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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 18 January 2012

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
2nd 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:

Richard Blake (Scottish Land & Estates Ltd)
Christopher Nicholson (Scottish Tenant Farmers Association)
Professor Phil Thomas (Tenant Farming Forum)
Scott Walker (NFU Scotland)
Andrew Wood (Royal Institution of Chartered Surveyors)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 2

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 18 January 2012

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

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning, everybody, and welcome to the Rural Affairs, Climate Change and Environment Committee's second meeting of this year. Committee members and members of the public should turn off mobile phones and BlackBerrys, as leaving them in flight mode or on silent affects the broadcasting system. We have received no apologies for absence.

Agenda item 1 is a decision on whether to take business in private. Do members agree to take item 4 in private?

Members *indicated agreement.*

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

10:01

The Convener: Item 2 is the Agricultural Holdings (Amendment) (Scotland) Bill. This is our second evidence session on the bill. We will hear from member organisations of the tenant farming forum, in advance of hearing from the Cabinet Secretary for Rural Affairs and the Environment next week. I welcome our witnesses, who are Christopher Nicholson, vice-chair of the Scottish Tenant Farmers Association; Andrew Wood, from the Royal Institution of Chartered Surveyors; Richard Blake, legal adviser to Scottish Land & Estates Ltd; Scott Walker, chief executive of NFU Scotland; and Phil Thomas, chair of the tenant farming forum.

I do not expect anybody to make statements so, without further ado, we will go straight to our questions, which arise from our discussion of the issues with the bill team.

Aileen McLeod (South Scotland) (SNP): I thank our witnesses for coming to the committee. Section 1 of the bill seeks to amend the definition of "near relative" to include grandchildren of a deceased tenant, who would then be eligible to inherit a family tenancy from a grandparent. What is your understanding of the term "near relative"? Should the change be limited to grandchildren only? Last week, we heard from the Scottish Government's bill team, who said:

> "there would be no legal impediment to making a change to the definition proposed in the bill."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 11 January 2012; c 500.]

Should the definition be extended beyond grandchildren?

Christopher Nicholson (Scottish Tenant Farmers Association): From a tenant's perspective, we would encourage the definition of "near relative" to be extended beyond a grandchild to include nephews and nieces. There are arguments that it should go further afield and perhaps should be in line with the class of relatives who have an entitlement to an estate if someone dies intestate. We hope that the definition will be expanded, as that would allow easier succession to and possibly assignation of heritable tenancies, which would help to preserve the number of heritable tenancies in Scotland.

Richard Blake (Scottish Land & Estates Ltd): It is worth flagging up a couple of points from a landowner's point of view. First, the legislation—the Agricultural Holdings (Scotland) Act 1991, as

amended by the Agricultural Holdings (Scotland) Act 2003—is complicated. Everybody at this end of the table realises that. As Professor Thomas will probably confirm, the tenant farming forum did a lot of work to achieve consensus on the amendment to the definition of "near relative". However, there is a deeper issue, which is that many of the definitions refer back to the Succession (Scotland) Act 1964. That causes confusion, particularly for non-lawyers, but probably for lawyers, too, in certain areas. You are probably aware that the Government has been looking at amending the Succession (Scotland) Act 1964. If there are policy issues to do with definitions in the 1964 act, that might be the time to look at that issue.

Secondly, under the 1991 act, as amended by the 2003 act, secure tenants now have a wider ability to assign tenancies. A Scottish Land Court case, Fleming v Ladykirk Estates Ltd, confirmed how that would work when a nephew was to have the assigned tenancy. Taking into account the Succession (Scotland) Act 1964 issues—or policy changes that the Government might introduce—and the fact that, under the 2003 act, tenants have a wide ability to assign during their lifetime, I think that, with a bit of planning before death, many of the complications that come after death can be avoided, as it is already possible to assign to a wider class.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I have a follow-up question for Mr Blake. As a lawyer in a previous life, I have dealt with the 1964 act. I do not see the particular difficulty, because it is an issue that is dealt with every day in the legal profession, but it certainly might take some time for any amending legislation on succession in Scotland to come to fruition. In the interim period, what is your particular concern with respect to the 1964 act?

Richard Blake: With the 1964 act as it stands now, as far as Scottish Land & Estates is concerned, the widening of the definition of "near relative" in section 1 of the bill to include grandchildren clarifies the situation following certain court cases. In the Salvesen v Graham case in the Scottish Land Court several years ago, grandchildren were brought in. The bill clarifies that succession by grandchildren is now permitted and we do not have any particular objection to that. If, as a matter of principle, we are looking at extending the definition of "near relative" beyond direct descendants, it could be argued that that takes away from landlords more rights that they have under existing legislation.

The Convener: I would like to follow that up, but Scott Walker will comment first.

Scott Walker (NFU Scotland): I come back to assignation and succession as is proposed in the bill. As has been said, the provisions in the bill have been discussed at length in the tenant farming forum. NFU Scotland welcomes the clarity that the bill brings, so we whole-heartedly support it.

