The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 20 March 2013

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
11th 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:

Andrew Hamilton (Royal Institution of Chartered Surveyors Scotland)
Andrew Howard (Scottish Land & Estates)
Angus McCall (Scottish Tenant Farmers Association)
Jamie McGrigor (Highlands and Islands) (Con) (Committee Substitute)
Christopher Nicholson (Scottish Tenant Farmers Association)
Tavish Scott (Shetland Islands) (LD)
Scott Walker (National Farmers Union Scotland)
Paul Wheelhouse (Minister for Environment and Climate Change)
Andrew Wood (Royal Institution of Chartered Surveyors Scotland)
Stuart Young (Scottish Land & Estates)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 2

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 20 March 2013

[The Convener *opened the meeting at 09:30*]

Aquaculture and Fisheries (Scotland) Bill: Stage 2

The Convener (Rob Gibson): Welcome to the 11th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off mobile phones and BlackBerrys, as leaving them in flight mode or on silent will affect the broadcasting system.

We have received apologies from Alex Fergusson, who is representing the Parliament in Malawi today. We welcome as his substitute Jamie McGrigor. Jamie, do you have any interests to declare?

Jamie McGrigor (Highlands and Islands) (Con): I have no interests to declare other than those that are recorded in my entry in the register of members' interests.

The Convener: We also welcome Tavish Scott, who is attending the meeting for stage 2 of the bill.

Under agenda item 1, we are starting stage 2 consideration of the Aquaculture and Fisheries (Scotland) Bill. I welcome the Minister for Environment and Climate Change, Paul Wheelhouse, who is the member in charge of the bill. I also welcome the officials accompanying the minister, whom he can perhaps introduce.

The Minister for Environment and Climate Change (Paul Wheelhouse): I am accompanied by four officials: Lindsay Anderson, who is here from the Scottish Government legal directorate to advise on legal aspects of the bill; David McLeish, who has been involved in the drafting of the bill; Alastair Mitchell, who is one of the lead officials on the aquaculture side of things; and Norman MacLeod, who can help us with group 10, on planning matters.

The Convener: I remind everyone that they should have a copy of the bill as introduced, the marshalled list of amendments that was published on Monday and the groupings of amendments, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in the group to speak to and move that amendment and to speak to all the other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate to me by catching my attention in the usual way. If the minister has not already spoken in the group, I will invite him to contribute to the debate before I move to the winding-up speech. The debate on the group will be concluded by me inviting the member who moved the first amendment in the group to wind up.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press the amendment to a vote or to withdraw it. If the member wishes to press ahead, I will put the question on the amendment. If a member wishes to withdraw an amendment after it has been moved, I will check whether any committee member objects to the amendment being withdrawn. If any member objects, the amendment will not be withdrawn and the committee will move immediately to a vote on the amendment.

Any member who does not want to move an amendment when called to do so may say, "Not moved." Please note that any other MSP who is present can move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting in any division is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The committee is required to indicate formally that it has considered and agreed to each section of the bill, so I will put a question on each section at the appropriate point.

We have agreed that we will not go beyond the end of part 1 of the bill today. If we do not get that far, we will stop at an appropriate point and pick up from where we left off next week. I thank the minister for introducing his officials. Let us move straight to the first group.

Before section 1

The Convener: The first group is on a duty to publish information on parasites. Amendment 1, in the name of Alex Fergusson, is grouped with amendment 52. I ask Jamie McGrigor to speak to and move amendment 1, on Alex Fergusson's behalf, and to speak to the other amendment in the group.

Jamie McGrigor: I am delighted to be able to speak to and move amendment 1 on behalf of Alex Fergusson, especially as aquaculture is so important to my region, as indeed is wild salmon and sea trout fishing. Over the years in the Parliament, I have always tried to stress the fact that we need to have both in sustainable co-

existence. In order to have that, it is important that we have available as much open scientific data as possible.

Given the written and oral evidence that the committee received, it stated in its stage 1 report that it is keen to ensure that farm-by-farm data on sea lice is available to the scientific and academic communities. The industry is hopefully heading towards a 50 per cent increase in production over the next decade or so, and that increase surely demands careful scientific monitoring given the environmental sensitivities that surround it. Both the industry and the minister have said that such data is already available for research purposes, but the Loch Linnhe report by Marine Scotland science states at least three times that major assumptions had to be made because there was no access to farm-by-farm data.

Amendment 1 would put the industry in Scotland on the same footing as the industry in Norway, where farm-by-farm data is available on request. The data is held by the Norwegian equivalent of the Food Standards Agency and it is published on an area basis, but it is available on a farm-by-farm basis. We have looked at various ways to replicate that, but they would all involve the data being held by a Government agency and therefore being subject to freedom of information legislation. We concluded that the only way in which to ensure that the environmental impacts of the expansion of the industry are properly and effectively monitored is to publish the weekly data—which is collected anyway and would just need to be published—relating to sea lice. That data is already gathered and collated, with a permitted delay of up to one month from the date of collection.

Let us look at what happens in other countries. In Norway, as I said, data is collected on a farm-by-farm basis and published on an area basis, with site data being available on request. In Ireland, farm-by-farm data is collected 14 times a year and published every month. In Chile, Multiexport Foods chairman José Ramón Gutiérrez has said that sea lice levels in Chile are rising steadily in line with the increasing volume of farmed fish. Site data is published by Chile's national service for fisheries and aquaculture.

At stage 1, the publication of farm-level data was supported by a wide range of stakeholders including the Scottish Environment Protection Agency, Highland Council, wild fisheries organisations, the Scottish Wildlife Trust and the UK Environmental Law Association. In addition, during the consultation on the bill, farm-level publication of sea lice data was supported by all councils that deal with aquaculture.

I say to the minister that the Scottish Government should stand for transparency. In my view and the view of many others, anything that is bound up with secrecy is likely to be detrimental to having an open playing field in which all the evidence is available. Therefore, if the Scottish Government wants transparency, please let the fish farm industry have it.

I move amendment 1.

Claudia Beamish (South Scotland) (Lab): Good morning to everybody—committee members, the minister, his officials and the public.

I have lodged an alternative amendment on the publication of sea lice data. On the question why such an amendment is needed, there was a great deal of discussion at stage 1 about the appropriate resolution for the publication of sea lice data. The committee stated in its stage 1 report that there might be publication of sea lice data at the farm management area level, which is different from the suggestion that has been made on behalf of Alex Fergusson by my colleague Jamie McGrigor, through amendment 1.

From my understanding of the situation, taking into account as best I can the different interests concerned, I believe that what amendment 52 proposes is a reasonable and balanced way of proceeding on the issue of sea lice data. I acknowledge that it is a step further than that proposed by the Scottish Salmon Producers Organisation. However, publication of such data would allow the industry to demonstrate its management response and performance in relation to sea lice at a resolution that would be relevant to the management unit of co-ordinated sea lice treatment, which is the farm management area.

Technically, under the Fish Farming Businesses (Record Keeping) (Scotland) Order 2008, fish farms are already required to maintain a record of the number of parasites in weekly parasite counts. However, there is no current requirement to publish such data. The Aquaculture and Fisheries (Scotland) Act 2007 should therefore be amended to require publication of parasite counts on a weekly basis averaged over the farm management area. That should be consistent with the requirements of paragraph 2 of schedule 1 to the record-keeping order. That data should remain for inspection and not be removed at the next reporting period. That point relates to a major failing, in my perception, of the current system that is operated by the SSPO, under which data is available only for three months, after which it cannot be accessed, even on request.

In my view, the arrangements in amendment 52 would, like amendment 1, aid transparency, but they would do so through a compromise that would take into account all the different interests. They would make information available for research purposes in a more accessible way,

which is extremely important, and they would contribute to sustainable marine development in the context of the target to increase fish farming production by 50 per cent by 2020.

On the farm management area definition, the Scottish Wildlife Trust made the point to me that it would have to be done on an ecological basis for it to work. I appreciate that that is not part of amendment 52, but I want to highlight that point in this context.

The Convener: No other member wishes to take part in the debate on the amendment. Do you wish to respond to Claudia Beamish, minister?

Paul Wheelhouse: I do. I acknowledge the strength of feeling in the committee—and, indeed, across the chamber during the stage 1 debate—about sea lice data reporting, and I recognise the motivation behind amendments 1 and 52. I will try to address the points that Jamie McGrigor and Claudia Beamish raised in that regard.

As I said during the stage 1 debate, it is important to contextualise the debate on the public reporting of sea lice data in a way that reflects its primary purpose, which is to reassure the public that fish farms are environmentally sustainable in the wider marine environment. Such reporting is not, as some might wish, a means by which to judge regulatory compliance by the salmon farming industry or individual farms. We have a thorough regulatory system for that, which is overseen by the fish health inspectorate, SEPA and others, and a robust regime of controls and checks, which the bill will enhance, in my view.

At stage 1, I referred to the SSPO's proposal for an increase in the reporting of sea lice data from reports for the current six areas to a considerably enhanced 30-area reporting level for public consumption, based on reporting against recognised wild fish catchments, which reflects to some degree Claudia Beamish's point about understanding the ecological impact of salmon farming. That proposal has been enhanced by a recent commitment by the SSPO to provide Marine Scotland science with access to sea lice information at farm management area level to support defined research projects.

09:45

Jamie McGrigor, on behalf of Alex Fergusson, raised the issue of the availability of farm-by-farm data. The Loch Linnhe report was produced at a particular point in time and the data issue has since been resolved. The information is now available at a farm-by-farm level, certainly to fish health inspectors and others. It is not published, of course, which is perhaps the point that most concerns Mr McGrigor and Mr Fergusson.

As I understand it, the new voluntary arrangement for public sea lice data reporting that the SSPO has proposed will include an annual report. For the first time, that allows the prospect of tie-up between farm sea lice data and wild fish catch and efforts statistics, to allow thinking on any impact from fish farming to be developed. The industry has rightly pointed to the complexity of data and the commercial risk if that data is misinterpreted or taken out of context. It believes that some might do that deliberately to suit their own agendas. The industry also advocates a regime that focuses on the environmental impact of its work in the wider marine environment, arguing that work on the farms is more a matter for the industry and the regulators directly.

On balance, I think that the industry has come a long way. I am therefore persuaded that its voluntary public reporting package is sufficient, offering a balanced and proportionate step forward to allow us to endorse its use in parallel with our on-going regulatory management of the industry.

That is the broader context in which the amendments should be considered. However, I continue to reassure members—in the committee and more widely throughout the Parliament—that we will keep the issue under review through the ministerial group for sustainable aquaculture, which includes wild fish interests in its membership. I will not shy away from using existing powers in the 2007 act to legislate if it appears that that voluntary arrangement is falling short.

I commit today to reviewing the success or otherwise of that arrangement within the current session of Parliament. I believe that the point that we have reached addresses many of the concerns that were expressed during the stage 1 debate. I encourage all sides now to work together in a spirit of collaboration to manage our marine environment. I urge the committee to resist the amendments.

The Convener: Graeme Dey has a question for the minister, which I am happy to allow. Jamie McGrigor will have his chance to come back in soon.

