



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 10 November 2010

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
24th 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)
Jamie McGrigor (Highlands and Islands) (Con)
*Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Andrew Howard (Scottish Rural Property and Business Association)
Professor Jeff Maxwell (Tenant Farming Forum)
Angus McCall (Scottish Tenant Farmers Association)
David Sturrock (Tenant Farming Forum)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 3

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 10 November 2010

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

Decision on Taking Business in Private

The Convener (Maureen Watt): Good morning, everybody. I welcome you to the committee's 24th meeting of the year. I remind everyone to switch off their mobile phones and BlackBerrys, as they impact on the broadcasting system. I welcome Sandra White, who will be substituting for Aileen Campbell while she is on maternity leave.

The first item is to decide whether to take item 3 in private. Item 3 is consideration of our approach to the scrutiny of the Reservoirs (Scotland) Bill at stage 1. Do we agree to take the item in private?

Members *indicated agreement.*

Subordinate Legislation

Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 and Executive Note (SG/2010/182) (Draft)

10:00

The Convener: Item 2 is evidence on tenant farming. We are having the discussion at this time because of the laying before the Parliament of the draft Public Services Reform (Agricultural Holdings) (Scotland) Order 2011. The draft order has been laid under the super-affirmative procedure, meaning that it must be consulted on for the period defined in statute—in this case, 60 days—before the Scottish ministers can go on to lay a final version of the order.

The draft order is one of the first to be introduced under powers in section 17 of the Public Services Reform (Scotland) Act 2010. Under section 17 of that act, the Scottish ministers may make orders to

“remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.”

The main focus of today's discussion will be whether the draft order does, indeed, remove or reduce some of the current burdens in tenant farming law, although the committee might also take the opportunity to ask some more general questions about the sector.

I welcome Andrew Howard, director of the Scottish Rural Property and Business Association; Angus McCall, chairman of the Scottish Tenant Farmers Association; Professor Jeff Maxwell, joint chairman of the tenant farming forum; and David Sturrock, legal adviser to the tenant farming forum. I thank all the witnesses for their written submissions and the information that has been provided by their organisations, which we have read with interest. To maximise the time that is available for discussion, we will not ask for opening statements but will go straight to questions.

It seems clear that the new forms of tenancy created under the Agricultural Holdings (Scotland) Act 2003 have not led to an increase in the amount of land that is available for let. Do you have any idea why that might be the case?

Angus McCall (Scottish Tenant Farmers Association): Any new legislation takes a long time to take effect. Initially, there were a lot of reservations about the use of limited duration tenancies and short limited duration tenancies, but they are becoming more common and are being used far more. There is a wider picture as to why

less land is being let, which is tied up with various things. One of the major factors is the uncertainty about what will happen to the single farm payment in the future.

It is quite a complex subject and it is difficult to pin down any particular reasons why there is less land for let. A lot of the land that is being let is probably being let on short-term arrangements rather than longer-term arrangements, which is probably due to a desire to keep land close to hand or in hand, pending changes to the subsidy regime.

Andrew Howard (Scottish Rural Property and Business Association): I share Angus McCall's view that familiarity with the new vehicles has increased but that they have not been used as much as everybody hoped. Angus referred to some of the issues, such as taxation, perceived concerns about the flexibility of the vehicles that were introduced by the 2003 act—the fact that there is a gap between the SLDT and LDT means that it does not really provide the sort of term that people want—and uncertainty over the single farm payment, which might impact on the economic decision whether to let the land or keep it in hand. There was also a fall in confidence in the sector, particularly among landowners, following the debate surrounding the 2003 act. Lots of issues were raised during that debate that caused people concern about making the significant decision to hand over the management of some of their land to a third party. Landowners want to be confident that the legal framework and the general environment within which they make that decision is favourable, and there are concerns that the 2003 act debate had an impact on that.

The Convener: Do you have an overall view on that, Professor Maxwell?

Professor Jeff Maxwell (Tenant Farming Forum): As you are aware, quite a lot of the evidence that was collected to support the proposals that have now been put forward by the tenant farming forum, particularly in relation to the failure of new entrants to farming to gain access to land, were collected during a consultation that the forum conducted. It became a major concern of the forum—indeed, of the industry in general—that there was a scarcity of land to let. One of the reasons for that was undoubtedly established as being a lack of flexibility in the terms of let that exist as a consequence of the two instruments that were introduced through the 2003 act.

