ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 3 May 2006

Session 2

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CONTENTS

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ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE
14th Meeting 2006, Session 2

CONVENER

*Sarah Boyack (Edinburgh Central) (Lab)

DEPUTY CONVENER

*Mr Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
*Rob Gibson (Highlands and Islands) (SNP)
*Maureen Macmillan (Highland and Islands) (Lab)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Nora Radcliffe (Gordon) (LD)
*Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Alex Fergusson (Galloway and Upper Nithsdale) (Con)
Trish Godman (West Renfrewshire) (Lab)
Jim Mather (Highlands and Islands) (SNP)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)
*Eleanor Scott (Highlands and Islands) (Green)

*attended

THE FOLLOWING GAVE EVIDENCE:

Sir Crispin Agnew of Lochnaw
Dr Jean Balfour (Scottish Rural Property and Business Association)
Duncan Burd (Law Society of Scotland)
Andrew Hamilton (Royal Institution of Chartered Surveyors in Scotland)
Matthew Hickman
Hamish Jack (Spey Valley Crofters Association)
Agnes Leask (Scottish Crofting Foundation)
Cameron Maxwell (Forestry Commission Scotland)
Duncan Mulholland
Councillor Drew Ratter (Shetland Islands Council)
Iain Russell (CKD Galbraith and Scottish Estates Business Group)

CLERK TO THE COMMITTEE

Mark Brough

SENIOR ASSISTANT CLERK

Katherine Wright

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 5

Scottish Parliament

Environment and Rural Development Committee

Wednesday 3 May 2006

[THE CONVENER *opened the meeting at 09:38*]

Crofting Reform etc Bill: Stage 1

The Convener (Sarah Boyack): I welcome members, the public and the press to our meeting. I remind everyone to turn their mobile phones and BlackBerries to silent. Mark Ruskell has apologised for not attending the meeting, but he has sent a substitute in Eleanor Scott.

This is the third of our five meetings to take evidence on the Crofting Reform etc Bill. Today we will hear from four panels of witnesses, so we will really do crofting. I welcome the first panel, which comprises Dr Jean Balfour, who is a member of the Scottish Rural Property and Business Association's crofting group; Andrew Hamilton, who is a member of the Royal Institution of Chartered Surveyors in Scotland; and Iain Russell, who is from CKD Galbraith and represents the Scottish estates business group. I thank you all for providing in advance helpful written evidence, which we have read. I go straight to members for questions.

Rob Gibson (Highlands and Islands) (SNP): Good morning. I will start with a general question, to help us get into the subject. What is the role of crofting landlords today? The Crofters Commission seems to exercise many powers. Where should the balance be struck between the right of crofters to realise value from their crofts and the future of crofting as a protected form of land tenure and tenancy from private landlords?

Dr Jean Balfour (Scottish Rural Property and Business Association): Private landlords have an important role to play. I am a hands-on crofting landlord in north-west Sutherland. I believe that there are opportunities for landlords and crofters to work in partnership on appropriate developments and to retain the value of crofts, in the widest sense. One disadvantage of the bill is that it seeks to remove what little power crofting landlords have, which will probably make partnership more difficult. One must also think of community owners, the number of which is likely to increase, which is welcomed by everybody. They must undertake the role that was previously undertaken by what we might call traditional landlords.

Rob Gibson: Where should the balance be struck between crofters' rights to realise their crofts' value—a value would have to be put on them—and crofting's future as a community activity?

Dr Balfour: I will let Mr Russell have a go at that.

Iain Russell (CKD Galbraith and Scottish Estates Business Group): It is difficult to strike a balance between individual crofters and the crofting community. One of Scottish estates business group's concerns is that the bill focuses on the rights of individual crofters and the definitions and detail attached to individual crofts, possibly at the expense of the wider crofting community.

On the roles of landlords and crofters and how they can work together, sustainability is created by communities, not by individual crofters. On the relationship between landlords and communities, there are often different crofting communities within one land ownership, whether private or public. We would like more joined-up thinking to bring together the rights of communities and individual crofters.

Rob Gibson: It was put to us that an individual or township might have an idea for development that the rest of the crofting estate does not share; indeed, a community might spread over more than one crofting estate. Does not your argument beg my original question, which was, what is the role of private crofting landlords?

Dr Balfour: Are you asking just about the role? I think the question also referred to the financial balance, if I understood it correctly.

Rob Gibson: I was talking about the balance to be struck between crofters' rights to realise the value of their crofts—the financial value or other values—and crofting's future as a community activity. What are your views on that?

