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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 8 February 2012

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
4th 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:

Graham Fisher (Scottish Government)
Stewart Stevenson (Minister for Environment and Climate Change)
Simon Stockwell (Scottish Government)
Jean Urquhart (Highlands and Islands) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 8 February 2012

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

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning. Welcome to the fourth meeting in 2012 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off mobile phones and BlackBerrys, as leaving them on flight mode will affect the broadcasting system.

We have apologies from Richard Lyle. I welcome Jean Urquhart, who is attending as a committee substitute.

Under agenda item 1, I ask the committee to agree to take in private item 6, on the European Commission's work programme; item 7, which involves consideration of the evidence session on the Long Leases (Scotland) Bill; and future consideration of evidence heard on the Long Leases (Scotland) Bill. Do we agree to do so?

Members *indicated agreement.*

Subordinate Legislation

Forestry Commissioners (Climate Change Functions) (Scotland) Order 2012 [Draft]

10:02

The Convener: Item 2 concerns subordinate legislation. The draft order has been laid using the affirmative procedure, which means that the Parliament must approve it before its provisions may come into force. Following this evidence session, the committee will be invited to consider the motion to recommend approval of the draft order.

I welcome the Minister for Environment and Climate Change, Stewart Stevenson, who is accompanied by his officials, whom he can introduce.

The Minister for Environment and Climate Change (Stewart Stevenson): I am accompanied by David Henderson-Howat, who is interested in forestry, and Dr Heike Gading, who is interested in legal matters, because what is before us is simple in principle but a little more complicated in practice.

The Convener: If you have some introductory remarks, you may fire away.

Stewart Stevenson: Section 59 of the Climate Change (Scotland) Act 2009 gives us powers, by order, to modify the functions of the forestry commissioners where we consider it necessary or expedient to do so in relation to climate change. As you know, the 2009 act created mandatory climate change targets aimed at reducing Scotland's net greenhouse gas emissions.

The substantial potential for using forests to help mitigate climate change was highlighted in the 2006 Stern report on the economics of climate change. More recently, in its 2010 report, "Scotland's path to a low-carbon economy", the Committee on Climate Change identified increased woodland cover and improved forest management as levers for helping to unlock our emissions reduction potential. That report also highlighted the very good opportunities that we have in Scotland for investments in renewable energy.

As the Executive note that accompanies the draft order explains,

"Most public bodies in Scotland are under a duty, when exercising their functions, to act in the way best calculated to contribute to the delivery of the climate change targets set in or under Part 1 of the 2009 Act."

However, as commissioners for a cross-border body, the forestry commissioners are not currently subject to that duty, although they manage a large

estate of more than 650,000 hectares on behalf of the Scottish ministers. The commissioners have voluntarily agreed to comply with the duty but, given the size of the estate that they manage, we consider it expedient to require them to manage that land

"in the way best calculated to contribute to the delivery of the climate change targets".

In fulfilling that duty, I would expect the commissioners to have regard to, for example, the range of forest management measures that are set out in the recently published forests and climate change guidelines. In addition, as we said during the passage of the Climate Change (Scotland) Bill, we want the commissioners to make full use of the national forest estate in Scotland for generating renewable energy and, where appropriate, to enter into joint ventures with developers and local communities.

It is expected that up to 2GW of capacity could be installed on the estate by 2020 through, for example, the development of hydroelectric schemes. Leasing is the traditional approach, but joint venture arrangements with commercial developers offer scope to increase returns for the taxpayer and to serve as a vehicle for stronger community engagement. There could also be potential for the self-development of small-scale schemes by the Forestry Commission Scotland.

Accordingly, the purpose of the draft order is to modify the functions of the forestry commissioners in Scotland by inserting a new subsection into the Forestry Act 1967, which would provide that

"The Commissioners also have the general duty of using land in Scotland placed at their disposal by the Scottish Ministers ... in the way best calculated to contribute to the delivery of the ... climate change targets".

I have been in correspondence with United Kingdom ministers about laying an order at Westminster under section 104 of the Scotland Act 1998 because, although the commissioners have powers to enter into joint ventures in Scotland for the purpose of exercising their powers under the 1967 act, those functions do not expressly include the development of the renewables potential of the land that is put at their disposal. The generation, transmission, distribution and supply of electricity are reserved matters and, in drafting our order under section 59 of the 2009 act, we needed to avoid anything that might be construed as relating to reserved matters. However, UK ministers have agreed in principle to lay an order in Westminster under section 104 of the 1998 act in consequence of the draft order that members are now considering. Their order specifically refers to what our order does. That will give the commissioners express powers to use land at their disposal in Scotland to generate, transmit, distribute and supply electricity from renewable sources where that would help the Scottish ministers in achieving their climate change targets.

I am sorry that there is a rather complex story about something that is relatively simple in practice, but I hope that my explanation gives members some insight into the processes and into why things have been done in that particular way. I am happy to take questions.

