



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 9 March 2011

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

7th Meeting 2011, Session 3

CONVENER

*Maureen Watt (North East Scotland) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Karen Gillon (Clydesdale) (Lab)

*Liam McArthur (Orkney) (LD)

*Elaine Murray (Dumfries) (Lab)

*Peter Peacock (Highlands and Islands) (Lab)

*Stewart Stevenson (Banff and Buchan) (SNP)

*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:

Bruce Beveridge (Scottish Government Rural and Environment Directorate)

Richard Lochhead (Cabinet Secretary for Rural Affairs and the Environment)

Caroline Mair (Scottish Government Legal Services Directorate)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 9 March 2011

[The Convener *opened the meeting at 10:16*]

Decision on Taking Business in Private

The Convener (Maureen Watt): Good morning. I welcome everyone to the Rural Affairs and Environment Committee's seventh meeting in 2011. I remind everybody to switch off their phones and BlackBerrys, as they have an impact on the broadcasting system.

Agenda item 1 is consideration of whether to take in private item 8, which is consideration of our draft legacy paper. Do we agree to take that in private?

Members *indicated agreement.*

Subordinate Legislation

Public Services Reform (Agricultural Holdings) (Scotland) Order 2011

10:17

The Convener: Item 2 is consideration of an affirmative instrument. Members will recall that we took evidence in November on a previous draft of the order under the super-affirmative procedure.

I welcome from the Scottish Government Richard Lochhead MSP, the Cabinet Secretary for Rural Affairs and the Environment; Bruce Beveridge, deputy director, rural communities division; Fiona Leslie of the land tenure branch in the agricultural and rural development division; and Caroline Mair from the legal services directorate.

Members will be able to ask questions about the order before we formally debate the motion. Officials can contribute under item 2 but cannot participate in the debate.

As we have heard, members will note that the Subordinate Legislation Committee made comments on the order, which were issued to all Rural Affairs and Environment Committee members with their agenda papers.

I ask the cabinet secretary to make a short opening statement before we ask questions.

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): I say on behalf of my colleagues and myself that it is a pleasure to appear before the committee. This is my last appearance before the committee in this parliamentary session—

Members: Ooh.

Richard Lochhead: I referred to this parliamentary session. Working with the committee in the past four years has been a pleasure.

We discuss today another important issue for the future of rural Scotland and the future of agriculture in Scotland. The order is the product of three years' continuous work in close partnership with the Tenant Farming Forum. I thank the TFF again for its hard work and spirit of compromise. I have just bumped into the TFF's chair, Professor Philip Thomas, who is in the public gallery.

The order enables us to make important changes to modernise aspects of agricultural tenancy legislation. The six measures in the order will considerably assist us in releasing more farmland for letting, delivering practical solutions for tenants and landlords and improving tenants' ability to enter into leases to farm productively,

which we hope will result in a stronger and healthier tenant farming sector in Scottish agriculture.

I need tell no one on the committee that agricultural tenancy legislation is extremely complex. The powers in the Public Services Reform (Scotland) Act 2010 have allowed us to introduce technical changes to modernise the agricultural tenancy legislation without adding to the heavy programme of bills. They have also allowed us to work more closely with stakeholders, and to consult more speedily and in more detail.

The Subordinate Legislation Committee has doubts, as you know, about whether the provision in article 3 that substitutes a definition for two-man unit is within the scope of the PSR act. However, I respectfully disagree. I consider that it will reduce the overall burden that the operation of the current definition of two-man unit causes: the purpose of the PSR act is, of course, to reduce burdens.

The current definition presents an obstacle to the efficiency, productivity and profitability of viable tenant farming and rural businesses. We have undertaken two public consultations. After the initial consultation we reconsulted on the changes that were proposed by the TFF and others, particularly to article 9 of the order, which relates to fixed equipment. The level of response to both consultations was positive, and there was clear support for the proposed changes.

The provisions on fixed equipment in the revised article 9 will ensure that both tenants and landlords have a clear record of what has been agreed at the start of the lease. The fixed equipment to be provided by the landlord and the condition that it will be in within six months of the start of the lease will be agreed and specified in a schedule before the tenancy commences. Any changes to that schedule will require agreement.

I know that there is widespread disappointment that we do not have sufficient powers to include two of the initial proposals: first, to prohibit the inclusion of upward-only or landlord-only initiated rent review clauses in limited duration tenancies, and secondly, to extend the definition of near relative to include the grandchild of a deceased tenant. I am considering how best to implement those outstanding proposals as soon as possible. As we all know, they have strong support in this committee and in the tenant farming sector.