Dr Balfour: I do not regard that as a major problem. The issue is not the realisation of value; it is what crofts are used for in the future. The question is whether crofts continue to be used not only for agricultural business but for forestry and other small businesses, or whether they are regarded—as they are by some—as housing sites to be sold off. That is an important issue. Currently, there is no means of controlling such activity. A crofter can set aside assignations, acquire their croft and sell it on and, subject to clawback, that is the end of it. There is a land-use issue, therefore, as well as a value issue.

Rob Gibson: That is interesting. Do other panel members have a view on that? Does the RICS have a view on crofters or landlords maximising their crofts' value?

09:45

Andrew Hamilton (Royal Institution of Chartered Surveyors in Scotland): The RICS has no particular view on the issue. Ours is a membership institution and we do not represent landowners or crofters, only our members. No strong views have been expressed on the topic.

Iain Russell: You have to ask what creates the value—it is often a combination of location and the ability of either a public or a private landowner to invest. I envisage more partnership between owners, crofters and wider communities.

I return to my point about the importance of the wider crofting community and the value that can be achieved by crofters working together as opposed to individual crofters working on what are often quite small landholdings. They would have difficulty realising any value, other than in developing house sites, to which Dr Balfour referred.

The Convener: Do any other members have questions on these issues? I saw a forest of hands.

Nora Radcliffe (Gordon) (LD): I am interested in where grazings committees fit in. In her submission, Dr Balfour says that where there is a properly constituted, properly functioning grazings committee it could deal with a lot of local issues. How true is that throughout the crofting counties? How many crofting townships have properly constituted, properly functioning grazings committees of the sort that you visualise in your submission?

Dr Balfour: It could be argued that coverage is patchy. The bill could help to make it not patchy.

Nora Radcliffe: Would other panel members like to comment on grazings committees as a mechanism for capturing the community interest?

Iain Russell: I agree entirely with Dr Balfour. There are excellent examples of vibrant grazings committees that effectively lead their communities. The Crofters Commission has a role in assisting grazings committees to put together their rules and regulations and it has a role as a referee—for want of a better word—in helping to operate them. The situation is mixed. There are many places with only one or two shareholders in a large area of common grazings, so there are all kinds of distortions, especially of value. There are equally good examples of multi-occupancy and shares being widely spread. Grazings committees are a good focal point for communities and they could be encouraged, strengthened and supported, especially by the Crofters Commission.

Elaine Smith (Coatbridge and Chryston) (Lab): I have a question for Dr Balfour in response to something that she said. I have received two submissions: one from Dr Balfour and one from the SRPBA. In your own, you say—

Dr Balfour: Forgive me for interrupting, but I am here as a representative of the SRPBA. I made it clear that, although the two submissions are not at odds, in a sense my submission is not part of the discussion.

Elaine Smith: Both submissions refer to the extension of clawback. In your submission you suggest a period of 10 years, but in its submission the SRPBA suggests 10 or 15 years. Can you provide further information on that point, which you mentioned in your answer to Rob Gibson?

Dr Balfour: We understood that a suggestion had been made to extend the clawback period to 25 years. The SRPBA's view is that that period is probably too long, which is why we talked of 10 to 15 years and why I referred to 10 years in my submission.

Elaine Smith: Would that stop the free trade in crofts on the open market and regulate the market in some way? You say in the SRPBA submission that the Crofters Commission

"does not take an adequate interest in regulating assignations",

which

"is likely to aid the free market in crofts. Rather than change the law, the Commission could be encouraged to take a more robust view on assignations".

Are those two things different or are they much the same?

Dr Balfour: The clawback applies to the outright compulsory sale of a croft to a crofter. Assignation is when the tenancy plus improvements go from one crofter to another. The commission can exercise a veto over assignations, but in such circumstances a crofter can decide that they will just buy the croft and resell it. That dilutes the ability of the Crofters Commission or anybody else to influence the situation. I hope that is helpful.

The Convener: It is helpful to get into the nitty-gritty of the situation.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): It is nice to see you, Dr Balfour. Perhaps you and your colleagues can help me with something. In taking evidence in recent weeks, we have noticed that on the one hand there is a strong body of opinion that the Crofters Commission simply does not have the powers to prevent situations such as that which happened at Taynuilt—it does not have the power to prevent the sale of a croft to a developer in particular circumstances. On the other hand, you say in your submission that it is disappointing that the bill will increase the level of involvement of the Crofters Commission. So on one hand we hear that the

commission does not have enough powers, but on the other we hear that it is too heavily involved. Where should the balance be struck?