The Convener: Thank you very much. I will kick off. In the consultation, 70 per cent of respondents expressed positive views and 15 per cent expressed negative views. Will you give us a flavour of what the negative views were?

Stewart Stevenson: There is quite reasonable and legitimate concern among people in certain areas of Scotland about what they see as overdevelopment for wind turbines. The Government certainly considers that when it provides planning consents under section 36 of the Electricity Act 1989, under which we have executive devolved administrative powers and give consents. Obviously, part of what is being proposed is to give the Forestry Commission the opportunity to put up wind turbines. I think that some of those who expressed concerns did so about that matter but, of course, it will be dealt with elsewhere through planning law, and what has been proposed will not relieve the Forestry Commission of meeting all the requirements of planning law.

The Convener: Do the 70 per cent or so who were in favour include people who mentioned specifically the need to meet our climate change targets?

Stewart Stevenson: Yes. People are also interested in making sure that, in these difficult times, all the assets that are to hand for the Government are used to maximum economic effect. Economic benefits are associated with the powers that we are considering giving to the Forestry Commission, as are substantial benefits for the climate change agenda.

Jim Hume (South Scotland) (LD): I remember quite well the Climate Change (Scotland) Bill and amending it to take out the Scottish Government's wish to sell off large parts of Forestry Commission land. I therefore seek assurances that the order will not give powers to sell any significant amount of Forestry Commission land.

Like some people outwith the Parliament, I am also concerned about the amount of trees that are being cut down. There should be replanting to replace them, but energy development companies are sometimes not doing that. It may be difficult to balance losing trees against making gains on renewable energy from wind farms. I am interested in the minister's view on those points.

Stewart Stevenson: I have a slightly different recollection of the effect of Mr Hume's amendments to the Climate Change (Scotland) Bill, but let us pass over that, because it is somewhat ancient history. The more substantive point that he raises is in relation to felling consents, which are almost invariably associated with the requirement that there be compensatory planting. That requirement is there precisely to protect our acreage of trees in Scotland, which is currently around 17.5 per cent of our landmass, and which our targets would take to a substantially higher figure.

It is worth making the point that compensatory planting to reinstate a forest that has been felled is a bit more expensive than planting on virgin land. We are alert to that and seek to monitor whether the condition associated with felling, which is that there is reinstatement, is in fact met.

Jim Hume: On my first point, you just glanced at my recollection of the bill, but the question was about selling off and longer leases. I know that reprovisioning is going on, which is not too much of a problem.

Stewart Stevenson: Okay. Mr Hume is correct to talk about reprovisioning. Certainly, the order will have no effect on that issue, which is dealt with separately. The order makes that neither easier nor more difficult; it simply does not touch on it at all.

Jim Hume: Thank you, that has made it clear.

Claudia Beamish (South Scotland) (Lab): Minister, you highlighted to us that the order might serve as a vehicle for stronger community engagement in wind and hydro renewable energy. In view of the concerns about the relationship between renewable energy developments and communities, will you expand on how the order might create stronger engagement?

Stewart Stevenson: The order will not have a direct effect on such community engagement. The Forestry Commission has a scheme that enables communities to stake equity in developments, subject to the proviso that the combined Forestry Commission and community interest does not exceed 49 per cent. There are technical reasons why that is the case.

The order will create new opportunities by increasing the amount of renewable energy projects on Forestry Commission land, but it will not change the principles or the process. As well as wind and hydro, other renewable energy projects could be created—for example, geothermal. I am not aware of any opportunities of that kind, but the order is not restricted to any particular technology; it has a general enabling power.

10:15

Margaret McDougall (West Scotland) (Lab): I come to this fairly new, so my question might have been discussed earlier. Has an environmental impact assessment been carried out on the proposed changes? I do not see anywhere in the covering papers the percentages that we are talking about and how much land will be made available for renewable energy. Is a limit going to be set on that?

Stewart Stevenson: The order does not require an environmental impact assessment and none has been done. Proposed projects would be subject to environmental assessment, and that is the point at which it happens. Environmental assessments are often quite specific to the conditions in a local area. The forest estate—which constitutes 7-plus per cent of Scotland's landmass and is a substantial amount of Scotland—contains quite variable conditions, so it is appropriate to do assessments.

The order sets no limits, but the Forestry Commission works to guidance that ministers provide. We will certainly consider what is appropriate to provide in the way of guidance. We are not talking about a wholesale transfer of forest land to renewable energy, because that would be quite perverse. The forests themselves are a substantial contributor to the climate change agenda, so doing that would be unhelpful. In creating a renewable energy project, we have to choose the site carefully so that there is a net benefit if there is a loss of trees, as Jim Hume said.

Margaret McDougall: When will that guidance be made available?

Stewart Stevenson: I do not want to mislead you. I said that we will consider whether guidance is necessary. We have regular discussions with the Forestry Commission about its activities and I meet the responsible official at least once a month to discuss a range of issues. We will consider whether it is necessary to have a formal discussion about the subject. We are aware of what the Forestry Commission is doing.