A wider issue that should perhaps be examined at a later date is assignation compared to succession. It seems a bit strange to the layman, and certainly to many of our members, that in some situations there is a wider definition of whom you can assign a tenancy to than of who can get succession to it. It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories. That is a point to consider, but there is an industry-wide consensus that the bill is a step in the right direction.

Professor Phil Thomas (Tenant Farming Forum): I will follow up on Scott Walker's comments. Strange as it may seem, a great concern from the standpoint of both landowners and tenants is that the legal framework might change in a way that causes unintended consequences. My impression from much of the discussion on the tenant farming forum is that there is concern that whatever is done is done in a systematic way that does not lead to consequences that nobody has envisaged. There has been strong support for the amendment to legislation that is in the bill. That does not rule out any widening of the approach, but it is important that there is a step-by-step process.

The Convener: Has the tenant farming forum compared the methods for assignation in tenant farming with those in crofting? There are procedures for dealing with assignation in crofting whereby a formal process can be initiated if the assignation goes beyond a certain degree of family membership.

Professor Thomas: The answer is probably no. I am certainly not aware that such a comparison has been made. As you well know, crofting law is a bit of a law unto itself, so perhaps comparisons would not be exact.

The Convener: I wondered about that. I come from a crofting neck of the woods and there is longstanding agreement on how assignation should work. I would have thought that the tenant farming forum would be looking at such matters.

On succession, I understand the issue to be about whether heritable property is shared between the spouse and children, which has little to do with how assignation works.

Richard Blake: The first point is whether a tenancy is heritable property. This is probably not the place to have a discussion about that. The Scottish Law Commission considered the point

that you made in relation to amendment of the succession law and I flagged the issue up in the tenant farming forum, because a widening of the availability of what are known as legal rights and changes to the division of property will affect tenants as well as landowners, as far as I can see. I am not sure what else you want me to say on that just now, convener.

The Convener: It is useful to have that on the record because, although this committee might not deal with succession law, the issue is certainly germane.

Jim Hume (South Scotland) (LD): On section 2, "Prohibition of upward only rent reviews etc", I said at last week's meeting that I was surprised to learn that there are allegedly some tenancies in which only the landlord can initiate a rent review and some in which rents can only be increased. Is the panel aware of many such tenancy agreements? Does anyone have a problem with section 2?

Andrew Wood (Royal Institution of Chartered Surveyors): I am not aware that our organisation has been involved with any limited-duration tenancies that have upward-only rent reviews, but I have heard on the grapevine that one or two agreements include such a condition. We would be concerned if there were such a mechanism, particularly in a longer-term lease—an LDT can last for a very long time. We would not support such a mechanism, which would be inappropriate and could lead to rents that impacted on a holding's viability and condition.

Jim Hume: Are you saying that you support what is proposed in the bill?

Andrew Wood: Yes, I support the amendment to the existing legislation. Historically there have been upward-only rent reviews in some high street shop-type commercial leases, but such an approach is not appropriate in the context of the ups and downs of the agricultural cycle.

10:15

Scott Walker: I do not know how many contracts specify the issue, but we know of a number of them and have spoken to individuals about them and some of our members have made representations about them. When the union first discussed the issue, there were mixed views with regards to what our position should be. Some people objected to the practice whereby, in order to secure a tenancy, someone goes in with what is called key money, which means that they start off paying an unrealistically high rental rate, which they hope to negotiate down in the long term, due to economic circumstances. Many of our members felt that having a provision for upward-only rent reviews would serve those individuals right. It was felt that having such a provision might bring a bit more normality into the bids for the tenancy in the first place, and ensure that those who were bidding did so on a fairer basis, with regard to the economic performance that could be achieved.

We weighed up that position against the social justice factor and asked whether it was correct for any tenancy agreement to specify that rents could move only in one direction. The union came to the conclusion that upward-only rent reviews are wrong, which is why we support the amendment that the bill proposes. It is worth bearing in mind the reasons why some people might have gone into their agreements with an extremely high rent in the first place, as that explains why there is not universal support for the removal of such provisions.

Richard Blake: Scottish Land & Estates was happy with the wording of this section by way of consensus within the tenant farming forum. However, it is worth pointing out that some sections of the industry feel that limited-duration tenancies are as near as damn it to the farm-business tenancies that exist in England, which allow for quite a lot of freedom of contract, and that this in some way constricts the ability to contract by way of negotiation at the beginning.

I have no difficulty with the provisions of the section as they stand. I am happy with it. It will bring clarity and certainty to the situation.

Jim Hume: Could you expand on your point about the ability to contract being constricted?

Richard Blake: Another member of the panel might have mentioned that this type of landlord-only or upward-only rent review is possibly more common in free-market contracts, such as commercial leases, which simply reflect the general law of contract, where both parties are negotiating with each other. The proposal represents another restriction that is being brought in. We have no difficulty with that, but it leads further away from freedom of negotiation at the beginning of the tenancy. That is the point that I am trying to make.

Professor Thomas: Just for clarity, the comparison that is always made is the comparison with England and Wales, where the degree of freedom to contract is, broadly speaking, much wider, so that the various types of tenancies might have additional clauses dealing with specific issues that would be ruled out under Scottish law.