I will be happy to address any points that the committee wishes to raise, or to answer any questions. As you can imagine, I have good legal back-up to assist me on the issue.

Stewart Stevenson (Banff and Buchan) (SNP): I will start off on the legal issue. In your opening statement, you noted that the Subordinate Legislation Committee suggests that part of the

order may be ultra vires, and you said that you respectfully disagree. Can you give us absolute clarity that you are asserting that the entire scope of the order that is before us is vires?

Richard Lochhead: That is my firm view. On the specific issue of the two-man rule, we believe that it is a burden, and that by taking forward today the order to amend the agricultural holdings legislation, we can use the PSR act to reduce burdens that arise from existing legislation.

I hope that the committee appreciates—indeed, I know that you do, as you have had a number of discussions on the subject—that the two-man rule is a burden. In agriculture in this day and age, the need to prove that anyone who has succeeded to a tenancy has a farm that can employ two full-time people, as the two-man rule requires, is a rather outdated concept, given the progress through technology and the fact that, as we all know, less labour is required in modern-day farming. We therefore view the rule as a burden, and that is why we believe that it is completely within the act to use those powers.

Stewart Stevenson: I am sure that colleagues will talk about the policy issues, as the committee will want to explore that area. In legal terms, however, you are stating without ambiguity that the order is vires and that there is no question of it being ultra vires.

Richard Lochhead: I will bring in Caroline Mair, who may wish to add a couple of points from that perspective.

Caroline Mair (Scottish Government Legal Services Directorate): Yes, that is right. We note the SLC's comments in its report, and we respectfully disagree with them. Our view is that the order meets the requirements of, and all the preconditions that are set out in, the PSR act. We do not agree with the SLC's interpretation that there is doubt as to whether the provision that substitutes the definition of "two-man unit" is intra vires. Our arguments are set out fully in the explanatory document, which was laid alongside the order.

The Government's position is that the operation of the current definition of two-man unit gives rise to a burden in certain circumstances because the effect of applying that definition would be to prevent a tenant farming business from continuing to farm a viable holding simply because it is not a two-man unit. That gives rise to a burden in the form of an obstacle to the efficiency, productivity or profitability of that tenant farming business. We believe that the burden will be removed by substituting that term and definition with the term "viable unit" and its definition.

Stewart Stevenson: The use of the word "or" in your answer means that only one of those items

needs to be satisfied for the order to be *intra vires*. You mentioned efficiency, financial viability and something else.

Caroline Mair: Yes—profitability.

Stewart Stevenson: So only one of those requires to be satisfied, not more than one

Caroline Mair: Yes.

The Convener: I call Peter Peacock.

Peter Peacock (Highlands and Islands) (Lab): Stewart Stevenson has put on record exactly the territory that I wanted to cover, so I do not need to ask the question.

Elaine Murray (Dumfries) (Lab): Is it the Government's argument that the burden has a greater effect on the tenant than the landlord? Rather than being an equal burden on both, is it a burden on the tenant who wishes to succeed?

Caroline Mair: Yes. The amendment will be advantageous to the tenant but maintains the status quo as far as the landlord is concerned, because the landlord will still be able to resume possession of land in circumstances where the holding is no longer capable of sustaining a viable business. How we assess that viability will change. Instead of a two-man unit test of viability, the viability will be predicated on the ability of the holding to generate employment for the occupier in addition to paying for adequate maintenance and for the rent of the unit.

Elaine Murray: Your view is that the landlord would basically experience the status quo. There is no particular reason why anybody would challenge the change in court, is there?

Richard Lochhead: There would be no grounds to do so.

Elaine Murray: I asked the legal adviser to the Subordinate Legislation Committee under what circumstances she envisaged that the change could be challenged in court and she thought that a landlord could challenge it. However, from what Caroline Mair says, there would be no reason for the landlord to wish to challenge it if they did not experience any reduction in their rights.

Richard Lochhead: There are two issues. First, there is the question of viability. The 2010 act would continue to say that viability was the criterion that would have to be taken into account for any challenge but, at the moment, viability is partly defined by the two-man rule, which is now outdated, so we are changing it.

Elaine Murray: Because there is general sympathy for the policy intention of the order, I am trying to get my head round any circumstances under which it could be challenged in the court if it is passed.