Graeme Dey (Angus South) (SNP): Minister, are you saying that, while data will be published for six areas, in addition information will be provided to Marine Scotland for 76 farm management areas for scientific assessment purposes?

Paul Wheelhouse: My understanding is that we are publishing for 30 areas rather than six and that the SSPO will provide information at farm management area level to Marine Scotland science for the purposes of scientific research.

That will not be published but it will be available for scientific use.

Jamie McGrigor: I listened to what the minister had to say. I am sure that he has thought it through carefully, but my point—and, I think, Claudia Beamish's, too—is this: why not publish these things? If, as you say, the figures in the Loch Linnhe report were eventually made available on a farm-by-farm basis, what has the industry got against publishing the figures? They are published in Norway, Ireland and Chile, all of which have big aquaculture industries. All that one is asking is for Scotland to be put on the same basis as those other countries. I want to put it on the record that I am not quite au fait with the minister's reasons for not doing that.

Claudia Beamish's amendment does not go quite as far as asking for farm-by-farm data but asks for clear publication on an area basis, with which I would also agree. If the data has already been collected and collated, I cannot see any reason why it cannot be published.

I press amendment 1.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 1 disagreed to.

Section 1—Fish farm management agreements and statements

The Convener: Amendment 65, in the name of Tavish Scott, is grouped with amendments 66, 49, 12 to 15, 50, 51, 2, 16 and 67.

Tavish Scott (Shetland Islands) (LD): I thank the clerks and the chamber desk team for their ability to turn my meandering thoughts into appropriate amendments.

As the convener knows well, the fish farming industry exists in parts of Scotland that would otherwise struggle to provide employment. By lodging my series of amendments, I seek to ensure that this competitive industry succeeds in the future, which I know the minister and the Government wish to happen for the very reason that Claudia Beamish mentioned.

I accept the point that Jamie McGrigor and other committee members have made with regard to the wild fish lobby. The lobby does not operate in my part of the world, but I accept that the convener and other members, including Mr McGrigor, face a serious issue in that respect in their areas of Scotland, and the committee and the Government must deal with it. At times, I wonder if Kofi Annan would be an appropriate person to call on in that regard.

On the specifics of this group of amendments, the bill amends the 2007 act to make compulsory fish farm management agreements or statements, which set out management requirements on each fish farm that cover fish health management, the management of parasites, the movement of live fish on and off farms, the harvesting of fish and the fallowing of farms after harvesting. In addition to those responsibilities, Government inspectors can enforce conditions in all those areas. My concern about the bill as it is currently drafted is that the Government will be involved in the day-to-day operations of fish farms, and I genuinely do not believe that that is what the minister—never mind Marine Scotland—wants.

Fish farm management agreements and statements are plans that cover a rolling two-year period. They will roll on in the normal course of business, but things change—as I am sure anyone, and any committee member, who is involved in the industry will know—as husbandry matters change. The course of events in the natural environment means that, for example, a farmer may need additional supplies or medicines or a particular change in treatment, or the weather may intervene. That is as true for the fish farming industry as it is for any food production system that involves the natural environment.

I will give an example from my constituency. If the system was too prescriptive, it would affect a fish farm in Unst that depends on supplies from Aberdeen, which involves not just a 12-hour overnight journey but two further hours of travel involving two ferries across Shetland. That is one significant example, but I am sure that similar distances are involved in the convener's constituency.

I therefore cannot conceive that the Government wishes to have a system that means that all such business decisions have to be referred to Marine Scotland. I am sure that the minister appreciates the potential that would exist for FOI requests and parliamentary questions—heck, I would lodge a topical question every week on such an issue, although the minister will probably be relieved to

know that I have never had one selected yet, so he is probably quite safe on that front.

The potential for members to question and scrutinise the activities on fish farms would be considerable indeed, and it would put an enormous—and quite unfair—pressure on the minister and on future ministers, as well as on Marine Scotland. Amendments 65 to 67 address the unintended consequences of section 1. Amendment 65 simply relates to wording and ensures that farm management areas cover the coast, which I hope was the intention in drafting the bill. Amendments 66 and 67 seek to ensure that the minister and Marine Scotland do not end up being responsible for the day-to-day operations of every fish farm around the coast of Scotland.

I move amendment 65.

Claudia Beamish: Amendment 49 introduces a requirement to be a party to a fish farm management agreement. Stakeholders and the committee are clear that the policy intention is that a farm management agreement should be in place where more than one company is operating and that there should be a farm management statement where there is only one operator.

However, the Association of Salmon Fishery Boards has expressed concern that the bill would allow a farm management statement to be used if operators failed to reach an agreement. I understand that that scenario was confirmed by the minister's response to the committee's stage 1 report. That could allow an area to be managed in a sub-optimal way and could compromise the principle of synchronisation of stocking, fallowing and treatment, which is beneficial to the industry and to wild fishery managers. Indeed, it is understood that that situation already applies in at least one farm management area in the Western Isles, where two operators use markedly different fallowing periods during production cycles.

The scenario can be remedied by ensuring that, when there is more than one operator in a farm management area, the operators are obliged to become parties to a single farm management agreement. I propose amending the bill so that a fish farmer must be a party to a farm management agreement, unless there is only one fish farm operator in the farm management area. It should not be possible to revert to a farm management statement if two or more operators in a farm management area fail to reach an agreement.

Paul Wheelhouse: I strongly endorse the desire that Tavish Scott expressed for ministers, the Government and Marine Scotland to avoid micromanaging a commercial industry such as aquaculture. He set out very well some of the challenges that that would present for ministers and Marine Scotland. It is certainly not the Government's desire to get involved in the day-to-day micromanagement of the sector—far from it.

I welcome the discussion about section 1, as all the provisions relating to fish farm management are fundamental to the bill's wider purpose and to ensuring that we have a regulatory regime that is appropriate, proportionate and complementary to the principles of sustainable growth. Tavish Scott has suggested that there are weaknesses in our intention to work within the framework of the code of good practice-designated geographical areas, but I disagree with that view. Farm management statements and agreements are best considered in the context of the code.

I understand the points that Claudia Beamish made about the desire to ensure that only farm management agreements are in place, other than in the obvious case of only one company operating in an area. Although that might be desirable, we would all accept that it is not always possible in reality, which is not always the consequence of a lack of determination on any party's behalf.

In some scenarios, amendment 49 would place a potentially unreasonable burden on an operator to comply with the other companies in its area—for example, in the scenario of different production cycles that Claudia Beamish described. When there are different scales of activity there may be dispute about how best to resolve the issue. I have talked to the committee about the role of mediation in trying to resolve differences within areas, but we must allow for the possibility of it being impossible to reach such a conclusion.

The Scottish Salmon Producers Organisation highlighted its concern about the reference to the code of good practice in proposed new section 4A of the 2007 act. It did not consider that compliance with statutory FMAs should be measured by reference to a non-statutory code of good practice. On reflection, I agree. I also agree with the Subordinate Legislation Committee's point that the bill appears to delegate to the SSPO and the code's authors the function of setting out good practice standards that fish farmers must apply. As a consequence, it is necessary to make amendments 12 and 13 and consequential amendments 14 and 15.

10:00

Jayne Baxter has suggested that we widen the statutory content of farm management agreements and statements to include measures to minimise impacts on wild fish and their populations. I strongly sympathise with the desire to support wild fisheries and, to pick up Tavish Scott's point about some committee members' constituencies, that is an important dimension. The bill's provisions are

balanced and proportionate in minimising the potential impact on wild fish. It is difficult to envisage what additional practical measures could be reasonably undertaken as a result of amendment 50.

Claudia Beamish has suggested that, as part of the development of FMAs and FMSs, we should make it a requirement to communicate with those with an interest in the marine environment in and around the farm management area. The code of good practice encourages close communication with all key stakeholders, and I consider that to be the appropriate framework in which communication should take place. Making communication a statutory requirement would make it increasingly difficult to ensure that all those with an interest have been appropriately consulted or that they would acknowledge that to be the case through the ministerial group on sustainable aquaculture.

The statutory publication of FMAs and FMSs, as suggested by Alex Fergusson through Jamie McGrigor, would be a disproportionate approach and would carry a significant commercial risk were the information to be taken out of context or misinterpreted. It would also impose an unjustified burden. Moreover, it could be a disincentive to operators who include substantial detail in existing agreements, who might become concerned that their positive approach could be presented out of context by A N Other.

I will address a point that Jamie McGrigor made in relation to the previous group of amendments. The bill rightly reflects more generally the fact that FMAs and FMSs are operationally and commercially sensitive and are therefore primarily matters for farmers. I am aware of some FMAs that are shared with local fisheries interests. I commend that approach, when it is possible.

Amendment 16 corrects a factual inaccuracy in the bill, which I have acknowledged previously, in relation to the ownership of the code of good practice.

Tavish Scott appears to support some stakeholder views that there is no correlation between the detailed requirements in an FMA or FMS and the need to make an informed assessment about whether operators are delivering, which may require taking samples, for example. Needless to say, I disagree.

I invite the committee to resist amendments 65, 66, 49, 50, 51, 2 and 67 and to agree to amendments 12 to 16.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning. There is a general acceptance that aquaculture development impacts on wild fish in some areas and circumstances. Recent attention has shifted from asking whether there is an impact to considering the extent and significance of the known impacts. Amendment 50 is designed to ensure that impacts on wild fisheries are minimised and adequately considered by the industry when compiling farm management agreements and statements.

Jamie McGrigor: Quite simply, amendment 2 would require all farm management agreements and statements to be published, to increase the openness and transparency that the publication of sea lice data brings about. It would add to the publication of sea lice data by setting the context behind sea lice management strategies.

Alongside publication of sea lice figures, the publication of farm management agreements and statements would show whether a management strategy was working. If a farm were to publish sea lice data and its agreement or statement together, that would show the industry, the public and environmental bodies what is being done to fix any problems that exist in a farm or an area.

Tavish Scott: I absolutely take the minister's point and genuinely believe him, not least from a practical point of view, when he says that he and other ministers do not want to micromanage the industry. However, that places an onus on the Government to set out how it will avoid doing that.

I appreciate that we have a short debate today, that we are considering amendments to a bill and that we do not have time to go into the detail—heaven help us were we so to do. However, once legislation is passed, it is on the statute book and, in the absence of any other way of addressing what I think are genuinely unintended consequences, there are concerns that the Government will be hauled into day-to-day management. The industry has expressed those concerns privately to the minister and to most of us who have fish farm interests in our areas and constituencies.

I am deeply concerned that, unless the minister has some other clever mechanism that is not clear yet—perhaps he will come back with it at stage 3—the Government now and in the future, because the bill is about not only today but the future, will end up in the ghastly situation of being held to account for decisions that are taken on fish farms.

That is my main point. Had the minister set out in some way the mechanism by which the Government and Marine Scotland could avoid that—perhaps he will do that in the future—I would be much more comfortable with what is proposed. There is a real danger that what I have suggested might happen and, on that basis, I will press my amendments.

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 65 disagreed to.

Amendment 66 moved—[Tavish Scott].

The Convener: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 66 disagreed to.