Annabelle Ewing: Is it the case that, in England and Wales, there are dispute resolution mechanisms that are not available to parties in Scotland? That might be seen as a balancing factor.

Professor Thomas: The reality is that there would be different disputes, because the nature of the contract would be different. I will let Richard Blake comment on the detail of the legalities around the resolution of those disputes, but they are a bit different. There is a long tradition of the two countries having different approaches to tenanted land.

Richard Blake: I cannot comment on the English dispute resolution process. In Scotland, under section 13 of the 1991 act, any sort of alternative dispute resolution is available.

Christopher Nicholson: I will comment on the comparison between the English and Scottish systems for determining rents. We fully support the amending of legislation to outlaw upward-only and landlord-initiated rent reviews. In England, the statutory system for determining rents is slightly different, and rents tend to follow the economic condition of agriculture more closely than they do in Scotland. From the mid-1990s onwards, there was a downturn in agricultural profitability, and rents in England came down accordingly. However, in Scotland, that did not happen to the same extent—in fact, there were very few, if any, rent reductions. Our system of determining rents is based on comparables and places less emphasis on economic conditions. That means that we welcome what is happening.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I want to return to the freedom of parties to contract. Will the restrictions on the ability to contract—perhaps as part of a bigger package—make it less likely that landowners will enter into tenancies, or will they skew the type of tenancies granted and the type of relationships entered into with farmers? Will the restrictions limit the supply of land?

Professor Thomas: We have to put the issue in context. Inevitably, the nature of contract arrangements will influence the contracts being made, and that would apply in England and Wales as well as in Scotland. However, the factors that limit the amount of land becoming available tend to be rather different. At the moment, the long-term view of the revision of the common agricultural policy is causing quite a lot of uncertainty, and that is likely to have a much greater influence on the environment in which people operate than will the details of the sections in this bill. However, contract arrangements will have some influence.

Richard Blake: Greater freedom of contract with less prescriptive statutory legislation would, in our view, make it easier to let all manner of rural properties. I am thinking not necessarily only of farmland but of disused farm buildings, or of different things brought together into one package. We—that is, Scottish Land & Estates Ltd, not the tenant farming forum—raised the issue of a Scottish style of farm-business tenancy with the Cabinet Secretary for Rural Affairs and the Environment three or four years ago.

Scott Walker: The terms of a contract are always an issue for the security of the tenant and for confidence in future investment—and therefore for the ability to increase the quantity of land that comes on to the market. If you offered total freedom of contract, more land would probably come on to the market, but you have to ask what conditions the tenant would be left with. We firmly believe that some sort of contractual relationship would have to be put in place; the structures of the Agricultural Holdings (Scotland) Act 2003 would be needed in order to give the right balance and to give security to the tenant in his relationship with the landlord.

I will touch on the point made by Phil Thomas. Many factors other than the terms of the lease will affect people's decisions, and CAP reform is one of the big ones. There is a lot of uncertainty over future entitlements.

Another issue that we might touch on later if time permits is also to do with taxation policy and whether there is encouragement under the taxation regime for the letting of land and for its letting to certain individuals. There is also the question of how taxation influences an individual's decision on whether to farm the land in hand or whether to let the land out. It is a complicated situation, but the NFUS firmly believes that a structure needs to be put in place. The structure under the bill will be hugely important to tenants, owner-occupiers and those who will wish to lease out land in the future.

The Convener: From the Scottish conditions over the past 20 or 30 years, it is clear that there have been far fewer secure tenancies and that far more limited partnerships and the like have been brought in. Do you think that the prohibition of upward-only rent reviews is strongly linked to the shortage of land that is available to be held securely and that people are arguing over a dwindling resource in order to get into agriculture?

Andrew Wood: I do not think that that is one of the big issues for the letting of land. Even to address the issues that Mr Walker raised, landlords and tenants can make use of lease premiums or find other ways of contracting through offering key money or making their position more advantageous for a tender of letting land. The other issues that have been spoken about are all, in financial terms, much greater obstructions to access to land.

Christopher Nicholson: Much comparison is made with English farm-business tenancies, which have been operating in England since 1995. There

are plenty of statistics to show how they have worked, and they have not been the success that people had expected. As far as I know, the English tenanted area has not gone up. The average length of FBTs is very low—I suspect that it is less than five years—and greater issues are at play; for example, a landowner might wish to contract a farm and retain himself as the farmer to gain tax advantages. In addition, CAP reform is hanging over us at the moment, which has an effect.

The Convener: We take that point on board. Obviously, the limited partnership arrangements have been the most popular, but they are in a similar situation in that they have less security than a secure tenancy would have, which must be a drag on their potential.

Christopher Nicholson: A lot of limited partnerships will have started in the 1970s and 1980s and will typically have been for up to a 20-year period, but those are now coming to an end. Those tenants now find themselves in a difficult position. That situation shows that short tenancies that are not for the lifetime of the tenant will not encourage tenants to make the investments that are necessary in today's farming.

The Convener: So, given the number of people who are in limited partnerships, we would need to consider having further legislation if fewer people are getting access.