Richard Lochhead: It is fair to comment that the TFF proposed the amendments after a great deal of discussion and negotiation among the various parties round the table from all sides of the tenant farming sector. Therefore, there is a lot of support from landlords and tenants for the amendment to the definition of viability.

Elaine Murray: Assuming that somebody managed to mount a successful legal challenge to the provision, I presume that the Government would then have to effect the policy in primary legislation.

Richard Lochhead: In theory, yes.

John Scott (Ayr) (Con): Was the wording that you now propose universally agreed with all the industry stakeholders in the discussions that you had with the TFF, the Scottish Rural Property and Business Association and other bodies since the evidence-taking session in November? Are they all content with it? There was some dispute about the wording of the amendment. Has it now been resolved to everybody's satisfaction?

Richard Lochhead: Yes. My understanding is that that is the case. I do not want to name Professor Philip Thomas, who is in the public gallery and is the chair of the TFF, but in my discussions with him, he indicated that there was widespread support for the amendment under the current proposed wording.

10:30

John Scott: Widespread support, though, as opposed to universal.

Richard Lochhead: Bruce Beveridge was at the meeting in question, so I invite him to comment.

Bruce Beveridge (Scottish Government Rural and Environment Directorate): It is not only the TFF that unanimously supports the wording in the revision; a wide range of cross-sector representatives who are represented on the TFF but were not at the table have discussed it with me and signalled the same degree of support. Indeed, I have not received any representations from anyone in recent times that gainsay the current wording or provision and I have not been made aware of any dissent, either in the TFF or much more widely across the sector.

John Scott: One might reasonably interpret the replacing of the two-man test with, as it were, a viability test as essentially exchanging one burden for another. Given that if the earlier test was a burden the lesser test of viability will also be intended to be a burden, I presume that you are telling me that simply reducing a burden does not, of itself, make the order *ultra vires*.

Caroline Mair: The power in section 17 of the 2010 act refers to removing or reducing burdens or overall burdens. The Subordinate Legislation Committee suggested that as the viable unit test will still operate to the benefit or detriment of either party, it cannot be said to be removing a burden. However, we disagree. Although the test will still operate to the advantage or disadvantage of one party in determining who gets possession of the holding, we think that the overall burden that the current definition gives rise to will be reduced. Although we agree that the outcome of applying the test will be to determine whether a landlord or successor tenant gets possession of the land in question, the purpose of that test is intrinsically linked to productive use of the land. If a tenant farming business in occupation of the holding is able to use that land productively—in other words, is able to sustain a viable tenant farming business—it should be able to continue. If a tenant farming business in such circumstances cannot do so because the holding is simply not viable, the landlord will be able to resume possession. We are changing the test but, instead of imposing a burden, we are reducing the overall burden presented by the current definition.

Liam McArthur (Orkney) (LD): With regard to legal challenge, the TFF has been an effective representative body that has reflected very effectively what the public have often perceived as competing interests. However, as it takes only one individual to take issue with a measure in order for a legal challenge to arise, you can offer only fairly limited assurances in that respect.

As you have acknowledged, I think that we all agree with the policy intentions behind the order. However, given the evidence that, as you have also acknowledged, we have taken on this matter, some of us are a little disappointed to hear that for legal reasons you have been unable to progress certain recommendations in a couple of areas. That suggests that you have taken a conservative approach to the legal issues on this matter and at this stage I do not think that it would be fair to suggest that you are being more cavalier with regard to the two-man unit test.

That said, the difficulty for those of us who had concerns during the passage of the 2010 act about the extent of the powers that were being introduced and the way in which they would be applied is that, although we agree with the policy intention behind the first provision coming down the track after the bill's enactment, we are apprehensive about setting a precedent that in future might be used to widen the envelope of provisions introduced under section 17. It would be helpful if you were to reassure the committee with regard to concerns that we might be pushing the envelope in relation to section 17 and that successor committees might yet find themselves

having to deal with provisions that raise more debate about the policy intent, and that this particular legal mechanism is one that might be considered inappropriate.

Richard Lochhead: I hope that you have taken some comfort from our response to your questions about the legality of the measure regarding the two-man unit rule. Eight measures were proposed by the TFF, each of which we have considered very carefully. As you can see, six of the measures have been brought forward using the legislation. We felt that we could not do that with two of them, so we are looking for alternative means as far as they are concerned.