Amendment 49 moved—[Claudia Beamish].

The Convener: The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 49 disagreed to.

Amendments 12 to 15 moved—[Paul Wheelhouse]—and agreed to.

Amendment 50 moved—[Jayne Baxter].

The Convener: The question is, that amendment 50 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

Abstentions

McGrigor, Jamie (Highlands and Islands) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 50 disagreed to.

Amendment 51 moved—[Claudia Beamish].

The Convener: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

Abstentions

McGrigor, Jamie (Highlands and Islands) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 51 disagreed to.

Amendment 52 moved—[Claudia Beamish].

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)

Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 52 disagreed to.

Amendment 2 moved—[Jamie McGrigor].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 2 disagreed to.

Amendment 16 moved—[Paul Wheelhouse]—and agreed to.

Amendment 67 moved—[Tavish Scott].

The Convener: The question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Hume, Jim (South Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)

Against

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 67 disagreed to.

Section 1, as amended, agreed to.

Section 2—Escapes, and obtaining samples, from fish farms

The Convener: Group 3 is on obtaining samples from fish farms. Amendment 68, in the name of Tavish Scott, is grouped with amendments 69 and 17.

Tavish Scott: I absolutely accept the need for the Government, through its appropriate agencies, to obtain samples from fish farms. The point of my amendments is to clarify the purpose of sampling and what the samples are to be used for.

I will make two other points on the amendments. First, I understand that there might be a challenge under the European convention on human rights because, as I am sure will have been recognised in the minister's legal advice, when the state obtains—for want of a better word—an asset that belongs to a private business or private individual, questions will be raised about the legal process and how that has been gone about. I have no doubt that the minister's lawyers have pored over that issue, but I seek clarification on the matter, given that the Parliament has in the past had to deal retrospectively with how bills or parts of bills comply with ECHR.

10:15

My next—and, I suppose, main—point is that I am concerned about how Marine Scotland's three distinct and separate roles of enforcement, research and policy can work in the same organisation. I have a huge amount of sympathy for the minister, because I think that he has been given a hospital pass on the issue. I did not agree with the decision to merge those functions into one body and thought, for lots of obvious reasons, that it was not the right move not just for the fish farming industry but for the fishing industry and other users of the sea.

The arrangement creates an important and indeed impossible conflict of interest among the different functions and, no matter how able the Chinese walls that are established in such organisations might be, I do not see how we can separate out the very clear conflicts that might well emerge. The bill brings that issue into sharp focus, particularly in the charging measures in its latter sections, and I want any such conflicts of interest to be avoided in the bill.

My amendments seek to end those conflicts, remove the bill's potential in that regard and ensure that the bill is compatible with ECHR. In simple terms, when Marine Scotland takes samples, it should do so for the prescribed purpose, and that purpose should be clear, unambiguous and understood by the industry, the fish farm and the Government. That is not too

much to ask with regard to an important function that I believe should be carried out.

I move amendment 68.

Paul Wheelhouse: I acknowledge Tavish Scott's point and will address it in my response.

The aquaculture measures in the bill will continue to enhance regulation and build on current and developing best practice. We acknowledge the excellent progress that the industry has made in tackling escapes, its continued significant investment in new equipment and its on-going engagement in developing technical standards—which I hope to take forward in the ministerial group on sustainable aquaculture—but escapes still happen and it has sometimes been difficult to trace the origin of fish.

Of course, the proposed powers are not just about tracing escapes. It is eminently sensible that the legislation is future proofed to ensure that we have the necessary powers to obtain samples for other purposes, such as scientific and other research that might be necessary in the future.

I have heard the SSPO's concerns about the scope of the proposals and the committee's comments on the matter at stage 1; I take on board Tavish Scott's point about the requirement to be clear about the intention behind the use of the powers; and I support the principle that sampling must be proportionate and that only what is needed should be taken. There must be controls on the use of fish. I say in response to Tavish Scott's fair point that our intention that sampling must have a legitimate purpose has been flagged up to the industry.

Given all that, the Government's amendment 17 is a direct response to the concerns and seeks to tighten the grounds on which we would take samples for our own purposes. I recognise that proposed new section 5A(3)(e) of the 2007 act is wide ranging and I concede that there is little to be gained in retaining it when read alongside proposed new section 5A(3)(b). However, Tavish Scott's amendments 68 and 69 should be resisted, as they would unhelpfully limit the future use of the provisions.

Amendment 68 seeks to remove proposed new section 5A(3)(b) of the 2007 act. Given the overall policy objective of securing a sustainable and growing aquaculture sector, we still consider that that power, deployed in a reasonable and—I stress—proportionate manner, is entirely appropriate and should be retained. Amendment 69 would clearly limit our ability to field test new or developing methodologies for tracing the origins of farmed fish escapees to ensure that they are robust and applicable to Scottish circumstances.

For those reasons, I ask the committee to resist amendments 68 and 69, which collectively would significantly limit our ability to develop and field test future tracing methodologies. The bill was considered by the Presiding Officer to be within the Parliament's competence at introduction, and we believe that that deals with the ECHR issue. I urge the committee to accept the Government's amendment 17.

Tavish Scott: Mr Wheelhouse is not the first minister who has said, "The Presiding Officer has, of course, said that the bill is ECHR compatible." Mr Gibson and I have heard that in relation to a number of measures. I do not hold that against Mr Wheelhouse in any way. He has said it on the record, and that is good enough for me, although heaven help us if we come back to the matter with a legal challenge in due course. At least we tested the point today.

I take the minister's point that the Government considers its amendment 17 to be a direct response to the concerns about prescription, as the amendment will ensure that the manner in which the sampling is done is described and that the samples are taken for the intended purpose. That is fair, it is as it should be and I accept it.

However, I am concerned by other Government statements. If I wrote down Mr Wheelhouse's words correctly, he said that my amendments would

"unhelpfully limit the future use of the provisions."

That is my point. Believe me—Governments always want to take more powers. I was part of a Government that took more powers, and it was not always the right thing to do.

I am concerned that Governments should always set out what they want powers for and why they want them. I understand the why, as the minister has been clear about that, but the what is a pretty important question because, given the way in which the bill is drafted, there is pretty well unlimited scope for how the provision could be taken forward—not by the current minister, of course, but by future Governments. That is the test that we should always apply when we are dealing with legislation. Because I want to constantly and consistently apply that test, I intend to press amendment 68 and move amendment 69.

The Convener: The question is, that amendment 68 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Hume, Jim (South Scotland) (LD)

Against

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 68 disagreed to.

Amendment 69 moved—[Tavish Scott].

The Convener: The question is, that amendment 69 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Hume, Jim (South Scotland) (LD)

Against

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 69 disagreed to.

Amendment 17 moved—[Paul Wheelhouse]—and agreed to.

Section 2, as amended, agreed to.

After section 2

The Convener: The next group is on prohibition on the introduction of genetically modified organisms. Amendment 11, in my name, is the only amendment in the group.

Amendment 11 addresses three elements with regard to genetically modified organisms. If the Food and Drug Administration of the United States of America gives final approval to the farming of genetically modified salmon and those salmon are capable of breeding, escapes could happen, as they happen in other cases. Any interbreeding with wild Atlantic salmon would be totally unacceptable.

If anyone introduced GM salmon into our farmed or inland waters, it would undermine the quality of Scots farmed salmon. My amendment underlines my belief that that should be an illegal act with an appropriate fine.

There is a third issue about GMOs, which is the introduction of GM-based feed, soya and oils for farmed salmon, which could be eaten by wild salmon into the bargain. The intent of amendment 11 goes alongside the concerns of supermarkets such as Waitrose, Sainsbury's and the Co-op, and their customers, who demand the highest quality of non-GM food. Those supermarket chains are looking for insurance that fish farming will be conducted in as natural a way as possible.

Amendment 11 aims to tackle those fundamental food quality issues and, above all, to meet the wishes of anglers, fish farmers and supermarkets and their customers to have GM-free Scottish salmon, whether farmed or wild.

I move amendment 11.

Jamie McGrigor: Can you clarify whether amendment 11 applies to triploid fish?

The Convener: I do not believe that it does, because triploid fish could not then breed with salmon, whether farmed or wild.

Jamie McGrigor: So it does not apply to triploid fish.

The Convener: That is correct.

Jim Hume (South Scotland) (LD): I have some other concerns about triploid fish. Some people have said that, for example, the process of making a rainbow trout a triploid fish is genetic modification. That happens in many inland waters, and amendment 11 refers to inland waters. With all respect, convener, you do not seem to be 100 per cent sure on that point and it was not something that we studied in any great detail during stage 1.

I am happy to support amendment 11 because I think that it is well intended, but I put on record that I might have to reconsider come stage 3. We do not want to have the unintended consequence of putting every inland fish farm out of business, which amendment 11 might do if triploid fish were seen to be genetically modified.

The Convener: Thank you for that point.

Minister, will you comment on amendment 11?

Paul Wheelhouse: I very much sympathise with the points that you made when moving amendment 11, convener, but my concern is that we should not deal with salmon in isolation from other foods. I recognise that some—indeed, maybe many—consumers have particular concerns regarding GMO produce. As one consumer, I am concerned about that. However, the application of GMO technology and the use of GMOs are already adequately regulated in Scotland and the European Union. The Scottish Government has made it clear on a number of occasions that we are steadfastly against having GMOs in our food chain.

The European Food Safety Authority is finalising draft guidelines for the assessment of GM animals, including GM fish, following a public consultation last year. Before any GMO, including salmon, could be released in Scotland, the Scottish ministers would be required to give consent under the Environmental Protection Act 1990. That would include assessment of the potential for detrimental effects.

We have made our position on the issue very clear. I stress that GMO is not an issue that we want to progress, given our view that the integrity and perceived purity of Scottish produce must be protected to maintain our premium market position.

Although we have taken the view that appropriate restrictions are already in place, I would perhaps direct the convener and other committee members, if they were interested, to ask the newly appointed food expert group, which the Minister for Public Health Michael Matheson announced, to address the general point regarding maintaining a GMO-free food chain, packaging standards and other matters. That might be an appropriate channel by which the issue could be addressed. I take on board Jim Hume's point about the potential to discuss the issue further in the committee and, indeed, to engage the Government on it before stage 3.

I put on record that the committee might wish to be aware that the Scottish salmon farming industry itself is opposed to the introduction of GM fish stocks. I recognise the convener's point about the potential for food for farmed salmon to be contaminated with GMO material, which I take very seriously.

The SSPO has a publicly-stated policy of opposing the use of genetic modification in salmon production. It states that there is currently no such activity on Scottish farms and it can foresee no circumstances under which there would be in future, for the reasons outlined about maintaining the perceived quality and premium value of Scottish salmon.

Given the fact that the SSPO, the Scottish Government, the EU and—as the convener outlined—many supermarkets are all against GMO, I think that there are a number of pressures that suggest that it is unlikely that GMO will be introduced into the salmon and trout farming industry. In the circumstances, I invite Rob Gibson to withdraw the amendment; if he chooses to press it, I urge the committee to reject it.