Dr Balfour: The powers, such as they are, and who exercises them are two different issues. We suggest that whatever the powers are, more of them should be devolved to properly constituted local grazings committees plus landlords, because they are the local people who work together.

As I said, there is also the question of who operates the powers. At the moment, the Crofters Commission might decide not to take steps. In other situations, as I explained in the case of assignations, its power can be overturned because of the right to buy.

The argument in the Taynuilt situation was about planning. It has been suggested that the Crofters Commission be made a statutory consultee. However, once there is a right to buy, neither the Crofters Commission nor anybody else can control what happens.

Mr Brocklebank: Let us pursue that further. If neither the commission nor a grazings committee can prevent that situation happening, what powers, other than extending the length of clawback, could be introduced to reduce the value of croft tenancies?

Dr Balfour: You are talking about value.

Mr Brocklebank: I am talking about how one can prevent the free-for-all when selling off crofts. What should the bill do to prevent that happening?

Dr Balfour: If you feel that it would be sensible for the Crofters Commission, a locally devolved arrangement or some other body to address the assignation situation, you will have to examine the right to buy, which is the trigger for taking a croft out of what might be described as a normal crofting situation and putting it into a separate enclave in the middle of a traditional—if I can use that word—crofting township. Some crofters do not like that. I notice that even Brian Wilson acknowledges the problem.

Mr Brocklebank: I am not sure that that answers the question.

Dr Balfour: I am sorry. I ask Iain Russell to address the point.

Iain Russell: I think that the issue of how to assist sustainability lies at the root of the question. The sale of crofts and croft land usually takes money out of the crofting system and puts it elsewhere. In some exceptions, the money is reinvested but, in general, the proceeds from the sale of a croft house site do not go back into the individual croft whence the site came. Indeed, historically, a sequence of house sites usually comes out of the same piece of croft land, and there is little evidence of the money going back into the croft itself or, indeed, into the community. If the bill aims to support sustainability, it should consider linking eligibility for grants or other support with conditions to ensure that part of the profit from the sale of a croft goes back into the croft or crofting community. That would at least ensure investment back into the community and it would create a sustainable fund or building block that could be tied into the grant support system.

Mr Brocklebank: Would the grazings committees or some other community organisation administer such a fund?

Iain Russell: I imagine that the Crofters Commission would administer the fund—after all, it already administers grants and other outgoing money. However, it would need to listen to the grazings committees' advice and views, because they are community bodies and they would be part of the consultation process.

The Convener: Nora, do you have another question for this panel? You asked a brief one earlier.

Nora Radcliffe: I want to explore the extension of crofting outwith the crofting counties—

The Convener: I think that Maureen Macmillan has more questions on the current topic. Because we are discussing complex issues, I am keen to stick with the subject until we have worried it to a conclusion.

Maureen Macmillan (Highlands and Islands) (Lab): The Executive has stated that it intends to introduce the concept of the proper occupier to regulate crofts that have been bought and no longer have tenants. Have you considered the implications of such a move? Dr Balfour has suggested that, because the selling of crofts takes people out of the system, those people cannot be regulated. Would regulating bought crofts in the same way as tenanted crofts dampen the market in selling and assigning crofts, which you all deplore?

Dr Balfour: As we say in our submission, we would like to give more thought to the proposal, but we welcome it in principle. However, we are more concerned about how it would operate in practice. It would involve bureaucracy, of which we have too much these days, and there is the question of how difficult it would be for the commission to set realistic parameters. That is our worry, but the committee might have given the issue more detailed thought.

10:00

Andrew Hamilton: The RICS does not have a particular view on the issue. Valuation is part of our profession. If the intention is to limit the value

of crofts and the number that are sold off as housing, the proper occupier concept is welcome.

Any conditions that are attached to a property affect its value. If the conditions that are attached to a croft include those that are proposed in relation to the proper occupier—for example, having to live within a certain distance and not subletting—the croft's value will be significantly restricted, which I think is the intention. I can assure the committee that the bill would have that effect on valuation. However, it depends on what happens in the property market. When it becomes heated and boils up, people sometimes overlook the effect of any restrictions. It ultimately boils down to how purchasers are advised by their solicitors. Generally, however, the conditions should restrict the value.

Iain Russell: The other issue that can affect value is grant eligibility. There is still a small anomaly, as a more rigorous means test is applied to owner-occupiers' grant eligibility than to crofting tenants' eligibility. That can fuel the market for the assignation of leases as opposed to the market for owner-occupied crofts, which have a more rigorous set of rules regarding the definition of a proper crofting person, what they can do on a croft and where they can live. That is a natural dampener on owner-occupied crofts as opposed to assigned leases for crofts. That small grant anomaly, in my experience and in that of the SEBG, moderates the number of crofting tenants who apply to buy their crofts.

