The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 11 January 2012

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
1st Meeting 2012, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Annabelle Ewing (Mid Scotland and Fife) (SNP)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Graeme Dey (Angus South) (SNP)
*Jim Hume (South Scotland) (LD)
*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)
*Richard Lyle (Central Scotland) (SNP)
*Margaret McDougall (West Scotland) (Lab)
*Aileen McLeod (South Scotland) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Barnes (Scottish Government)
Fiona Leslie (Scottish Government)
Caroline Mair (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 4

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 11 January 2012

[The Convener *opened the meeting at 10:01*]

Interests

The Convener (Rob Gibson): Welcome to the first meeting in 2012 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off mobile phones as leaving them in flight mode or on silent affects the broadcasting system.

There are no apologies today and no additional members are attending the meeting.

Under item 1, I invite Claudia Beamish and Margaret McDougall to declare any relevant interests.

Claudia Beamish (South Scotland) (Lab): I am a member of the Campaign for Borders Rail.

Margaret McDougall (West Scotland) (Lab): I am still a councillor on North Ayrshire Council.

The Convener: I welcome you both to the committee.

We thank former committee members Elaine Murray and Jenny Marra for their contributions.

Decision on Taking Business in Private

10:02

The Convener: Under item 2, I seek the agreement of the committee to take in private item 5, which is consideration of evidence on the Agricultural Holdings (Amendment) (Scotland) Bill, and future consideration of evidence on the bill. Are we agreed?

Members *indicated agreement.*

Agricultural Holdings (Amendment) (Scotland) Bill: Stage 1

10:02

The Convener: Item 3 is our first evidence session on the Agricultural Holdings (Amendment) (Scotland) Bill. We will hear from Scottish Government officials on the content of the bill and associated documents. It is not for officials to answer questions on policy decisions, but they can offer clarification on the content of the bill and associated documents. The policy aspects should be left to our discussion with the Cabinet Secretary for Rural Affairs and Environment. We expect to hear from stakeholders at next week's meeting, and the cabinet secretary at the meeting on 25 January.

I welcome the Government officials. David Barnes is deputy director of the agriculture and rural development division; Fiona Leslie is the land tenure branch policy officer in the agriculture and rural development division; and Caroline Mair is a solicitor, rural affairs, in the directorate for legal services.

I invite questions from members.

Aileen McLeod (South Scotland) (SNP): Section 1 of the bill seeks to amend the definition of "near relative" to include grandchildren of a deceased tenant, who would be eligible to inherit a family tenancy from a grandparent. What do you mean by "near relative"? Why is the extension limited to grandchildren?

David Barnes (Scottish Government): I thank the committee for inviting us here and wish you a happy new year, as it is your first meeting in 2012. I make it clear that I am a policy official and my legal adviser will kick me under the table if, at any point, I stray into legal territory in a way that is not wholly accurate.

The term "near relative" has different definitions across statute—it does not have a fixed definition, so it is possible for the bill to define the term in whatever way the legislature decides. What the Government has put in the bill is precisely what the tenant farming forum recommended and, as far as I am aware, there would be no legal impediment to making a change to the definition proposed in the bill. The definition extends to grandchildren but no further because that was the TFF's recommendation. As the committee will know, the bill is part of the process of implementing a package of recommendations from the TFF, and that is the policy reason why the definition in the bill extends to grandchildren but no further.

Claudia Beamish: Is there any impediment to extending the definition of "near relative" beyond grandchildren to nephews and nieces? There is the possibility of other people being involved. I take your point about the submission from the tenant farming forum, but would it be possible to extend the definition?

David Barnes: Caroline Mair will answer from a legal perspective and, as the question touches on policy, I will give a response on the policy. However, as the convener said, the policy questions are for the cabinet secretary.

Caroline Mair (Scottish Government): I cannot see any particular legal impediment to extending the definition. However, we must bear in mind that, if we confer new rights on people by extending the definition and the benefits that flow from it to nieces and nephews, there will be an associated disadvantage or disbenefit to a landlord who might be contesting a notice to quit.

David Barnes: I will complete that answer by touching on why the Government is holding tightly to the TFF recommendations. Over the years, relations between the different parties—the landlord side and the tenant side—have, at times, been strained and the Government has put great effort into making progress in a consensual way. The significance of the TFF recommendations is that, by definition, they have the consensual support of all sides in the debate, who have collected around the table. It is for the cabinet secretary to answer the policy question whether he would be prepared to move from that position. For us, it is significant that the bill, as drafted, has that consensual support. Anything other than that would not have, at least demonstrably, the consensual support of all sides in the debate. As Caroline Mair says, any change to the interests of one side will have a counterbalancing effect on the interests of the other side.