10:30

The Convener: There could be unintended consequences regarding inland fish farms in the way that the amendment is worded. That gives me pause for thought as we would wish to avoid unintended consequences.

The need for access to non-GM soya to be widely available is very important as fish farms move away from the use of fish feed. There is a huge debate to be had about how that can be achieved through wholesalers. In South America, there are huge difficulties in getting non-GM soya because GM soya has been planted in such large amounts. I believe that that is a cause for considerable concern for the future of our industry in Scotland and its GM-free status.

I understand the minister's comments about the various means by which the Government can address some of those points, and at this stage I would seek to withdraw amendment 11 from discussion, with the agreement of the committee. Does any member object to the amendment being withdrawn?

Claudia Beamish: I object.

The Convener: As there has been an objection to the amendment being withdrawn, I must put the question on the amendment.

The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)

Against

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Hume, Jim (South Scotland) (LD)
Lyle, Richard (Central Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 11 disagreed to.

The Convener: We will end proceedings on the bill for today as we have reached an appropriate point at which we can pick up next time. I thank all of the members, the minister and his team for their contributions.

10:33

Meeting suspended.

10:43

On resuming—

Rent Review Working Group Report

The Convener: The second agenda item is our second evidence session on the rent review working group's report to the tenant farming forum and the Scottish Government. The session will be in round-table format. We will hear from the organisations that make up the tenant farming forum.

I welcome our witnesses and ask each of them to make a brief introduction, after which I will open up the meeting to questions.

The first member on my left is Jayne Baxter, and then we have our first guest.

Christopher Nicholson (Scottish Tenant Farmers Association): I represent the Scottish Tenant Farmers Association.

Angus McCall (Scottish Tenant Farmers Association): I represent the Scottish Tenant Farmers Association.

Claudia Beamish: I am an MSP for the South Scotland region and the shadow minister for environment and climate change.

Andrew Hamilton (Royal Institution of Chartered Surveyors Scotland): I represent the Royal Institution of Chartered Surveyors Scotland.

Andrew Wood (Royal Institution of Chartered Surveyors Scotland): I represent the Royal Institution of Chartered Surveyors Scotland.

Richard Lyle (Central Scotland) (SNP): I am an MSP for the Central Scotland region.

Jamie McGrigor: I am an MSP for the Highlands and Islands. I am substituting for Alex Fergusson, who is normally on the committee.

Stuart Young (Scottish Land & Estates): I represent Scottish Land & Estates.

Andrew Howard (Scottish Land & Estates): I represent Scottish Land & Estates.

Jim Hume: I am an MSP for the South Scotland region.

Scott Walker (National Farmers Union Scotland): I represent the National Farmers Union Scotland.

Angus MacDonald (Falkirk East) (SNP): I am the MSP for Falkirk East.

Graeme Dey: I am the MSP for Angus South and the deputy convener of the committee.

The Convener: I am Rob Gibson, the MSP for Caithness, Sutherland and Ross.

If anyone is using an iPad, it should be used only for notes and should not be connected to the internet, as is our custom in the committee.

As no one has indicated that they want to make introductory comments, I open the floor to questioning.

Graeme Dey: John Ross of the rent review working group told the committee:

> "We genuinely believe that our recommendations for greater transparency and better understanding of how the act operates, along with a code of conduct that will see land agents, factors, and tenants operating correctly, will see the small number of disputes diminish."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 6 March 2013; c 1908.]

Is that a fair assessment?

Angus McCall: I begin by extending our appreciation to the committee for giving its time to hear our evidence. It is important that we have an open debate about tenancy matters. I observe that I was here 10 years ago saying virtually the same things as I will say today, and I hope that I am not here in another 10 years saying the same thing.

On Mr Dey's question, reviewing rent is a two-part operation. One part is about the way in which rent is calculated and the other part is about the process of carrying out rent reviews. The recommendations that the rent review working group made for the establishment of a practitioners guide and a code of conduct will go a long way towards helping matters.

My organisation's main concerns are about how robust the code will be, whether there might be a requirement at some stage to make its provisions mandatory and what sanctions could or should be imposed on people who transgress.

My organisation also believes that, as we have made clear in various submissions, we need a fairer system of setting rents. The recommendations of the rent review group will certainly help. I think that the intention is to minimise the number of disputes. However, the situation on the ground is often a little more fractious and contentious than is publicly made out to be the case.

Scott Walker: There can often be other factors that mean that tenants and landlords have, shall we say, a grievance between each other that comes to the fore during rental disputes. Tenants have often not undergone a rent review for many years, so they are inexperienced and unpractised in the way in which the reviews are conducted, whereas on the other side the land agent will be experienced and practised in that. On that basis, the greater transparency and the code of conduct

that John Ross spoke about would be helpful for all parties involved.

Through the tenant farming forum, all the organisations that are represented today are working to achieve those aims and towards achieving some form of greater transparency, so that on both sides of the argument, whether it be tenant or landlord, evidence is presented in a fair and reasonable manner.

In addition, all the organisations are working with the TFF on a code of conduct for the rent review process, which will perhaps set timescales for when both parties should respond to certain aspects of the process. NFU Scotland believes that that will all help with most cases, but it would be unreasonable to believe that it will solve every problem. No matter what the industry puts in place, there will still be unreasonable parties and disputes will still arise in the rent review process.

Andrew Howard: The short answer to the question is yes. There are two areas in which transparency and clarity will assist. The first area is, as has been mentioned by Angus McCall and Scott Walker, the process itself: the more that people understand the process, the smoother it is likely to operate. That will be beneficial.

The second area is the negotiation on the rent: if one party sets out more clearly how they reached their original proposal and the counterparty sets out more clearly why they think the proposal is not appropriate and suggests an appropriate alternative, we will get a better understanding of the respective positions, which is always helpful. There will be less of holding the playing cards close to the chest, so the parties will be much more likely to reach an accommodation because they will find the areas in which they agree and they will quickly narrow down and focus on the areas in which they disagree.

Andrew Hamilton: We agree almost whole-heartedly with what the rent review working group came up with.

On the question of a code of practice, one of the things that the TFF hopes to produce, as Scott Walker described, is a code that sets out when various things should happen in order to avoid last-minute brinkmanship, if you like. For example, the code could set out that, for a 12-month rent review, negotiations should commence at a fairly early stage and not in the last fortnight. We are wholly in favour of that sort of thing; anything that goes towards smoothing the process and removing dispute and disagreement has to be welcomed.

When we discussed the issue in the TFF, we foresaw a problem in how far to take such a code of practice. Angus McCall referred to it perhaps becoming mandatory. That idea is based on the fact that, if the code was not adhered to, one would presumably want some sort of teeth to make it work. We regard that aspect as a difficulty because a range of people and professions are involved in the process. In many cases, for example, a land agent and a chartered surveyor may be involved; there may also be another type of agent who is not a chartered surveyor; sometimes lawyers represent the parties; and very often the parties represent themselves.

If we are going to have a code of practice that can be applied, how can we make it apply to, say, a landlord or tenant who represents themselves, and what sanctions might be available? Our view was that that would be a difficult problem to tackle. However, it was also our view that a code of practice that is freely available to all and easily understandable and consumable by all will lead to a better standard of practice throughout the rent review field.

Graeme Dey: Can I come back on that point? Mr Wood, when you were in front of the committee last January, you indicated that a paper would be presented to the TFF on a code of conduct for land agents and that there would be joint consideration of the wider range of people beyond chartered surveyors who are involved in advising landlords and tenants on how they may deal with issues. Was any progress made on that?

Andrew Wood: Yes, significant progress has been made on that in the TFF.

Three documents were referred to in the evidence that was given by the rent review working group. The initial information letter—which we hope will be widely adopted by the profession and will go out with rent review notices—is in final draft form. The intention is to have that signed off by the TFF by the end of next week. It will then be available, through the TFF, before May rent reviews this year.

The second set of documents are substantial ones. The RICS is working with the Scottish Agricultural Arbiters and Valuers Association to produce a book that will act as a practitioners guide. Flowing from that there will be an executive summary, which will act as a more easily understandable guide and will be available to the wider industry. That has been instructed, and timelines are being set out with a view to it being published this autumn.

The Convener: We know that enormous pressure is being placed on some tenants, at the 11th hour, in order to settle a rent. We also know that the time that is being taken to create a code of practice is extending the period under which people are being treated in this pressure area, which means that it is taking far too long to get to

something that can actually be applied. How would you respond to those points?

Andrew Wood: The initial part of the code will be available prior to the May term. I do not think that we can bring it forward any more quickly than that. The practitioner's guide will be interlinked to that.

The key issue that you are getting at involves timescales and people not being given sufficient notice in the negotiations. The code and the practitioners guide will encourage both sides to communicate.

Mr Howard referred earlier to people being much more transparent about how they arrive at the figures and how they go about the rent review. The intention is to have set notice periods in law, but that still allows people to serve notices a year in advance and possibly not commence negotiations until the notice is nearly expired. That can place unreasonable pressure on both sides. The code will set out guidance that will encourage people to engage early in the process so that they can avoid that period of pressure as the notice comes to an end.

Andrew Howard: I am not going to defend any professional representative who conducts matters in such a way that things are left to the last minute or who tries to apply undue pressure as part of the negotiating tactics. It is important to understand that, in a two-party relationship, it can be either party who is dragging their feet and using a deadline, such as the rent day, to bring about that pressure.

The rent review group has said that it is important to consider alternative dispute mechanisms that might help parties who are having difficulty reaching agreement. Sometimes, that might just be down to a personal relationship, the use of an expert, short-form arbitration, mediation or something else that might help to get the parties to a sensible middle ground without having to have recourse to the Land Court.

The Convener: Earlier, we discussed the fact that a voluntary code of good practice has existed in the aquaculture sector and that it is the intention to statutorily underpin that in the bill. It is interesting that you are proposing a voluntary code. Do you think that, at some point in the future, we would need to put it on a statutory basis?

11:00

Angus McCall: That is a good observation. Voluntary codes do not always work, as we have seen in the past. We sit around in the TFF and we make agreements on various aspects of how we should conduct ourselves, but getting that to percolate down to the various practitioners and the people who are involved in the industry is difficult.

As has been stated, we hope to have a short-form code available by the end of May. It will be interesting to observe, over the next wee while, how far that code goes and how much it is respected. Given how a certain minority of agents are behaving, the code may well have to become statutory at some stage in the future.

Scott Walker: I have a couple of points. We have certainly been frustrated by the slow progress in developing the code. Ideally, most people in the industry would have liked to see a code in place by now. However, I firmly believe that, with the timescale that the TFF has now set itself and with the work programme that it has put in place, we will have a code in place this year. That is a good step forward for everyone concerned in the industry.

As an organisation, we are always concerned about voluntary codes because they rely on both parties being reasonable and wanting to apply the code. I am sure that most people in the tenancy sector will adhere to the code, whether they are tenants, landlords, land agents or anyone else who is involved in rent reviews. However, we are concerned that that will not be the case in every circumstance. When the code is produced, the industry will need to monitor carefully whether it is being adhered to. If it is not being adhered to, the industry will need to work out the best method to enforce it.