At this stage, we are not necessarily minded to put guidance on a formal basis, but we will have the opportunity to do so if we feel that it is necessary in the future. I am sure that members of the committee and others will keep an eye on what goes on in the real world.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I want to explore the economic advantages to which you referred earlier. Looking at wind farms as an example, traditionally, the landowner would enter into a deal with the developer in exchange for rent and a share of the profits of the electricity revenues that

were generated from each turbine. Do you expect the Forestry Commission to enter into arrangements with third-party developers for, say, a wind farm, or do you expect it to be the developer?

Stewart Stevenson: Both of those could apply. It is worth saying that the Forestry Commission can already enter into agreements with third parties. The order extends its powers to take the lead and be the developer, which would mean more of the profits being retained in the public purse.

The Forestry Commission is also keen to make sure that it shares the benefits with local communities. Whenever there is development of any kind, including renewables projects, there could be disbenefits. If there are such disbenefits to a community, it is perfectly proper that part of the discussion should be about whether a benefit of a project could compensate for a potential disbenefit. I know of many communities across Scotland that have been able to benefit substantially from a share in revenue from a range of renewables projects—most commonly, but not exclusively, wind farms—and many communities have welcomed that.

Graeme Dey (Angus South) (SNP): The Executive note refers to a clear separation of functions between the specialist business unit and the parts of the Forestry Commission that are responsible for regulatory work. How do you envisage the relationship working in practice? For example, how might conflicts of interest and so on be avoided?

Stewart Stevenson: We are relatively familiar with dealing with such conflicts of interest; after all, the Scottish Environment Protection Agency is both an adviser and a regulator. There are two important factors to take into account, the first of which is that there are formal processes to make clear the basic principle that those who provide advice cannot advise themselves in their regulatory role. Secondly, the projects are all subject to local authority planning—unless they are over 50MW, in which case they are subject to Government planning under section 36 of the Electricity Act 1989. It is not as if such projects sit outside normal consent procedures; they are within the planning system. Nevertheless, you are perfectly correct to highlight the potential for tension between what might be termed the secondary objective of delivering economic value from developments—and, indeed, supporting climate change—and the Forestry Commission's broader, primary objective, which is to provide forest estate for all the purposes that we require.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I thank the minister for attending this morning.

At the moment, the Forestry Commission is under a de facto best efforts obligation to meet these requirements. What does the minister expect will be the practical concrete difference—with regard to, for example, reporting—of turning the best efforts obligation into an actual obligation on this public body?

Stewart Stevenson: As a cross-border institution, the Forestry Commission is not included in the existing duty, but it has voluntarily agreed to operate as if it were subject to it. Legally requiring it to do all this, which is what our order provides for, gives a more robust environment.

Importantly, if we put in law the requirement on the Forestry Commission in relation to climate change, that gives the Westminster legislation something to refer to when it provides the legal power to generate and distribute electricity—that is, renewable electricity, the definition of which in the Westminster order specifically excludes fossil fuels and nuclear power. As your brother constantly points out to me, that definition will include fungible matters—in other words, the burning of wood—if that is what is wished. There is a little bit of debate about definition in that respect, but that clearly falls within it.

As far as the legislative process is concerned, although the order puts into law something that is already happening, it also provides the legislative hook for Westminster to lay its own order, which I expect to happen in a matter of weeks if the Parliament approves the order that we are considering.

The Convener: I must intervene at this stage—

Stewart Stevenson: That sounds ominous, convener.

The Convener: I know that we are always being educated but, nevertheless, I suspect that many of us do not know what the word "fungible" means. We have had charrettes and ridiculous organisms in the past, but what does that mean?

Stewart Stevenson: I seek to assist. In general terms, a renewable source is something that is renewed by a natural process, and a fungible source is something that is capable of being renewed but which requires our intervention to ensure that that happens.

When a tree is cut down and burned to generate energy or heat, it is not replaced on a timescale that makes sense; there are natural processes that might or might not cause the seeds that it may have cast to the ground to renew the tree. Forestry is not like the wind, the waves and the sun, which involve natural processes from which we can extract as much as we want—in practical terms—without affecting the continuing supply, so it is fungible rather than renewable.

That is not a formal definition but a definition of the practical effect. I suggest that you ask my ministerial colleague Fergus Ewing if you wish to have a legal definition, as he apparently has one.

The Convener: Thank you for that, minister.

Jim Hume: I feel as if I have been transported on to "Call My Bluff" and I should hold up a card that says "true" or "false". Of course I believe you, minister.

To return to Graeme Dey's exploration of planning matters, you said that for a smaller renewables project, planning permission would fall within the local authority's remit.

