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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 15 May 2013

Session 4

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CONTENTS

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
17th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Graeme Dey (Angus South) (SNP)

COMMITTEE MEMBERS

*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Claudia Beamish (South Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
*Alex Fergusson (Galloway and West Dumfries) (Con)
*Jim Hume (South Scotland) (LD)
*Richard Lyle (Central Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sir Crispin Agnew QC (Crofting Law Group)
David Balharry (Crofting Commission)
Derek Flyn (Scottish Crofting Federation)
Richard Frew (Scottish Government)
Kenneth Htet-Khin (Scottish Government)
Sandy Murray (NFU Scotland)
Tavish Scott (Shetland Islands) (LD)
Jean Urquhart (Highlands and Islands) (Ind)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 15 May 2013

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

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning and welcome to the 17th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. I remind members and the public to turn off mobile phones, Blackberrys and so on because leaving them in flight mode or on silent will affect the broadcasting system.

Item 1 is for the committee to decide whether to take item 3 in private. Are we agreed?

Members *indicated agreement.*

Crofting (Amendment) (Scotland) Bill: Stage 1

10:01

The Convener: I welcome Jean Urquhart to the meeting. We also expect Tavish Scott to attend for stage 1 of the Crofting (Amendment) (Scotland) Bill. We will hear from the Scottish Government's bill team, and then from stakeholders.

I welcome the bill team to the meeting. Richard Frew is the policy adviser and Kenneth Htet-Khin is the senior principal legal officer. Richard Frew will give a brief introduction.

Richard Frew (Scottish Government): Thank you for inviting me to give evidence on the Government's Crofting (Amendment) (Scotland) Bill, which was introduced to Parliament on 9 May. I will briefly cover the key points, as I know that the committee has questions.

The main purpose of the bill is to allow owner-occupier crofters to apply to the Crofting Commission to decroft their land, as landlords and tenant crofters already can under the Crofters (Scotland) Act 1993. Parliament has recognised the need for the bill to focus on that single issue.

At the moment, crofting legislation allows an owner-occupier crofter to apply to decroft only when the croft is vacant. However, owner-occupier crofters, like tenant crofters, are required to meet their duty to be resident on the croft or to reside within 32km of it unless, of course, they have consent from the Crofting Commission to be absent. That means that the existing provisions in the 1993 act do not work as intended. The Government has therefore introduced a bill that includes stand-alone provisions—proposed new sections 24A to 24D—to be inserted into the 1993 act, which should be simpler and clearer for owner-occupier crofters, their legal advisers and others involved in the process to follow.

As well as allowing owner-occupier crofters to apply to decroft all or part of their croft—whether or not the croft is vacant—the bill allows the commission, in considering such applications, to give decrofting directions.

The bill also allows the commission not to consider a decrofting application if it has already required the owner-occupier crofter to submit proposals for letting the croft. That will apply when action is being taken by the commission to address a breach of duty under section 26J of the 1993 act, and mirrors the current legislation when the commission requires letting proposals from landlords of vacant crofts.

The bill applies section 25 of the 1993 act to owner-occupier crofters as it applies to tenant crofters and landlords, but disapplies parts of section 25 that relate only to tenants—for example, the tenant crofter exercising their right to buy the croft under section 12(2) of the 1993 act, in cases where the owner-occupier crofter already owns the croft.

The bill provides the same right to owner-occupier crofters as that which is afforded to tenant crofters, to decroft the site of a dwelling-house on the croft, where they have not already decrofted a house site. It also provides that, in the event of a breach of conditions relating to a decrofting direction, the direction will be revoked. The sanction in the 1993 act for tenant crofters is that the croft is declared vacant, but that sanction is inappropriate for owner-occupier crofters, since section 23(10) of the 1993 act provides that the croft is not vacant if it is occupied by, among others, an owner-occupier crofter.

Section 2 and the schedule to the bill make consequential amendments to the 1993 act and to the Crofting Reform (Scotland) Act 2010, as a result of proposed new sections 24A to 24D. Those will mainly add cross-references to include the new provisions.

Section 3 of the bill will enable the new legislation to be applied retrospectively, as if the new provisions had commenced when the definition of owner-occupier crofter was introduced on 1 October 2011 by the 2010 act.

Those provisions are necessary to address concerns that the commission had acted outwith its powers, and other concerns relating to the subsequent transfer of title to land that had been subject to a decrofting direction. The bill therefore directly addresses the issues relating to the 159 decrofting directions that had already been issued before the commission stopped processing applications.

The bill also provides for the 50 applications that have been held in abeyance by the commission to be treated as competent applications. That means that they can be processed once the bill's provisions come into force—subject, of course, to Parliament's approval of the legislation. That will ensure that all 209 applications that have already been processed or which are being held in abeyance do not require to be resubmitted, thereby avoiding unnecessary administrative burden, and expense, on both the applicant and the commission. In effect, the retrospective provisions will place individuals who are in the owner-occupier decrofting process where they expect to be.

On 25 February 2013, the Crofting Commission published a note indicating that owner-occupier crofters could no longer apply to decroft their land. During the 42-day appeal period before 25 February—that is, from 14 January—it is possible that someone relying on the commission's statement may not have appealed against a decrofting decision or direction in the belief that their appeal may, like the application and the decision, be incompetent. For fairness, therefore, section 4 of the bill enables an appeal to be made, within 42 days of the legislation coming into force, on the 22 applications that are affected.

The bill also contains transitory provisions to ensure that the provisions in the 2010 act relating to the crofting register apply equally to owner-occupier crofters' decrofting applications. That means that registration will remain voluntary until 30 November this year, one year after the register commenced, with the requirement to register croft land subject to a regulatory application being effective thereafter.

Finally, sections 6 and 7 of the bill are self-explanatory. Section 6 will provide for the provisions to come into force following royal assent, which will allow the legislation to address owner-occupier crofter decrofting applications as early as possible.

At this stage, I will mention very briefly that there are also two things that the bill does not do. It does not address the definition of owner-occupier crofter in section 19B of the 1993 act; nor does it address another issue that has been raised—namely, that of multiple owners of distinct parts of the same croft, since that relates more to the definition of owner-occupier crofters than to the matter of decrofting by owner-occupier crofters, which is addressed in the bill. To do that would widen the bill's scope beyond justification for the expedited procedure to be applied to the bill.

I hope that that is a useful overview of the bill; we are happy to take any questions.

The Convener: In order to set the scene, has the bill team any response to make to the argument that was made by Brian Inkster? He makes the case that because the current law can be read as saying that owner-occupied crofts could be considered to be vacant, decrofting applications from owner-occupiers could still be allowed.

Richard Frew: Yes—we have considered Brian Inkster's view. It is not surprising that different people reach different conclusions on the issue, as a number of people who are involved in this have done. It is clear to us that, although that issue is worth considering, section 23(10) of the 1993 act clearly sets out that a croft is not vacant if an owner-occupier crofter is on the croft.

The Convener: Could the problem have been solved with subordinate legislation?

Kenneth Htet-Khin (Scottish Government): Other legal fixes were considered, but we felt that the bill is the most appropriate way for Parliament to scrutinise the bill and to meet an expedited procedure.

The Convener: Did the Government consider subordinate legislation, which could have been effected within about 40 days?