Graeme Dey (Angus South) (SNP): I am looking for guidance on how extended succession would work in practice. Is the assignation of tenancies standard—is it the norm? If it is not, is there a danger that extending the definition of "near relative" could lead to a dispute arising whereby a spouse and a child who helped to farm under a tenancy both sought to take up the tenancy when the tenant died? I wonder whether there could be a potential difficulty in extending the definition.

Fiona Leslie (Scottish Government): I do not perceive there to be a significant difficulty with priority. My understanding is that the position depends on the type of lease that the family member who works the tenancy has under the Agricultural Holdings (Scotland) Act 1991. That is important because, if the lease says that it is only for the lifetime of the tenant, there may be difficulties with assignation anyway. However, if it does not say that, the practical likelihood of a problem arising would be low given that, if the wife and the son or daughter worked the unit on behalf of the father—who was taking a less involved role—there would be an assumption that they would take on the tenancy. It would be a matter for the individual family and the landlord, depending on their future intentions. That is where the area of dispute could kick in.

Graeme Dey: So you do not envisage that it will be a problem.

Fiona Leslie: No, but if the NFU Scotland perceives an issue with that, it might be able to give detailed examples when it gives evidence next week.

The Convener: Are you aware that, in crofting tenure, assignation can be by agreement between the tenant and a successor? That provides a resolution mechanism if the assignation is outwith the family. There is already a precedent in Scottish agriculture.

David Barnes: Yes. It would be naive and unrealistic to think that any legislation that is introduced would entirely avoid the risk of dispute. However, as you say, there is precedent and arrangements are already in place. Therefore, although we are not naive enough to think that there would never be any dispute in an individual case, we are confident that the matter has been considered in enough detail by enough experts—not only within the Government but in the stakeholder groups and professional bodies—to ensure that the matter is as clear as it can be and that the risk of dispute is acceptably low.

The Convener: A wee bit more clarity is required.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I will go back to the definitions and will pick up Graeme Dey's point. If two children and/or two grandchildren, for example, were involved in the farm, what competition would there be between them in the event of the tenant's death?

Caroline Mair: It would depend on who had succeeded to the tenancy. To talk about changing the law of succession in agricultural holdings is a bit of a misnomer. That is not what we are doing; we are simply changing a definition that applies when a landlord serves a notice to quit following the passage of a tenancy by succession.

The changes that we are making would not affect the first stage of the process, which concerns who succeeds to the tenancy, whether that be testate or intestate succession. That would be determined first, under the terms of a bequest, the terms of a will or the law of intestate succession under the Succession (Scotland) Act

1964. Then we would get into the realms of the Agricultural Holdings (Scotland) Act 1991 and the landlord's right to serve a notice to quit on a successor tenant.

The Convener: To make it clear for us all, you are saying that a wider group of people might be able to serve a counter-writ to contest the landlord's writ to foreclose the tenancy.

Caroline Mair: Yes, that is right. At the moment, when a tenancy passes by succession, the landlord has certain rights to serve an incontestable notice to quit. Where the tenancy passes to a near relative of the deceased tenant, persons who fall within that category have a greater degree of statutory protection because they are entitled to serve a counter-notice. That means that the matter must go to the Scottish Land Court before the notice to quit can be successful, and they may successfully contend that notice.

10:15

The Convener: That is fine. Thank you.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Is there any indication of how many holdings or farming units the proposal will affect? I am not sure whether this is a complete shot in the dark. Do you have any indication of the number affected by the change?

David Barnes: We do not have firm statistics. How many cases would be affected in future is a speculative question. In ballpark terms, we think that the number would be very small. I do not know whether it would be safe to speculate that the number of cases affected might be in single figures or low double figures but we are talking about a relatively small number. The Government views the proposal as a positive and consensually agreed but modest change to the legislation. We do not think that it will revolutionise the system or affect a large number of cases; it is a modest change.

Jim Hume (South Scotland) (LD): I will move on to the section on the prohibition of upward-only rent reviews. Most of us will be pretty surprised to learn that rents could go only up in some cases. In most markets the level of rent would be market led. My question is similar to John Lamont's question. Do we know in how many limited duration tenancies—perhaps you could give the figure as a percentage—there is a clause that stipulates that rents are only to increase and that only landlords can initiate a rent review?