We hope to progress the discussions that we have had in the TFF about the Land Court in Scotland. Although the code will not be law, it will be an interpretation of best practice and we would like the Land Court to be able to take it into consideration in some way if a case escalated to the Land Court. Certainly in awarding expenses to any winning or losing side, the Land Court could consider whether either side had adhered to the code properly. If the Land Court could be brought on side to think along those lines, that would be particularly helpful.

Stuart Young: It will be important to disseminate the code among members and to talk to members about what is expected as regards the best practice that will be set out in the guide; Scottish Land & Estates is committed to doing that. I hope that other TFF members will want to be involved in that too so that we can present a united approach on how we see things going forward.

Andrew Hamilton: A statutory code or a code that is enshrined in legislation would not cause chartered surveyors any problems. We have all sorts of codes of behaviour within our institution and if there was a statutory code of practice for

dealing with rent reviews, we would have no problem following it. We like to think that we work on the basis of best practice and we will certainly follow the voluntary code. However, if the code was made statutory, the problem that I have already alluded to is how it would be applied to the non-professionals—those who are not lawyers or land agents—who are also involved in these matters. It must be equitable. Bear in mind that, despite what Angus McCall would have you believe from some of his comments, land agents work on both sides. I have certainly represented tenants and landlords and I have also been subject to tenants' agents serving notices at the last moment.

Any system must be equitable. We do not seek to operate a system that benefits one side more than the other. Whichever side is involved—landlord or tenant—the type of advice that they choose to take, or their choice to take no advice, must also come under the code. Otherwise, the situation will be unbalanced.

The Convener: I will make the same point that I did to Andrew Wood in a throwaway remark the last time he was here: it is in the interests of people to earn a living, and the middleman is the person who stands to gain from a protracted discussion about rent. Is that a correct interpretation?

Andrew Hamilton: I would say no, of course. For my part, as well as being a chartered surveyor, I am an arbiter. When we hear rent review disputes, we spend most of our time trying to get people to agree so that the dispute does not drag on too long. I do not think that you can accuse professionals, be they lawyers, accountants, surveyors or whoever, of trying to protract a dispute so that they make more fees out of it. That is not a way for them to enhance their professional reputation. The aim is to deal with things quickly and smoothly, with the minimum of disruption. That would be the client's instructions, whether they are a tenant or a landlord. They do not want the dispute to go on for ever, and we are obliged by our constitution to do what is right for the client, not for ourselves.

The other side is the whole question of the rent review calculations and the fact that we have been asked to produce not only a practitioner's guide but a layman's guide, because there has been a lot of criticism about how complicated the system is. That criticism is justified—it is complicated—but I question whether it is reasonable to try to simplify the system to the extent where everybody can understand it and there is no need for professional advisers. The analogy would be to say that we should simplify all law so that everybody can understand it and we do not need lawyers. That is never going to happen. Rent review calculations are complicated because the calculation process is complex.

However, I am all in favour of complete transparency. Various areas have been referred to as "dark arts", I believe. I do not think that they should be dark arts; they should be explainable and understandable to all the parties. However, valuation is not simply a matter of empirical calculation. It cannot be worked out just on a formula. It has always contained, and must contain, an element of judgment, as with any judicial or quasi-judicial system—there must be an element of judgment, generally based on experience—but it is difficult to write that down as an empirical formula that can be applied to every situation. We need to understand that there is an element of judgment.

The Convener: We will come in due course to the detail of how the calculations are done, but Jim Hume has a point to make first. Is it somewhere in this area?

Jim Hume: It relates to calculations and formulae—and dark arts.

Part of the review group recognised that the common agricultural policy was part of the formula. The CAP as it is at the moment is based on historical payments, although we are going through a review. From talking to Scott Walker earlier, I think that we may know sooner rather than later what that review will be like. There will be changes in Scotland, and we are moving to an area-based payment. It would be interesting to hear from the panel about what the implications of the reform of the CAP will be.

Angus McCall: It is well accepted by most people in the industry that farmers' incomes will fall. We are working with a reduced budget for direct support, in volatile markets and with increasing costs. There is no doubt that we will have to tighten our belts in the next decade or so.

It is going to be especially difficult for tenant farmers who, as well as facing all the other pressures on their business, must find rent to pay. That is why it is important that rent levels should be able to react to economic circumstances and reflect falling profitability in agriculture. If that does not happen, the smaller farmers will find it very difficult to stay in business and—this applies not only to tenant farmers—the only farmers who will prosper will be those who are large enough to spread the costs over increasing acres. If we are to have a well-populated rural landscape, we must keep farms of all sizes there. It is important that how rent is calculated takes into account economic circumstances and the profitability of agriculture.

Andrew Howard: Historically, there is not a high correlation between changes in the CAP and

rent patterns—in fact, I am not sure that there is a correlation at all. The market and the rent mechanism do not suddenly react to a change in the way in which support is provided to the industry. Whether it was price support, MacSharry arable area aid, the sheep annual premium scheme or the move to decoupled payments, it did not lead to any perceptible change in rent, so I do not think that we will see a big shift.

To pick up on a point that Angus McCall made, the assessment of rents in a market and, let us say, any offer made by a prospective tenant will be underpinned by the market circumstances in the particular sector of agriculture at the time. It is not really fair to characterise the system that we have at the moment as not taking account of the productive capacity of the farm or the conditions in that agricultural sector. Those are clearly driving the price that anybody who proposes to take on a farm thinks is an appropriate rent to pay for it. It is not absolutely everything, as Lord Gill explained in his judgment. The prospective tenant will make an assessment of what share of the surplus that he expects to make is an appropriate allocation and what he thinks about the future circumstances of farming. However, in essence, the decision that he makes will be massively influenced by the economic environment in which he makes it.

Scott Walker: The uncertainty over CAP reform has been stifling the rental market to a degree for a few years and, rightly, individuals have been sitting back until they know what the future picture is. Although that future picture is starting to become clearer, it will remain unclear for some time until the Scottish Government determines how it is going to implement the reforms in Scotland. We hope that, once that implementation takes place, confidence will be restored to the market so that people can make business decisions in an informed environment. Hopefully, that will be a factor in bringing more rented land to the marketplace.

We have some concerns over what the CAP reform process could mean for individual productive units. There will certainly be change and movements of money away from certain farming systems to other farming systems. There will also be movements of money away from certain regions of Scotland to other regions of Scotland. However, tenant farmers, owner-occupiers and landowners will face all that together.

A specific detail of CAP reform that is important to our tenant members relates to the fact that, under the current system, a tenant can leave the farm and take the single farm payment with him. He could start farming and renting land somewhere else and, as long as he activated it within three years, he would still have access to that single farm payment. It is likely that, under the new system, the ability to move single farm payment entitlements elsewhere will be severely restricted. In some ways that is good, but in other ways it is bad. It would mean that a tenant and his landlord would probably have to strike a deal with regard to entitlements, as there would be no benefit in a tenant walking away with those entitlements if he has no land elsewhere on which to claim them. At present—certainly in my view—the ramifications of such a change are unclear, but we will have to watch the situation closely in the coming months and years.

11:15

Jamie McGrigor: I would like some clarification on that point. You mentioned that the farmer can leave and take the single farm payment with him. Will that be the case in Scotland after the next CAP reforms? It is not the case in England at present.

Scott Walker: Again I am speculating to a degree, because the Scottish Government will have a number of options for implementing the reforms. My understanding is that the entitlements will continue to be held by an individual rather than being tied to a specific piece of land.

We treat Scotland as one single entity at present, so someone can take a single farm entitlement from Dumfries to the Highlands or from Aberdeenshire to Fife. In future, however, that type of movement will not be possible because Scotland will probably be split up into a number of regions, and people will have to continue to claim those entitlements only in those regions. In addition, as entitlements will be granted once more, the number of entitlements will probably be far more likely to reflect the amount of land that we have in Scotland. The term “naked acres” is used just now for land on which entitlements are not claimed, but that type of flexibility will not exist in future. Technically, a tenant will be able to take his entitlements and claim them somewhere else, but in practice that will not be possible in future.

Jamie McGrigor: Are you saying that the entitlements will be ring fenced to certain areas? Is that your understanding?

Scott Walker: Yes, that is my understanding. The entitlements will be ring fenced to certain areas.

Andrew Hamilton: In the assessment of rent, the level of income that CAP payments represent for farmers should normally be taken into account as one source of income in the basket of incomes that a tenant receives—for example, from selling livestock or crops, or from subsidies. The flexibility that exists in the current rent review system to take into account the earning capacity of a farm,

which in turn will be represented in the amount that people bid for land, should be taken into account whichever system comes into place.

We do not need to adjust the rent review system to take account of every different machination within the CAP with regard to how the payments are made, as it should be flexible enough as it stands to take into account any changes. We have heard reference to increasing costs and reductions in product prices, and all those things should be taken into account in the rental payment, so we do not need to adjust the system specifically to take them into account.

The Convener: We may come back to some of the issues that have just been raised, but Graeme Dey has a question.

Graeme Dey: We are talking about the worth of land in agricultural terms, but I wonder whether diversification projects should be taken into account in calculating rents. In these challenging economic times, it is the tenant who is taking the financial risk in diversifying.

Angus McCall: At present, the Agricultural Holdings (Scotland) Act 2003 allows tenants to diversify as long as they have the landlord's consent, and that diversification can be taken into account in the rent. One would expect that the rent that is paid would reflect the relative investment of the landlord and the tenant, and if the landlord is providing only land, the rent that is paid for diversification should take that into account. The issue is widely recognised; indeed, south of the border, diversification is being built into the rental formulas because, as agricultural income falls, it becomes more important for tenants to diversify. Indeed, diversification might well end up providing quite a large part of the income, especially in smaller farms, and I see no reason why tenants should be penalised for their initiative in that respect. The rent that the tenant pays should reflect exactly what he is paying for.

Andrew Hamilton: There is no doubt that if a tenant has invested his own time and capital on an improvement, he should not necessarily be paying rent on it. However, the rider to that is that there is an asset involved—the land that is being rented from a landlord—and where non-agricultural use is being made of that asset to bring in outside income, including the use of sheds for storage or farm shops or the erection of windmills, and therefore falls outwith the normal confines of the 2003 act, we often find that deals are done and separate leases are set up to cater for such commercial activities. Why would you have commercial activity on a farm if no rent is being paid on it? After all, if that activity was taking place elsewhere, the person undertaking it would have to pay rent. A balance has to be struck. Nevertheless, I absolutely agree with Angus McCall that, where a tenant has done something to improve his income on the farm, the rent should not be based on the value of that investment; however, rent should be paid for the land that is being used for that because that is an asset that belongs to someone else and is being rented to the tenant.

The Convener: Why should small wind turbines, which you mentioned, be described as a development if they are being used to defray the costs of drying grain, say, or by a dairy farmer who is trying to reduce his considerable electricity costs? Would that not be seen within the context of agricultural activity?