Professor Thomas: The situation is complicated. The recent survey figures show clearly that the number of tenancies has declined by about 10 per cent over the past five years. However, we must also recognise that there is a wider economic context. Over the past few years, farming or buying land in any form has become an attractive prospect because the opportunity to invest money elsewhere has seemed less secure. A lot of people who might have invested outside agriculture 10 years ago are now investing in agriculture and land.

Secondly, when somebody comes into farming as an initial entrant and buys or becomes a tenant of a relatively small piece of land, the only way in which they can make that a viable business is to run it relatively intensively. That creates a need for capital investment but, at present, it is difficult for new entrants to get capital investment. The way in which the land law operates is not the only issue, because economic factors are in operation.

10:30

Richard Blake: I will try to keep my comments as short as possible, but several points arise from the question and from my colleagues' comments. First, I want to clarify for the committee that, since the 2003 act, limited partnership leases cannot be entered into, so there has been a natural withering away of such leases. That will come through in the statistics as we progress—there will be no new limited partnership leases, because we are not allowed to do it.

My second point is on the statistics that have been mentioned. Andrew Wood and I were involved in the break-up of an estate near Perth, when I was in private practice up there. In many cases, the landowner offers secure tenants the possibility of buying the land through negotiation, and often on favourable terms. That approach immediately takes out a swathe of secure tenancies from the statistics, because the tenants become owner-occupiers. I would struggle to name many owner-occupiers who have bought out their tenancies in that situation and who then make the land available for let. That removes from the statistics a number of tenancies pre the break-up of an estate.

The Convener: What sort of number are we talking about?

Christopher Nicholson: The STFA reckons that, since the 2003 act, about 100 tenants have bought their farms. Therefore, that point does not account for the drop of 1,000 in the number of secure tenants in recent years.

Richard Blake: I have a third point, which is on the figures. I do not have the figures immediately in front of me, although I have them with me. I understand why the Government has used the statistics in the way that it has, but there is an issue on the number of short limited duration tenancies—which, under the 2003 act, are tenancies of up to five years. Because the process started, I think, in 2005, the first batch of SLDTs will have come to an end by 2010. Therefore, the figure for the latest year in those statistics will not necessarily show the full number of tenancies that have been created under the 2003 legislation.

Fourthly, I want to give an example that might help the committee to understand where we are coming from. I have a member who has a hill farm on the west coast and who ran a series of grazing tenancies with a shepherd. The shepherd has retired as the grazing tenant and the son of the shepherd wants to take over. He has another job, but he wants to farm part time as a new entrant. However, the landowner and the prospective tenant are finding it difficult to find a mechanism under the legislation whereby the prospective tenant can come in as a new entrant but the landlord can invest in fencing and drainage, as the tenant does not have sufficient capital to do that. There is no possibility of a limited partnership arrangement and not really a possibility of a partnership arrangement. Therefore, unfortunately, that one might be dead and buried.

Annabelle Ewing: A point was made earlier about the ability to attract financing. I would have thought that, for a lender, the more security there is on a loan, the more attractive it is because there is a greater possibility of recouping the money if things go belly up. That is another element to bear in mind. Professor Thomas raised the issue of access to finance, but it is important to bear that issue in mind. The situation is not as straightforward as was suggested, because there are other normal commercial issues for the lender, as there would be with any other financial loan.

Professor Thomas: That is absolutely right. The point that I was trying to get across, which might seem a little hidden, is that if someone initially comes into farming on a small scale, they can make a viable business only by having a quite intensive business, which by definition generally involves a greater level of capital investment. There is another barrier to entry, if entry is on a small scale. If a person can get a tenancy that provides a land area on which they can run a viable business on an extensive basis, the amount of investment that they must make is often much less.

Andrew Wood: On what happens at the end of limited partnerships, in practice a number of people go into shorter-term arrangements, often for family reasons. If someone has granted a limited partnership to someone and their son then returns to the farm, potentially to farm himself, a shorter-term arrangement might be offered, to fit in with that.

We find that people have a lot of confidence in limited duration tenancies, which are being used in practice and are being granted as a substitute for limited partnerships. There are not vast numbers of LDTs, but they are active and they are out there, and there is confidence in the mechanism and how it operates.

Scott Walker: I return to investment, which is a thorny subject for our members at both ends of the spectrum, up and down the country. How someone invests in a tenanted farm is a complicated issue, not just in the sense of the return from investment in agriculture, which is a reflection of the profitability of different agricultural enterprises, but in the sense of what happens when a tenancy comes to an end and who benefits from waygo—the compensation that is payable.

From talking to our members throughout the country, we think that uncertainty in relation to waygo compensation hinders investment by landowners and tenants. To be fair to landowners, if they invest in a holding there is an issue about the return that they can expect from the rent. Anyone who invests in a business must consider the return that they will get.

The issue is tied up with the profitability of agriculture. The other big issues for us are, first, the length of term of an agreement, because the longer that someone has access to the land to get a return on their investment, the more encouragement there is to invest, and secondly, what form of compensation someone thinks that they will receive when the tenancy comes to an end.