That is the comfort that I can give you: we scrutinised the proposed measures very carefully, and we are very confident about how we are proceeding. We have the six measures that are before you, which can go forward, and we have to find alternative means for the other two proposed measures.

Liam McArthur: You have referred, a couple of times I think, to the two-man unit rule being outdated. I do not think that anybody would necessarily dispute that. However, many bits of statute could readily be said to be outdated. In fact, each time we put something on to statute, presumably it starts to become outdated almost from that point onwards.

The Subordinate Legislation Committee raised concerns about the outdated nature of a provision being used as a means of triggering a section 17 order under the 2010 act. Do you have any comments on that?

Richard Lochhead: Only on the fact that, because the rule is outdated, it has become a burden, and we have been able to identify it as such. Where there are burdens, we want to address them, and we have the opportunity to do so in this case.

The Parliament is considering a variety of other issues across a range of portfolios. This is one reason why the 2010 act is so useful—it allows us a platform from which to address such matters.

Bruce Beveridge: Not only is the rule inconvenient, as are many outdated legislative provisions here and there, but the weight of the burden that the outdated nature of the provision adds could result in a tenant being dispossessed; that is a significant burden, in our view. It is the fact that the condition is outdated that gives rise to the burden. We are seeking to make the amendment to the law not just because the rule is outdated, but because of the significant burden that could arise as a consequence, and because of the fundamental nature of the existing provisions.

Bill Wilson (West of Scotland) (SNP): The Subordinate Legislation Committee seemed to suggest that the rule could not be qualified as a burden, because even if one side did not get possession of the land, the other side would. Therefore, the land would be worked. Your argument is that the rule is effectively a burden because the test is so outdated that it has become biased towards one side. Therefore, one side is burdened by an unfair disadvantage and loses the opportunity to work the land profitably.

Richard Lochhead: Yes—that is part of the rationale.

Liam McArthur: Given the views that have been expressed by the Subordinate Legislation Committee, is it your view that a legal challenge is made more likely? Have you made any assessment of whether a potential challenger would be able to pray in aid the concerns that the Subordinate Legislation Committee has highlighted?

Richard Lochhead: All I can say is that we have considered the views of the Subordinate Legislation Committee, and you have heard a response to them today. We remain in the same position as before that committee issued its report. We are confident that we have chosen the right route to go down.

Bruce Beveridge: It is being suggested that someone might pray in aid the Subordinate Legislation Committee's concerns, and somebody might well wish to advance any material that they could get, if they were minded to make a challenge. However, we are extremely confident that the Scottish Land Court would view the matter on the basis of a burden, rather than considering it to be about an unfair use of the provisions. The support that the provision has and the recognition of the outmoded nature of the rule have also attracted comment from the judiciary, as stakeholders. Someone could raise a challenge if they so wished—people can do that with regard to many things—but we do not consider that any such challenge has the prospect of being successful.

John Scott: Notwithstanding your certainty, if a successful challenge were to be raised, would that destroy the whole value of the order, or would it eliminate only the measure that we are discussing? You will appreciate that the committee has only a yes or no option, in that we can vote on the order only in its entirety. If the provision that we are discussing were subject to a successful legal challenge, would the whole order fall, or would only the provision that was challenged fall?

Richard Lochhead: My legal colleagues will correct me if I am wrong, but I think that it is fair to say that the decision that is before the committee

is whether to accept or reject the amendments in the order. If, as we hope, the committee accepts the order, it will amend existing legislation. Should there be a challenge to that legislation on any grounds, that will be for the courts to analyse, but it would not impact on any of the other amendments that are made through the order. I am not sure that there would be a link.

John Scott: Does Bruce Beveridge have a view on that?

Bruce Beveridge: Caroline Mair might want to comment on the impact of legal challenge on primary legislative provisions, but I point out that a challenge would have to be about a particular case in which the provision was deployed and complained about, rather than just a general challenge. There would have to be a specific interest to challenge the provision.

The June 2010 census shows that, of the 42,316 holdings in Scotland, 12,293 on which some or all of the land is rented have one or fewer full-time equivalent employees. That is between a quarter and a third of holdings, which underlines the potential scale of the impact of unfairness that the current legislative provision would have.

Stewart Stevenson: To be clear, as the effect of the secondary legislation is to amend primary legislation, is it the expectation of the minister and his advisers that any challenge would be not about whether it is valid to amend the primary legislation, but about the amended primary legislation? It is not the order that would be challenged, but provisions in the amended legislation. Therefore, it is overwhelmingly likely that any challenge would be focused on a narrow point, rather than seek to strike down the validity of using the secondary legislation to amend the primary legislation per se.