Over a period of years, the forum has worked quite hard to establish the appropriate balance between maintaining security of tenure, which the tenant sector would like, and giving landlords a greater degree of flexibility in the terms of let and not allowing a situation to develop in which they let land for long periods without any certainty of

getting that land back. The forum reached the consensus position that has been put to the Cabinet Secretary for Rural Affairs and the Environment and which you will find in the consultation document. That position has the continuing support of the forum.

There are, of course, concerns about the two elements that do not appear in the draft order, and those have been expressed in the papers that you have received. It is a concern of the forum that the way in which the legislation is handled should not, in the future, in any way reduce confidence in the tenant sector, particularly the confidence that landlords can have in letting land.

The Convener: We will explore those issues a bit further later on.

What has been your experience of the operation of the right-to-buy provisions in part 2 of the 2003 act? Have they worked? Have there been any cases of buying?

David Sturrock (Tenant Farming Forum): I do not have the statistics with me, but I think that approximately 1,000 cases of the pre-emptive right to buy have been registered with the keeper. However, my personal experience is that, if a landlord wants to sell, the procedure in the 2003 act for the valuation and all the rest of it is not followed, because it is quite a convoluted procedure. Generally, the parties sit down at the kitchen table and do a deal.

The Convener: Do you have any idea of how many deals have been done?

David Sturrock: No. I can speak only for the Borders, which is where I come from, where there have been a number.

Peter Peacock (Highlands and Islands) (Lab): Given your previous answer, do you think that the provisions in the 2003 act have encouraged more deals to be done, notwithstanding the fact that they are not used?

David Sturrock: It depends on what the estate wants to do. If it is the estate's policy to draw in its marches, so to speak, and make the estate slightly smaller, the farms on the periphery will probably go. It is not something that a tenant can do anything about; the initiative has to come from the landlord.

Angus McCall: We monitor our membership through our database, and I am aware of a number of names vanishing from that database, which is a sign that a significant number of people have managed to buy their farms. I think that that is being encouraged by the existence of the legislation, although there have been only one or two instances of the whole process being gone through because it is proving to be complicated and difficult to work. Certainly, in the first case in

which there was an official valuation, the tenant has not bought the property, because the valuation was significantly higher than the valuation that he was expecting.

The Convener: Have tenant farmers taken advantage of the opportunity to diversify that was provided under the 2003 act?

Angus McCall: Yes, that has been a great success. Tenants are now diversifying into areas that they would not have thought of previously, such as hydro generation and other projects that one would not necessarily think that a tenant would become involved in.

Andrew Howard: I agree that there has been an increase in diversification activity on tenanted units. It is a little difficult to disentangle whether that has been driven by the economics of agriculture in the past decade and the need to find other means of income or has been facilitated by the 2003 act. However, it is certainly no bad thing that tenants have that ability.

The Convener: Are landlords still tending to frustrate the process of diversification in some instances?

Andrew Howard: I am sure that there will be isolated incidents, although it is difficult to know what the circumstances of such cases are, and there may be reasons why a landlord is concerned about a particular kind of diversification. However, in my day job, I am not aware of particular circumstances in which landlords are refusing to allow diversification.

Angus McCall: I agree, although I have come across circumstances in which a landlord has been reluctant to allow diversification and has therefore imposed fairly stringent conditions.

We have a bit of concern arising from a situation in which one of our members who was undertaking a hydro scheme got the diversification permission from his landlord but then discovered that, because he had not got a way-leave to cross his landlord's land, he was not able to do that, and had to reroute the access route around his own land. The situation ended up as a case before the Scottish Land Court, which said that, although the landlord had given permission, he was expected only to tolerate the diversification, not facilitate it.

Liam McArthur (Orkney) (LD): Has the greater role of the Land Court assisted dispute resolution?

David Sturrock: No. The 2003 act removed the arbitration provisions that were contained in the Agricultural Holdings (Scotland) Act 1991. The 2003 act says that, unless there is agreement on the subject matter that is under dispute, the matter must be referred to the Land Court. The result of that is that the Land Court has been bogged down with a substantial number of applications because

there is nowhere else for them to go. That is particularly true of rent reviews.

Leaving rent reviews aside, there are a number of matters that have been to the Land Court and that are still not resolved. There was an assignation case in which the appeal was eventually withdrawn. There are concerns about the application of section 72 of the 2003 act, which involves a tenant serving a notice whereby he can become an absolute 1991 act tenant if a notice of dissolution of a limited partnership is served within a certain period, which occurred during the passing of the 2003 act. Those are just two of the fairly major items that have arisen out of the 2003 act and which have been the subject of substantial litigation.