Kenneth Htet-Khin: Yes, subordinate legislation was considered, but we felt that a bill was the most appropriate way.

Alex Fergusson (Galloway and West Dumfries) (Con): May I follow up on that point? I would like to know the reasoning behind that decision, if it is possible to give it. Kenny Htet-Khin suggested that a bill was considered to be the most appropriate way of addressing the matter, but did not say why.

Kenneth Htet-Khin: I am unable to give the legal advice that was provided to deal with that point. All other alternatives were fully considered.

Richard Frew: It might help the committee to understand our position if we clarify the point further, since—as Kenny Htet-Khin quite rightly said—legal advice is at issue. It is no doubt apparent to the committee, as it is to us, that provisions in the 2010 act would allow order-making powers to amend crofting legislation, such as those in section 54 of the bill. Those are for specific purposes, although they would not necessarily be appropriate for this particular issue.

Graeme Dey (Angus South) (SNP): For clarity, the convener has made the point that if subordinate legislation had been used we would have been looking, potentially, at taking 40 days to fix the problem. What is the timescale—all going well with the bill—for solving the problem?

Richard Frew: Clearly, now that the bill has been introduced to Parliament, that is a matter for Parliament. We will work with Parliament as much as we can to assist that process; I am sure that the minister will be equally happy to do so. As the minister said in the chamber on 28 March, the intention is to have the legislation through by the summer recess.

The Convener: Tavish Scott, whom we welcomed in his absence, will now speak.

Tavish Scott (Shetland Islands) (LD): I apologise for being late. I went to the wrong room, which was due to my incompetence, rather than to anyone else's.

I want to ask two questions. First, my understanding of this—Mr Frew will correct me if I am wrong—is that the Crofting Commission's own legal advice found that there were faults in the 2010 act, and that that is why this problem occurred. Is that a fair assessment?

Richard Frew: Yes—that is fair.

Tavish Scott: Secondly, after your discussions with the commission—and given that it is a Government-created body—is it now comfortable with the Government's proposals for solving the problem?

Richard Frew: Yes. I have had on-going discussions with the commission. As a non-departmental public body, the commission exists to assist in delivery of Government policy. The committee will hear later from David Balharry from the Crofting Commission. I have no reason to believe that there are any differences, in terms of the action that is being taken, between the Government and the commission.

Tavish Scott: I take your point that you are not going to share legal advice with parliamentary committees. To put it the other way round, has the commission shared its legal advice with the Government, in respect of its assessment of the Government's proposals to resolve this issue?

Richard Frew: When the commission received that legal advice, it had to make a decision there and then. The commission put what I consider to be an adequate notice on its website to state its position. I do not think that there was any need to divulge the content of the legal advice. Clearly, that would be a matter for the commission.

Tavish Scott: I was referring, rather, to the situation now. Is it your understanding that the commission has taken legal advice on the Government's new proposals to deal with the situation, and have you discussed that with the commission?

Richard Frew: It was very useful to have a member of the commission assisting the bill team; unfortunately, that person could not be here today. We certainly worked closely with the commission to ensure that the new proposals will work for everyone involved.

Tavish Scott: I have a final question on Mr Frew's final point in his opening remarks about crofts that are vacant and held by joint landlords. I have presented evidence to the minister on that, as I know other colleagues from across Parliament have. If I picked you up right, Mr Frew, you said that that could not be dealt with in the bill because it would widen the bill's scope more than was considered appropriate. When will it be dealt with? I am sure that you well appreciate that it is a very significant issue. What it really means now is that lots of crofters are being told, "Consult your lawyer" and, in the meantime, nothing happens.

10:15

Richard Frew: The Government has not advised crofters to consult lawyers; that would be a matter for individual crofters or, in this case, people who are not necessarily crofters but who hold distinct parts of the same croft and therefore do not fit within the definition of owner-occupier crofter in section 19B of the 1993 act. When and whether we address that, and whether particular legislation is introduced at any time is really a matter for the minister, rather than for civil servants, to determine.

Tavish Scott: I appreciate that that is a policy issue for ministers, but would it be fair to say that this is a significant issue? Do you recognise that it is now a prevalent issue across the crofting counties that is causing significant challenges to lots of people who are trying to go about their normal lives?

Richard Frew: I would not necessarily say that the issue is "significant". The commission has considered ways in which it could regulate such people in certain circumstances. For example, on submission of a regulatory application, my understanding is that the commission has advised that people who were, in effect, owner-occupiers prior to the 2010 act can apply jointly to the commission, as long as they do it collectively as landlords.

Tavish Scott: The point is that those people are not agreeing to act jointly in that way. If that was happening, I would agree with you entirely.

Richard Frew: I would hope that everybody would be able to work together at some point to recognise the benefits.

Tavish Scott: We do not live in a perfect world, Mr Frew, but thank you for your answers. I appreciate what you have said.

The Convener: That is an interesting issue that might affect some crofters. We do not know how many—unless Mr Frew can give us a ballpark figure at the moment.

Richard Frew: I am not aware of the exact figures, but I am sure that the commission has a list of the different types of crofter.

The Convener: Okay. We will move on to the effects of the cessation in approving decrofting applications.

Claudia Beamish (South Scotland) (Lab): As you will know, when the commission learned of the potential legal problem, it suspended consideration of 50 decrofting applications from owner-occupier crofters. The commission has also stopped accepting further decrofting applications from owner-occupier crofters. I ask you to comment on that, as appropriate. If the bill were passed before the summer recess—which is, I understand from today's evidence, a possibility—when might the commission be able to decide on the decrofting applications that are currently before it and when would it be able to open the door to new decrofting applications from owner-occupiers? What practical problems are the delays causing and what help can be given to those who are affected?

Richard Frew: You asked a number of questions, but I will try to address them.

Claudia Beamish: I am happy to ask them one at a time, but I wanted to give you a chance to respond generally.

Richard Frew: The commission has undertaken initial checks on the 50 applications that have been held in abeyance. If Parliament passes the bill, there is no reason to delay processing any of them. Likewise, there is nothing to prevent owner-occupier crofters from submitting their applications—in accordance with section 6—the day after the bill receives royal assent.

Claudia Beamish: I am sorry to have asked you a range of questions all at once. Are practical problems being caused by the delays and, if so, what help can be given?

Richard Frew: I think the minister alluded to a number of the known problems. When the issue arose, it was very helpful for representative organisations to provide information on what is happening on the ground so that we had examples of why legislation was needed quickly.

I am certainly aware of a young couple who have been unable to take over the decrofted part of an owner-occupier's croft to build a house and start a new family. There are other similar issues, but general crofting transactions could be affected.

The Convener: We move on to the timescales for preparing the solution in the bill.

Jim Hume (South Scotland) (LD): Good morning, gentlemen. As Richard Frew has pointed out, Paul Wheelhouse made a statement on the need for the bill on 28 March—or 48 days ago. There has been no formal consultation, which is very unusual for any piece of legislation from any legislating Government, and there is always the concern that one prepares at haste and repents at leisure. Indeed, that is probably what happened with the 2010 act.

I am concerned that the legislation is being rushed through and that due process is not being followed. What consultation have you had with stakeholders?

