors where the bequest of a crofting tenancy is not valid, by removing the requirement to seek commission consent for the transfer of the tenancy and allowing executors an additional 12 months within which to transfer the tenancy without having to obtain an extension of time by agreement with the landlord.

I hope that the committee agrees that this suite of amendments addresses the various concerns that were raised by stakeholders during stage 1.

I move amendment 9.

Amendment 9 agreed to.

Amendments 10 to 12 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 13, in the name of the minister, is grouped with amendments 19, 24, 27 and 28.

Roseanna Cunningham: Amendments 13, 19, 24, 27 and 28 seek to increase the maximum distance within which tenant and owner-occupier crofters must be ordinarily resident from the croft from 16km to 32km, throughout the legislation.

I welcome the committee's recommendation, in its stage 1 report, that the Government consider the extent to which the regulatory burden of the commission would be eased if this limit were extended to 32km. I agree that that is about the right balance in terms of easing the regulatory burden on the commission in addressing absenteeism, while ensuring that the distance reflects more modern commuting distances and that a person is ordinarily resident in the locality of the croft, thereby delivering occupancy objectives.

Amendment 13 applies the new residency distance to the issues that the commission must have regard to in considering regulatory applications to the commission in section 31.

Amendments 19 and 24 extend the residency requirement from within 16km to 32km. In effect, an investigation into whether a person is an absentee will not be triggered if they reside between 16km and 32km away from the croft.

Amendments 27 and 28 apply the 32km distance to tenant and owner-occupier crofters who apply for consent to be absent and the commission's consideration of good reasons for absence.

I move amendment 13.

Peter Peacock: There is no right answer to the question. One can make a case for retaining the 16km requirement; someone who lived within that distance of their croft would arguably be within the community, rather than apart from it as might be the case if the requirement is changed to 32km.

On the other hand, all the evidence that the committee received was in favour of widening the requirement because of the change in travel times since the original 16km requirement was established, and because it would mean less administration for the commission because certain people would be excluded from having to justify their absence.

I stress, however, that the distance is only a trigger. It does not imply any automatic offence if someone lives more than 32km away, or that they are guilty of anything; it is simply a trigger for the commission to consider whether there are any issues around that absence that require to be addressed. It is in that spirit that I am happy to support the amendments in grouping 18.

Liam McArthur: Peter Peacock is right: when we took evidence, it quickly became apparent that whatever conclusion the committee reached, it could be accused of arriving at a fairly arbitrary judgment about where the trigger should lie.

Although I certainly support the amendments that will extend the requirement to 32km, I sound a note of caution about the requirement's applicability in an island context. When one is off the island one is off the island, and certainly in the area that I represent there are no direct links

between many of the islands. That may not be the case in Shetland and the Western Isles, but I hope that the commission would, in acknowledging the arbitrary nature of the requirement, be alive to the different circumstances in island groups.

John Scott: I take Liam McArthur's point—I was originally in thrall to the idea of a variable trigger distance for different communities. However, bearing in mind that the distance is only a trigger that might stimulate an investigation, and bearing in mind the need for simplicity and for common understanding throughout the crofting communities that a trigger exists and that there is a figure, it seems easier just to have one figure, rather than variable figures that might be subject to electoral platforms. I am happy to support the amendments to extend the requirement from 16km to 32km.

Elaine Murray: I have concerns that reflect what others have said about the difficulty of finding the right answer. Although 32km, or 20 miles—which is the distance between Beattock and Dumfries, for example—is easily commutable for someone who works on a croft, they are not terribly likely to be involved in the community. They will not be living there or sending their kids to the local school.

I am sympathetic to John Scott's suggestion—it would have been nice if we could have dealt with the issue in a way that reflected the needs of different communities. However, it is difficult to see what that solution would be or how it would work.

On balance, the extension to 20 miles is a sensible idea, but I still have some reservations about whether it supports some of the more fragile communities.