The Convener: The Scottish Tenant Farmers Association had something to say about waygo in its submission. Is it the on-going job of the tenant farming forum to address such issues? If so, why has the issue not been addressed?

Christopher Nicholson: It should have been properly addressed in the 2003 act, because there was agreement among all parties that any genuine improvement that was applicable to farming that the tenant had made should be compensated for, irrespective of write-down agreements, missing paperwork, lack of written consent and so on. However, compensation remains a grey area in the 2003 amending act.

The Convener: That leaves us anticipating that a further bill or order might be needed in the future.

Professor Thomas: For clarification, the item is on the TFF's list of things to look at. I cannot comment on why it was not looked at earlier, simply because my occupancy of the chairmanship has been relatively short term, so we are talking about a period before my time. It is probably fair to say that, after the 2003 act was passed, the TFF initially tried to try to come together on areas in which it thought that there might be low-hanging fruit—that is, areas in which consensus might easily be reached. The approach brought forward a number of matters.

We are now dealing with some of the more difficult issues, of which waygo is one and the whole issue of dispute resolution and arbitration is the other. The good news or the bad news—depending on how members want to look at it—is that we will probably return here at some stage.

Richard Blake: The waygo, improvements and dilapidations issue is horrendously complex on both sides—the landlords' side and the tenants' side. There is a considerable lack of understanding. The tenant farming forum is trying to clarify advice to all parties on what the bill means, not just on dilapidations and waygo but on various other areas.

We might have to consider a consolidation act at some stage because we are beginning to get fragmented legislation, which does not help. We might be back here at the committee in a few years' time.

The Convener: Believe it or not, there have been similar suggestions in the crofting world. The thought of consolidation legislation fills us with horror, but if it is needed we will have to think about it—it might become a priority.

Graeme Dey (Angus South) (SNP): I apologise if I take the discussion off on a slight tangent. We have touched on how difficult it is for new entrants to get into farming. My question is directed at Richard Blake. I know that you are the legal adviser to Scottish Land & Estates but will you update us on the progress that has been made by your organisation on providing starter units for new entrants? Perhaps as important, how are you getting on identifying ways of creating what I think you have referred to as down-the-line churn to ensure that those who move on from those starter units have somewhere to farm?

Richard Blake: You are right in implying that as the legal adviser I do not know very much about that. Scott Walker might know a bit more about where the joint initiative has got to on that. Sorry to pass the buck.

Scott Walker: As you can imagine, starter units are a hugely important issue for our members. Whether it is landowners, tenants or owner-occupiers, there is a consensus in the industry that we want to do everything possible to help new people to get started in agriculture.

I will go off on a slight tangent before I answer Graeme Dey's question. There is always the issue of what is meant by new entrants. A traditional new entrant to farming would be a farmer's son, whose route into agriculture is pretty clear cut: he waits on the farm and works for endless hours until his father basically hands over the cheque book and the business to him. It can often be at the tender age of 55 or 60 that he starts making decisions.

Recently we have been interested in the alternative routes. How do individuals who do not have a traditional route into agriculture get started? When I first looked at the issue many years ago, I thought that the best way to get somebody started in the industry was to set them up with a 150 or 200-acre piece of land with buildings and a house—in other words, what is thought of as the traditional way into agriculture. However, if we want to do that on a large scale, that is generally not possible, for various reasons. Therefore, I look at all the other individuals out there who have clawed their way into the industry through different routes and through their hard work and endeavours. That has often meant that they have worked or contracted somewhere and that they have a little bit of land and a building.

Richard Blake referred to the joint initiative. We have been working with other organisations that have access to land, buildings and properties and looking at how we could bring them together with new entrants. We could get a new entrant enabler, for instance, to work in the industry and try to build the confidence of individuals who wish to get started, allow them to bid for land and buildings, and provide education and mentoring. That would be helpful.

In addition, the enabler would actively go out to individuals who have land, buildings and any other sort of asset so that they could work with people to get started. At the moment, that is only an idea or a concept; I should say that it is one that is heavily criticised in some quarters—not everyone likes it. However, we are being innovative and are looking at the many different ways in which people can get started.

10:45

Graeme Dey: This is obviously an important subject. The committee would be grateful if you could keep us up to date on the progress or lack of progress that is being made.

The Convener: We will return to the issue. As you say, if the CAP reform has an effect on renting and leasing land, we will want to consider the issue in that context, without changing our work programme any further in the next two or three months.

Claudia Beamish (South Scotland) (Lab): Can any of the representatives before us give us an indication of what interest there is among families and new entrants who might want to enter the industry, given that we are in a time of uncertainty? I am not asking for statistics, necessarily, but it would be interesting if some light could be shed on that.

Scott Walker: It is difficult to give figures. In the past two years, two members of the staff of NFUS have left to start a farm. One moved to France, because they found that to be an easier route into the industry, and one now farms just outside Blairgowrie.