Maureen Macmillan: How would you dampen people's desire to have an assigned lease? Would you do it by stronger regulation and by the Crofters Commission having the power of veto? How do you envisage that being achieved?

Iain Russell: We should create parity between owner-occupiers and tenants. The SEBG's view is that there should be no gap between the two in eligibility for support and the criteria that they must meet.

Dr Balfour: But if owner-occupiers were treated more like other crofters, they would have to relet, which does not happen just now. Normally, a landlord would relet, but that has not been implemented in the case of owner-occupiers.

Elaine Smith: The SEBG makes a point about the existing five-year clawback on page 5 of its submission:

> "The legislation nevertheless allows the crofter to contrive a conveyance from the landlord to a nominee without triggering this 'claw back' provision"

and goes on to say that people can "make a fast buck". Can you explain that a bit more? Can you also say how that can be avoided through new legislation and whether it is what you would like?

Iain Russell: It is possible to do that. It is common practice for a selling crofter to avoid clawback through title being taken in the name of a nominee, in other words, the person to whom the crofter is selling the croft on to directly from the principal sale. That has been established, and there is case law to that effect. It means that not only is a five-year clawback a short period—in our view it does not act as a disincentive—but, in the majority of cases, it is avoided altogether through title being taken in the name of a nominee.

Elaine Smith: Would increasing the period of the clawback to 10 years or 15 years address the issue?

Iain Russell: Not unless the question of taking title in the name of a nominee were also addressed.

Elaine Smith: How do you suggest we go about that?

Iain Russell: That would have to be considered under the bill.

Elaine Smith: And you do not see anything in the bill that would cover that.

Iain Russell: No, I do not.

The Convener: Nora Radcliffe wants to talk about the extension of crofting to new parts of Scotland and about how new crofts would actually be created.

Nora Radcliffe: I think that you have asked the question for me.

The Convener: I did not mean to.

Nora Radcliffe: My question is about extending crofting tenure outwith the crofting counties by creating new areas where it could be applied.

Dr Balfour: Is this in the context of wanting to make smallholders crofters?

Nora Radcliffe: Yes.

Dr Balfour: In general, we would not favour the extension of crofting. One realises that there are concerns among smallholders. In practical terms, it is difficult to understand how such an extension might work. Would somebody designate a parish near Motherwell because it happened to have three smallholders in it and turn it into a little bit of crofting tenure? Would that apply to the whole parish or just to the areas around the crofts themselves? We are concerned about the practicality of the proposal, apart from anything else.

It seems that the main reason for the proposal is to create a right to buy for smallholders. If the appropriate legislation is amended, they could easily have a pre-emptive right to buy, like agricultural tenants do. That might be a simpler

way of dealing with the matter. If the Crofters Commission is to be given the job of looking after a range of quite small new areas, that will have an impact on resources for the existing crofting counties and on the commission's staffing levels.

Nora Radcliffe: Do other panel members wish to discuss the pros and cons—for both the landlord and the tenant?

Andrew Hamilton: Our members would be concerned about the principle to which Dr Balfour alludes, which is the extension of crofting tenure outwith the crofting counties, because of the difficulties and complications that go with that. You will hear further evidence this morning on some of the complications connected with the various legal matters that can arise with crofting tenure.

The RICS gave some thought to whether smallholdings should be brought under the agricultural holdings acts. There seems to be a problem or anachronism with small landholdings. The legislation is very old, and the people concerned are in a difficult position. The more logical approach would be to use the agricultural holdings legislation, in any case, as crofts are effectively small agricultural holdings. That legislation holds for every other agricultural holding outwith the crofting counties. To introduce crofting tenure in small areas would seem to be a massively overcomplicated way of addressing the problem.

Iain Russell: The SEBG has a general concern about the uncertainty that the provision could create. Over the past few years, the rural let sector has undergone a period of change. The addition of further uncertainty would lead to instability and the inability of both owners and tenants to plan long term. Would they be able to plug into some of the crofting opportunities or have the opportunity to buy? Would a landowner, public or private, have tenants' rights changed within their ownership? In our view, it would be generally unhelpful to extend uncertainty to an area where it does not presently exist.

Nora Radcliffe: Do you see an advantage in the side effects of having crofting as a means of keeping people on the land or repopulating areas of Scotland? Is that a possible argument for going ahead with the proposal, despite the practical difficulties that you see with it?