Richard Frew: Right from the first day the issue arose, we have had on-going consultation with the Crofting Commission and key stakeholders such

as the NFU Scotland and the Scottish Crofting Federation. A number of concerns have been expressed not just on this issue but on how things might be taken forward. Parliament will adopt an expedited or fast-track procedure that will nevertheless give it a fair time to consider and scrutinise the bill. It will have more time than it would have for, for example, an emergency bill. From that perspective, we are in a better position.

As for the Scottish Government's consultation, we face the same timescale as everyone else, but we have tried to consult as widely as possible within it. Only on Friday, just after the bill was published on the website, I met a number of key stakeholders to discuss the detail. That meeting was very useful in allowing us to gather thoughts on the proposed legislation.

Jim Hume: Okay. Am I, however, correct in thinking that you said earlier that you are not 100 per sure how many crofts will be affected by this bill? Would not full consultation have teased out the figures before we had reached this point?

Richard Frew: That is not necessarily the case, because such things—for example, the number of applications that will be submitted in any year and the number of people out there—are very difficult to assess. Unless every single person comes forward, we will never have the exact figure. We have done as much as we can to address the problem, irrespective of the number of people involved, and I think that the bill represents a suitable way forward in that respect.

Jim Hume: You have obviously taken legal advice, but do you think that the bill team and the Government lawyers have had enough time to consider all the bill's implications or is more input needed?

Richard Frew: I am happy to invite my legal colleague to answer that question.

Kenneth Htet-Khin: The bill has been fully considered by the legal team. I, too, was at Friday's meeting, which we both found very helpful in receiving views from stakeholders, including a lawyer who I think will be giving evidence later.

Jim Hume: Thank you.

Richard Lyle (Central Scotland) (SNP): On Jim Hume's point that the legislation is being rushed through, do you agree that the 50 applicants in question want you and the Government to rush it? Mr Frew mentioned a young couple who are being held back because they are unable to build their house.

Richard Frew: You are absolutely right. The 50 applicants will have submitted the decrofting applications for good reasons, which could include some sort of development. However, the issue is not only the 50 applicants. There was general acceptance by everybody involved—not least Parliament—that the issue had to be addressed as quickly as possible. Parliament recognised that need.

Alex Fergusson: I will comment on a concern that I think some of us have about the bill. I suspect that, with the bill that became the 2010 act, Mr Frew and other officials said exactly what they are saying now: that all the bases had been covered, all the advice had been taken and everybody was comfortable. That is more a comment than anything else.

I declare my hand as a complete layman in crofting legislation. I come from the extreme south-west of Scotland, so crofting to me is a different world altogether. However, I realise that we are in a complex area for all sorts of reasons.

Multi-ownership, which Tavish Scott mentioned, is one of many issues that still need to be resolved. The whole thing seems to me to be a bit like the Hydra—you cut off one head and two others appear. With crofting, we get rid of one problem and two others appear in its place. What other issues have been identified during the process for the 2010 act and the recent process, and what timescale might the Government have in mind for addressing them?

Richard Frew: I am certainly aware that there are other issues, albeit that they are not of the scale of the one that is dealt with in the bill. There are issues not just with the 2010 act, but with the 1993 act and of course, the Crofting Reform etc Act 2007, which came between them. It is everybody's responsibility, from the development of draft legislation—in this case, in the Scottish Government—and as it passes through Parliament to ensure that legislation is fit for purpose when it is passed and that it delivers what it is intended to deliver. We all need to work closely to ensure that that is the case with this bill, focused as it is.

There are examples. One that I would like to have a look at, as I mentioned earlier, is the definition of "owner-occupier crofter" in section 19B of the 1993 act. Some people do not necessarily fall within that definition in the legislation. Whether they need to fall within it could clearly be considered. Other issues in the legislation are mostly to do with cross-references and how various sections interact, an example being the register provisions. It would be useful to look at those issues but, as I said, when and how that happens is a matter for ministers.

Alex Fergusson: As a brief follow-up question, what priority do those issues have and how important is it to address them? I am afraid that I genuinely do not understand that. I presume that, if the problems are important, they ought to be addressed fairly soon.

Richard Frew: As I said, it is for ministers to decide when such matters are addressed. I am sorry if I sound repetitive. Before we introduce any legislation, we have to consider carefully what it would do and what issue we are trying to address. If something is highlighted as being a particular problem, we would clearly want to consider not just legislation, but other ways of resolving it. For example, that might be done administratively, which I think would be the first choice.

Alex Fergusson: Thank you. I will leave it to others who are more expert than I am to follow that up, if needed.

The Convener: Jayne Baxter, would you call yourself more expert than Alex Fergusson?

Jayne Baxter (Mid Scotland and Fife) (Lab): This is not the moment for me to appear if you are looking for an expert—I am not the expert on this committee.

What other options would be open to the Government when it considers resolving the issues? Mr Frew, you mentioned legislation and administrative processes, but can you give me some examples of that? Given my pure ignorance, that would be helpful.

10:30

Richard Frew: An obvious one is the introduction of further primary legislation to amend the existing legislation. As I mentioned, we would also have to look at the section 54 powers in the 2010 act to see whether they could be utilised in any way. They are for very specific purposes, and we would have to consider whether—as in this case—the introduction of legislation changes the policy or whether it is deemed that the primary legislation needs to be tidied up or clarified.

Kenneth Htet-Khin: The provision in section 1(3) of the 1993 act for ministers to give directions to the commission could be another avenue to explore.

Jayne Baxter: I know that I am asking you to second-guess what other folk will do, but will the Government talk to the Scottish Law Commission about this? Will it take advice about how and when to take this forward? How does that work?

Richard Frew: From a civil servant's perspective, first and foremost I would, as I have said already, rely on ministers for guidance on timescales. We in the Scottish Government have our own legal team and law officers to address legislative issues. When I was involved in land reform previously, we sought the Scottish Law Commission's views on various legislative measures. That is an option.

The Convener: Graeme Dey has a question about the financial memorandum.

Graeme Dey: Good morning, gentlemen. Mr Frew talked earlier about the 50 applications that have been held in abeyance. Why is the financial allowance for considering those applications in the financial year 2013-14 set at £30,000? In the normal course of events, and given the average cost of a decrofting application, we would be looking at a figure of a little more than double that.

Richard Frew: That is right—I can see why you might reach that conclusion. The figure of £30,000 in the table towards the end of the financial memorandum reflects the figure in paragraph 10—£26,433—that the commission has estimated it would cost to process the 50 decrofting applications, on the basis of time spent on the applications. The commission has already spent some time on them, so £26,433 is not 50 times the unit cost.

Graeme Dey: To be clear, you believe that the £30,000 that is set aside covers the cost that will be incurred in this financial year.

Richard Frew: I certainly believe that to be the case, on the basis of the information provided by the Crofting Commission.

Nigel Don (Angus North and Mearns) (SNP): Good morning, gentlemen. I will pick up on the issue of retrospectivity, if the *Official Report* will let me have that word. We do not like making law that is retrospective—we all understand that. However, there are obvious reasons why, in this case, we would want to do so, and you have outlined them.