We hear mixed views from different people. We hear about land being offered to rent and there being apparently no new entrants who wish to take up that land. A number of years ago—before Phil Thomas became the chair of the TFF—we contracted out a bit of work that studied the barriers to new entrants and held a number of meetings around the country with people who wanted to enter farming but had encountered difficulties in doing so. Those meetings were attended by a huge number of people of a huge range of ages. There were people from traditional farming families who knew that they were not going to inherit the farm and were therefore looking for a different route in, and there were

people ranging in age from 19 to 50, who had worked on farms and were looking for alternatives.

One of our ideas would be for the new entrant enabler to gather those very statistics so that we could get on the books the number of people who wanted to get a start in the industry and track their development over time. We could record how many people we got started and find out where they were in terms of the development of their business five or 10 years down the line. At the moment, however, I am unable to give you any exact numbers.

Professor Thomas: You can get some sense of the numbers from the number of student registrations. In the late 1980s, the number of students in agriculture was declining quite steeply. That has now reversed quite significantly and is going in the other direction. However, it is quite difficult to analyse that because the analysis depends on people's perceptions of agriculture. We went through a period in which the perception was that agriculture was overproducing and we had mountains of food and so on. Now, there is a clear perception that there are world shortages of food, and the situation will get worse and more challenging, which means that agriculture will become a central strategic industry again. Young people buy into that in a big way.

Christopher Nicholson: With regard to new entrants and the current basis on which land is let, any let land on the market has only an SLDT, which is for up to five years—or for lucky people, an LDT, which might be for 10 or 15 years. That kind of basis for farming land is unlikely to attract new entrants; indeed, it is more likely to attract established farmers who, if they lose the tenancy 10 years down the line, will be able to survive. Only yesterday, I was speaking to someone who has had three limited partnerships come to an end; this family are farming year-to-year on grazing lets on those partnerships, and they have two other partnerships that are due to end. New entrants can see that unless they have an owned farm or heritable tenancy in their family background, they are probably unwise and would be ill advised to go out and bid against established farming families for a short or limited duration tenancy, because such a move will be unsuitable in establishing them long term.

Richard Blake: I want to make a couple of brief points, the first of which is in response to Chris Nicholson's reference to 10 to 15-year LDTs. We have been getting some detail on new tenancies that our members have created over the past year or two to see how the legislation has been bedding in and, although we do not yet have all the figures available to give out, we have been quite surprised at the number of LDTs of more than 20 years—and, in some cases, more than 30 years.

Secondly, as I think that Phil Thomas will confirm, the TFF is to invite a new entrant body or new entrant representatives to discuss the issues around new tenants getting into agriculture and allow the forum to better understand the situation. Indeed, I believe that that will happen at its next or next-but-one meeting.

Professor Thomas: We are trying to revisit the strand of work to which Scott Walker referred earlier and see whether we can begin to get a practical hands-on feel for what might be done for new entrants. Scott Walker has already highlighted one initiative and we have also taken an interest in land being leased from the Forestry Commission, the Crown Estate and other institutional bodies. Although, historically, many of those organisations have tended to consolidate and bring together any small properties that have become available, they have become much more receptive to the notion of keeping small properties small with the specific aim of creating opportunities for new entrants. We would quite like to encourage such an approach. Obviously, the properties need to be viable but it would be good to open up somehow or other a greater range of opportunities for people coming in.

The Convener: Thank you for that. Annabelle Ewing will ask about the issue of transitional provisions.

Annabelle Ewing: Thank you, convener, but I wanted first to add something to the previous debate. A number of helpful statistics have been referred or alluded to. Do those who compile those statistics intend to put them into the public domain to give a scientific basis to and inform not only our debate but the broader debate on the key issue of new entrants to the sector? Such a move would be very helpful.

Secondly, I have received an e-mail from a constituent—I will not take up the committee's time going into the detail and, in any case, I do not think that they wish me to do so—and the bottom line is that they are in a dispute and feel that they have nowhere to go or, indeed, nowhere they can afford to go. Does the TFF have any role in helping to mediate or facilitate dialogue between a landlord and a tenant who are having issues?

Professor Thomas: We have very little direct involvement in that regard, but we can do quite a lot to try to improve the situation. For example, in our past few meetings we have considered the opportunities that the Arbitration (Scotland) Act 2010 presents. Many people do not want to end up in the Land Court, because it is costly, time-consuming and difficult. Therefore there must be greater focus on alternative possibilities, and arbitration is clearly one strand. There may also be opportunities in facilitated dispute resolution, but we have not teased out what mechanisms might

be best for that. However, we are signed up to getting better relationships between tenants and landlords.

On statistics, any that we get our hands on will appear in the public domain.

The Convener: Thank you. We are dealing with issues in the order in which they appear in this short bill, so is everyone happy with the VAT changes element?

Members *indicated agreement.*

The Convener: Excellent. We have agreement on something, which is good. The next issue is transitional provisions.

Annabelle Ewing: I raised a point with the bill team last week about whether the succession provision would have retrospective effect given section 4(1), but I now know that the provision will apply only when tenants die on or after the date when the legislation comes into force and not when tenants die before that date on whom a notice has not been served. I understand that the majority view of the tenant farming forum, though, was that the latter position should prevail—that is, that there should be a retrospective effect for a set of circumstances that, in practice, will be tightly defined. Now that we know that the bill will not have retrospective application in that regard, will each of you indicate whether you support the bill as introduced or whether you would prefer it to reflect your initial position?