Dr Balfour: It is not clear that the proposal will have that benefit, unless you think that smallholdings will be turned into housing sites by the back door. We discussed that issue earlier in relation to the crofting counties. Andrew Hamilton covered the broad issue. I do not think that the proposal will necessarily improve the local health of the bits of countryside that we are discussing.

Nora Radcliffe: Let us consider the issue from the point of view of landowners who want to develop part of their estate or landholding into crofts, rather than that of small landowners. Would such development be desirable?

Dr Balfour: It is unlikely that landowners would want to create more crofts. Although it could be done in the crofting counties without the right to buy, it is not clear that that would be the case elsewhere. Even if the legislation put such a safeguard in place, there is nothing to say that in two years' time Holyrood would not change it. Iain Russell made that point. As a crofting landowner who has interests in Fife, I do not believe that the proposal would bring the benefit that you seek. We are the biggest employer in north-west Sutherland, through fish farming, which primarily makes use of shore facilities and other parts of the land. Even in the crofting counties, we do not need crofting to develop, although in the north there are lots of ways of developing together, as we have demonstrated.

Andrew Hamilton: There are many different types of landowners and communities outwith the crofting counties who would wish to encourage young people to stay in areas by providing them with small farms on which to stay. That could be done within the regulations that already exist under the agricultural holdings acts. There is no limit to the size of the holding that can be created. The leases can be for up to five years initially and thereafter for 50 years or more. There is already legislation that would allow a landlord who was so minded to create new farms. I am not sure that extending crofting tenure would bring additional benefits.

10:15

Iain Russell: Again, we are talking about individual units instead of communities. Very often, communities—and the grazings committees and clerks that go with them—drive these rural areas, and simply creating individual stand-alone crofts of varying sizes would not address the point that crofting communities in the crofting counties have emerged from groupings of populations that have worked together. The legislation contains a lot of references to "resumption" and "decrofting", and the common grazings and grazings committee system exemplifies that approach. I find it difficult to see how such a system could be created from scratch in non-crofting counties where the same communities and traditions of working together do not exist.

Eleanor Scott (Highlands and Islands) (Green): At the start of the meeting, Rob Gibson asked you about the role of crofting landlords. Can each of you, in one or two sentences, outline the landlords' duties?

Dr Balfour: Their duties include working in partnership with local crofters on their estate or on part of their estate; being concerned about the health of the whole estate; and pursuing opportunities for employment and development that are in keeping with the quality of the estate.

Andrew Hamilton: Crofting landlords are in charge of the land's sound management and the local community's sustainability. Although their input is necessarily limited, they form, as Dr Balfour pointed out, an important cornerstone of the partnership that allows the community to continue. I do not think that the relationship is any more complicated than that; however, although it is relatively straightforward, it is important and, in many cases, is working very well.

Iain Russell: I agree. Crofting landlords are the system's administrators and are required to respond to and initiate provisions in the crofting legislation. Some landowners, like certain crofters and crofting communities, are very active and have introduced a lot of change and innovation, whereas other landowners do not initiate such changes. It all comes down to the partnership.

Mr Brocklebank: I should point out that a witness at a previous meeting has already wondered why on earth anyone would want to impose the hellish complexities of crofting law on other parts of Scotland.

We will hear later from a witness from Arran but, notwithstanding whether we accept your judgment on this matter, would you consider excepting Arran and Bute from your comment that crofts should not be extended into the lowlands?

Dr Balfour: It is difficult suddenly to decide that we should put Arran and Bute into the crofting counties. That might be seen as a simple solution from a bureaucratic point of view, but it would have enormous impacts on the people and on the activities that currently take place there. I imagine that it would create all sorts of compensation problems. I suggest that the committee examines closely the impact of going down that road on businesses, landowners, the general structure, tenant farmers and so on. It would be a pity to make a change, for the sake of 16 smallholders, to two places that are probably well run and are doing good things.

Mr Brocklebank: Does anyone else have a view?

Andrew Hamilton: I cannot remember the phrase that you used—I think that it was something like "hellish complexities". I might be about to repeat myself, but if there is a problem on Arran that needs to be dealt with, the issue is whether introducing crofting legislation is using a sledgehammer to crack a nut. Could a provision in the existing legislation on agricultural holdings not be used to address the problem? Let us face it, crofting is not simple. It brings with it other changes that could affect the community in ways that are not necessarily desirable. Having said that, there were reasons for crofting communities and crofting counties being set up and if it is deemed that Bute and Arran meet the criteria, perhaps the option should be considered. However, it seems to be a very complex way to deal with the problem.