Roseanna Cunningham: There are a variety of views, even among crofters. I have heard crofters express the view that the distance should be 50km, while others have said that there should be no figure at all, because—to pick up Elaine Murray's point—having a zero-kilometre limit would enhance the residency and population retention aspects of crofting. We are where we are, and the 32km figure is the compromise that we have reached.

We must bear in mind the nature of highland roads. The mileage that we are talking about does not seem like very much in respect of urban roads, but in large parts of Scotland it will take longer to drive, which is presumably the method by which people will access their crofts, given the lack of public transport.

I do not think that there is a strong view on any particular figure. There has been no great consensus, but most people simply feel that a limit of 16km is now too short and that we need to increase the figure. I do not know whether the argument will ever be resolved by 100 per cent agreement.

Liam McArthur: I am interested to know whether any safeguards can be put in place in relation to island groups.

Roseanna Cunningham: As we said, the 32km limit is simply a trigger for a look at what is happening. The commission will retain the flexibility to look at the situation in actuality when people are outwith the mileage figure. That currently happens, and I presume that, even in an island community, a move from 16km up the way is better than no move as it will take further groups of people outwith any initial consideration. It is probably impossible to account for every single possibility in legislation, and the commission will continue to apply its judgment to individual cases.

Amendment 13 agreed to.

The Convener: The next group is on duties of crofters and owner-occupier crofters. Amendment 14, in the name of the minister, is grouped with amendments 20 to 23, 25, 26, 29 to 33, 38, 40 to 43 and 48 to 50.

Roseanna Cunningham: The amendments in the group are largely technical. They relocate statutory conditions on tenant crofters to cultivate and maintain the croft that are currently in schedule 2 to the 1993 act—which means that they are enforceable by the landlords—into the main body of that act. They also apply the conditions equally to owner-occupier crofters. The effect of the move is that the duties will be enforceable by the commission, thus ensuring consistency of enforcement between tenant and owner-occupier crofters. A large number of the amendments are consequential on amendment 23, which sets out the duties in new section 5C.

The amendments attempt to simplify crofting legislation and remove repetitions of various definitions in the 1993 act. The Government is seeking to ensure that tenant and owner-occupier crofters are subject to the same duties to occupy and work their croft. Amendment 23, the main amendment in the group, achieves that by ensuring that tenant crofters have the same duty as owner-occupiers to cultivate the croft or to put it to purposeful use. At present, that duty is a statutory condition for tenant crofters, which limits the Crofters Commission's ability to take action. Under the statutory condition, landlords can take action when there has been a breach, but the commission can take action only when a complaint has been made or when it has the consent of the landlord. New section 5C of the 1993 act will ensure that it becomes a duty for tenants, as with owner-occupiers, and that the commission can take proactive action when a crofter is failing to

cultivate, maintain or put the croft to purposeful use.

The following amendments are consequential on amendment 23. Amendments 14 and 20 amend a cross-reference from section 5(7) of the 1993 act to section 5C(4), as inserted by amendment 23. They are necessary following the restructuring of the duties and statutory conditions.

Amendment 21 inserts the word "purposeful" into new section 5B(2)(c) of the 1993 act for clarification only. Reference in paragraph (c) to "any such purposeful use" rather than "any such use" clarifies that failure to put the croft to purposeful use that is consented to amounts to misuse of the croft. Amendments 22 and 26 simplify the 1993 act by removing the definition of "purposeful use" from the new duty on tenant and owner-occupier crofters not to misuse or neglect crofts. Amendment 23 includes a definition of "purposeful use" and amendment 49 applies the definition to the whole of the 1993 act.

Amendment 25 inserts a new subsection into new section 19C of the 1993 act, which is inserted by section 21 of the bill, to set out the matters to be considered in determining whether an owner-occupier croft has complied with the duty to

"keep the croft in a fit state for cultivation".

The explanation of that duty was set out in respect of tenant crofters in paragraph 3B of schedule 2 to the 1993 act and will be included in new section 5C of the 1993 act. Amendment 25 therefore aligns the factors to be considered in relation to both crofters and owner-occupier crofters.