You have apparently picked up on decisions already made, applications in abeyance and appeals that might or might not arise from decisions already made, but I am concerned that there are quite a number of other possible unintended consequences. Can you reassure me that, in consequence of those previous decisions, you have thought about people who have been allowed to buy, people who have not been allowed to buy, mortgages, neighbours and all manner of other ancillary issues and rights that come out from left and right field to bite you? I am conscious that a lot of incidental legal issues relating to land have nothing to do with crofting. I am looking for reassurance that you have tried to think your way around the possible consequences of retrospectivity.

Richard Frew: Absolutely. You highlight, very appropriately, the issues that we have considered. The purpose of retrospection is, in effect, to cleanse the whole process. If any stage in the process, from the submission of the application right through to the end result—the transfer of title and so on—was deemed still to be incompetent, that could have a knock-on effect. The result of

including retrospection in the legislation is that the whole process is competent. We do not therefore expect the legislation to have any unintended consequences.

Nigel Don: At the risk of pushing that, I remind you of the case of IO and LO v Aberdeen Council and the policy consequences of assuming that everything is tied up in a timescale. In that case, things turned out not to be tied up in the timescale, and we finished up in the Court of Session and got our knuckles rapped as a result. I encourage you to reflect on whether you have built in any timescales that the law might subsequently find to be inappropriate.

Richard Frew: To the best of my human ability and, I am sure, that of my colleagues, we do not consider that there is anything that we have not considered at this stage. Obviously, we would be interested to consider any issues that arise.

The Convener: We understand that civil servants are as human as crofters.

I thank you for that introduction to the issue. We recognise the expedited nature of the legislation and the focus that has been brought to this particular problem.

10:36

Meeting suspended.

10:40

On resuming—

The Convener: I welcome to the meeting our next panel of witnesses. David Balharry is head of regulation at the Crofting Commission; Sir Crispin Agnew QC is chairman of the crofting law group; Derek Flyn is chair of the Scottish Crofting Federation; and Sandy Murray is the crofting Highlands and Islands chairman with the NFUS.

First of all, do any of you have a view on Brian Inkster's argument that the bill is not needed?

Derek Flyn (Scottish Crofting Federation): When I brought the matter to the Crofting Commission's attention, Brian Inkster's response was pretty immediate. However, having looked very closely at the Crofters (Scotland) Act 1993, as amended, I think that he has missed one thing. The requirement for an owner-occupier to report to the commission within a month of becoming an owner-occupier is contained in section 23(12) of the 1993 act, but there is also section 23(12A), which seems to talk about an owner-occupier crofter as a subset of owner-occupiers.

I am sorry—I realise that the issue is complicated, and I know that most people's eyes glaze over when I start to talk about it. The point is that owner-occupiers are not entitled to occupy their crofts, which can therefore be held to be vacant, and they can be asked to take tenants. However, owner-occupier crofters are entitled to occupy their crofts and must intimate to the commission the fact that they are owner-occupier crofters. Instead of their being persons who have to give notice, they are persons who give notice as owner-occupiers as well as intimating the fact that they are owner-occupier crofters. I think that Brian Inkster has missed the fact that owner-occupier crofters are a subset of owner-occupiers. The matter is very complicated but, having looked at it many times since Christmas, I cannot see how one can be persuaded that an owner-occupier crofter could have a vacant croft.

The two things that are needed for decrofting are an application by a landlord or landowner and a vacant croft. Although an owner-occupier crofter could be seen as a landlord under the legislation, he certainly could not have a vacant croft.

Sir Crispin Agnew QC (Crofting Law Group): Having looked at what Brian Inkster has said, I agree that there is an argument about effect. However, like many provisions in the legislation, the provision is totally unclear and we would end up in the Scottish Land Court having an argument about it. It is good that we are putting this right and beyond doubt.

To pick up on Derek Flyn's comments, I think that there is a lacuna with regard to section 26J of the 1993 act, on the letting procedure for owner-occupier crofters, subsection (1) of which says

> "The Commission must, unless they consider that there is a good reason not to, direct the owner-occupier crofter to submit to them"

proposals for letting the croft.

10:45

Every owner-occupier crofter has to go through that test with the commission, which has the discretion to decide whether to order him to let, notwithstanding the rights that are given by an earlier section to owner-occupier crofters. That is another lacuna in the 1993 act, and it is good that it is being put right in the bill. In my view, that could be done very simply by amending section 24(3) of the act, which says:

> "Where a croft is vacant, the Commission may"

decroft. The legislation could instead say, "Where a croft is vacant or occupied by an owner-occupier crofter, the Commission may". That would probably solve the problem. I have not considered the matter in any detail, however, having only got the bill on Friday—I was in Portree sheriff court on Monday, and I had other commitments. Those are therefore just immediate reactions, although I have

taken some soundings from other members of the crofting law group.

The provisions are in a complicated set of sections that stand alone, with no attempt to integrate them with the rest of the 1993 act. Problems may arise from that. That is part of the problem with the amendments that were made in 2007 and 2010. There is no clear link-up to all the various sections. It is very difficult to achieve that in the crofting context, but that is my concern—the legislation is perhaps overcomplicated. It is too late to do anything about that in the bill, however.

I have some specific comments on the bill—I do not know whether you want me to make those now. I could hand in a copy of my speaking notes at the end, if that would be helpful.

The Convener: That would be very helpful. I will let members ask questions first. If the points that you wish to make have not come out as a result of those questions, we will come back to you to discuss those matters.

Sir Crispin Agnew: They relate to specific drafting issues in particular subsections. It might be sensible if I had the opportunity to go through them one by one at some stage.

The Convener: Yes. We will certainly do that. We can deal with the process and the principles involved, and then come on to the detail later.

Incidentally, I seem to remember that, in relation to the Crofting Reform etc Act 2007, you had considerable concerns about people not having enough time to be able to read across between the different acts. We are well aware of the difficulties around a consolidation bill, but that is for another time. Such a bill would not suit an expedited process.

Sir Crispin Agnew: That was not what I meant. The Crofting Commission has put a very good make-up of the legislation on its website. From a legal point of view, however, the sections do not fit into one another—they do not read well together—which means that one has to try and interpret what a section means. It might mean one thing, but that will conflict with what another section says—the Land Court is always having that problem. That is what I meant, rather than the physical difficulty of working out what bit sticks in where. The commission has done a very helpful print-up. Lawyers can get that on the Westlaw site, but the general public can now get it from the Crofting Commission.

The Convener: Thank you for that—it makes things slightly clearer for me. The other panellists do not have to have an opinion on the matter, but if either of them wishes to say something now, they are welcome to do so.

David Balharry (Crofting Commission): I will clarify one small point. Sir Crispin was offering an alternative solution. The commission's board was keen to have retrospective provisions so that no hardship was caused. The bill provides for that, which is welcome.

Sir Crispin Agnew: I was not suggesting that there should not be retrospective provisions, but the principal part could be done more simply.

Tavish Scott: Can I confirm that you believe that the bill will solve the problem that we want addressed?

Sir Crispin Agnew: Broadly, yes.

Tavish Scott: Could you quantify that "broadly", please?

Sir Crispin Agnew: As I said, I have one or two specific comments on and criticisms of the drafting but, from looking at it in the timeframe that I have had available to look at it, I think that the broad principle of the bill should solve the problem. However, as I said, there are one or two specific drafting points that might give rise to problems.