If permission is refused by the local authority, the decision can be appealed to the Scottish Government. Larger projects would go directly to the Scottish Government anyway. I can foresee some conflicts of interest in future, in cases in which the Forestry Commission, which is a Scottish Government body, benefits from the project, and therefore the Scottish Government benefits through the public purse. How can that conflict be overcome if the Scottish Government is looking at appeals from itself and at larger projects directly?

Stewart Stevenson: There is nothing new in the potential for conflict, which is why the ministerial code contains a whole range of requirements in relation to planning. If a project is in the decision maker's constituency, for example, that person is removed from making that decision. By the same token, it is the minister responsible for energy who makes decisions under sections 36 and 37 of the Electricity Act 1989, so they are not made by the minister—me, in fact—who is responsible for the Forestry Commission. There is a separation.

In making such a decision, the minister acts in a quasi-judicial role, and must consider only matters that are put in front of him or her that relate to the planning issue in question. Other matters of which the minister may happen to aware cannot be considered. If we do not follow that process, there could be the prospect of a legal challenge.

We are quite familiar with dealing with those conflicts, which illustrate the precise point that Graeme Dey was pursuing—in a slightly different context—about separation of interest. I have a lifelong familiarity with that discourse. On one occasion my wife and I were on opposite sides of a stock exchange takeover battle, and we did not discover that until six months after the battle ended, so it is perfectly possible even when you are sleeping on opposite sides of the same bed to maintain a Chinese wall down the middle.

The Convener: Thank you for that information.

Stewart Stevenson: I thought that you would like that, convener.

The Convener: I remind members that officials cannot speak during the debate that follows under the next agenda item. If members have no further questions, I will ask a little technical question about wind farm and hydro development. Keyhole development in forests is one way of using some of the least productive pieces of ground, which are on the tops or the steep sides of hills and perhaps would not otherwise be redeveloped in future forestry. Are there good examples of that happening already? It is clearly important in large parts of the Highlands, where there are a lot of steep slopes that would probably not be redeveloped.

10:30

Stewart Stevenson: I do not have examples to hand, but I will seek to provide some in writing.

You make the important point that some of the planting that has been undertaken, both by private forest owners and perhaps by the Forestry Commission, has been on sites that are very difficult to harvest. Modern forestry practice would perhaps lead to different sites being chosen. You are therefore correct that there are opportunities for wind farms in keyhole developments, probably in areas where we would not today plant in the first place. We will seek to identify some examples, but I am afraid that I do not have any to hand.

The Convener: Thank you. We have no more questions.

Agenda item 3 is consideration of motion S4M-01903. I invite the minister to speak to and move the motion.

Stewart Stevenson: I think that we have had a good debate, so I will just move the motion.

I move,

That the Rural Affairs, Climate Change and Environment Committee recommends that the Forestry Commissioners (Climate Change Functions) (Scotland) Order 2012 [draft] be approved.

Motion agreed to.

The Convener: We will record that and confirm the committee's report in due course. I thank the minister and his officials for attending.

Long Leases (Scotland) Bill: Stage 1

10:32

The Convener: Agenda item 4 is our first evidence session on the Long Leases (Scotland) Bill. We will hear from Scottish Government officials on the content of the bill and the 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 the associated documents. Discussions on the policy aspects should be left for the minister. We expect to hear from stakeholders at our meetings following the recess on 22 and 29 February and from the minister on 7 March.

I welcome the Scottish Government officials: Simon Stockwell is bill team leader, family and property law, in the law reform division; Sandra Jack is policy officer, family and property law, also in the law reform division; and Graham Fisher is head of branch in the constitutional and civil law division.

Thank you for providing written evidence in advance of your appearance. I invite questions from members.

Graeme Dey: I have questions on two matters, which both concern common good. First, which eight councils did not respond to the consultation? Does the Scottish Government have any powers to compel them to provide the information?

Secondly, is the Scottish Government taking on trust the figure of four possible cases that might be affected by the bill? There is, for example, a degree of dispute over whether the land on which the Waverley shopping centre stands could be included, and at least one council initially indicated that it had a case but then changed its mind.

Simon Stockwell (Scottish Government): The councils that do not seem to have responded to the survey are Angus Council, Western Isles Council, Dumfries and Galloway Council, Moray Council, North Ayrshire Council, Perth and Kinross Council, Scottish Borders Council and South Ayrshire Council. It is possible—although I cannot say for certain—that some councils take the position that they have no common good property. Some local authorities have suggested that to us. We had no power to compel local authorities to respond to the survey, which was voluntary. When we wrote to ask them to complete the information, we cited no statutory powers.

We are taking on trust the figures that councils have provided to us. We have no way of checking whether properties are part of the common good. I asked Registers of Scotland whether it had any way of knowing that and it said that it did not, and the Government has no way of knowing that.

Fife Council changed its initial view after it looked further at the titles and at what the occupants had the power to do. I recollect that the council said that the tenants have the right to use the hall occasionally over the next 1,000 years but do not have exclusive occupation of the property.