Richard Lochhead: We do not anticipate any challenges to the legislation on the basis of the proposal that we have brought to the committee today. That is our starting point. As Bruce Beveridge said, if a challenge were to arise to the agricultural holdings legislation, the issue would depend on the grounds that were used for the challenge and on the view of the whole act that was challenged.

John Scott: We are trying to establish whether—

The Convener: Sorry, but Karen Gillon is next.

John Scott: I beg your pardon.

Karen Gillon (Clydesdale) (Lab): If we vote for the order, we will have accepted the legal advice that the cabinet secretary has put before the committee and accepted that his argument is right. We surely all want tenant farming to continue to be a viable option for those who want to do that in Scotland. In our discussions in the past few

weeks, we have considered how agriculture can continue to be a viable part of the Scottish landscape. Through what we do today, we do not want to undermine tenant farming as part of the framework for agriculture in Scotland. If I vote for the order today, I will be accepting the legal advice that is before me. That will be my position.

10:45

John Scott: At the risk of labouring the point—

The Convener: Do not.

John Scott: I am told not to, but I want to hear from Caroline Mair whether, if challenged successfully, the order in its entirety would fall, or only the part that we are discussing.

Caroline Mair: It would depend on the nature of the challenge. It is difficult to speculate on what would happen or what the nature of any challenge might be. I cannot give any more definitive answer than that.

John Scott: Thank you.

The Convener: Cabinet secretary, given that you are here, and that you mentioned other proposals that you wanted to take forward but could not—Liam McArthur mentioned your caution on the matter—I will ask whether you have ideas on how the Tenant Farming Forum's other proposals might be taken forward.

Richard Lochhead: Yes. Notwithstanding the dissolution of the Parliament, it is our intention to introduce as soon as possible the necessary proposals to implement the two remaining measures that the TFF recommends are essential to introduce the flexibility and the assistance required to encourage more tenancies in Scotland.

The Convener: Would that require primary legislation?

Richard Lochhead: Both measures would require primary legislation.

The Convener: As there are no further questions for the cabinet secretary, we move to the debate on the order. As I said earlier, officials cannot participate in the debate.

Motion moved,

That the Rural Affairs and Environment Committee recommends that the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 be approved.—[*Richard Lochhead.*]

The Convener: Does any member have a contribution to make?

Stewart Stevenson: I support this piece of secondary legislation. I want to put it on the record that I accept and agree with the legal position as laid out by the cabinet secretary and his advisers.

Peter Peacock: I guess we would not be having a debate on the order if it were not for the Subordinate Legislation Committee's report. I support the order's policy objectives, as do other members—they said that in the course of questioning the cabinet secretary. Indeed, I was one of the committee members who supported the proposal to write to the cabinet secretary calling on him to go further than he has been able to go. We wanted all eight points to which he referred to be in the order, not just the six that are in it. I think that it is fair to say that we are disappointed in policy terms that that is the case. As Liam McArthur indicated in his earlier questioning, that indicates a degree of caution by the Government in relation to the powers that it has under the 2010 act. The Subordinate Legislation Committee raised that point with us.

As I said, the committee would have been more cavalier than the Government was prepared to be on the matter, which makes me think that I should support the order as being *intra vires*, in the way that the Government has described. The statement that the cabinet secretary and his officials set out was helpful in clarifying precisely the Government belief in all this. I have no problem with that, but it is important to take seriously the points that the Subordinate Legislation Committee raised with us, which it did to protect the interests of the Parliament. The Subordinate Legislation Committee rightly said that the Public Services Reform (Scotland) Act 2010, under which the powers are being deployed, is a controversial act. In fact, I and others—in my party and in other parties—opposed it strongly. We thought that it would open up a dangerous precedent for making fundamental changes to our law and institutions—public agencies and the like—without consideration of primary legislation. That said, in arguing against the public services reform bill, I did not envisage the matters that are before us today.

The advice from the Subordinate Legislation Committee has made us question whether the order sets a dangerous precedent and whether the Government is being cavalier. For the reasons that I have set out, I think that it is not. The Subordinate Legislation Committee is saying not that the order is definitely *ultra vires*, but that there may be a question about that—it is simply highlighting that to us. It is not unhelpful for the Subordinate Legislation Committee to do that and we ought to consider the matter in that context. However, having listened to all that the minister has said and to what the Subordinate Legislation Committee clerks told us, and having read all the written information, I will support the order on the basis that I have set out.