Tavish Scott: Mr Flyn, do you have a definitive view on that?

Derek Flyn: It appears to me that it solves—

Tavish Scott: "It appears"—

Derek Flyn: Yes.

Tavish Scott: That is very legalese.

Derek Flyn: One has to be with crofting law because it is so complicated. However, it solves the problem that was raised.

Tavish Scott: That is a very fair observation.

Mr Balharry, I asked the Government officials about the legal position in respect of the commission. Has the commission had a chance to take its own legal advice on whether the bill will fix the problem that we all want to see resolved?

David Balharry: I think that this was mentioned earlier, but we seconded one of our legal team to help with the preparation of the bill. As has been said, we believe that the bill addresses and solves the problem that was raised. We have not seen a need to take legal advice.

Tavish Scott: That is helpful, thank you.

On Sir Crispin's earlier point about the test for the commission of who is an owner-occupier crofter and who is not, can you describe to the committee how that works in practice? Is it an actual test? Do people have to confirm in documentation? How will it work in practice so that the process is kept simple and straightforward?

David Balharry: Could you ask that question again, please?

Tavish Scott: Surely. Earlier on, Sir Crispin said that the commission applied a test to decide who was an owner-occupier crofter. I am just trying to understand what that involves.

Sorry, Sir Crispin. Did I not understand that correctly?

Sir Crispin Agnew: I think that you misunderstood me. I was referring to the section that says that, when an owner-occupier crofter reports to the commission, the commission has to decide whether it should order him to re-let. That is not linked in with section 19B—I think—of the revised 1993 act, which defines an owner-occupier and gives them a right to be an owner-occupier crofter. Nevertheless, they have to pass through the commission, which makes a decision on whether to allow them to remain an owner-occupier crofter or to look for decrofting. Those are another two sections that have not been linked. It seems to me that they should say that if you are fulfilling your duties, you are entitled to occupy, but if you are not, the commission can look at whether you should re-let.

Tavish Scott: That is clear to me, but in the context of some of the questions from my committee colleagues about whether there are unintended consequences that we have not considered yet, has the commission given any thought to Sir Crispin's point on that area?

Sir Crispin Agnew: That is outwith the bill.

David Balharry: I think that that was referred to earlier, in the sense that the bill is designed to address a specific problem. That is not to say that there are not other areas of crofting law where complexities remain, in particular around the issue of people who have bought parts of their croft.

Tavish Scott: Yes. Those areas are not being dealt with here. Does the commission have a view on how we are going to address those issues—if, indeed, it believes that there are issues to address?

David Balharry: The commission does not have a view, although there is an awareness that there is a potential problem there. However, it is not in the same league as the problem that came to us with owner-occupiers being unable to decroft.

A policy fix has been mentioned whereby, collectively, they could be regarded as the landlord. You quite rightly flagged up the question of what happens when the owners of parts of a croft are unable to reach agreement. That has still to play out: the policy is relatively new and the problems have not come to the commission yet.

Tavish Scott: There is some pace behind getting the bill through—I agree with that because the problem needs to be resolved as quickly as possible. Will the commission be able to move the applications forward once the Parliament endorses the legislation—absolutely on the day, as it were?

David Balharry: Absolutely. When the bill becomes law, we can start processing the applications immediately with no further delay.

Tavish Scott: Is it fair to say that you processed them up to the absolute final point of determination?

David Balharry: A number of applications were suspended at various stages, so we will just start the process again, depending on the stage that they are at.

Tavish Scott: Thank you.

Richard Lyle: I am not a lawyer or a crofter. However, I know that in 1993, 2007 and 2010, and now in 2013, we have had to try to deal with this problem. I am sure that it is a very important issue for many crofters. With the greatest respect to Sir Crispin Agnew, however, I am sure we can agree that if we put 20 lawyers in a room, they will come up with 20 different answers. In relation to the interpretation of the law, the point was made earlier that between an "owner-occupier" and an "owner-occupier crofter" there can be a world of difference as to whether those people fit into the bill.

As was mentioned earlier, Brian Inkster suggests that we can deal with the problem elsewhere, and Sir Crispin Agnew said earlier that he has other items to present to the committee. Can you really tell me that the proposals in the bill will solve the problem? Do you agree with me that there will be other problems that need to be addressed but which may have to be addressed at a later date because people have not even thought of them yet?

Sir Crispin Agnew: Yes. Where there are two lawyers, they can give different opinions. If something is well drafted, generally speaking—although not always—lawyers will give the same advice.

Other problems have arisen already, and another one was drawn to my attention while I was asking around. The definition of "owner-occupier crofter" means that if there is a development—a wind farm, for example—and the owner-occupier crofter reaches an agreement with the developer, that agreement is not binding if that croft is subsequently let as a croft.

Under section 5(3) of the 1993 act, if a developer reaches an agreement with a crofter, in order to allow the development to go ahead it is possible to get the authority of the Scottish Land

Court, which is then binding on singular successors. However, there is no way of making an agreement with an owner-occupier crofter binding on the croft for the future. I have been told by one firm in Edinburgh that that is holding up a number of wind farm developments in the north of Scotland: the developers are going shy because those particular crofting townships have quite a number of owner-occupier crofters.

A whole host of issues has arisen from the definition of "owner-occupier crofter", which is causing problems. There are other problems to deal with, but we are speaking here about owner-occupier crofters. For example, if a crofter buys 99 per cent of his croft, he remains a tenant of one per cent and is a crofter of that one per cent. However, he is not an owner-occupier crofter of the 99 per cent and subject to the duties of an owner-occupier crofter. He is just an owner-occupier of a vacant 99 per cent, which he can be ordered to re-let. We are then back to the discretion of the commission. That is what applied from 1976 onwards, when the commission said, effectively, "You are a vacant croft with the owner-occupier in occupation; we will not do anything about that, provided that you behave like a crofter." The whole purpose behind defining owner-occupier crofters was, in a way, to take away that discretion and bring the owner-occupiers under the legislation, but it has not achieved that.

Those issues are all separate from the problem that is before us, which has arisen because of the bad definition of "owner-occupier crofter". There are all sorts of implications beyond this particular problem. In a way, the bill is a missed opportunity to put right all those other issues, too. Wind farm developments are being held up. Government policy is to have 100 per cent renewables by whenever, yet a faulty definition is impacting on that. Nobody seems to feel any urgency to put right all the other problems.

Richard Lyle: I have been watching Mr Flyn, and I would be interested in his response to my points and to Sir Crispin Agnew's points.

11:00

Derek Flyn: The problem of owner-occupier crofters has been here since 1976, when crofters were given the right to purchase their crofts. It was with me throughout my legal career. I am now retired and writing about crofting law—I am a harmless drudge. I am concerned about the law's accessibility, because it is really the crofters out there who want to know what the law says. The Scottish Crofting Federation goes out and talks to crofters. We have been out talking to crofters about the new crofting register, which is a great mystery to them, and how they must map their crofts. Those are practical aspects of crofting law.

On getting 20 lawyers in a room, I do not think that you would find 20 crofting lawyers who were prepared to sit and talk knowledgeably about crofting—although, as we know, there might well be more than 20 lawyers wanting to listen. I disagree with Crispin Agnew even on the very first extra problem that he raised, which was about section 26J of the 1993 act. Disagreeing with Brian Inkster and Crispin Agnew is part and parcel of what is a complicated piece of law.