Rob Gibson: I would like to test your views on the assignation part of the process of buying and selling crofting tenancies. Murdo Mackay, who wrote to the committee in a personal capacity, suggests in his submission that often nothing is done with the land when family assignations pass between people for nothing, but that when people pay for an assignation they try to recover the value by being economically active. Is it your experience in the estates that you deal with that such a sale of tenancies is the norm? Is it your experience that when people buy a tenancy they use the land?

Iain Russell: I can see where the argument comes from. In the experience of my members, it would be fair to say that those who buy assignations and those who buy leases may very well develop the asset in some way, but they do not necessarily reinvest the proceeds. That is the crucial point, because we come back to the issue of sustainability. If someone pays money for a croft lease there is an incentive to try to recover some of that value, but it does not necessarily follow that having recovered the value they reinvest it in the croft. There can certainly be circumstances in which leases are bought and house sites are developed, but the money does not go back into the croft. It would be fairer to say that there is certainly activity—there may well be commercial activity—but it does not necessarily support the crofting community through reinvestment.

Andrew Hamilton: We have no direct experience from our members that suggests that what Murdo Mackay says is the case. However, I would say—I am bringing in experience from agricultural tenancies—that we have not noticed any lack of incentive to invest when tenancies are inherited from previous generations. In fact, the opposite is probably true. When a tenancy is inherited from the previous generation that usually provides a kick-start and a lot of energy and investment is put in by the new tenant. I would have thought that that would also be the case with a new crofter. I would be worried that people who have paid would perhaps have less finance available to invest in the croft, although I am not sure that that is the case. I have no direct evidence.

Dr Balfour: Our experience does not support Murdo Mackay's view. He will no doubt have a specific example in mind, but I do not feel that that is the case, based on our experience.

Rob Gibson: The Crofters Commission's own statistics show that, in the Western Isles last year, three quarters of all assignations were either family assignations or accessions. Murdo Mackay's supplementary evidence states:

"I can point out to anyone who cares to listen at least 100 crofts that have been assigned with no Crofters Commission involvement to family members (at no cost in all probability) and they are totally unused in most cases."

That comment was made by a person who was observing exactly the opposite to what you are saying.

Dr Balfour: I was not talking about the Western Isles, and I know that the Western Isles is a special area in many ways, but is the suggestion that there should not be free assignation of crofts between families? I thought that one of our objectives was to try to keep local people in the area, although effectiveness does vary from generation to generation.

The Convener: I think that we will leave that point for now.

I have a final question about the complexity of different types of leases on property. I am keen to get your perspective on that. The SRPBA submission makes a distinction between the different types of leases that can be put in place over croft land, and makes particular mention of interposed leases. Could you comment on the differences between interposed leases and other types of leases and on how you see them being distinguished in law?

Dr Balfour: I beg your pardon, convener. Did you want me to respond?

The Convener: I thought that both you and Iain Russell would be able to comment.

Dr Balfour: There are obviously a whole lot of detailed legal aspects to interposed leases, on which I would not be able to comment. However, we can easily provide you with some written details if you would like. The point is that interposed leases are used for a variety of sensible reasons relating to land management and the best use of assets, and they are not necessarily there to frustrate land reform, as has been suggested. We would not support something that was about frustrating land reform, but trying to make those leases not applicable in crofting areas would have serious implications for other perfectly proper business management arrangements.

Iain Russell: Our members would agree with that position. There is a wide range of leases, and the ones that we have mentioned specifically are lifetime leases, which are fairly common in property ownership. It seems to us that the matter needs to be examined in a little bit more detail before a rather general piece of legislation is allowed to cover areas that it was perhaps not intended to cover. We can see that any lease that might be considered to be an avoidance mechanism should be looked at if it is deemed to be frustrating other parts of legislation, but it is common practice in property ownership and property development to have a wide range of leases, which should not be at risk from a non-specific piece of drafting.

The Convener: Does Andrew Hamilton have a view on the issue?

Andrew Hamilton: I would simply like to say that there are a great many leases of all types for perfectly valid reasons, often involving family members and trusts. The only appeal that I would make is that, if something is to be done to deal with the problem of a mechanism being created to get round the Land Reform (Scotland) Act 2003, it should be specifically targeted at that alone, rather than being an all-encompassing piece of legislation that would have quite serious effects on perfectly valid leases that exist for other reasons.

The Convener: We will wrap it up at that point. We could probably ask many more detailed and technical questions, but I think that we would rather rest and reflect on the answers that you have given. Thank you for being prepared to come along to the committee. Your evidence has been helpful to us.