Fiona Leslie: Part of our problem with all the lease arrangements is that, because they are contractual arrangements between two parties, we do not know the exact details of all the leases, so we do not have a figure for the number of individual cases in which that clause is in the contract. We know from Falkirk Council's evidence that there seems to be at least one such lease out there, but we do not know the percentage, or the volume, of leases that have such clauses.

Jim Hume: I suppose that there are two aspects. First, the rent can only increase and, secondly, the rent review is always led by the landlord. Can we look more closely at the fact that rent reviews are led only by the landlord? Can tenants currently seek a rent review in short limited duration tenancies and limited duration tenancies?

David Barnes: As Fiona Leslie said, because we are talking about private arrangements between landlords and tenants, we do not have statutory data so we are dealing with anecdotal evidence. Our understanding from stakeholder organisations, which the committee will also hear from, is that this is a small issue and the practice is not widespread, although there are examples of it happening. In the Government's eyes, this is again about dealing with a relatively small issue that affects a relatively small number of individual cases. The aim is to have a positive impact, but the change will not revolutionise the sector.

I remind the committee that the provision would not affect clauses in existing tenancies. It would prohibit future tenancies from including such clauses but it would not take retrospective action and strike down such clauses in existing tenancies. It is about protecting the future position of tenants who enter into new tenancies from the point when the bill is enacted.

Jim Hume: That was going to be my second question. Would that be the case with all LDTs and with traditional partnership agreements? If not, is there room for the bill to address that issue?

Caroline Mair: The prohibition of upward-only and landlord-only-initiated rent reviews will apply only to LDTs under the Agricultural Holdings (Scotland) Act 2003. As David Barnes said, it will not have retrospective effect; it will prohibit the inclusion in future LDTs of such terms, which are perceived as unfair. The provision was included as part of the package that the TFF recommended. It is not proposed in the bill to interfere with the contractual terms of 1991 act tenancies.

Fiona Leslie: Mr Hume might find it helpful to know that landlords and tenants can negotiate their rent through section 13 of the 1991 act, which contains statutory provisions on the code that they should follow in such negotiations. Therefore, there is potential for partnerships under the 1991 act that are still running to explore the issue.

Jim Hume: That is helpful, thank you.

Annabelle Ewing: Do the witnesses have intelligence on how things stand in practice where there is not such a prohibition—that is, where there is the possibility of an upward or downward rent review? Are there many examples of downward rent reviews? I would have thought that market circumstances would normally dictate an upward direction.

David Barnes: We do not have data on that. As I said, in an area in which there is no statutory collection of data we rely very much on intelligence from stakeholder organisations, with which we work closely through the TFF, and individuals. We have not had a conversation with stakeholders about the issue that you raised, although we can certainly do so. However, if the committee takes evidence from stakeholder groups, they might be able to help you with what I guess will be anecdotal evidence rather than statistically valid data on the matter.

John Lamont: Am I correct in thinking that the ban on upward-only rent reviews will not deal with a situation in which the level of rent at which a tenant farmer entered a tenancy has become unsustainable because of changes in market conditions and should arguably be reduced? The provisions will only stop the rent going up; there is no provision that will allow a reflection of changing market conditions to be incorporated into a lease where the rent is frozen.

David Barnes: The provisions for fixing the level of rent in a rent review are set out in legislation and are untouched by the bill. If market conditions ought to lead to a change in the rent—in one direction or another—provision in that regard, first, exists in statute and, secondly, is untouched by the bill.

The proposed new provision does not say that the rent must go down in certain circumstances; it simply says that a clause that says that the rent can only ever go up cannot be put into a tenancy. The issue of whether rent should go up, down or stay the same will continue to be covered by the existing rent-review provisions.

Graeme Dey: I will digress slightly and talk about the stats behind the proposals. You are aware that there was a 10 per cent drop in tenancies in Scotland between 2005 and 2011. Do you have figures on the extent to which the drop is due to tenants purchasing their farms or to landowners taking back vacant land and perhaps reletting it under alternative arrangements?

David Barnes: I am happy to take that question to our statisticians, to ascertain whether we can come back to the committee with an answer, although I am not confident that our statistical sources will enable us to discern the trends that you mentioned.

The Convener: I have a question about the commencement procedure. The bill says:

> "The other provisions of this Act come into force at the end of the period of 2 months beginning with the day of Royal Assent."