More than a century ago, a textbook said that crofting law was more complicated than the tax laws. Every time there is a reform, it is always stated that crofting law is to be simplified but, every time, we get another layer on top of what has gone before. The 2010 act placed the crofting register into the 1993 act, but it is all done in such a way that it is virtually impossible for lawyers, let alone the layman, to understand the law—it is even difficult to find.

In 1990, I was involved in writing a book with D J MacCuish, who was the retired solicitor to the Crofters Commission, and we heard that there was going to be a consolidation. At that time, the Scottish Land Court would stop a case at the beginning and say, "Can we just sort out what sections we are arguing about here?", because we had the Crofters (Scotland) Act 1955, the Crofters (Scotland) Act 1961, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 and the Crofting Reform (Scotland) Act 1976. It took a long time for us to figure out just what wording we were going to use in a particular case.

In 1993, we had a consolidation and everything was put in the one place so that we could find it. However, there was no attempt to sort out the problem of owner-occupier crofters, of which by then we had quite a few, because people had been buying their crofts since 1976. The issue was not sorted out in 1993 and we got another layer of law in 2007 and again in 2010. We have not really sat down and sorted out how the law is supposed to work. It goes back and forward, and it is difficult to understand.

There are very few specialist practitioners. There is a crofting law group, of which Crispin Agnew is the chair. I believe that the group has a part to play, but identifying all the things that are causing a difficulty and getting them in one place is a problem. Is the new Crofting Commission to collect all those problems so that, when we come to consolidation, we can talk about pre-consolidation aspects and identify just where the problems are? The Scottish Law Commission has told the cross-party group in the Scottish Parliament on crofting that it will not look at

crofting law. Somebody has to do it. We just do not want another layer on top.

The Convener: Thank you very much—it is useful to have a seminar as well as answers to questions. It gives members context, which is important.

Graeme Dey: I have a brief supplementary question in passing. We are here to talk about the bill but, given some of the comments that Mr Flyn made about disagreeing with Sir Crispin and Mr Inkster on certain aspects, how on earth could we get to the point at which we simplify the law? Do we need consolidated legislation, or should we start with a blank sheet of paper and try to do it that way?

Tavish Scott: Now, that is a seminar.

Sir Crispin Agnew: My personal view is that it is unfortunate that crofters are in a special position in the crofting counties. It seems to me that, if there is a social need for crofting-type legislation, it should apply to everyone in those crofting areas. We are in the unfortunate situation that, in 1886, certain holdings were defined as crofts and certain holdings were not when they were precisely the same. Lots of small farms in the crofting counties are no bigger and no different from crofts, and yet they operate under a totally different regime.

This is my personal view: if there has to be a social policy for an area, that social policy should apply to everyone and not to a privileged few, although some people say that the greatest blight on development in the crofting areas is crofting legislation. I recommend starting with a blank sheet of paper and deciding on the social policy in respect of smallholdings in the area, and then applying it. However, that is not what we are here for—I would like to go through some of the particular problems that I see in the drafting of the bill.

The Convener: We will certainly get to that. Alex Fergusson wants to make a point.

Alex Fergusson: We have encroached on the area in which I want to ask questions so I will bring in my question at this point.

In answering a question, Derek Flyn said that the bill will solve the problem that has been created. I come back to the Hydra idea of solving one problem and creating two more. Do you believe that the bill will bring to light any other problems? It is clear to me that, if we could somehow simplify or do away with crofting law, we would not need 20 lawyers in a room because five would do. Crofting seems to be an area that breeds lawyers—not that I am saying that that is necessarily a bad thing. [*Laughter*.]

We obviously need to simplify the situation and consolidate the wealth of legislation. Given the complexity to which you have all referred, and the tightness of parliamentary timescales, is consolidation possible? I just drop that into the seminar.

Sir Crispin Agnew: The Crofting Commission has consolidated the bill in that it has typed it all up in the appropriate places so that one has access to the legislation in that way. However, for example, more recent legislation has not repealed certain sections; it appears to have moved them to other parts of the 1993 act. Legally, those sections are still live because they have not been repealed and they are repeated somewhere, sometimes with slightly different wording.

There are problems like that, but we are working around them. Westlaw says that the sections have not been repealed but they have been moved. When you look at Westlaw in print, you can see pages of blanks saying “not repealed but moved” and you can find the provisions somewhere else.

The legislation could be consolidated if it could be done without amendment, but the reason why we lawyers are all in dispute is that the sections are not clear. When they are not clear, there are two opinions; if a section was clear, there would, I hope, be only one opinion. As legislation usually deals with broad principles, it never ends up as clear as it might, but the crofting legislation is more obscure than a lot of other legislation, and part of that obscurity comes from the layers that legislators have put on it over the years without really thinking it all through.

To go back to the question, I think that the bill will solve the particular problem by making it clear that the Crofting Commission can decroft owner-occupier crofts. Brian Inkster might well be right but Derek Flyn might well be right that he is wrong. Until a case has gone to the Land Court and it has made a determination, it is sensible to clarify the situation for the avoidance of doubt.

Alex Fergusson: To go back to my original question, are you happy that the bill will not give rise to three other problems that do not currently exist?

Derek Flyn: I think that the bill covers the point—to answer the question that was raised—about whether the commission has the authority to decroft on the application of owner-occupier crofters. The commission said on the website that it could do so, but there did not seem to be any power in the legislation for it to do so.

As for the future of crofting, to repeat Mr MacCuish’s phrase, I may not live to see it. However, having spent the past 12 years of my legal career involved in committees looking at the reform of crofting law, I think that the investment of the new crofting register gives us a system that will begin to be useful.

When I talk to crofters, I have to take the view that we need to work with the law as it stands, but it seems to me that it is hardly the sign of a mature system that we cannot identify the land that we occupy. In Scots law, it is very strange that the contract of landlord and tenant does not force the landlord to explain what he is receiving rent for. Instead, the onus has been put on the tenant to identify what he is paying rent for, and the costs associated with setting up the register on behalf of the applicant are being paid by the crofters.

I could raise further issues about that, such as the requirement for a newspaper advertisement. If every crofter who has a croft—there are 18,000 crofts—has to pay £100 to explain that he has his croft in the register, crofting is paying £1.8 million to advertise the fact that the crofts are being put on the register. For what purpose?

As with lots of things in recent legislation, I think that we want to see what works and what does not work before we consolidate. There should be some area or sump where we can put our problems so that we will have them together for any consolidation, but I am not sure who is looking after that just now. The crofting law group consists of people such as Crispin Agnew, Brian Inkster and myself, and we do not agree on everything, so that group is not the proper place for the sump.

The Convener: In due course, we will be able to question the minister on those general points, which are of considerable interest to us—especially if they entail a lot of work over the next few weeks—but we must get back to the bill. Graeme Dey has the next question.

Graeme Dey: In your experience, gentlemen, what problems is the delay in approving applications causing on the ground? Assuming that the bill becomes law, do you think that anything more could be done now to assist applicants to be ready to hit the ground running, as it were?

Derek Flyn: As chairman of the board of the Scottish Crofting Federation, I can say only that we have not had many members raising problems because we have been giving them the information that something is being done. As soon as that something is done, they should know about it. As for specific problems, I have none to bring to you.