John Scott: Much of what I intended to say has already been said, so I will be as brief as possible.

I, too, will support the order and I welcome the policy objectives behind it. I very much regret that the proposals on the prohibition of upward-only rent reviews and the inclusion of grandchildren are not part of the order, but I look forward to those being introduced in primary legislation.

I share Peter Peacock's philosophical concerns about the order, but I do not share his view that the Subordinate Legislation Committee may have a point. My view is that that committee may not have adequately understood the complexity of a two-man unit and the issue of proving a burden. That is not through any fault of the Subordinate Legislation Committee; it is the Rural Affairs and Environment Committee that is meant to understand matters rural. It was relatively easy 20 or 30 years ago to prove what a two-man unit was, but that is no longer the case. I believe that the Subordinate Legislation Committee's view of the order's vires turns on the fact that, through no fault of its own, it does not fully appreciate what the definition of a two-man unit means, which is where the committee's difficulty arises. As I said, I will support the order.

Liam McArthur: Like others, I certainly support the policy intent of the measures. As Peter Peacock has already suggested, the majority, if not all of the committee has been keen to see the other two recommendations from the Tenant Farming Forum picked up and progressed. Nevertheless, the cabinet secretary's response to Stewart Stevenson's earlier question about the vires issue was pretty unambiguous, which is as much as we can look to achieve today.

Like Peter Peacock and his colleagues, I have reservations about aspects of what is being taken forward under the Public Services Reform (Scotland) Act 2010. It is perhaps unfortunate that we all agree with the policy intent of the first section 17 order under the 2010 act and so do not have much incentive to question whether the use of the provision will push the envelope.

Nevertheless, as I indicated, I am happy to support the policy intent behind the order. The minister's assurances on the legal position have provided as much comfort as we can look for in that regard.

Richard Lochhead: I thank committee members for their comments. We can take at least some comfort from imagining what the Subordinate Legislation Committee's report would have said if all eight measures had been brought forward under the Public Services Reform (Scotland) Act 2010.

This is an important issue for the future of rural Scotland and particularly for our tenant farmers. As we are all aware, tenancy laws are complex and the debate surrounding tenant farming in

Scotland has, over no doubt many centuries, been fractious and challenging at times. I set up the Tenant Farming Forum because I felt that the way forward was not simply to have a stand-off, but to bring everyone around the table to try to reach consensus on a number of important issues that are beneficial to both landlords and tenants.

I am pleased that, after the past few years, we now have a number of measures that, I hope, will make it easier for tenants to access land and, at the same time, will deliver fairness for landlords. I hope that tenant farmers will be empowered by the measures and that landlords will recognise that they are fair and beneficial to both sides.

This is a big step forward, but I recognise that there is still some way to go. Of course, the two measures outstanding are important, so I am committed, as I am sure are all committee members, to ensuring that they are implemented as soon as possible. We need viable tenant farming in Scotland because it has an important role in this country's agricultural profile and in looking after the landscape and delivering food production. We must ensure that there is fairness in the system. I am pleased that the order will deliver that.

The Convener: The question is, that motion S3M-7875 be agreed to.

Motion agreed to,

That the Rural Affairs and Environment Committee recommends that the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 be approved.

The Convener: Cabinet secretary, thank you very much. As you said, this is probably the last time that you will appear before the committee this session. I thank you and all your civil service staff for the co-operative manner in which you have worked with the committee.

Richard Lochhead: Thank you. I wish everyone the best of luck for the future.

The Convener: I suspend the meeting for a few minutes to let the witnesses leave.

10:55

Meeting suspended.