Why will it take two months to apply very simple provisions?

Caroline Mair: To my knowledge, the two months is a standard amount of time to allow people to become aware of changes to legislation and take them on board. I can take the question away and come up with a more specific answer.

The Convener: Is it related to the fact that we do not know when Her Majesty will put pen to paper?

Caroline Mair: Yes. We do not know when the bill will receive royal assent. A date will be set, which people can be made aware of.

Annabelle Ewing: On implementation, the two-month period is fairly standard, although it may vary slightly. I imagine that the philosophy behind it is that it accords with the idea that while people must be aware of the law—there is not an excuse not to be aware of the law—it is reasonable to allow a short bed-in period.

I have a couple of questions on section 4, on transitional provisions. First, I note that there is, in effect, a retrospective effect of the provisions on VAT. If there has been an election or a change in the VAT rate before implementation of the act, that is to be reflected, whereas other provisions do not benefit from that retrospective effect. I will deal with those other provisions in a minute. Why is the VAT provision retrospective?

Caroline Mair: The provision is not retrospective per se—it applies to circumstances that exist when the act comes into force. It has to work that way or it would not achieve its intended effect because recent changes in VAT would have the effect of freezing rents for three years. What we are clarifying in the bill is that a change in the rate of VAT or an option to tax will not constitute a variation of rent such as would prevent parties from having the rent reviewed for the next three years. If that were not to apply to VAT changes that have taken place in the past couple of years, in cases that are affected by that change in VAT the rent would effectively be frozen for a three-year period from the date of that change, or from the date that any option to tax was taken by the landlord. It would not therefore achieve its effect, which is the mischief that we are trying to rectify with the provisions.

Annabelle Ewing: My next question concerns the date on which section 1 would come into effect. I think that the provisions in section 4(1) are clear about that, but the view has been

expressed—you may be aware of it from the papers—that they are not.

There are also differing views about whether the provisions should apply to situations in which the tenant has died before the bill has come into force but where the legatee or acquirer of the lease has not yet given notice under the relevant provisions. Views on that have been expressed by the Scottish Tenant Farmers Association and the NFUS. Will you comment on those issues?

Caroline Mair: Certain responses to the draft bill that was put out for consultation raised issues about the transitional arrangements. We took those on board and amended the transitional provision in the light of those comments. It is hoped that that has clarified the position. We changed the transitional provision to make it clear that it will affect only cases in which a tenant farmer has died after the act comes into force. We believe that that is a nice, clear and unambiguous cut-off point.

We are aware that there are two differing views on when the change to the definition of "near relative" should take effect, and we have preferred one of the views, which is that it should affect only cases in which a tenant has died after the coming into force of the new law.

10:30

Annabelle Ewing: I note the rationale that has been given that the cut-off point is "clear and unambiguous", but I presume that scenarios in which the tenant has died before the bill has come into force, but notice has not yet been served—such as the NFUS and the Scottish Tenant Farmers Association suggest—would not be beyond possibility. I presume that that would apply only in a finite number of circumstances. What is your opinion of that?

Caroline Mair: My understanding is that how far back we would have to go in time would depend on whether the tenancy is passing by testate succession or intestate succession. If a tenant dies and the estate is distributed and wound up according to the law of intestate succession, it may take some time. It would introduce a degree of uncertainty to apply the changed definition to circumstances in which a tenant might have died, for example, up to a year before. We would be changing the rights and expectations of some parties whose circumstances are extant at the point when the act comes into force.

David Barnes: I will supplement what Caroline Mair said by referring back to the balance of interests. It is an interesting situation: the two organisations that the member mentioned are both members of the TFF, and the whole raison d'être of the TFF is to broker compromises between organisations that have differing views. It is possible for a single organisation to have its own view—if it were up to that organisation in isolation, it would have a certain preference—while in the context of the TFF it signs up to a compromise that is slightly different. We are aware that we are living in a situation in which there are differing nuances of view.

As Caroline Mair said, we are aware of a small number of cases and of some organisations that have made representations to ask, in effect, for the bill's provisions to be amended in a way that would shift the balance of interest in favour of a certain small group of potential new tenants. Once again, I refer back to the point that, by definition, there would be a counteracting effect on the interests of other parties and that the question of consensus is so important for the Government that that effect is a good reason to hesitate.