We will have a short break before hearing from the second panel of witnesses.

10:30

Meeting suspended.

10:34

On resuming—

The Convener: We move on to our second panel, members of which may have listened to our discussions with the first panel. Although the three witnesses are all from areas that are not crofting areas, they may have an interest in the bill's proposal to allow for the creation of new crofts. I welcome Duncan Mulholland, a small landholder from Arran; Matthew Hickman, a small landholder from Dumfries and Galloway; and Hamish Jack, who represents the Spey Valley Crofters Association. Thank you all for attending and for providing us with your written submissions, which members have found helpful.

I will kick off by asking what benefits you think the bill will bring. You heard members of the

previous panel say that the system will be highly complex and that it is doubtful whether anyone will want to have imposed on them legislation that will not necessarily produce any benefits. We want to get your perspective on whether the bill is worthwhile and on what opportunities the ability to extend crofting to more communities would create. I invite Matt Hickman to start.

Matthew Hickman: For years, we have been trying to encourage appropriate repopulation in Carsphairn, which has suffered population decline for a century or more. If the initiative in the bill was pursued, we would be massively oversubscribed before the process had even begun, especially if the Forestry Commission Scotland provided assistance and the suggestions about woodland crofts were taken up. If an advert was put in the paper in which a lease, which came with the ability to build a house on the land, was offered in perpetuity for a nominal ground rent, a huge number of people would be interested. That interest could be filtered to encourage just the sort of repopulation that we are looking for. The extension of crofting to areas where there is none at the moment would bring enormous benefits.

Duncan Mulholland: There is no point in my going through the forestry scenario on the island of Arran because everything that Matt Hickman said applies there.

Farmers on Arran are quite keen to diversify by allowing small sections of their land to form crofts. In addition, there is a housing problem on Arran, which we need to chip away at by providing affordable housing for the people who want to live on the island. Although living in sheltered housing seems to be the most popular scenario, there are plenty of people who live in sheltered housing who would move into a forestry croft or another small croft, which would allow others to move into the sheltered housing, for which there is a queue of some 200 people. That would keep the rural structure going and would provide a practical solution to the problem of the provision of affordable housing that everyone talks about.

For small landholders, the bill represents a last-gasp opportunity to get on to a level playing field. We see no way forward, other than to approach the Crofters Commission. We tried to use the Land Reform (Scotland) Act 2003 but did not get anywhere. Everyone seems to be upset about the scenario facing small landholders. Arran is in a slightly different position from other areas of Scotland in that it does not have a tenanted sector. The fact that the small landholders are surrounded by owner-occupiers means that they, not—as has been suggested—the owner-occupiers, are at a disadvantage. There are only three tenanted agricultural holdings on Arran, so they are very much in a minority. The bill would not create a disparity; it would allow us to fix a problem that has existed for a long time.

Hamish Jack (Spey Valley Crofters Association): First, I must correct what the convener said—my members all come from the crofting county of Inverness-shire. We are most anxious to be registered by the Crofters Commission. People in the Spey valley could have been registered back in 1955 but, at the time, the older members of the community perhaps thought that they would offend their landlord by doing so, so they chose not to. The result is that there are many small areas of land next to crofts. In many cases, the crofts are bigger than the small units that sit next to them. The topography is exactly the same; the only thing that divides them is the fence.

Because we are not registered crofters, under the crofting counties agricultural grants scheme we can apply for and—once we have been means tested—obtain grants, which last for three years at a time. The Government states that our receipt of CCAGS grants means that we have the same economic standing as registered crofters. Given that that is the case, we feel that it is logical that we should be on the crofting register.

The issue goes deeper than just the land. We live in a low-wage economy and we now fall within the Cairngorms national park. There is no way that young folk can find a house to allow them to live and work in the valley. If the crofts were registered, that would give young people a rung on the ladder into agriculture. The cost to a young person of entering farming is prohibitive; he would be in debt at the start. If he had a croft, he could have a part-time job and work the croft part time. If the Government is committed to keeping a sustainable population, which affects schools, post offices and communities, it must provide for those small units to go on the crofting register.

Thank you for listening to me.

The Convener: I presume that you very much welcome the opportunities in the bill to set up new crofts.

Hamish Jack: I most definitely do.

The Convener: It is great to get that clear.

I have a follow-up question for Duncan Mulholland. Matt Hickman's paper is about the opportunity for young people to get a foot in the door of working the land, but you talked about older people. Did you mean that older people should move on to crofts or that new opportunities should be freed up for them in sheltered housing, which would allow younger people to move on to crofts?