10:58

On resuming—

**Marine Licensing (Exempted Activities)
(Scottish Offshore Region) Order 2011
(SSI 2011/57)**

**Sea Fishing (EU Recording and Reporting
Requirements) (Scotland) Amendment
Order 2011 (SSI 2011/59)**

**Aquaculture and Fisheries (Scotland) Act
2007 (Fixed Penalty Notices) Amendment
Order 2011 (SSI 2011/60)**

**Sea Fishing (Licences and Notices)
(Scotland) Regulations 2011 (SSI 2011/70)**

**Less Favoured Area Support Scheme
(Scotland) Amendment Regulations 2011
(SSI 2011/73)**

**Marine Licensing (Fees) (Scotland)
Regulations 2011 (SSI 2011/78)**

**Marine Licensing (Consultees) (Scotland)
Order 2011 (SSI 2011/79)**

**Marine Licensing (Register of Licensing
Information) (Scotland) Regulations 2011
(SSI 2011/80)**

**Reporting of Prices of Milk Products
(Scotland) Amendment Regulations 2011
(SSI 2011/81)**

**Milk and Milk Products (Pupils in
Educational Establishments) (Scotland)
Amendment Regulations 2011 (SSI
2011/82)**

**Dairy Produce Quotas (Scotland)
Amendment Regulations 2011 (SSI
2011/83)**

**Drinking Milk (Scotland) Regulations 2011
(SSI 2011/84)**

**Rural Development Contracts (Land
Managers Options) (Scotland) Amendment
Regulations 2011 (SSI 2011/85)**

**Rural Development Contracts (Rural
Priorities) (Scotland) Amendment
Regulations 2011 (SSI 2011/106)**

**Town and Country Planning
(Miscellaneous Amendments) (Scotland)
Regulations 2011 (SSI 2011/138)**

**Town and Country Planning (Marine Fish
Farming) (Scotland) Amendment
Regulations 2011 (SSI 2011/145)**

The Convener: We move to consideration of 16 negative instruments. The Subordinate Legislation Committee made comments only on the Marine Licensing (Exempted Activities) (Scottish Offshore Region) Order 2011. The comments have been issued to all committee members along with their papers. No motions to annul any of the instruments have been lodged. I propose that rather than go through each instrument in turn, I will ask whether the committee has any points to make on any of the instruments. Does any member object?

Members: No.

The Convener: Does any member have any points to make?

11:00

John Scott: I declare an interest in relation to the Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2011. In fact, there are possibly two instruments on less favoured areas.

I have no comment to make on any of the instruments.

Liam McArthur: I hesitate to say this. I have no problem with the policy intent behind the Sea Fishing (EU Recording and Reporting Requirements) (Scotland) Amendment Order 2011, but I note that, under "Policy Objectives", paragraph 3 of the Executive note refers to

"an annual financial turnover in first sales of fisheries products of €200,000 or more".

I take that to be the de minimis rule, but the de minimis rule for primary production is a lower level of €7,500. I wonder whether a higher de minimis level applies in this case because the order deals with activity that is one stage removed from primary production. I am happy with that, but I know that the lower de minimis level has caused problems in other areas, especially in the application of feed-in tariffs, for example.

The Convener: I do not think that anyone can answer your question. Do you want us to write to the cabinet secretary about it?

Liam McArthur: That would be helpful. We could add another point to the letter. I do not think that the Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Amendment Order

2011 includes an explanation of the additional offences that will be covered. That is not particularly helpful. The measure does not seem to be at all controversial, but it would have been helpful to have had such detail.

Stewart Stevenson: Paragraph 5 of the Executive note states:

“The amendments of this Order are in accordance with, and do not go beyond, the policy objectives of the principal Order.”

In other words, the amendments are essentially technical and do not change any policy. I accept the point that Liam McArthur makes, but that is the claim that is made. I make no comment about the claim; I merely draw attention to it.

Liam McArthur: Paragraph 3 of the Executive note suggests:

“The purpose of this Order is to update the list of relevant offences for which a fixed penalty notice may be issued”.

As Stewart Stevenson says, the amendments will not be outwith the parameters of the original order, but it would have been helpful to know how the list had been updated.

Peter McGrath (Clerk): In fairness, the order may list the offences; I will need to double-check. We do not provide hard copies of instruments because some while ago members opted not to receive them, although we provide members with the opportunity to access them.

The Convener: We will write to the minister about the specific points that have been raised on two instruments. Does the committee agree that it has no recommendations to make on any of the negative instruments that are before it today?

Members *indicated agreement.*

Petition

Tree Preservation Orders (PE1340)

11:03

The Convener: PE1340 is from John Scott—not the John Scott who is sitting next to me—on behalf of Neilston and district community council. The petition relates to increasing the protection of Scotland’s trees from felling. We discussed it at our meeting of 22 December and decided to revisit it after completing consideration of the Wildlife and Natural Environment (Scotland) Bill. An amendment to the bill that sought broadly to implement the change that the petitioner requests was lodged at stage 2. During those proceedings, the Minister for the Environment and Climate Change, Roseanna Cunningham, indicated that the Scottish Government did not support that change but that other recent changes to tree preservation orders should address some of the concerns that had been raised. The amendment was not pressed to a vote.