Graeme Dey: Why is the Scottish Government minded only to recommend to local authorities—rather than instruct them, if you can do that—that any compensatory or additional payments that are received through the conversion of common good land to ownership should be allocated to common good accounts? Is it feasible that there could be an impact on common good land in, for example, a rural burgh that no longer has a functioning common good fund? If so, what would happen to any payments?

Simon Stockwell: I am not sure about your last point. We propose to make a suggestion to local authorities rather than put a provision in the bill because that is in line with our general approach to working with them under the concordat. We work in co-operation with local authorities rather than give them too much instruction through legislation or statutory guidance.

We sent local authorities an initial letter in which we said what we planned to do. We have had two or three replies, but we have not had significant responses that said that we should do something different.

We have said that, if a lease on the common good converts to ownership under the bill, we recommend that any moneys that accrue from that should be allocated to common good funds. If no common good fund exists, I suppose that we would tell local authorities that they should consider the best way of allocating the money so that it can continue to benefit the people of the burgh or local authority area.

In general, we do not expect the compensation to be all that much, given that most of the leases involved are ultra long. As the rental is quite low, we would expect the compensation that is payable to be quite low in most cases.

Jim Hume: I declare an interest, as I am still a member of Scottish Borders Council. I am well aware that that council has quite a large amount of common good property. You said that the survey was voluntary, so that lets the council off the hook, if you like.

I do not know whether Scottish Borders Council is unusual in having large tracts of agricultural land that is leased to tenants—I can point to Selkirk and, I think, Hawick. Has the Government thought about any implications for agricultural tenants?

Simon Stockwell: Nobody has raised with us agricultural tenancies in the common good context. The survey took place some time ago, when the previous bill was considered by the previous Justice Committee, and we chased up the local authorities that did not respond, but we can certainly chase them up again to see whether we can have to hand any more information that would help this committee. If you think that issues could arise in Scottish Borders Council's area, we will chase up that council after the meeting.

Jim Hume: There will be issues, so that would be appreciated.

Margaret McDougall: Perhaps I should declare an interest as well, as I am still a councillor in North Ayrshire, where there are common good assets and a common good fund. I am disappointed that the council did not respond.

Simon Stockwell: North Ayrshire is also one of the areas in which there are ultra-long leases.

Margaret McDougall: I will look into the matter.

What would happen if a local authority retrospectively discovered that it had common good land or some common good assets? Registers are not always up to date and people do not always have access to the records that they should have.

Simon Stockwell: I know that local authorities are constantly trying to improve their common good registers. Audit Scotland and others have put pressure on them to try to update them. To reflect the situation that you raise, when we write to local authorities—if and when the bill is passed—we will have to include something to say that, if an authority discovers that a piece of land was, after all, part of its common good assets, it should look to see whether the compensation can be moved into its common good fund. We would also emphasise, again, that authorities should be making every effort to try to identify common good property. That is in line with the general guidance that they are getting at the moment.

Annabelle Ewing: Concerns have been raised about the fact that, although Peterhead harbour has been excluded from the revised bill, common good property has not been. Will you comment on the reasoning behind that? I am not suggesting that the two are analogous but it would be good to know the reasons behind the non-exclusion of common good property from the revised bill.

Simon Stockwell: The point that was raised by Peterhead harbour was reflected in representations that agents acting for the harbour made to the previous Justice Committee. They said that, if the bill proceeded without an exemption for harbours, that could have an adverse impact on the operation of the harbour at Peterhead, because the south breakwater has been leased for 999 years.

One of the questions that we considered in that regard was whether the leasehold conditions could convert under the bill as well. The arrangements at Peterhead are that, although the breakwater has been leased for 999 years, there are leasehold conditions that allow the harbour authority to continue to exercise functions in relation to the south breakwater, to ensure that the harbour can continue to operate safely.

When we considered the issue, we thought that it would be difficult to ensure that the leasehold conditions could convert under the bill, and we also asked some other ports and harbour bodies whether they had particular concerns about the potential implications of the bill for the operation of ports and harbours. Most of them said that they did not, but one said that they did. It could not point to any particular examples, other than Peterhead, but it thought that the issue that Peterhead raised about the possibility that the leasehold conditions might not be able to convert might have negative implications.

The conclusion was that, as we did not want the bill to impact adversely on the operation of ports and harbours, we would exempt harbour authorities. Of course, the exemption is not just for Peterhead; it is for harbours generally.

Unlike the situation with Peterhead, where concerns were raised about the fact that the harbour might not be able to continue to operate, the arguments that were made with regard to common good property and other areas that have not been exempted from the bill did not concern whether the land could continue to be used; they were more to do with the benefits to the people of the burgh.

Margaret McDougall: Many local authorities are trustees for funds. What happens in that respect? Will they be bound by the conditions of the trusts? I imagine that they would be, but what happens if land is involved in that?