All the rent review cases are still pending and sisted in the Land Court. They were awaiting the decision in what is known as the Moonzie case, or the Paterson v Morrison-Low case, which was decided just a couple of months ago.

10:15

Liam McArthur: Is it generally felt that a return to some form of arbitration, or the introduction of an interim step that was short of going to the Land Court, would be a positive development?

David Sturrock: That would be positive. In my view, there is nothing fundamentally wrong with section 13 of the 1991 act, which concerns the method of fixing the rent. The method has been in existence since the Agricultural Holdings (Scotland) Act 1949, and it has not caused much difficulty. What is causing difficulty is the procedural way of getting there.

At the moment, the forum is working towards an agreed protocol for the procedures for going to the Land Court or a pre-Land Court form of arbitration or mediation, in order to get rent reviews sorted—of course, whether that protocol is statutory or voluntary is up for debate.

Liam McArthur: Is the status quo that existed before the 2003 act also flawed? Is it the case that a return to the previous situation would not be the desirable route?

David Sturrock: The schedule to the 1991 act, which was repealed by the 2003 act, created a complicated and expensive formal route of arbitration. It was the view of this Parliament that it had become too cumbersome and expensive, which is why it was changed and the provision about the reference to the Land Court was included. It was hoped that that would be cheaper and quicker, but that has not turned out to be the case.

Liam McArthur: Is the outcome of compensation arrangements seen to be fairer as a result of the 2003 act?

David Sturrock: There has not really been any substantial change to the compensation arrangements, with regard to 1991 act tenancies.

Liam McArthur: A point was made about the new legal vehicles creating a degree of uncertainty. Is there any sense at this stage about what the consequences of the act have been with regard to the use of limited partnership tenancies?

David Sturrock: New limited partnership tenancies are a no-go area now.

Andrew Howard: I am sorry if I gave the impression that uncertainty had been created by the new vehicles. They are quite certain in terms of what you can do with them, but there is a lack of flexibility. Under limited partnerships, which effectively allowed the two parties to agree the term between them, the average term was about 10 years, yet that was a term that was impossible to achieve under the vehicles that were created under the 2003 act, which resulted in a range of terms of between five and 15 years even though, previously, it seemed that 10 years was a popular period of time.

Angus McCall: I am afraid that I must disagree with David Sturrock on section 13 of the 1991 act, which deals with rent reviews. I view the system as needlessly complex. It is predicated on an open-market system. As David Sturrock said, it has been in place since 1949, and it is high time that we had a look at it to see whether we could put a better system in place. The complications that are associated with having to make adjustments for the fact that there is no open market lead to many of the disagreements that arise and the difficulties that parties have when settling rents.

Professor Maxwell: It would be fair to say that the Cabinet Secretary for Rural Affairs and the Environment has written back to the forum to respond to the suggestions that we made. He has invited the forum to consider section 13 specifically. I imagine—although I will not be in the chair—that that will be a major part of the forum's business in the coming months, so that it can come back to the Executive with some firm proposals as to what could be done to improve the situation.

We have debated this for at least 12 months and there is no doubt that there are complications associated with the process, given the difficulties that emerge as soon as one has to approach the Land Court. There is a general interest in trying to streamline the process to the point at which people can agree before they have to go to the Land Court.

The provisions in section 13 of the 1991 act are a matter that the parties will have to debate in trying to reach consensus about whether a change is favourable.

John Scott (Ayr) (Con): Do you see that as being within your remit, or are you suggesting that the Parliament should get involved in it?

Professor Maxwell: The cabinet secretary has told us that he expects us to attempt to come together to present a view. That view is, generally speaking, a consensus view; it does not represent absolute agreement by all the parties, but it allows for the fact that parties give way on some areas in order to achieve a common result. Given the complications around the land holdings legislation, that is probably a reasonable way forward. It is one way that you can avoid the difficulties that might emerge if such a matter came before the Parliament.

Andrew Howard: I reinforce that. The Scottish Rural Property and Business Association is an enthusiastic supporter of the tenant farming forum. Although we might disagree with the Scottish Tenant Farmers Association's view of the need to amend the element of section 13 of the 1991 act that sets rents, we certainly see the TFF as the most appropriate forum in which to address the future direction of section 13 and whether it needs to be changed at all. We certainly support a review of the element of section 13 that deals with dispute resolution, to find a cheaper and quicker mechanism for the parties, with ultimate recourse to the Land Court if they simply cannot resolve their differences.