Professor Thomas: There was complete agreement in the TFF that the bill lacked clarity on this issue, so everybody will welcome the clarity that has been given in that regard. Organisations in the TFF had different views: there was greatest support for the bill having retrospective effect; but one group favoured the provision applying only when the bill came into force. That view was given largely from a legal standpoint, I think, but I will let other people comment on that. There was consensus that however the bill operates, not many cases will fall into the category in question, so although there will be a small advantage to certain people and a small disadvantage to certain people, the number of people involved will not be huge.

Christopher Nicholson: We hoped that the provision would be retrospective. I agree that only a small number of people will be involved, but we know of one or two. The succession provision was meant to be part of the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011, so the people involved were under the impression that when the tenant died, they would be able to succeed to the tenancy. However, because that provision could not be part of the order, they had to wait for this bill. If the provision is not retrospective and does not apply when the tenant has already died, they will be in a difficult position.

Richard Blake: We made our position clear in our written submission. As a solicitor, I do not, in principle, like retrospective legislation—I am not sure whether Annabelle Ewing would agree—because it does not bring clarity and leads to uncertainties in the future. As Christopher Nicholson said, only one or two individuals will have a problem in this regard. The numbers are a moving target because when a tenant has died the window is open for a maximum of 12 months, which obviously will continue to move forward as the bill process continues—some people will drop out and others might come in if they die later in the 12-month period. At the moment, advisers to a deceased tenant's family will not have a clue about what they should do by way of notice unless they see certainty in the legislation.

11:00

Annabelle Ewing: The key point is that the process involves the serving of a notice; that is a very clear element. Therefore, it would be easy to ascertain the group of people who would be impacted. Although they are not a usual occurrence in Scottish legislation, there have been retrospective applications from time to time; I took the matter up directly with the bill team last week. Therefore, this would not set any great precedent because there have been similar examples in the past. In particular, I take on board the comments of Christopher Nicholson and Professor Thomas on the fact that a very small group of people would be impacted, for whom, as Christopher Nicholson said, any amendment to the legislation could be very important.

Scott Walker: We have considered this issue long and hard and we view it on the basis that very few people will be affected. We do not view it as an issue of retrospective legislation as such, but merely as something that gives clarity to individuals who have not gone through the entire process. Provided that someone has not gone through the entire process, we believe that this aspect of the bill should still be allowed to apply to them. In that sense, we would not support what is proposed in the bill and would prefer the view that is held by most of the organisations within the TFF to apply. We recognise that that will cause difficulty for some people but the TFF agreed to the change some time ago. Because of the delay in implementing the measure, it may be happening a lot later than the industry had hoped.

The Convener: Thank you very much. Are there any other questions from members?

Jim Hume: I have a small point about retrospection applying only to landlord-initiated

rent reviews. If I recall correctly, the Government officials informed us that the provisions would apply only to any new tenancy agreements and so on that are signed after the bill's enactment. Did the tenant farming forum think that that was correct, or would its representatives be more happy with the existing agreements?

Professor Thomas: In essence, the provision reflects the legal position. From the standpoint of the Scottish Government and the regulator, there is a tendency to be uneasy about retrospective legislation. Richard Blake will comment more widely on the legal aspects. It was accepted from the outset that how the matter is expressed in the bill would be how it would work. The difference between that and the issue about the transitional provisions was that there was a clear understanding among everybody in the group that somebody, or possibly a few people, would feel disadvantaged by the transitional process. The flavour of the discussion was that it would be helpful if that could be avoided. That is the view of the TFF.

Annabelle Ewing: Can I make a technical comment that might help my colleague, Jim Hume? I fully understand why one would not seek to have a provision that impacted on the freedom to contract and was also retrospective. I do not think that anybody would ever seriously suggest such a provision. Scott Walker made the point very well with regard to the application of section 1 to transitional arrangements, in that the key difference is that the process has not been gone through—de facto, he is right. The provision is not retrospective because the process has not happened. From a legal perspective, that is the key point that I noted when I read the various submissions.

Professor Thomas: Your legal understanding is much better than mine.

The Convener: I think that we have exhausted the questions. If the witnesses would like to make any final, brief comments, they now have the opportunity to do so.

Richard Blake: The first thing that I was going to say is that I have to go, because I must give evidence to another committee on the Land Registration etc (Scotland) Bill. The evidence that I will give to that other committee covers two issues that are pertinent to tenancies and tenancy legislation. The first one—which I have raised with the TFF; I have not raised the second one yet—is that it is worth noting that, under that bill, when a limited duration tenancy is entered into for more than 20 years, it will have to undergo an application for first registration. I suspect that that will lead to additional costs for both parties—tenants and landlords. I do not know whether there has been much crossover between the bill teams.

The second issue is perhaps of more concern. As drafted, the Land Registration etc (Scotland) Bill states that all paperwork to do with the terms of a registered lease must be registered in the land register. It seems to me to be unwieldy and a little crazy that written discussions between a land agent and a tenant, rent review memorandums, decisions of court and so on must all be registered in the land register. That would not seem to assist anyone; it will only clutter up the land register.