Andrew Hamilton: Yes. My understanding from legal advice is that a renewable energy development introduced by a tenant to power a farm—the very circumstances that you described—would be a perfectly valid improvement by that tenant and would, as usual, not be rented on. However, if the intention behind the development were to produce a profit by selling electricity back to the grid, that would be a separate matter and should be dealt with differently. However, you are absolutely correct; the circumstances that you have described should be allowed within the form of a tenancy. If we go back 50 years, we see exactly the same thing with tenants laying on mains power for the first time. It all goes towards the running of the farm.

The Convener: Do you have evidence that landlords encourage such developments?

Andrew Hamilton: I have not dealt with any personally, apart from taking advice from lawyers on what the circumstances would be. I am aware that, where the tenant uses such developments to power the farm, that has been agreed to, and I know of other cases where separate leases have been entered into for land that has effectively been taken out of agricultural use and is producing income from activities that have nothing to do with the farm itself.

Andrew Howard: This is not specific to renewables as such but, reinforcing what Andrew Hamilton has said, I simply note that most of the diversification requests that come to landlords tend to be for other things. The solution to set the diversification out in a separate lease is usually mutually agreed, often because a commercial lease allows one to frame the agreement between the parties in a way that is not permissible under the 2003 act, which after all is designed to deal with a particular type of land use. It might be more appropriate to deal with a cheese plant, say, or some other commercial venture under a commercial lease.

Graeme Dey: So is it more appropriate for the landlord to calculate rent on the basis of the value

of the land, as we have heard earlier, or to say, "We want a percentage of the profit from the business that's occupying the land"?

Andrew Howard: I could use two examples without giving away too many details. In the case of a cheese plant, a ground rent is involved, because the tenant built the facility. That ground rent is determined by ground rents in the area, which are not very high. In the case of holiday cottages that are owned by the landlord but which the tenant manages and has refurbished and so on, a small turnover rent that is based on their output during the year is a sensible way of measuring that. I reinforce Angus McCall's point—that rent will be assessed on the respective contribution of the parties.

Angus McCall: There is case history for such diversification, particularly with farm cottages. The Land Court has case law on farm cottages; it has a formula that lays out how they should be assessed from the point of view of rent. Therefore, it is not a new question.

The new issue is wind turbines. With farm-scale turbines that have been designed to improve the running of the holding, there is often a difficulty to do with whether they are a tenant's improvement, for which the tenant is liable for compensation at the end of the tenancy, or whether they are a tenant's fixture, on which the tenant cannot be charged rent, but for which he will not be compensated, although he will get to use the electricity. Landlords are often unwilling to grant that such turbines are an improvement, but they are quite happy for them to be a fixture.

Claudia Beamish: I have a broad question on rents, as well as a more specific one. As far as the relationship between landlord and tenant is concerned, some would argue that the power lies one way—and not with the tenant—which has an effect when it comes to negotiations when things are difficult. Does anyone have any comment to make on that perception?

More specifically, how comparable are short limited duration tenancies and limited duration tenancies with tenancies under the Agricultural Holdings (Scotland) Act 1991?

Andrew Howard: I will have a stab at that. The perception that you mention is one that I have heard on many occasions. You might expect me to say that I am not sure that I agree with it. On behalf of our members, I make it clear that Scottish Land & Estates would wish to see a mutually beneficial, businesslike and respectful relationship. There are circumstances in which the parties do not get on. There are 6,500 tenancies—the number of tenants is slightly smaller, but it still runs into thousands—so it is perhaps not surprising that, although it is not ideal for the parties, in some circumstances the personal relationships do not work.

I think that someone has already alluded to the fact that the rent review process, which is what we are talking about, is sometimes the conduit through which a wider breakdown in relations finds its way to the surface because a formal process is being gone through. It is an opportunity for the parties, finally, to kick each other in the shins. Part of what is important about the rent review working group is that it is putting in place improved frameworks for ensuring that the opportunity for parties to do that is minimised. However, it will not be a result of this process that people will not want to go to court. Some people will want to fight. That is an unfortunate consequence of human nature.

You asked about LDTs and SLDTs. They are comparable with 1991 act tenancies, but it is necessary to do some work on the figures to break back, for example, a bid for an LDT or an SLDT that might be seen on the open market to make it comparable with a negotiation over a 1991 act rent review.

There are all the usual adjustments—for example, whether the farm is the same and what the land and the buildings are—but you then have the normal disregards such as marriage value and scarcity. It represents the professionals, so RICS may want to comment on this. My opinion is that the vast majority of the higher rents that you might see at tender for an LDT or an SLDT will be heavily driven by marriage value. In other words, neighbouring farmers, who are getting significant benefit by spreading their costs over a wider area, are bidding higher.

11:30

I do not want to give too many details, because there are not that many open-market LDT tenders, but I can refer to one in which a group of neighbouring farmers were bidding and stand-alone farmers were bidding. The stand-alone farmers were bidding between 10 and 20 per cent above the normal reviewed market in that part of the world for 1991 act tenancies. However, the neighbouring farmers were bidding at double that. They were up at £150 an acre when you would expect the rent on that farm, under a 1991 act tenancy, to be about £65 an acre. That is heavily driven by the huge advantage that they gain from adding extra land to their holding. They will run an entire budget of their farm to see what happens if they add 400 extra acres. They will think, "Crikey, that makes a difference", and they will bid on that basis. In many circumstances, marriage value is a much bigger driver of the premium than scarcity. That can be broken back, though.

Christopher Nicholson: Marriage value and scarcity are key adjustments to make in the use of SLDTs and LDTs as comparisons. However, they are the most difficult and significant adjustments to make and they are not particularly transparent adjustments.

The situation is made worse by the recent Court of Session decision to allow SLDTs and LDTs as comparables for sitting tenants. Whereas in the past tenants would be presented with a list of comparables in which one or two were SLDTs and LDTs and four, five or six on the list would be comparable sitting tenant rents, some agents are now exclusively using SLDTs and LDTs as comparables. We are seeing that particularly on estates where outside agents are hired specifically to do rent reviews. We are faced with a difficulty and lack of transparency in making adjustments for scarcity and marriage value, which is leading to contentious situations. To a certain extent the practice has been going on for a long time in Scotland because, in comparison with the English system, our system has focused on the open market.

I will go back to the effect of area aid payments in the early 90s, with CAP reform. The combination of the open market test in Scotland and the introduction of area aid produced quite significant rent rises in Scotland, whereas in England, where the focus was on the productivity and profitability of the farm, the rents remained much more stable during the introduction of area aid. The use of SLDTs and LDTs and the decision of the Court of Session will create more problems for tenants in rent reviews in Scotland.

Scott Walker: I will deal with the perception of the balance of power first. Virtually every tenant in Scotland would say that the balance of power is very much with the landlord rather than the tenant. That said, however, an awful lot of good relationships exist between tenants and landlords. In many circumstances, whether it is negotiations on rents, diversification or investment in holdings, things will go smoothly. That is not to say that both sides start off by agreeing, but both sides conduct themselves professionally, understand what the other side requires and take things forward.

As I have mentioned, problems arise because many tenants have not been involved in rent reviews for many years, so the process is new to them. A landlord will, in virtually all circumstances, have a land agent or other professional acting for him, and whether the issue is about rent or something else, there is therefore a perception that the balance of power favours one side compared to the other.

The subject is very, very complicated, whether we are talking about rents, diversification or investment in holdings. It is understandable that when the average tenant, who is in essence there to farm, is faced with a professional—some professionals take a very robust negotiating stance—that person may feel that they are being harshly treated.

We touched earlier on the code of practice that the TFF is developing. If that is adopted and implemented by all sides, it will go a long way to solving the issue. The TFF is also developing ideas around arbitration and mediation. If we get a form in place that means that individuals do not have to go to the Scottish Land Court, with the huge expense and the need to deal with high-level professionals such as Queen's counsels that that entails, that will help level the balance of power.

Chris Nicholson and Andrew Howard have touched on the main points in relation to SLDTs and LDTs. Ideally, we would like 1991 secure tenancies to be the only comparable, but that is not the case; SLDTs and LDTs will be used. We need more transparency in how discounts are applied to those and on the issues of scarcity and marriage value. That comes back to the problem that it is very difficult for the average tenant to get their head around the subject. I certainly cannot get my head around it; I do not fully understand it. A professional who deals with those issues day in, day out, whether in the field of agriculture or other commercial leases, understands the subject and works with it.

We need more transparency. The rent review working group talked about putting strict formulas in place. If it is possible to develop strict formulas that deal with marriage value, scarcity or other factors that would help to get the transparency that is required.

Andrew Hamilton: On the point about the balance of power—I am sure that you will say that I would be expected to say this—I have said to Angus McCall for the last 10 or 11 years that if he spent less time lambasting land agents and more time employing them, we would all get along a lot better.

My experience from the rent reviews that I have done is that if there is an agent on the other side, the conclusion quite often comes much more quickly because we both know the rules and the comparables that are available; we will not ask for something that is too high or too low; we will be round about the same area and we will reach a conclusion very quickly.

However, there is a problem with affordability and that is where the balance of power comes in. The question is whether tenants can always afford to employ agents. I fully understand the financial pressures and one of the most important pieces of work that the TFF is doing is to make the whole process more transparent. As we have said

numerous times, the process is necessarily complex, but it is viewed with deep suspicion because of the lack of knowledge about it. If we can educate all those who might become involved in a rent review—tenants, landlords, whoever—to a much greater level so that they understand what is going on and do not feel that they are fighting against a force greater than themselves because they do not understand the process, we are part of the way there.

The question about the balance of power is reasonable. That is what happens when you have professionals on one side and not on the other. My answer would be to have professionals on neither side or on both. Professionals on both sides would help to get to a conclusion more quickly.

Lord Gill gave some helpful guidance about SLDTs and LDTs in his Moonzie farm decision. I do not necessarily agree with Christopher Nicholson's view on this. The point of comparables is that we have to know what is happening in the market. Whether a rent is for a farm, house or commercial premises, its value is looked at first. That value is based on what other people are willing to pay for it. LDT and SLDT bids are the only evidence of market trends available, because there are no new 1991 act tenancies. That evidence shows whether rents are going up or down and it is vital, so that rents are linked to the market level. As people have outlined, it is difficult to analyse those comparable rents to make them similar to the holding being dealt with, although that can be done. Lord Gill alluded in his decision to the fact that an SLDT might be expected to be at a lower level, because a full tenancy has security of tenure for many years. That is one argument, and there is a way of calculating that benefit of a secure tenancy.

Equally, Andrew Howard's point on marriage value is key. A way of discounting scarcity from the calculations is to look at the range of bids that have been made, because many of them will be distorted by marriage value—the bid from the chap next door—while others will not. As an arbiter or agent on either side, some of the best evidence can be the range of bids for a tenancy, who has made those bids, and the situation of the bidder—for example, whether they are first-time entrants or do not have another farm. That is much closer to the true comparable than taking the example of the bid from the chap next door. All those things can be calculated, but on any rent, whatever the asset, we have to start by asking what it is worth—what the market is saying about the current value of that rent. We can only begin to assess that by looking at comparables, although I accept that we must adjust thereafter.

The Convener: Would you advocate some form of legal aid for tenants if they could not afford to employ land agents? If so, is there an existing scheme?