John Scott: In its consultation paper, the Government has not chosen to change the position regarding upward-only rent reviews, which I understand is a matter of regret—I share that view. Do you have any comments on that, bearing in mind that there are sub judice elements to it?

Andrew Howard: As the TFF chairman said earlier, it is extremely disappointing that the whole package has not been brought forward. We spent a lot of time producing a package that we felt was for the general good of the industry. For two elements of it not to be brought forward was extremely disappointing. At this stage, we probably do not fully understand why those two elements were not brought forward.

John Scott: Can you give us any reasons why you think that the Government chose not to bring them forward?

Andrew Howard: I can only make the observation that the Government felt that they did not reduce the burden on the industry. I guess that that is a matter of interpretation, on which I cannot comment further.

Professor Maxwell: We have attempted to discover precisely the reasons for not including the two elements. There is clearly a technicality in relation to the nature of the legislation that is being used to take forward the rest of the package. Clearly it was felt that the other two elements might come under some stress in the context of the procedure if they were put into the package. However, we are disappointed that they are not there.

John Scott: So you still share the view that this should go ahead if at all possible. That is certainly my view, given my background. I should have declared an interest earlier as a farmer and member of NFU Scotland. I know that this issue has been debated over many years and to get all the bodies together in agreement at this time is perhaps a once-in-a-generation opportunity, which it appears that the Government is scorning. That disappoints me hugely.

Professor Maxwell: You can take it quite positively that the collective view of the forum is that the two elements should have been included.

John Scott: And that remains its view.

Professor Maxwell: Yes.

John Scott: And every pressure should be put on the Government to include those elements.

Professor Maxwell: Yes.

John Scott: That is very clear. Thank you.

Bill Wilson (West of Scotland) (SNP): We know that the tenant farming forum has been working for some time on removing barriers to new entrants. You issued your report in 2008. Would you care to comment on the work of the tenant farming forum, either on the report or on any work that you have done since then?

Professor Maxwell: We carried out the necessary research to establish the possibilities for new entrants. The extent to which that has had an impact is not necessarily that encouraging. That has to be in large measure due to the uncertainties that surround the agricultural sector at present, not least because of the single farm payment and the common agricultural payment reforms, about which we shall hear more later this month. All those elements are reducing people's confidence about entering the farming industry.

The forum has set out clearly the barriers that we see, in terms of the legislation, that discourage new entrants. We expressed views on how the various grants that could come from Government could be better used. We have produced a paper—it is on our website—which indicates the ways in which potential new entrants can get into the industry. That is as far as the forum can reasonably go. It has used the information that it

collected during its consultation on the industry to bring the various guidance notes and opportunities to people's attention.

Bill Wilson: Does anyone else want to comment?

Angus McCall: The main barrier to new entrants is finding land. A certain amount of finance is available through the new entrant scheme, and there is plenty of training, so new entrants can build up their knowledge and skills, and get a bit of capital. Finding land is the really difficult bit.

New entrants are also faced with having to compete in the marketplace, as we all do. With the tendency to add units and to amalgamate units, whenever a farm comes up for let, it is immediately snapped up by the neighbour or by someone who is seeking to expand. Part of the problem is therefore the nature of the marketplace.

A number of areas have land that could be let to new entrants, and there are certainly institutions such as the Crown Estate, for example, that have farms that could be rented to new entrants. The Scottish Government is one of the largest—if not the largest—landowners in Scotland, and I suggest that Scottish ministers might have land that could be released. There is a lot of Forestry Commission Scotland land, and the Forestry Commission buys a lot of farms for tree planting, but not all that land gets planted. There is no reason why some of that land should not be channelled towards providing an opportunity for new entrants, who could work part-time for the Forestry Commission and work on their farm.

Bill Wilson: You said that you are confident that the Crown Estate and the Forestry Commission have land, and you think that the Government might have land. Have you any idea about why that land is not being let for farming? Does something need to be done to ensure that it can be let? Has it not been thought of?

Angus McCall: I suppose that it needs leadership. I do not know. From a commercial point of view, if someone who has a farm to rent lets it to someone who is able to pay more rent than a new entrant could, that is what will happen. We need landowners to show a bit of philanthropy and to let land specifically to new entrants.

Bill Wilson: If the Crown Estate has land but it is not letting it to farmers, is it lying unused?

Angus McCall: I am sorry; you misunderstand me. The Crown Estate has tenancies that come to an end, but generally the farms get re-let on the open market either to neighbouring tenants or to someone else.