Graham Fisher (Scottish Government): Do you mean land that is owned by the local authority?

Margaret McDougall: No, the land could be owned by a trust, but managed by the local authority.

10:45

Simon Stockwell: An arm's-length trust?

Margaret McDougall: No. If somebody has left land to the local community and it is managed by the local authority, any leases on that land are managed through the local authority.

Graham Fisher: The bill generally affects the owner of the land that is let when the leasehold interest converts into ownership in the hands of the tenants. Generally, that owner will be affected in the same way as any other landlord.

Simon Stockwell: As a principle, if local authorities get any compensation as a result of common good land converting to ownership, we would say that they should allocate that to the common good fund. Your point is that, if a local authority owns land in trust that would convert to ownership under the bill, the compensation should benefit the people of the burgh or local authority rather than go into the local authority's coffers. We can certainly reflect on that point when we write to local authorities once the bill is enacted. We were initially talking about common good. If there are other scenarios that are similar to common good but are not called common good—if land is held in trust in a similar arrangement—we could reflect that in the advice that we give local authorities.

Margaret McDougall: There are bequeathments that are set up as trusts.

Simon Stockwell: Yes. We could reflect that when we give advice to local authorities after the bill is enacted.

Claudia Beamish: Good morning. I have a question on a different point. Is there any concern about the preservation of sporting rights under section 8 when a tenancy moves to ownership? For instance, if there was a change of use of the land and the person who took on the ownership did not want the former landlord to have the right to come on to the land, what would happen?

Simon Stockwell: That point has not been raised specifically with us during the consultation or the scrutiny of the bill. I thought that we might get more comments about the preservation of sporting rights, but we have not had any so far. If a new owner discovered that someone had sporting rights and they were unhappy about that, we would probably have to leave it up to a private arrangement between the new owner and the holder of the sporting rights—for example, if the new owner wanted to buy out the holder of the sporting rights. The principle behind the bill is that a landlord who has sporting rights at the moment will be allowed to maintain those sporting rights—his or her rights will continue to be protected under the bill. If somebody was unhappy with that, they would have to buy out the holder of the sporting rights through a private agreement.

Annabelle Ewing: I have some more technical questions further to concerns that have been raised by different bodies. The first concerns the need to preserve the standard security on conversion. From a very legalistic perspective, concern has been expressed that the language in section 6 may not be sufficiently clear. Will you comment on that?

Simon Stockwell: Yes. Over the past couple of days, we have looked at the points that have been raised by the various consultees. I have a lawyer—Graham Fisher—sitting to my left, so I hope that I get this right. We think that the answer to the point that was raised by Morton Fraser is that the relevant provision is in section 6(2) rather than sections 6(3) and 6(4). Section 6(2) states:

> "The converted land is subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject."

That is certainly the intention. If the tenant is granted a standard security, it should transfer to his new right of ownership under section 6(2).

The point has also been raised that the landlord might have granted a standard security. What would happen to that, come the appointed day? In most cases, the landlord's interest in these leases will be very low. The typical rental for an ultra-long lease, as shown by the survey that was carried out by the Scottish Law Commission, is less than £5 a year, on which the landlord would probably not be able to raise much of a loan or advance. We have already excluded from the bill cases in which the landlord has a significant interest by excluding leases for which the rental is more than £100 a year. We do not think that there is an issue. It has been suggested that we should write to the British Bankers Association just to check that it is content. We will do that later this week.

Annabelle Ewing: I have another technical question on the concerns that consultees have raised about variable rent. There is a question in the submissions about whether there is sufficient clarity on how variable rent is to be calculated so that, where appropriate, the figure goes beyond the £100 threshold and therefore outwith the scope of the bill. It would be helpful if you could clarify the position.

Simon Stockwell: We think that we are okay on that and that there is sufficient clarity. The interpretation that Brodies gave of the provision is in line with ours. However, we will double-check that and make certain that the provision captures what it needs to capture. There is an important point. The main point that Brodies and others have raised on the £100 exemption is that we need to be absolutely certain that, if there are variable rentals as a result of turnover, the leases can be exempted when the landlord has a significant interest. As I said, we think that we have got it right, but we will double-check that and report back to the committee.

Annabelle Ewing: I have one final technical point, which I think was raised by the Faculty of Advocates. The faculty is concerned that certain

time limits will be prescribed by way of subordinate legislation, after the bill is passed, and suggests that it might be more helpful to have the provisions set forth in the bill. Will you comment on that?

Simon Stockwell: To be honest, we think the reverse of that. Our view tends to be that it would be better to consult on time limits so that everybody can see the proposals and has a chance to comment on them. There is a lot of technical detail there. Before we came into the meeting, we were discussing what would happen if, for example, a case is appealed. It might be difficult to lay down precise provisions in the primary legislation.