Sandy Murray (NFU Scotland): I would say the same from the NFU's perspective. The members who are asking us whether anything is being done are happy that something is being done. Those who are in limbo because they submitted an application have problems and they are waiting. I know of several cases in which people might have sold their house if they had had it decrofted by now—in fact, they would have sold the whole croft because the decrofting of the house was integral to the raising of a mortgage following the sale of the whole croft.

Graeme Dey: That is the kind of thing that I am getting at. What is the scale of the problem for the 50 people whose applications are in abeyance? Are they encountering difficulties, or are we comfortable that the issue will be resolved fairly quickly so everything will be fine?

Sir Crispin Agnew: There are 50 applications in abeyance, but how many people have not made an application because they have not been able to do so? I do not think that anyone will know that until the bill is passed and other applications are made.

Derek Flyn: There are also many people who are holding decrofting directions that are faulty because there was no legal authority for them to be granted. That is the nature of the problem, for which we are looking for a quick solution.

11:15

Graeme Dey: But the point that I am making is that the applications in abeyance are from those who took a course of action and expected things to be cleared fairly quickly. With respect, are they not the principal concern? After all, they might be the people who are encountering difficulties.

Derek Flyn: The world in which they live requires planning permission before developments can take place. Delays are normal, and I think that this is simply a hiccup and a lesser delay.

Jayne Baxter: I appreciate what has been said about the need to move quickly and to minimise the disadvantage caused by the delay. We have talked a lot about legislation this morning, but I am seeking reassurance that a bill is the best way of resolving the problem. What are the witnesses' views on that?

Sir Crispin Agnew: I certainly think that a bill is needed. As I have said, it could be done in a simpler way but, having reached this stage, I see no point in our saying, "Just do it more simply." That would just cause delay. The Government has decided to go down the route of a bill; it should do so, by all means, but I think that it could have been done more simply.

I do not think that a statutory instrument could have been used, because the change seems to be fairly fundamental rather than a correction. That said, I have not looked at the matter in any great detail. Saying "You can't go by this way—go by another" will just cause delay, so it is best that we proceed with this bill.

Jayne Baxter: That was helpful. Does anyone else wish to comment?

Derek Flyn: No.

Jayne Baxter: Thank you very much.

Jim Hume: My questions, which are similar to those I pursued with the Government bill team, are about consultation and are perhaps more for Sandy Murray and David Balharry, given that their organisations were mentioned in the previous responses.

Given the tight timescale—the minister said that he would move forward on the issue only 48 days ago—there has been a limited rather than open consultation. Has that been a matter of concern to the organisations involved?

Sandy Murray: No. I think that we have had ample opportunity to respond. We have been invited to several stakeholders meetings—as they are called—and although I have not been present at all of them there has been representation from NFUS head office. Feedback from our members, especially those who encountered a problem after submitting their application or when they considered submitting an application, suggests that the consultation with regard to the draft bill has been fine.

Jim Hume: That is good.

David Balharry: From the commission's point of view, the restricted consultation works because the problem itself is very defined. As long as the bill deals with that, the commission will be content. If the bill spreads wider, it will, as we have heard, open up many other issues that will require a longer period of consultation.

Jim Hume: That is what I wanted to hear.

Angus MacDonald (Falkirk East) (SNP): Good morning. It is clear from your responses to Tavish Scott's questions that you consider the bill's measures to provide a watertight solution to the lack of a legal basis for owner-occupier crofters to decroft land and that you think that, as Sir Crispin Agnew has put it, we will not end up in the Scottish Land Court.

As that issue has been well covered, I want to move on to the speculative development of croft land. I know that the witnesses are unable to comment on live applications, but members might be aware that in North Ballachulish an application to decroft land has been granted planning permission for the construction of 10 houses. As I understand it, the 2010 act gives the commission more powers to reject decrofting applications to tackle speculation on the development value of croft land. In that regard, is the current legislation fit for purpose in preventing speculation on the development of croft land through decrofting?

Sir Crispin Agnew: I will answer that question in relation to the bill. It is one problem that I raised with the Scottish Government team.

Proposed new section 24C(2) of the Crofters (Scotland) Act 1993 gives owner-occupier crofters the right to decroft the croft house site. It refers to cases in which

"(i) the application is made in respect of a part of a croft, which consists only of the site of the dwelling-house on or pertaining to the croft"

—that is all right—and

"(ii) they have not previously given a direction under section 24B(1) to the applicant in relation to such a site".

Let us say that the owner-occupier crofter decrofts the house site and transfers the rest of the croft to his wife. She was not the previous applicant, so she builds another house, applies as the applicant to decroft the new croft house site, which she is statutorily entitled to do, and then transfers the rest of the croft to her son, who builds a new croft house. He was never the applicant, so he makes an application, and he has a statutory right.

That is a flaw in the bill. If somebody exploits it to get planning permission and all the rest of it, they will have an absolute right to decroft. That does not appear in the rest of the legislation for an ordinary crofter or an owner-occupier who is not a crofter, but I think that the particular provision will lead to precisely the situation that Angus MacDonald has raised.

That was one of the specific points that I was going to bring up.

The Convener: We will come back to them.

Derek Flyn: That particular point is strange, as it seems to raise an inconsistency. As long as the owner-occupier crofter has not decrofted the house before, he will have the right to decroft the house site, and it seems that the next person will become an owner-occupier crofter who would then have the right to decroft. That is a real problem that I would like to make a written comment on.

Some of the points that I would like to make are really not for this forum. I think that I will make written comments within the timescale, which is by Friday. We do not have much time to make written comments.

Angus MacDonald: That would be appreciated. We can certainly raise the issue with the minister next week.

The Convener: I am sure that we can.

Nigel Don: Good morning, gentlemen. I think that you heard my comment to the previous panel about the provisions being retrospective. We understand why that is the case, but do you have

any concerns about how that is being done or any possible unintended consequences?

David Balharry: I reiterate that the Crofting Commission was pleased to see provisions in the bill to apply measures retrospectively. We recognise that, under the bill, mechanisms will be put in place so that those who are in the period of suspension and who fall within the appeal period will be allowed the opportunity to appeal. Therefore, they will not be disadvantaged. That would have been our only concern, but it is dealt with.

Sandy Murray: I agree. It would be terrible if those whose decrofting applications have been granted found out that there was some flaw in the law and that the decisions could be challenged at a later date.

Derek Flyn: I do not think that I can add anything to what has been said, apart from saying that comfort was required. What lawyers call a letter of comfort might have been helpful, but today's meeting is comfort that things are happening to correct things. I have no concerns about retrospectively making existing decrofting directions real.

Sir Crispin Agnew: I have not really had an opportunity to consider the path fully in detail. If any of the decrofting applications was opposed and is now being retrospectively corrected, the person who opposed it might have an argument that that affects their human rights because, if there was no retrospective effect, they would have the opportunity to oppose the next application. Otherwise, I do not see much in that. I do not know how many applications, if any, were opposed.

The Convener: Does David Balharry have any indication of that number?

David Balharry: I do not have the figures with me but, if the committee requires them, I can have them sent through.

The Convener: If you could do that, that would be a help.