Bill Wilson: You are right—I did not quite pick up your meaning. Thank you for that clarification.

You touched on the new entrants scheme. Do you have suggestions for improving that? Is it working?

10:30

Angus McCall: The scheme is working to a degree, but it is not really benefiting proper new entrants—it is benefiting people who are in, or who come from, the industry, such as farmers' sons. To my knowledge, few genuine new entrants have been helped to start by the scheme.

One barrier is age—only people up to the age of 40 can apply. Most of us who have started in farming realise that capital is built up only when people are in their mid-40s, so that is a barrier.

I think that about £6 million of the £10 million has been used, but I would like to know how much of that has been for genuine new entrants to the industry.

David Sturrock: It is fair to say that one problem for new entrants is the lack of availability of the single farm payment, which is a fixed sum for Scotland. If no income is received from the single farm payment, it is difficult for a new entrant to achieve profitability in a unit—however big or small it is—or to get anywhere and build up capital, as Angus McCall said.

Andrew Howard: One challenge that the TFF faces is that some barriers to entry—for landowners in making land available for letting and for new entrants—are outwith TFF's influence: for example, taxation and the single farm payment policy, which have a major bearing on the availability of land or on a new entrant's ability to compete in the system. Those matters are outwith the scope of agricultural holdings legislation.

On land supply, it always needs to be borne in mind when thinking about how to frame legislation that more than 70 per cent of the land is in the owner-occupied sector, which has grown significantly in the past 50 to 70 years. Legislation needs to make letting land attractive to an owner-occupier who does not want to farm for a period because of generational change or some other reason. That is probably the greatest potential land source, which is untapped because such people are not familiar with the letting system or do not see it as an attractive alternative to other activities that they might be able to do.

John Scott: The most recent information that we have had is that only 19 people have become new entrants to farming, but that was provided about six months ago. I share the view that that figure is scandalous. I also share the view that it is much to be regretted that single farm payments are not available to new entrants. That is a huge

oversight, but it has been done and was not thought of at the relevant time. There we are.

I will pick up Angus McCall on his suggestion that much Government land is available. Are you seriously suggesting that the Government, rather than the market, should decide who is given tenancies for that land? You appeared to suggest that the Government should allocate tenancies.

Angus McCall: I cannot say that lots of land is available, but odd bits of land could be let. As a public body, the Government should look to the industry's future. If we do not encourage young people to enter the industry, even on just small bits of land, we will be left in the future with a fairly ageing farming population. I am now past the average age in the industry and I am a bit frightened when I think how few young people are coming into the industry. As a public policy, we should encourage the use of starter units. All a young person needs is a foothold—100 acres or something on which they can start.

John Scott: Would you agree that, rather than the Government allocating tenancies, the parameters of the scheme should be redrawn—or revisited at least—to make it more effective at encouraging young people in?

Angus McCall: The scheme is tied by European Union regulations. The age limit of 40, for example, is an EU regulation and cannot be changed. You can redraw the parameters, but if new entrants will be competing in an open market, some type of incentive would be needed to encourage landowners to let to them rather than to someone who will offer to pay much higher rent.

Professor Maxwell: It is worth emphasising Angus McCall's point. One of the real problems is that we are very much tied in to European legislation; there are many things that we would like to do as a nation state but cannot. There are major difficulties in encouraging new entrants into the industry, simply because we cannot provide the necessary incentives to get them on their way.

I anticipated that we would be able to resolve the single farm payment issue. I have not read Brian Pack's full report, but I was hoping that he would find a way we could get over that barrier.

The Convener: Does John Scott want to continue?

John Scott: No, that is probably enough. We could talk about the issue all day, but we had better not.

The Convener: We can see how the issue is tied up with single farm payments and Brian Pack's recommendations.

Sandra White (Glasgow) (SNP): I am interested in the age limit of 40. As a member of

the European and External Relations Committee, I know that it causes a lot of concern when we discuss it in committee. It would be a good idea for this committee to pass its concerns over to the EERC, so that it can examine the issue, too.

Perhaps Andrew Howard can expand on the matter, as he mentioned the fact that 70 per cent of land is owned by owner-occupiers. Are those large landowners? What are the proportions?

Andrew Howard: The owners are farmers, basically.

Sandra White: What are the numbers?

Andrew Howard: There are about 25,000 or 26,000 holdings in Scotland, of which around 6,000 or 7,000 are let holdings. Those will be on estates of various different sizes. About 70 per cent of Scotland's agricultural land is occupied by farmers who own and farm their land.