Andrew Hamilton: I am not aware of any scheme. I understand that legal aid is under pressure from cuts in funding.

The Convener: I am using the term legal aid in inverted commas.

Andrew Hamilton: I am not aware of any such system at the moment; others might be. That might make it easier to reach satisfactory agreements and avoid dispute resolution.

The Convener: Okay. There are some other comments to hear.

Andrew Howard: Andrew Hamilton has covered some of my points, so I will be brief.

As a general point, despite the appearance of prosperity from Andrew Hamilton and Andrew Wood, land agents are not particularly expensive as professionals. I imagine that most tenants, in running their businesses, employ an accountant to ensure that their accounts are in order and take professional advice over other matters. Advice on rent could be given at a relatively low level: it might amount to ringing an agent and saying, "Does this proposal sound reasonable?" That advice would probably either be free or cost about £50. At a higher level, an agent could attend meetings and conduct the whole process for a tenant. It depends on the tenant's needs. However, advice is available and we would encourage people to take it.

The Convener: Do you agree that tenants and crofters applying for the Scotland rural development programme often pay for consultants to help them? Professional help costs money and people could find themselves in grave difficulties if they were unable to even up the balance of power.

11:45

Andrew Howard: We have to be careful not to characterise the relationship as being hugely unbalanced. The bulk of tenancies are secure 1991 act tenancies and the tenant is going nowhere. They are under no threat of losing the farm. It is a mutually beneficial relationship that both parties are in for the long term. In some circumstances, they are there whether they like it or not, so they have to make it work. It is not the case that there is a great sword of Damocles hanging over one of the parties but not the other.

A further point, which comes out in the rent review working group report, is that we have to be careful not to mischaracterise the English system as some sort of panacea for the questions that we are talking about. The English system draws on both comparables—that is, it draws on the market

data and it asks the arbiter to take account of the productive capacity economic circumstances. As I understand it—I am not a lawyer—it does not say which should take precedence. In fact, what we end up with is the parties deciding to choose whichever route they think best suits their circumstances but, in essence, the answer remains rooted in what the market will pay.

When we look at the evidence of what rents are paid south of the border, we see that there is no appreciable difference other than that they are slightly higher than they are here. They do not result in any different patterns or in increases at a different time. In effect, there is added complexity and if you were to add that into our system now, you would add uncertainty and probably the need for legal clarification of uncertainties, with no particular benefit for what the system does or the way in which calculations are done.

The Convener: That issue was raised by the rent review working group. We have some statistics to suggest that rents are actually higher in Scotland than in England, in general.

Andrew Howard: Well, there are statistics, damned lies and whatever. The latest set of documents that I could find from a quick trawl of the internet was "Farm Rents 2011/12" for England, which comes from the Department for Environment, Food and Rural Affairs. We have to be careful because it averages everything and we have to look at the regions, but if we look at the average rents broken down into acres, they look similar to what people would expect to pay here. The average cereals rent is £69 per acre. Clearly, there will be huge variation there, with higher rents in certain regions of England. The figure for general cropping is £76 per acre, for dairy it is £75 per acre, and for livestock less favoured areas it is £27 per acre. Those are rents that we would find and consider perfectly normal in Scotland.

I have spoken to agents on the other side of the border to try to get the Northumberland borders experience, and the anecdotal feedback that I got from them was that the rents were marginally higher. We would expect them to be pretty close because the areas are similar climatically and in terms of soils and so on.

The Convener: A number of people want to comment on this. I call Angus McCall, to be followed by Scott Walker and Andrew Wood.

Angus McCall: The discussion has moved on slightly since the question about the balance of power between landlord and tenant. Just to deal with that quickly, there is no doubt that tenants feel—it is more than a perception—that landlords have more financial resources and more information. That can perhaps be dealt with through increased transparency and so forth, but I think that tenants will always feel that they will invariably be outgunned. As an organisation, we try to provide tenants with as much information as possible through our rental data bank and helplines. However, with a three-year rent cycle, tenants have to face a bit of a hurdle every three years. In most cases, rent reviews go quite smoothly, but there are many cases in which they do not, and in many cases they last for many years.

Regarding LDTs and SLDTs, we struggle to see how an open market system can be sustained in the long term the further away we get from there being a market for 1991 act tenancies.

We have done a bit of research into the system south of the border, which delivers a more sustainable rent. One of the advantages of that system is that it does not rely on the primacy of the open market. The open market is taken into account, as is other comparable evidence and the productive capacity of the farm. A whole basket of things is taken into account.

One aspect south of the border that we do not have north of the border is that there is recognised clear water between using farm business tenancies—which is the equivalent of the LDTs and SLDTs—and direct comparables with traditional agricultural tenancies. They are taken into account in the broad mix as background noise to what is going on in the rental sector, but they are not used as direct comparables, which they are in Scotland.

We run a rental databank that goes back to 2004. The English Tenant Farmers Association has a rental databank that goes back many years—to about 1987, I think. Having analysed the figures from both databanks, we have come to the conclusion that rents in England are marginally lower than in Scotland. Rents tend to be highest in the south-east, obviously. As we move north, they fall away until we get to the border. They then rise a bit and, as we come north—up into Aberdeenshire and so forth—fall off again.

It is difficult to get empirical evidence on rents and rents paid. We have had figures from DEFRA and our sister organisation and we believe that the perception that we get is correct. When we examine the relative productivity of different types of farms south of the border and north of the border, there is no doubt that there is more productivity and more profit in the more favoured areas in the south than there is in the north. From that, we can extrapolate that rents in relation to farm profit are a good deal lower in England than they are in Scotland. That is driven by different rent formulas.

Scott Walker: Having professionals on both sides would be helpful. Costs are an issue for

many tenants. If there was anything that could be done to help with those costs, that would be useful.

One of the other issues that has been mentioned in the TFF is the fact that a record of condition is not being kept on all farms. It can be quite easy to get that in place. If there was money available to incentivise and help with a record of condition, that would be useful.

Another approach that the TFF is considering now on dispute resolution is expert determination of rents. That would balance the factors up if the parties could not reach an agreement on the rent. Very many landlords and tenants reach agreements between themselves but, when no agreement is reached, it would be extremely helpful if we had a dispute resolution process that involved expert determination, in which an expert who is knowledgeable in the field sets the rent.

My next point answers a question that the committee might ask, but it is worth making it right now. It comes back to the balance of power and it concerns available information for the rents that are paid for SLDTs, LDTs, secure tenancies or any other rental agreement. If we had some form of compulsory database where that information was gathered and if, therefore, it was freely available to both sides, that would go a long way towards relieving any imbalance of power that might exist.

The Convener: Is it your understanding that the number of rent reviews each year is around the 350 to 400 mark?

Scott Walker: I do not know. I would be speculating if I gave an exact number.

Andrew Howard: It is difficult to be precise, but there will have been a lot more since 2008, because of the upturn in agricultural conditions. One point that Scott Walker has raised twice is that many tenants had not experienced a rent review, because there had not been any since the mid-1990s. If nothing else, that showed a sensitivity to the difficulties that were experienced during that 10-year period.

The Convener: Last year, 32 cases—roughly 9 per cent—were referred to the Land Court.

Andrew Howard: When the Land Court visited the TFF, it indicated that it thought that four of those cases were what might be called serious and the rest were cases in which time had simply run out before the due date and the parties were, in effect, reserving their position to carry on discussions. Those cases were almost certainly settled by agreement, but just after the 28th of the respective term.

The Convener: That is useful to know.

Andrew Wood: I have a number of points, but I will try to be brief. To respond to the point on the balance of power, a perception is often given that landlords are very wealthy and have large assets, but many do not and the balance of power can easily swing in a completely different direction. I am referring, for example, to cases in which an elderly person whose relatives have died has inherited a small portion of land that is farmed by somebody who also farms significantly larger areas. That person might not have a background in agriculture and certainly would not have significant assets.

Another issue relates to charities. Many charities hold areas of land, some of which are large, but most of which are small. Those charities are often small local charities, so they do not have large amounts of money. In such cases, the balance of power is completely in the other direction. We should not lose sight of that in our discussions.

The English legislation clearly focuses on the market and takes into account productive capacity. One thing that has come through in today's discussion is a concern about costs. If we start to get involved in detailed budget analysis of farms, that leads to many more avenues for dispute and, generally, to significantly more cost in analysing the way in which businesses are dealt with. We urge caution on going down that route, because we could end up with significantly more layers of cost, which people would rather avoid.

My final point is one that Andrew Howard and Scott Walker have touched on. I know of many cases in which rent reviews have not been conducted for 12 or 15 years. There is a slight concern that people think that rent reviews come along every three years, but they do not. People vary the notices to take account of what is going on. For example, in the Borders last year, farmers had an incredibly difficult season and many people held off from considering rents because of the climatic conditions that the farmers endured.

The Convener: Do you mean that landlords held off from considering rents?

Andrew Wood: Yes.

The Convener: Does that happen often?

Andrew Wood: Yes.

The Convener: Even in proportion to the total number?

Andrew Wood: Back in the 1980s and 1990s, many farms had no rent reviews for significant periods.

Stuart Young: I simply want to restate Andrew Wood's point, which Scott Walker and others have touched on, that, from the BSE outbreak in 1996

until 2007-08, many farm rents simply were not reviewed. In fact, most were not reviewed.

The Convener: The discussion about tenancy law in the Parliament brought to the fore the question of comparability, up-to-date rent prices and all the rest of it. The old open-market method for 1991 act tenancies was transferred as the process for dealing with SLDTs and LDTs.

The complexity of what we, as laymen, are trying to grapple with in order to ask questions is enormous. I do not know whether some of my colleagues have admitted that it is difficult to see their way through this, but we are trying to make recommendations. We have to question the tenant farming forum very soon, so we are keen to tackle as many points as we can. We have a limited amount of time just now, and we may have to take more evidence from some of you in due course.

12:00

Jayne Baxter: I have been listening, and I have been getting to grips with what has been said. Forgive me if this has already been said, but who would compile and maintain the rent register? Who would hold the data, and how would the register be accessed?

Stuart Young: The tenant farming forum debated and discussed that last week. There are a couple of ideas on the table. One is that the Government could hold the data. The Government is going to think about that and report back on the matter at our next meeting in a month's time. Another thought was that the RICS could hold the data; it, too, is going to think about it and come back to us at our next meeting.

The Convener: Before we move on, I know that members have some comments about what has just been said. Does Jamie McGrigor have another question? I do not want you to ask it if it is on a different point, Jamie.

Jamie McGrigor: I wanted to ask it a while ago. It is a small question, in relation to the final—

The Convener: Let us wait until we hear what people have to say on this point, and then you can ask your question. Is that okay?

Jamie McGrigor: Certainly.

Andrew Hamilton: I saw some doubt on your face, convener, when we were talking about the past 20 years and what has happened with rent reviews—particularly the fact that rents were not reviewed. I remember that, in 1996, I did something like 150 rent reviews—I remember counting them. Frankly, I doubt that I have done that many since. In the intervening period, rents have also gone down. In quite a lot of the estates in which I was involved, we knew what was going on, and rent reductions were offered. Often, they were relatively nominal—5 or 10 per cent—and sometimes people did not even ask for them. That went on for quite a period until fairly recently.