12:15

Amendment 38 seeks to repeal section 5(1A), 5(2A), 5(2B) and 5(7) to 5(10) of the 1993 act, which relate to statutory conditions in schedule 2 of the act. Instead, those conditions will be included in proposed new section 5C of the 1993 act as duties to "cultivate the croft",

"put it to another purposeful use"

or

"keep the croft in a fit state for cultivation".

Amendment 40, which is consequential on amendment 48, is a technical amendment that is intended to simplify the bill and avoid multiple references to "cultivate".

Paragraph 14 of schedule 2 presently provides that a crofter may be removed from the croft if they fail to comply with the duty not to misuse or neglect the croft as set out in proposed new section 5B to the 1993 act. Amendment 41 seeks to extend the provision to include removing crofters who do not comply with the duty to cultivate and maintain the croft and is consequential on amendments 23 and 50, which remove the tenant crofter's duty to cultivate and maintain the croft from the statutory conditions set out in schedule 2 of the 1993 act and place them in proposed new section 5C.

Amendments 42 and 43 simply seek to change cross-references in schedule 2 to the bill to reflect the insertion of proposed new section 5C of the 1993 act. Amendment 48 seeks to apply the definition of "cultivate" to the whole 1993 act and is a reference to the definition provided in proposed new section 5C. Basically, it seeks to simplify and tidy up the 1993 act by reducing repetition of the word "cultivate" and having one definition that applies whenever the word is mentioned.

Amendment 49 seeks to insert definitions of "purposeful use", "registered", "unregistered" and related expressions into the interpretation section—section 61—of the 1993 act, again to simplify the act and remove repetition. The reference to "purposeful use" is relevant to this group of amendments, but the definitions of "registered" and "unregistered" are more relevant to our planned discussion next week on the crofting register. However, we have had to lodge the amendment for debate at today's meeting and I ask the committee to agree to the amendment on the understanding that, depending on the outcome of next week's discussion, we might need to amend it again at stage 3.

Amendment 50 seeks to remove the duties in paragraphs 3, 3A and 3B and the definitions of "cultivate" and "purposeful use" from schedule 2 to the 1993 act, as these are now included in proposed new section 5C of the 1993 act set out in amendment 23.

Amendments 29 and 30 seek to simplify proposed new section 26A of the 1993 act, as set out in section 23, detailing the duties on which the commission might take enforcement action, by replacing individual references to residency and misuse or neglect duties for tenant and owner-occupier crofters with individual sections covering all three duties for crofters and owner-occupiers alike. These sections reflect the duties in proposed new sections 5A, 5B and 5C of the 1993 act for tenant crofters and in proposed new section 19C(2) of the same act for owner-occupier crofters.

Amendments 31 to 33 are consequential on amendments 29 and 30. Amendment 31 seeks to simplify proposed new section 26A in section 23 of the bill by removing the definitions for "residency duty" and "other duty"; amendment 32 seeks to simplify the operation of provisions relating to undertakings by removing the reference to proposed new section 26D of the 1993 act, which is removed by amendment 33, and to provide the commission with the necessary case-by-case

flexibility to determine the timescale for an individual to comply with their undertaking. Amendment 33 seeks to remove proposed new section 26D in section 23, which sets out the types of undertakings that a tenant or owner-occupier can give in response to the commission addressing a breach of duty. Those undertakings are now contained in proposed new section 26A of the 1993 act to simplify the operation of these provisions.

I hope that the committee will agree that this group of amendments usefully aligns the duties of tenant and owner-occupier crofters and reduces the repetition of various definitions in crofting legislation. I certainly trust that everything is now clear.

Accordingly, I move amendment 14.

Peter Peacock: Everything is absolutely crystal clear now, minister.

I have no problem with the generality of this group of amendments, apart from amendment 49, which I will treat the same as amendments 5, 6, 7 and 8 and vote against. However, with regard to amendment 23, I wonder about the appropriateness of the phrase "every part" in the line

"so that every part of the croft is cultivated or put to such use"

in proposed new section 5C(2)(a)(ii) of the 1993 act.