We will have to consult on various issues, anyway, once the bill is passed, such as the draft forms of notices. It will take time to implement the bill. Therefore, rather than put something in the bill now that we might need to change later if we discover that people have different views from ours, it is preferable to leave the bill as it is and to carry out a consultation on the time limits so that the key bodies such as the Faculty of Advocates, the Law Society of Scotland and the keeper can comment on what is proposed.

The Convener: I have a question on cumulo rental, which is mentioned in paragraph 7 of your submission. Can you give us more detail on the number of cases in which a single rent is payable for two or more leases? Are there many such cases and, if so, are they the kind of thing that should get in the way of attempts to deal with rentals that are under £100?

Simon Stockwell: There are quite a lot of cumulo rentals. The Scottish Law Commission report gives a figure but, unfortunately, I cannot remember it off the top of my head. However, they are common in traditional ultra-long leases, so they will be a feature.

On the second part of the question, we suspect that the provisions will not have much direct impact because, in the vast majority of cases, rentals in ultra-long leases, particularly traditional ultra-long leases, are very low. Once the cumulo rental has been allocated, we will probably find that, in many cases, we are talking about rental of well under £5 a year, so there will not be much of a practical impact. However, this time round, we amended the previous bill because it is at least theoretically possible that there could be cumulo rental that, once it has been allocated, comes to more than £100. Those landlords would still have a legitimate interest in the property and should be given the right to seek an exemption in the same way as other landlords with a rental of more than £100. In practice, we do not think that there will be many such cases, given that, in traditional ultra-long leases, the rental is very low.

The Convener: Do members have any further questions for the bill team?

Annabelle Ewing: I have a final question about a point that the Scottish Law Agents Society raised in its submission. The society felt that it would be useful for the committee to explore European convention on human rights compliance. I note that the Scottish Government feels confident that there is no compliance issue, but will you comment on that, in the light of the fact that the bill interferes in principle with property rights, albeit that the tangible value that is involved seems to be low?

Simon Stockwell: We provide some information on ECHR compliance in one of the accompanying documents, which summarises our in-house analysis. The Scottish Law Commission considered ECHR compliance when it produced its report and we have had subsequently to look at it as well because some of the issues that have arisen have led to an increased number of exemptions in the bill, which raises the question whether we can justify an exemption for lease X but not for lease Y. We have gone into that in some detail and, because we have come up with justifications for the various exemptions that we have added, we have concluded that we are in line with the ECHR.

On the ECHR generally, the issue is not just about converting the leases to ownership but about providing appropriate compensation and additional payments to landlords. The main compensation is likely to come from the rental; in other words, from asking the landlord how much rent they are getting at the moment, which converts to a capital sum. However, there is also potential for additional payments if a landlord thinks that other rights would disappear. As we mentioned earlier, in the new world there will also be the right for landlords to convert certain things into burdens in the title deeds, including sporting rights.

We have gone through the ECHR implications in some detail. To be honest, it has been the bane of my life at times. Given the various provisions in the bill—the fact that there is compensation, potential for additional payments and the right to preserve certain rights—we think that the bill complies with the ECHR.

Margaret McDougall: You mentioned “certain rights”. Can you give me an example?

Simon Stockwell: Sporting rights are one example; those rights could convert under the bill.

Margaret McDougall: Do you mean sporting as in gaming or fishing?

Simon Stockwell: Yes. I mean fishing rights or the right to shoot certain types of bird.

Margaret McDougall: What about rights of way?

Simon Stockwell: They, too, could potentially convert.

The Convener: There are no further comments from members. We have—remarkably—taken less time than I had expected. It is an interesting bill for the committee, and we thank the bill team for its input. I am sure that our witnesses at the next two meetings will come up with many more conundrums for us to juggle with.

Subordinate Legislation

Specified Products from China (Restriction on First Placing on the Market) (Scotland) Amendment Regulations 2012 (SSI 2012/3)

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2012 (SSI 2012/4)

Fodder Plant Seed (Scotland) Amendment Regulations 2012 (SSI 2012/5)

Conservation of Salmon (River Annan Salmon Fishery District) (Scotland) Regulations 2012 (SSI 2012/6)

10:57

The Convener: The next item on the agenda is subordinate legislation. Four instruments that are subject to the negative procedure are listed on the agenda. One relates to specified products from China, another deals with prohibited methods of fishing, fodder plant seed is the subject of the third and the fourth deals with salmon conservation in the river Annan fishery district. No motion to annul has been lodged in relation to any of the instruments. I refer members to paper 3. Do members have any comments on the instruments?

Graeme Dey: On the final instrument—SSI 2012/6—it may be an obvious question, but I presume that when we are talking about the cause of the problem, the implication of what we are being told is that—

The Convener: Do you mean the River Annan salmon fishery district instrument?

Graeme Dey: Yes. I am sorry—I should have said that. The indication is that the problem is being caused by people not adhering to the voluntary catch code. This is a point of information, but it would have been nice to have been satisfied that no netting is going on on the river, whether sanctioned or unsanctioned. It would also have been nice to know what is the drop in stocks that is causing concern and prompting the regulations.