They do not always have a generational plan, and they might have a gap before they wish to do something. They may wish to step back from farming and retire while retaining their asset and gaining an income stream from it. At the moment, they choose avenues such as contract farming that are outwith the agricultural holdings legislation. One question that we must bear in mind is why they choose that route rather using a tenancy.

Sandra White: The European dimension means that a farmer can get moneys from the single farm payment and other European funding. How many landowners own the land? Is that a barrier to other people coming in to farming? I think that you have given me the answer, but I wanted to clarify it. I will certainly check the figures that I have from the EERC.

John Scott: On that subject, given the expertise of those who are before us, can any of you make suggestions for how the new entrants scheme might be changed within the parameters that we face to facilitate more new entrants?

Professor Maxwell: One of the immediate things to consider would be the age issue. If you could reduce the age significantly and ensure that people had access to the single farm payment, you would alter things significantly. You would not necessarily alter access to land, because—as others have said—that is, by and large, still done on a market basis.

It is the extent to which any Government believes that it must step in—partly because there is a failure in the market—to encourage young people into an industry that determines whether or not it would create special incentives to make that possible. There are ways in which that could be made possible, but they may well run counter to the current legislation in Europe. That is the major

difficulty, but if those two elements—the single farm payment and the age barrier—could be resolved, it would be possible to improve young people's ability to get into the industry.

John Scott: Are you telling me that the age barrier needs to go up from 40 to 45?

Professor Maxwell: Yes.

John Scott: Or to 48 or something.

Professor Maxwell: Yes. Because, as has rightly been said, by that age an appropriate amount of capital has been accumulated and it could well be the first step—indeed, it has often been argued that it is the first step—for someone to tenant a farm and subsequently to create sufficient capital ultimately to purchase the farm or another farm.

Bill Wilson: In terms of European equality law, the situation strikes me as being rather discriminatory. Whether you set the age barrier at 45, 40 or any other age, you are basically saying that, once you hit a certain age, you cannot go into farming regardless of whether you are physically capable of carrying out the work. I do not suppose that anybody has ever looked at the European equality laws as far as that matter is concerned.

Professor Maxwell: I do not suppose that they have. What you say is perfectly true in that, in some respects, you could be a new entrant at 60 or—dare I suggest it?—even at 70. As the law exists, you would not be able to access the support and grants that come through in the new entrant scheme. It is a matter of great concern that we do not have a level playing field for people who want to come into the industry. Also, to an extent we have created barriers ourselves through our choices about how we pay the single farm payment. Whether that can now be changed as a consequence of how we want to pay those elements of grant either now or after 2013 is one of the choices that we can begin to make.

Peter Peacock: I will move on to short limited duration tenancies and limited duration tenancies. You appear to be in complete agreement that the proposal to move the limited duration tenancy back from 15 years to 10 years is correct, although it would be fair to say that Angus McCall does not fully agree with the proposal. You do not like it, but you are going along with it. Can you explain your position on the proposal?

Angus McCall: I am a firm believer that farming is a long-term business and that if you are going to get started in a farm, you need to have a clear road map in front of you, with plenty of time to plan and to develop your business. The changes that we have suggested and that are in the consultation will do a great deal to help us, because I hope that enabling someone to move

from a five-year tenancy on into a longer one will encourage the first five years to be viewed as an apprenticeship. You can see how the new tenant gets on, how he develops his relationship with the land and what he is doing with the land. Hopefully, that will roll on into a longer tenancy.

I think that most tenants would like to have a retirement tenancy, because there is no point in going into a 15-year tenancy at the age of 30, because you could be out when you are 45. Farming is a long-term business, so it is important to keep the traditional tenanted sector rolling on, because young people need continuity and a decent length of tenancy to enable them to develop the farm business.

Peter Peacock: While you hope that the outcome will be as you have described—I can see exactly why you are making that argument—are you confident that that will be the outcome?

Angus McCall: I am a born optimist.

Peter Peacock: Are other members of the panel content with the move from 15 years to 10 years?

Andrew Howard: Yes, I think that it is very positive. Allied to the clarification over fixed equipment, which we may come on to, I think that it provides important flexibility for those who are offering the land. It is important to recognise that if you want a supply of something, you have to make it attractive to supply it.

I take Angus McCall's point about agriculture being a long-term business, but what the TFF had to address at this stage was why the supply of land was not coming forward. It was necessary to find ways of making it more attractive to offer the land. I would not suggest that you should expect a flood of land, because the land market is not like that, as it moves slowly, but the move is a very positive one.