Scott Walker: My comments are not on the Agricultural Holdings (Amendment) (Scotland) Bill as such. As I think most people will be aware, considerable tension can often exist between landlords and tenants and there are a number of areas in which landlords and tenants can come into dispute, some of which have been touched on. Whether we are talking about the rent review process, investment in holdings or waygo, there is general consensus among the witnesses on the areas that cause dispute, even if there is not a consensus on how we should solve those disputes.

The TFF wants to work long and hard to see how we can provide some dispute resolution, solve the problems that bring people into conflict with one another and avoid the costly process that has unfortunately evolved in the Scottish Land Court, with both sides feeling the need to employ a Queen's counsel and all the associated costs of that. We are looking long and hard at arbitration as a means of solving such disputes. In addition, NFU Scotland is considering other alternatives, which we still have to work through.

Another issue that it would be fair to bring to the attention of members and one that I hear often gives rise to lots of conflicts is to do with the way in which land agents act on behalf of landlords in their on-going discussions with tenants. We strongly favour the enforcement of a code of practice in that area so that everyone knows timeframes and how the process should be conducted.

In the many cases of dispute in which NFU Scotland is involved, it is extremely rare for the land agent to be breaking the law—inevitably, land agents are on the right side of the law—but we tend to find that some of their practices might leave a little to be desired and would certainly not be considered to be best practice. We would favour a strongly enforced code of practice to which all sides of the industry signed up and adhered. We would like that code to have some teeth and there to be some recognition that if either side—tenant or landlord—does not adhere to it, a dispute can be progressed at the Scottish Land Court.

The Convener: Thank you for that.

Andrew Wood: Let me update Scott Walker on a matter of which he is not yet aware. The RICS and its members have rigorous guidance on how chartered surveyors behave and conduct themselves, but not all agents are chartered surveyors. What might be called sharp practice, rather than illegal practice, is an issue not just for landlords but for tenants' agents—we act on both sides. I have agreed and will present to the TFF a paper on a code of conduct. A guidance note on a code of conduct has been produced in the past, which we will work up with the TFF. We will consider the wider range of people who are involved in advising landlords and tenants and how they might deal with issues.

The Convener: Thank you. I do not want to prejudge discussions that we will have on land reform in future, but I can certainly say that disputes that arise often point to the person in the middle—the agent, of whatever stamp. When a middleman takes an inordinate cut in the process, that creates a huge problem for the relationship between tenant and landowner. We have sufficient evidence on that to consider. We look forward to the production of codes of conduct, which I am sure will address some of the issues, but I am sure that we will return to the matter after the bill has been passed.

Christopher Nicholson: I support everything that Scott Walker said about areas in which disputes arise, in relation to which we need different and cheaper methods of resolution. We also think that the legislation requires modifying in the areas that he was talking about, such as assignation, succession, rent reviews, consents for improvement and waygo compensation.

The issue is not just the cost of taking a case to the Scottish Land Court. Richard Blake mentioned the Fleming v Ladykirk Estates case, which demonstrated that a tenancy could be assigned to a nephew. However, although the tenant won the case in the Land Court, the nephew did not become the tenant, because the landlord started an appeal process to the Court of Session and the tenant did not have the financial means to fight the case. The tenancy was lost and one more new entrant from a farming family was denied a start.

Professor Thomas: Members will appreciate that we have no shortage of items for your agendas.

The Convener: It has been useful to have a run round the issues, which has demonstrated that the two-page bill that we are considering is only the start of the committee's work. I thank all the witnesses for their candour in giving evidence, which has been useful. We look forward to seeing the cabinet secretary next week.

11:13

Meeting suspended.

11:14

On resuming—

Subordinate Legislation

Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 2) Order 2011 (SSI 2011/433)

Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 2) Amendment Order 2011 (SSI 2011/437)

The Convener: We move on to item 3, which is consideration of two Scottish statutory instruments that are not subject to parliamentary procedure. I refer members to paper RACCE/S4/12/2/2 and invite comments.

Richard Lyle (Central Scotland) (SNP): Am I correct in saying that there are two mistakes in the orders? In paragraph 8 of our paper, it says of SSI 2011/437:

"This order amends an error in the Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 2) Order, with the effect that section 13 (snares) of the Wildlife and Natural Environment (Scotland) Act 2011 comes into force on 1 January 2013 so far as not already in force on that date."

Over the page, it says that there is a drafting error in the order, because "2011" was left out of the title of SSI 2011/433, which is unfortunate. The committee has now come across six mistakes in orders—

The Convener: I think that it is probably five mistakes, because two are the same error.

Richard Lyle: I agree with you, but I thought that I should highlight the issue again.

The Convener: Okay, thank you for that. If there are no more comments, do we agree to make no comment on the orders?

Members *indicated agreement.*

The Convener: The committee will move into private for item 4, as agreed at item 1, and for item 5, as previously agreed.

11:15

Meeting continued in private until 11:31.

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