I will step back from the actual facts and suggest a hypothetical scenario. There may be no cases for which the changed definition would be a problem—let us say that the relations between the landlords and tenants in the small number of potentially affected cases are such that everything can be sorted out amicably. There might therefore be no positive benefit for those cases from amending the bill in the way that some organisations have suggested, but there might be a negative effect on the consensus. The organisations, the tenant farming forum and the Government are trying to work together consensually in difficult areas. I offer that as a hypothetical scenario; I am not suggesting that it is the reality, but we risk undermining confidence in the consensual nature of the TFF for changes that would not have significant benefits for cases in the real world.

We are aware of the representations and the Government has put its position in the bill. The reasons that I have just set out are reasons for us to hesitate rather than simply to adopt without question the suggestions that have been made by those organisations.

Annabelle Ewing: Thank you. I have a final point on that. Obviously, we will pursue this and other issues through the evidence that we will gather from stakeholders in due course. If a notice has not been served, it could be argued from a semantic legal perspective that in a sense there is no retrospective effect because the de facto position is that a notice has not been served. However, I will leave that for another day. I presume that there have been examples in Scots law of legislation that has had retrospective effects—I do not imagine that that has never happened.

David Barnes: Yes—the Government's position thus far in response to those representations is not based on there being a legal impediment.

Caroline Mair: It is possible to pass legislation that has a retrospective effect, but we generally try to avoid that because we prefer not to interfere with established circumstances or the existing rights of parties. It is preferable for new law to have a future effect rather than a retrospective one so that it does not interfere with established rights of parties who rely on it.

The Convener: Thank you very much. As there are no other questions, I thank our witnesses for their evidence. I know that we have points to follow up with stakeholders and the minister in due course.

Subordinate Legislation

Control of Volatile Organic Compounds (Petrol Vapour Recovery) (Scotland) Regulations 2011 (SSI 2011/418)

Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc) (Scotland) Revocation Regulations 2011 (SSI 2011/428)

Police (Retention and Disposal of Motor Vehicles) (Scotland) Amendment Revocation Regulations 2011 (SSI 2011/429)

10:37

The Convener: Agenda item 4 is consideration of three instruments that are subject to negative procedure. One relates to the control of volatile organic compounds and the other two are instruments that will revoke disposal of vehicles instruments, and which the committee previously raised concerns about. Members should note that no motions to annul have been received in relation to the instruments. I will ask the committee whether, once we have looked at the papers, it wishes to make no recommendations. Are there any comments on the papers?

Annabelle Ewing: On Scottish statutory instrument 2011/418, it seems that there has been a drafting error, but it is not of such a nature that it should prevent us from suggesting approval of the instrument. However, the Scottish Government will obviously have to ensure that the drafting error is corrected, so I think it important that the committee impose a monitoring or reporting period for the Scottish Government to come back to us and tell us what it has done to rectify the position.

The Convener: Okay. There is a problem, though, because the reporting deadline for the instrument is 16 January and it is now 11 January. In terms of the Government reporting back, do you mean before we—

Annabelle Ewing: No. I mean that we should go ahead with approval, but should also ask the Government to explain within a reasonable period what it has done to rectify the situation.

The Convener: Indeed. As members know, the Subordinate Legislation Committee helps enormously to throw up process issues, and we constantly find that drafting of instruments is an issue. Does anyone want to make any comments on the instruments? We will not make any unless members are of the view that we should.

Margaret McDougall: What is the error in the instrument?

Annabelle Ewing: It is explained in the explanatory memorandum.

The Convener: Page 8 states that the Scottish Government responded with:

"The failure to insert a reference to new regulation 9G into the definition of "hybrid permit" in regulation 2 of the 2000 Regulations is an error which the Scottish Government regrets. It will be corrected at the first available opportunity."

Richard Lyle (Central Scotland) (SNP): I think that this is the fourth order that we have come across in which mistakes have been made. I am sure that someone somewhere is trying to rectify that situation and that they will take note of what has been said here.

The Convener: That is now on the record, so we can certainly ensure that they do. Does the committee agree that it does not wish to make any recommendations in relation to the instruments?

Members *indicated agreement.*

The Convener: Thank you. Before we move into private session, I thank anyone who is still in the public gallery. Our next meeting will be on 18 January.

10:41

Meeting continued in private until 10:49.

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e-format first available
ISBN 978-1-4061-8096-1

Revised e-format available
ISBN 978-1-4061-8108-1

Printed in Scotland by APS Group Scotland