10:45

Peter Peacock: Earlier, you made the point that past practice before the 2003 act tended to end up with tenancies of about 10 years.

Andrew Howard: Yes.

Peter Peacock: In a sense, we are coming back to that. That begs the question whether any regulation is needed. Why should there not be a free transaction between the two parties?

Professor Maxwell: I will step in, if I may. We could rerun for you the three-year debate that we have had on the issue if you wish, but I do not think that that would necessarily be helpful. It is clear that the forum had to face those kinds of questions. The view was expressed that there should be freedom of contract, but that was simply

not acceptable to the tenanted sector for perfectly understandable reasons. Members now have proposals in front of them that the industry will back across the board. It is true that some members of the organisations that Angus McCall and Andrew Howard represent will have reservations even about what we are currently proposing, but the great majority are prepared to move with it. The Parliament now has a role in increasing the sector's confidence if it goes along with the proposals. It is extraordinarily important that it does that.

Peter Peacock: Does Andrew Howard want to add to that?

Andrew Howard: Tempted as I am, I think that Jeff Maxwell has nicely covered the matter.

Peter Peacock: It is helpful to have what has been said on the record. Thank you very much.

Elaine Murray (Dumfries) (Lab): I want to move on to fixed equipment. It is considered that the provisions on limited duration tenancies and short limited duration tenancies in the 2003 act are ambiguous and that they require to be amended, but I understand that there would be no change to tenancies under the 1991 act. Is there a case for change for either or both?

Andrew Howard: We focused on addressing matters that had an impact on the supply of land under the new vehicles. Concern was repeatedly expressed about the ambiguity that the legal profession felt existed about whether a landlord might have to provide further fixed equipment that he had not necessarily expected to provide at the outset of the tenancy. The changes in the order are designed to address that concern. There was no remit in our discussions to amend the 1991 act tenancies, the position of which is quite clear.

Elaine Murray: The ambiguity is specific to the 2003 tenancies.

Andrew Howard: Yes, and they are the principal supply of new land. Other than in exceptional circumstances, no new 1991 act tenancies are being created. We looked to address how we might increase the supply.

Elaine Murray: How will the change affect the new tenancies? Is it a matter of negotiation?

Andrew Howard: It will remove a concern for a potential landlord, which may tempt them into entering into a longer agreement than they might otherwise have entered into. They might have used a five-year agreement with the view that any dispute over the extent of fixed equipment would be unlikely within the space of five years, but there could well be a dispute within 15 years, and they could end up with a liability that the parties—certainly the landlord—might not necessarily have contemplated at the outset. If the ambiguity is

removed, a potential concern about letting for a longer period of time under an LDT will be removed.

Elaine Murray: Under the proposed provisions, it would basically be a matter of the tenant and the landlord negotiating at the beginning of the tenancy.

Andrew Howard: The fixed equipment will be specified at the outset of the tenancy, and the landlord will then get no nasty surprises, in common parlance.

Professor Maxwell: I should point out something about the detail of the order. Across the forum, we are attempting to refine the current drafting because an element of ambiguity still arises. In particular, we want to be certain that there is no doubt about when the agreement has to take place: it has to be at the beginning of the lease. Therefore, we will suggest some redrafting. We have already spoken to the Executive about that.

John Scott: I want to ask about post-lease arrangements. You mentioned ambiguity as regards fixed equipment. Are you content that the post-lease rearrangements are fair to both parties?

Professor Maxwell: We believe that they are. The drafting of that part of the order causes no problems. We think that the suggested change is entirely appropriate and addresses our concerns.

John Scott: Fine.

Peter Peacock: I will move on to the two-man rule. Does the proposed change to a viability test fall into the category of an honourable compromise between the parties, which was mentioned in relation to my previous question? Are there any concerns at all about it?

Professor Maxwell: I think that the STFA has already expressed concerns to the committee, but when the package was put forward, there was unanimity on how we would present matters to the cabinet secretary. As far as I am aware, that still holds, but the STFA, quite properly, has expressed concerns about the outcome. What we have got is a compromise, but it is one that will work.

Peter Peacock: In its submission, the STFA drew attention to its concerns. You would prefer all reference to a two-man unit to be removed from the relevant schedule.

Angus McCall: That is the view of the majority of our members. In the last wee while, I have had some representations from members who are unhappy about the retention of such a test. However, the proposed compromise has been agreed within the TFF, and it will certainly be a big

improvement on the previous arrangements. We are 100 per cent behind it.