The Convener: That is a good question. I am pleased to see a catch-and-return policy in this fishery board area. I think that we will hear in due course about other areas where that ought to be happening—for example in parts of the Highlands, where it is ridiculously possible to catch salmon at the early spring runs.

The regulations are to be welcomed. We can write to the ministers on the points that were

raised by Graeme Dey. Are there any other points to do with the salmon regulations?

11:00

Claudia Beamish: It has been pointed out to me that in South Scotland there are long-standing traditional rights to fish. However, if caught fish have to be put back for conservation needs at particular times, we will have to accept that.

Jim Hume: As another South Scotland MSP—we seem to be as common as muck nowadays—

The Convener: Speak for yourself.

Jim Hume: Absolutely. I am from a farming background where what I said is not an insult but a compliment, because "Where there's muck, there's money."

There is a lot of salmon fishing with nets in the Solway, which is in the conservation area. I wonder whether the ministers have a view on the implications of that. It is an old tradition to net salmon when they are in the sea and heading towards the River Annan, rather than in the river.

The Convener: We will try to find out.

We turn to the Clyde cod exclusion order, SSI 2012/4, which I had dealings with in a previous session of Parliament. It is of interest not only to me but to people in the south of Scotland. The order relates to two areas that are set aside in the spring in which cod cannot be caught. I am interested in how the boundaries of the areas were drawn. I have thought about this not constantly, but over several years because predecessor committees have agreed to a no-take zone for the spring in part of Lamlash Bay that is outside the cod-restriction zone. It has never been clear to me why the zone's boundaries were chosen. Prawn trawling and the like are not excluded from those areas, so why that particular set of boundaries? I would like us to find out.

Graeme Dey: In the same spirit of inquiry, convener—although this might show my ignorance of the subject—I note from the briefing paper on the order that it

"applies only to Scottish and relevant British fishing boats"

fishing in the area. Is there an issue with foreign boats fishing in the area?

The Convener: I cannot answer that definitively, but I believe that the order refers to inshore waters, from which foreign boats are excluded.

Annabelle Ewing: The briefing paper indicates that there are certain exceptions that are not covered by the prohibition, which include fishing

"with scallop dredges, creels and ... trawls used for fishing for Norway lobsters".

I imagine that they would not apply to foreign-owned vessels, because the area seems to be inshore.

The Convener: Indeed.

Graeme Dey: If the order applies

"only to Scottish and relevant British fishing boats,"

that would tend to open the door to the possibility of foreign vessels fishing.

Annabelle Ewing: Yes. I see how the order is drafted.

The Convener: I do not think that there is a quota or whatever in that area, but we will find out.

SSI 2012/3 is to do with genetically modified rice. I asked a lot of questions about this when the issue first arose in 2008. The background is that an agricultural university in China developed the strain Bt63 rice, but it has not been approved anywhere else in the world for commercial growing. However, it appeared in some imports from China from 2005 onwards, and in 2007 the UK imported from China almost 1,000 tonnes of rice-based products in which the Bt63 gene had previously been found.

The European Union was involved in an alert that led to the directive that stops importation of products containing rice with the Bt63 gene. The regulations are a continuation of previous regulations, because there is concern that this particular rice is still being grown in China. However, I note from an e-mail that I have received:

"China's major financial weekly the Chinese newspaper the Economic Observer quoted on Friday, Sept 23rd, 2011, an information source close to the Ministry of Agriculture that China has suspended the commercialisation of genetically engineered ... rice. ... It has also been found that many of the GE rice lines in China are embedded with non-Chinese patents".

In other words, there are developments in genetically engineered rice in China, but probably multinational companies from elsewhere have patented them in the first place.

The EU was left with the difficulties that I referred to earlier. In that regard, a letter from the Food Standards Agency on the Bt63 gene states that

"the European Food Safety Authority has been unable to assess its food safety risk because of lack of data on the GM crop."

The FSA issued a food alert at that time, which has been continued. It reminds us that the understanding of this science is still in its infancy, but the issue is taken seriously in the EU.

Margaret McDougall: Does it mean that rice of that type that is already in Scotland will be impounded?

The Convener: Yes. The cost of that will be placed on the importer. It has been suggested more widely that the EU ought to ask the Chinese Government for compensation for such importers, but that is outwith the scope of what we are considering. So, it is up to the people who have imported the prohibited rice to remove it. If tests show that there is any quantity of Bt63 rice in imported rice or rice products for human consumption, such as rice sticks and noodles, then it must be dealt with according to the continued alert, which I welcome.

I do not think that we need to say any more about the four instruments. Is the committee agreed that it does not wish to make recommendations in relation to the instruments?

Members *indicated agreement.*

The Convener: As we agreed, we will now move into private session. I thank all those who attended and have already left.

11:07

Meeting continued in private until 11:34.

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