I can think of circumstances in which it would not be physically possible to cultivate or put to purposeful use every part of a croft. For example, some crofts run into a beachhead, which might move over time. Sometimes there is a pile of stones in a corner of the croft, which have been taken out of the land over 150 years, and sometimes there is a huge rock in the middle of the croft.

The words "every part" do not add anything to the provision. I do not expect an instant answer from the minister on the matter, but I urge her to consider it before stage 3. I will raise the same issue at next week's meeting when we consider proposed new section 19C of the 1993 act, "Duties of owner-occupier crofters", which also contains the words "every part". I urge the minister to consider whether a literal interpretation of "every part" might cause unnecessary problems, given that the sense of the provision is clear.

Roseanna Cunningham: Thank you for your comments. The fact is that that is the terminology that is in use in the current legislation. We have simply mirrored the existing terminology. However, I take your point. We will consider whether it would be possible to lodge an amendment at stage 3 that will fix the issue. That might not be as easy as it seems, given that we would have to amend right across legislation. We will come back on the issue.

Amendment 14 agreed to.

Amendments 15 and 16 moved—[Roseanna Cunningham]—and agreed to.

Section 31, as amended, agreed to.

After section 31

Amendment 17 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 18, in the name of the minister, is grouped with amendments 35, 36 and 44 to 47.

Roseanna Cunningham: This group of amendments concerns appeals. The committee heard complaints about the issue during stage 1, although it was not a theme of Shucksmith or the original bill. After the issue had been raised, we began to hear about it from the commission and the Scottish Land Court.

It seems that the stated case procedure is not well liked. That is hardly surprising, given how cumbersome it is. Therefore, we are responding to an overwhelming degree of consensus in the crofting world—this might be the second instance of such consensus in our debates this morning—by lodging amendments that will replace the procedure with a straightforward appeals procedure.

Amendment 18 is two-fold. First, proposed new subsections (1)(a) to (1)(c) will remove from the 1993 act the stated case procedure for appeals to the Scottish Land Court. In conjunction with the provisions in amendment 35, the approach will provide for a simplified appeals process to be applied throughout the legislation. Secondly, proposed new subsection (2) will relocate the commission's ability to be party to an appeal to or questions that come before the Land Court, which is currently in paragraph 15 of schedule 1 to the 1993 act, so that it sits alongside the appeals provisions in section 52A of that act. The approach simply brings together provisions that relate to appeals.

Amendment 35 will remove another reference to appeals being by way of stated case procedure in proposed new section 26K of the 1993 act, which will be inserted by section 23 of the bill and relates to appeals against enforcement action by the commission in addressing a breach of a duty by a tenant or owner-occupier crofter. Amendment 36 will extend the timescale for lodging an appeal under new section 26K from 21 days to 42 days, to align with existing appeals to the Land Court under section 52A of the 1993 act. The intention behind amendment 36 is purely to provide a

consistent approach to lodging appeals with the Land Court under the 1993 act.

Amendment 44 is a minor drafting change, consequential to amendments 45 to 47, and will remove a reference to repeal from the first line of paragraph 3(19) of schedule 2, because that is contained in amendments 45 to 47. Amendment 45 will make minor consequential amendments to paragraph 3(19) of schedule 2, to reflect that the reference to subsection (5)(a) of section 52A of the 1993 act should be to subsection (5). Amendment 46 will make a minor consequential amendment to paragraph 3(19) of schedule 2, to reflect that section 10(4B) of the 1993 act will have been repealed by paragraph 3(9)(c) of schedule 2 to the bill. Amendment 47 will make a minor consequential amendment to paragraph 3(19) of schedule 2, to reflect that amendment 44 will have deleted the words "the following are repealed" from the first line of that paragraph.

I move amendment 18.

John Scott: I welcome the thrust of the amendments, which will provide much-needed simplification and clarification. The bill should do that wherever possible.

Amendment 18 agreed to.

The Convener: That ends today's consideration of the bill. We will continue our stage 2 consideration next week, when the target will be to complete consideration of part 2. I thank the minister, her officials and everyone else for their attendance.

Meeting closed at 12:26.

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