The committee is now asked either to close the petition or to continue it, to allow the successor committee to decide whether to take any further action on it. Do members have any comments on the paper that the clerk has produced or any suggestions as to how we should proceed?

Stewart Stevenson: I was not present when the committee originally considered the petition, so I am simply proceeding on the basis of what has been said and what is in front of us. The petition certainly seems to have contributed to the discussion of the Wildlife and Natural Environment (Scotland) Bill, but I cannot identify what further parliamentary action would sensibly flow from it, although perhaps colleagues can. Therefore, I am minded to support its closure.

Peter Peacock: I broadly agree with Stewart Stevenson. Bill Wilson did the right thing in raising the matter when the opportunity arose to give it a good airing in the Parliament, but the proposal that all trees be designated is probably impractical.

Perhaps I should declare an interest. My house is called “Birchwood” because I live in a birch wood.

It is inevitable that trees have to be managed and designating all trees would place a huge burden on the authorities, making it difficult to get anything cleared, even in the most innocent circumstances. I understand where the community council that lodged the petition is coming from. There is nothing more infuriating to a community than losing good, mature trees that are part of the amenity of its area without any prior notice. I saw that happen a number of times when I was a

councillor and it causes extreme annoyance and distress. However, I do not think that the mechanism that has been suggested would be practical.

I agree with Stewart Stevenson. The issue has had an airing and the petition should be closed.

Bill Wilson: To be fair, the proposal is not to designate all trees, but only ancient avenues of trees, for example, or all trees in an area. An area would be specifically designated. That is my understanding of the intent of the petition. However, in light of Roseanna Cunningham's response, it makes sense to see whether her amendments will be effective before we try to add yet more legislation. The petition should therefore be closed. If, three or four years down the line, the petitioner concludes that the new methods do not work, it is open to him to say, "Look, this hasn't worked. We have to look at something else."

The Convener: Okay. Do members agree that the petition should be closed?

Members *indicated agreement.*

Annual Report

11:07

The Convener: I ask members for general comments on our draft annual report and whether they think that anything needs to be added to it.

Liam McArthur: The start of paragraph 26 on page 5 of the report, which is on the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011, is odd. It states:

"This was a super-affirmative instrument".

It takes its lead from the title of the paragraph, which is an odd way to start. However, whether we need to acknowledge the vires question that has been considered this morning is possibly of more substantive concern, as we are talking about the first occasion on which the power has been used. There seems to be an opportunity to acknowledge that.

The Convener: Okay. We will add to that.

Stewart Stevenson: I am mindful of comments that Peter Peacock made earlier. I am mindful of the risks of making too much comment on the intra vires versus ultra vires issues relating to the order that was before us today, and of giving that further weight by including it in the annual report. I am not entirely sure that we need to do that. The discussion will be fully documented in the *Official Report*, and I might not be entirely comfortable with elevating the matter to such a point. However, I am here to be persuaded.

Liam McArthur: I certainly accept that there are risks in the debate that we have just had and in what we have put on the record. I envisage something in the annual report that acknowledges the matter, but makes a fairly firm statement on the committee's view on the legal assurances.

Peter Peacock: If we want to cover the point, we need say only, "In arriving at its conclusion, the committee was mindful of the advice of the Subordinate Legislation Committee," or that it "took account of" that advice.

Stewart Stevenson: We could add, "but concluded ...".

Peter Peacock: That is right.

Bill Wilson: On stretching the envelope in future, the only other thing that we might want to note is that the cabinet secretary did not lodge two possible amendments and he therefore recognises that there must be a limit to the power.

The Convener: I think that we are tying ourselves in knots, and it seems that my colleagues at the end of the table—Elaine Murray

and Karen Gillon—are not very supportive of Liam's suggestion.

John Scott: I think that we should simply note that we had our first super-affirmative instrument. Time will tell whether we did the right thing, but I believe that we did.

The Convener: We will simply update paragraph 26 on the basis of this morning's discussion, without going into too much detail.

Members *indicated agreement.*

The Convener: Are there any further points on page 5 or page 6?

Members: No.

The Convener: Okay. Do members agree to the draft annual report?

Members *indicated agreement.*

John Scott: Well done to the clerks.

The Convener: Yes, well done.

That concludes the public part of today's meeting. I thank everyone in the public gallery for their attendance.

11:11

Meeting continued in private until 11:54.

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