However, there is one possible difficulty that I would like to flag up, which could occur if a young person took advantage of the new entrants scheme, got a farm and then their father on the home farm died. In those circumstances, they might have trouble inheriting the family farm, but that is an issue of forward planning and all the rest of it. Generally speaking, we are quite satisfied that something is being done.

Peter Peacock: That is helpful.

John Scott: I have a question about succession by grandchildren, which is one of the two issues that the Government has chosen not to deal with in the order, to your regret and, probably, that of the committee. Could you just confirm, on the record, that it is a matter of the greatest regret that that issue has not been pursued in the order?

Professor Maxwell: It is indeed. Of all the matters that you have drawn to our attention and asked us to take a view on, the proposal on that issue went through the forum with the greatest ease. I think that the landlords felt that it was a reasonable and fair change; equally, the tenants believed that it was appropriate. Therefore, the forum as a whole backed it whole-heartedly and without any equivocation. It is a great pity that it has not been adopted.

John Scott: It is the role of a parliamentary committee, at the very least, to act as an influence on the Government. How hard do you think that we should push the Government to change its mind in that regard?

Professor Maxwell: It is for you to make a judgment on whether your colleagues would run with it. I am speculating to some extent, but I think that it was decided by the officers who were responsible for drafting the order and, ultimately, by the cabinet secretary that the proposed legislative route was perhaps not the most appropriate, as no guarantee could be provided that the provisions would pass through Parliament appropriately.

John Scott: I cannot speak for others, but if the committee and the Parliament were prepared to follow the proposed legislative route and to agree to the provision, that would be the job done. I am attracted to the idea of acting on this because of the coincidence of views—it is a once-in-a-generation opportunity when all parties are agreed. That does not happen regularly in this type of discussion or negotiation and I do not want to see this opportunity pass. Do you agree with me in that regard?

Professor Maxwell: Absolutely. We are here to point out the reservations that have been

expressed by the SRPBA regarding the primary legislation route. Those are concerns of the forum, too. Angus McCall clearly wants the measures to go forward. However, I am certain that he will be concerned that going down the primary legislation route could undermine the confidence that we have attempted to create in presenting the package of measures in the way that we have done. Personally, I am anxious to persuade you to influence affairs such that the package can be pursued in its totality if that is at all possible.

Angus McCall: I second that. It is important to try and push the measures through. I know of at least one tenant who will be very grateful if we do so—otherwise, he stands to lose his farm.

The Convener: Speaking as legal adviser, would David Sturrock say that there are insurmountable barriers to the Government pursuing the two provisions?

David Sturrock: We have discussed the matter with the rural and environment directorate in some detail. It is my understanding that it is the parliamentary draftsmen who have a difficulty in putting the two provisions under the public services reform legislation.

The Convener: You are referring to Government draftsmen. We, as Parliament, do not have draftsmen, unfortunately.

David Sturrock: Yes, sorry: Government draftsmen.

John Scott: So it is a technical issue—the provisions cannot be drafted.

David Sturrock: I understand that it is a technical, constitutional matter. I cannot comment further on it, and I am not a constitutional lawyer; I am an agricultural guy.

Professor Maxwell: It is fair to inform you that the letter that we received from the cabinet secretary expressed his firm disappointment about not being able to include the measures. It is not as if he does not wish to include them; he does, but, because of the technical matters that have been drawn to his attention, he chose not to.

The Convener: Before we have the cabinet secretary in front of us, the committee should perhaps seek some background information on that.

Peter Peacock: The point that I was about to make has largely been answered. What you have just said is important. We need to clarify the matter. Has there been a discussion between the Parliament and Government at some point about the permissibility of the measures, or has the Government simply taken a view about that?

I return to a point that Andrew Howard made earlier, about the issue being one of interpretation

rather than one of absolute law. Has the SRPBA taken any independent advice on the matter?

Andrew Howard: Not independently, no.

The Convener: That was a helpful and interesting evidence session. I thank the witnesses for their submissions and the information that they provided. If you have anything else that you think we need to know, please give that information to the clerks over the next few days or weeks.

On behalf of all my committee colleagues, I thank Jeff Maxwell, the outgoing chair of the tenant farming forum, for his work. I think that he has done an excellent job, and I am sure that my colleagues would wish that to be on the record. We welcome Professor Thomas, who has been listening intently in the public gallery—this is probably part of his induction programme.

I thank you all. That concludes the public part of today's meeting. I thank everyone in the audience for their attention.

10:59

Meeting continued in private until 12:45.

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