To me, that is the market leading the process. There was not enough money for people to pay higher rents, so they were not asked to. It was as simple as that. In some cases, rents were reduced to take account of the circumstances. To me, that is how the rent review process should work. It represents the ability of farmers to make money out of what they do.

Christopher Nicholson: Andrew Hamilton, Stuart Young and Scott Walker have mentioned that there were very few rent reviews from 1996 to around 2006—over a 10-year period. It is evident from the STFA rent database that not many reviews were done then. In comparison, the English Tenant Farmers Association database shows that there were as many rent reviews in England during those years as there were in other years. That is because the English system allowed tenants to ask with confidence for their rents to be adjusted downwards.

There was a significant drop in agricultural incomes in the five or six years from 1997. Rents in England and Wales responded to that, but individual downward reviews were rare in Scotland—there were some, but the number was not significant, whereas it was common practice in England to review rents downwards. I know of some farmers in England who had three rent reviews and three rent reductions in a row. That allowed rents in England to follow the productivity and economics of farming south of the border.

Returning to Andrew Howard's points about Scottish arable land rents, they may well be similar to English arable land rents, but something is wrong with the system if an arable farm in central Scotland is paying the same rent as an arable farm 250 miles further south in a sugar beet-growing area of Lincolnshire, Nottinghamshire or Leicestershire, where the profitability of the crop rotations is considerably higher than it is in Scotland.

Scott Walker: The lack of a rent database is a clear market failure. I would not be happy if it was left to a private sector firm to gather, collate and present the information to the industry. I am not convinced that all sides of the industry would have faith in that. This is a clear area for intervention by the Government, which should make the data publicly available to everyone on all sides.

What data to gather would need to be carefully considered because having only the rent figure is not sufficient. Some background details are needed, including the basis for the rent, the class of land and whether any cottages are available. As

Angus McCall said, we, the STFA and land agents have databases, so that information can be gathered. If there was an in-depth look into the key figures and details that we wanted, I am sure that that information could be pulled together. It would then be for the Government to determine whether that would be best done under its auspices or whether it should put it out to contract elsewhere. That is ideally how we would want that to develop.

Andrew Howard: I speak as a member of a family that has English tenancies—we are tenants, rather than landlords—and I am not sure that Chris Nicholson's description of the process during the 1990s and early 2000s characterises our experience. I am also not sure that I would necessarily accept that there is a huge difference between the profitability of farms with the best arable land in Scotland and in England. You only have to look at where the world records are for wheat and barley production. Those are now held in Lincolnshire but for many years they were held in east Lothian or Aberdeenshire. We must be careful about a characterisation that all is the land of milk and honey further south and that it is dreadful up here.

I am also unsure about why Chris Nicholson believes the tenants did not feel confident enough to issue notices in Scotland if they wished to or felt that there was an advantage in doing so. That right exists. Landlords in Scotland are not any different from those in England, and tenants in England are not any different from those in Scotland.

This is anecdotal only, but I am concerned about a headlong rush to a compulsory register of rental data. Whenever I have spoken to our tenants about making their rental data available to other estates that might wish to use it as a part of their negotiations, they have absolutely refused. I have respected that, because they consider that to be their private data. Clearly, the NUFS and the STFA will have a better handle on what their members think, but I am slightly surprised that tenants are willing to have their data exposed publicly, because my experience is that they have always been rather guarded about it.

The Convener: I will have to take two short questions together from Jamie McGrigor and Jim Hume, because there are plenty of other matters arising. We will go once round the table, so I ask for a combined answer from the witnesses.

Jamie McGrigor: If we are to have a vibrant tenanted sector, we must have young people coming in. Although my question relates to everybody, it is perhaps more for the tenanted sector representatives.

From what I have heard today, it seems to me that a young person who wants to farm faces difficulties caused by the marriage value factor and by the lack of a single farm payment, without which a young person cannot get the money together to pay the rent, given that there is no reserve in Scotland. I think that a lot needs to be looked at in our system, which I am not sure is as good as other systems, by comparison. Can people comment on young people getting into tenancies?

The Convener: I must ask the witnesses to restrict their remarks to the context of the rent review, which is what we are talking about, rather than wider access issues. Perhaps people can talk about how young people get into tenancies if marriage values are so high, as Jamie McGrigor has said.

Jim Hume: Convener, I appreciate that we are time restricted.

In the Moonzie case, the Court of Session was quite critical of the 2003 act, but the rent review working group recommended no changes to that act. Should the 2003 act be reviewed and amended?

Andrew Hamilton: On Jamie McGrigor's point, the whole question of young entrants is fraught with difficulty. In the TFF, we looked at the issue in great detail and found that a lot depends on the availability of subsidies. There was a perception that the reason why so many young tenants could not get land was because there was no land available to rent, which was thought to be their biggest hurdle. However, the TFF-sponsored studies that were undertaken showed that that was not necessarily the case. The biggest hurdle is money and raising capital; the availability of land is a difficulty, but it is not the prime problem for young entrants.

The Forestry Commission has favoured young tenants in letting some tenancies, as have clients of ours that are charities, so there are landlords who will do that. That is one way through, but even then—certainly, this was the case when I looked at a list of tenders from young entrants—the problem is that young entrants do not have enough money to do the farming, which involves buying stock and equipment. Money is by far the biggest problem. That could be alleviated by the CAP: however that is designed next time round, it would be useful if it included help on that issue.

Sorry, can you remind me of the second question?

The Convener: The question was on the 2003 act.

Jim Hume: My question was on the 2003 act amendments to section 13 of the 1991 act.

Andrew Hamilton: The process always starts off with a statute that is put in place to cater for

what will happen in the future; then, a number of cases need to come to court for that basic statute to be interpreted. Lord Gill was critical of the drafting of provisions in the 2003 act, but he has given an interpretation of those. As has been the system of law in Scotland for a long time, the interpretation given by the courts after the statute is enacted is what gives rise to the law, and I think that that is what we have here. There is not necessarily a need to change section 13 because it was badly drafted; we simply look to the courts to interpret it for us and then we follow that.

On the difference between England and Scotland, one point to bear in mind is that we are very fortunate here because, in England, nearly all arbitrations are carried out by arbitrators—there is no equivalent of the Land Court—and those arbitrations are private. Therefore, people do not have a whole lot of decisions that they can revisit when carrying out their own rent review to see how things were decided last time. In Scotland, we are fortunate that, although there has been only one case since the 2003 act, we have a court system that produces public decisions, which can be looked back at to determine what happens next time.

Andrew Howard: Andrew Hamilton has largely covered the issue. I think that Lord Gill was criticising the drafting rather than offering a criticism of the mechanism itself. Those are two slightly different things.

Scott Walker: On young entrants, the TFF produced quite an extensive piece of work a number of years ago about the barriers to entry to agriculture that young people face. Those involve a complicated mix, which will be difficult to resolve. I refer the committee to that paper as an exceptionally good read that shows the problems that individuals face and what some of the solutions might be. I do not believe that there is simply one solution. A mixture of different policy measures will need to be introduced if we are to overcome that issue.

12:15

On the 2003 act, as an organisation, the NFUS believes that the TFF has made progress, although it has perhaps not made as much progress as we would have liked last year. I firmly believe that, during the course of this year, a new form of arbitration will be introduced, as well as a code of practice and documents for laymen on how rent reviews and other issues involving tenants and landlords should be taken forward. Given the nature of the parliamentary process and the uncertainty involved in any changes in the law, I would like to see how the initiatives that the TFF will put in place operate before, after a period of time, making any legislative changes that are considered necessary. I am forever the optimist and I hope—indeed, I firmly believe—that the changes that the TFF wishes to introduce could resolve many of the issues between tenants and landlords that we have discussed today.

Angus McCall: On new entrants, I think that there is no doubt that accessibility to land is probably the major stumbling block. Obviously, capital is a problem, but if you cannot get land, you cannot start a career in farming. Going forward, I think that the single farm payment will make provision for new entrants so that a new entrant can claim his full entitlement to direct payments from day one as well as benefit from the uplift in subsidies and all the rest of it. Therefore, from the financial point of view, I think that there is a bit of help coming for new entrants. Land will always remain the major stumbling block. On the open market, a new entrant will invariably be outbid by an existing tenant or farmer who wants to expand his operation. I do not see how we can get round that.

The Forestry Commission starter farms were a very good initiative, on which I would certainly congratulate the Government. However, when those tenancies come to an end in 10 years' time, the young people who have built up those businesses may have a problem with where to move to from there in order to find the next step on the ladder. My concern is that, as farms that are let on the open market are amalgamated with or added on to other units, that next stepping-stone will not be available. I find it difficult to see where a young person, having got that start, will be able to move on to. In 10 years' time, that may be a real challenge for us.

I am one of the few people in this room—I think that Andrew Hamilton is the only other one—who was involved in the passage of the 2003 act. At that stage, we had great expectations and hopes that rent reviews would take much greater account of economic circumstances and that there would be an equality between comparable evidence and economic evidence. However, that was not translated in the legislation. From my perspective, our organisation was too naive to understand the implications of what was happening. I think that the intention in those days was to give greater weight to the economics of farming so that rents would reflect what tenants could actually pay.

I do not think that the issue will go away. We will need to have another look at the rental system. A system that is predicated on comparing rents with the open market is not sustainable. That view is shared by, I think, the majority of tenants in Scotland—certainly, no tenant has come to me to say that I have that wrong—so I think that we will need to come back to the issue in future.

The Convener: I will stop the discussion now, if you do not mind, and we will take the matter forward in our work programme. In our minds, there are still too many unanswered questions with regard to the processes that we are going through, and there is a huge frustration out there over the time that it is taking to achieve things. We are increasingly concerned that there will be a need for further reviews of the work that is proposed by the tenant farming forum. A small change in arbitration law has been suggested, and there is some debate about whether there should be an official rent register, which could require legislation. It is taking an age to reach agreement on all those matters.

The cabinet secretary attempted to put some energy into the tenant farming forum to come up with solutions quickly, and we look forward to speaking to the tenant farming forum directly. However, when we look at our work programme, we will consider inviting you, as stakeholders, to speak to us again in the near future. We value all your points of view because they inform us enormously, but we do not yet have a clear view of the matter in our minds.

Angus McCall said that he had been involved with the passage of the 2003 act. He has talked about demitting his position in the Scottish Tenant Farmers Association, so I do not know whether he will be a witness again on its behalf. We thank him for his input into the debate today and for the work that he has done on behalf of the STFA. New people are coming forward at every stage on either side of the argument, and we will welcome whomever the representatives happen to be in the future.

I thank all of you for your input. We would be happy to receive any of your thoughts on paper after the meeting. We will continue our consideration of these matters in detail and with as much speed as we can bring to that, and we encourage the tenant farming forum to do the same.

That brings us to the end of this agenda item. We will have to get our sheepdogs out, as we will now move into private and must shoo you all out of here in rather a bigger hurry than many of us would like, because we would have liked to talk to you.

12:22

Meeting continued in private until 12:55.

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