We come to the point at which we can consider the technicalities that Sir Crispin Agnew suggested might be discussed at this stage, on which members might have questions. This is the germane part of making law, which we are concerned to make accurate.

Sir Crispin Agnew: If committee members had the bill open in front of them, that might help.

Proposed new section 24A(2) of the 1993 act states:

"In this section and in sections 24B to 24D, a 'decrofting direction' is a direction that the owner-occupier's croft is to cease to be a croft."

It is sensible to define such a direction in the bill, but we have always colloquially called a direction given under section 24 a decrofting direction. It seems unfortunate to have a statutory definition that applies only to proposed new sections 24A to 24D and not to directions given under section 24. Therefore, it might be better to amend the 1993 act to define a decrofting direction in relation to section 24 as well as those other sections. That is just a technical point.

Proposed new section 24B(2) relates to appeals. It states:

"But the Commission need not consider the application".

If the commission decides not to consider an application, that does not appear to be

"any decision, determination or direction"

that gives a right of appeal under section 52A of the 1993 act. The commission saying, "We don't need to consider, so we're not considering," does not appear to be a decision on an application that would give a right to appeal. Therefore, someone would be forced to go to judicial review as the only way of challenging the commission's decision not to consider their application.

It is a slightly grey area and one can argue both ways, but I think that the bill would read better if new section 24B(2) said, "The commission may refuse the application if—" and gave the grounds on which it can refuse an application. There would then be a decision that could be appealed, which would avoid that potential argument. The wording in new section 24B(2) is used in section 24(3A), which was inserted by the 2010 act, so it has been used once before—that is why it is being used now. However, it might lead to an argument that someone cannot appeal to the Land Court but must go to judicial review to appeal what, in effect, is a refusal for the reasons that are set out in the bill.

Derek Flyn: The wording in the bill—and in the 1993 act—says that the commission can put the application aside or investigate the application if it has already given a direction. Proposed new section 24B(2)(a) requires that

"they have given the owner-occupier crofter a direction".

To me, that allows the commission to put an application on the shelf until the other direction is dealt with, and the other direction is appealable, so there is a possibility of resolving the matter by application to the Land Court.

11:30

I was going to wait until Crispin Agnew had finished to come back to his first point, but I will do so now and talk about the decrofting direction. When D J MacCuish and I looked at crofting law in

1990, there was no mention of decrofting, because the word "decrofting" was not used in the 1976 act. The word was used in the 1993 act and we used it in our book, because everybody called a direction that took land out of crofting a "decrofting direction". Before 1976, the direction was made by the Secretary of State for Scotland and it was given to a landlord, because crofting tenants had no interest in having land removed from crofting.

The nub of the problem comes from the 1976 act. When a crofter bought his own croft, he suddenly became the landlord of a vacant croft, so we had the two elements that were needed: landlordship and vacancy. The word "decrofting" is fairly fresh, but decrofting directions should certainly be unified. Every direction that brings land out of crofting is a decrofting direction. The bill suggests that a decrofting direction is a direction that the owner-occupier's croft has ceased to be a croft, but the same is the case for any person's croft: if a decrofting direction can be given, the land ceases to be a croft.

Sir Crispin Agnew: I accept that people can appeal a direction to submit proposals to re-let, but the Crofting Commission is being given discretion above that. It can consider an application, but it need not do so. It can say, "Right, we will consider an application to decroft the house, but we will leave the direction in relation to the land in place."

In a way, the commission is making a decision that would be subject to judicial review if it were unreasonable and so on. However, the use of the wording "need not consider" does not appear to give rise to what is defined in section 52A of the 1993 act as

"any decision, determination or direction".

The bill is vague; the Land Court might say, "Yes, it is a decision that we can deal with." However, the situation would be clearer if the wording was, "The commission has the discretion to refuse the application," if it has been given that discretion. That would make it clear that the decision could go to appeal.

The next problem is perhaps more about the wording of proposed new section 24B(3) than its practical application. The provision requires that people who apply to the Crofting Commission to decroft must apply to register the whole croft, including the area that they seek to decroft. People then get the decrofting direction, which means that they have to amend their application for registration or that the application for registration has to go through to register the whole croft and they have to make a subsequent application to register the decrofted part. The decrofted part continues to be shown on the register for 20 years, because in that period it can be called back into crofting.

The process seems to be a bit cumbersome. Somebody needs to look at the technicalities and simplify the process. Otherwise, the crofter has to apply to decroft and then has to apply to register the whole croft. He then gets the decrofting direction and has to apply to amend the original application or make a new application to register the decrofted part. The process needs to be tidied.

My next point is on the interrelationship between new sections 24C and 24D. Section 24C states that section 25 applies to decrofting directions, which is fair enough. However, section 24D(1) states:

"Where a decrofting direction is given in relation to a croft, this Act ceases to apply to the croft."

If the act has ceased to apply, how can section 25 continue to apply under section 24C? I can see how one might argue that that would work, but it seems to me that the two provisions would be much better run together if section 24C said something along the lines of, "Where a decrofting direction is given in relation to a croft, this act ceases to apply to the croft, except as provided hereafter." Subsection (2) would then take in the existing section 24C and subsection (3), or whatever, would take in sections 24D(2) and 24D(3). That seems to me a tidier way of doing it. I have mentioned the applicant point about section 24C(2).

My next point relates to new section 24D(3)(b), on an application to decroft part of a croft that is already on the register, which states that

"the direction takes effect on the date of registration."

Someone who applies to decroft must send an application to amend the register. I think that there is a six-month appeal provision.

Derek Flyn: It is nine months.

Sir Crispin Agnew: I am sorry—there is then a nine-month appeal provision and, if somebody challenges the application, it goes to the court and so on. As the decrofting direction will not take effect until the date of registration, the crofter or crofting owner-occupier might be in limbo for quite a long time. However, that point does not seem to appear in new section 24B(3)—I have highlighted problems in that subsection—which seems to suggest that, if there has not been a first registration, a decrofting direction takes effect immediately and is subsequently registered somehow. That is not a lacuna, but sections 24D(3)(b) and 24B(3) take different approaches.

Those are the minor drafting points that I have picked up and which the committee might wish to consider. Perhaps I should have put them in by Friday as a written submission.

The Convener: You have been busy, and it is very helpful to us to know that the Government, as well as the committee, can see your points.

Sir Crispin Agnew: I sent a copy of the points to Richard Frew and I discussed a number of them at the stakeholders meeting on Friday.

The Convener: Because the bill process has been expedited, it is helpful to have the information from you at this time, as we are conscious that we will have a limited amount of time to deal with the bill at stage 2. We will be able to question Richard Lochhead or Paul Wheelhouse—whichever one comes to see us next week—on the Government's response to the information.

Thank you very much for your detailed thoughts. I will not ask about other means of solving the problems, because I think that we have just gone over much of that. We have taken the time to get into the detail of the bill in a fashion that I had not expected at the outset. However, that is helpful, because we know what problems there have been in interpretations of previous bills. The evidence of all the witnesses has been most useful at a practical level and in terms of the interpretation of the law.

I thank the witnesses for their evidence. Next week, we will perhaps hear about exciting changes to the Government's approach to the issue.

11:40

Meeting continued in private until 12:24.

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