Duncan Mulholland: On Arran, a mixture should be used. By older people I mean people who are in their 30s or 40s—most are probably in

their 40s. I am not talking about people who are in their 50s or 60s.

The Convener: I am sorry—I thought that you were talking about pensioners, because you referred to sheltered housing. You mean not people who are just starting out but people who are established.

Duncan Mulholland: Exactly. I am talking about estate gardeners, forestry workers and farm workers—people who know what the situation is. They must stay in houses that have been provided for them but in which they do not want to stay; they would rather have other housing.

The Convener: That answer is helpful.

Mr Brocklebank: I will address a couple of questions to Mr Mulholland. You are a small landholder. Will you remind us of the difference between a small landholder and a smallholder?

Duncan Mulholland: A small landholder and his family would have been given or cleared to—or whatever happened—a section of land. It would have been his family's duty to fence that, to drain it, to take the boulders off and to build their dwelling-house and any other buildings that they required to operate the small landholding.

Smallholdings have developed in places where an estate has helped to drain the land and to construct houses and other buildings. The estate largely owns the buildings, unless its input was very small. Smallholdings are of about 50 acres.

That is how I see the difference between a small landholding and a smallholding. Estates have a hold on some smallholders, whereas small landholders—apart from the land that sits under their buildings—are entirely free from the estate.

Mr Brocklebank: You are a small landholder. How many people on Arran are in your category?

Duncan Mulholland: There are about 16 of us.

Mr Brocklebank: Does not existing legislation provide room for you to achieve what you seek? That would avoid crofting legislation imposing on you an extra load of bureaucracy.

Duncan Mulholland: If existing legislation had that ability, I would not be here. We have been advised that our way forward is through the bill. The Land Reform (Scotland) Act 2003 let us down, although I made representations on the same topics when it was considered. Members may remember that the land reform consultation paper said that the Government did not believe that there were many small landholders, so small landholding was not an issue.

Mr Brocklebank: You said that the bill would help to address the lack of affordable housing, but when that point arose in a previous evidence session, one witness said that the dilemma in opening up Arran is that houses that became available would disappear due to market forces and that prices would be incredibly inflated, so that, within a generation, the houses would be removed from the system. How do you respond to that?

10:45

Duncan Mulholland: Quite easily. The new houses that I was talking about would be new crofts. The market forces on Arran are something like those in the centre of Edinburgh, Perth or London. I will not even quote to you the figures on Arran.

Mr Brocklebank: Would the same not happen under the right to buy under the bill?

Duncan Mulholland: We are talking about small landholders having the right to buy, and it is highly unlikely that small landholders who have been there for 100 years will buy their farms, sell up and walk away. It is more likely that the buildings that surround the small landholdings will be renovated with assistance from the Scottish Executive Environment and Rural Affairs Department and, possibly, a CCAGS grant, as long as the landholders match fund. At the moment, they cannot match fund because the banks will no longer lend money to small landholders because they do not own the land that is under the buildings that they are about to renovate. Nowadays, most of the grants stipulate that the houses must be for letting, not holiday letting. If SEERAD ensured that that could happen in future, that would help the availability of affordable housing to let on the island and would boost small landholders' income.

Rob Gibson: I have separate questions for the three witnesses, because they have different circumstances.

The Convener: Who do you want to fire a question at first?

Rob Gibson: I will stick with Duncan Mulholland at the moment, as we are dealing with Arran. Other members might want to ask about that too.

The bill will sort out problems with the Land Reform (Scotland) Act 2003 that are not directly related to crofting reform, so it would be possible for it to rectify issues that relate to landlord-tenant relationships. Is Duncan Mulholland saying that he wants holdings of the type that he is talking about to become crofts rather than regularised agricultural tenancies?

Duncan Mulholland: That would be up to the individual smallholder. I am more concerned that the rest of the island should get involved in crofting, because the benefit is for the whole island

and not necessarily for the pocketful of small landholders, which is how people describe us. If Arran is included in the crofting counties, the small landowners will be able to decide what they want to do and the rest of the island's population, including the Forestry Commission, will have an opportunity to kick-start the rural infrastructure.

Rob Gibson: Are you saying that some owner-occupier farmers might be prepared to create crofts on their land?

Duncan Mulholland: Definitely.

Rob Gibson: Are you also saying that there is obvious potential for a community land-based arrangement for creating croft tenancies on Forestry Commission land?

Duncan Mulholland: You will have a Forestry Commission witness later. Arran lends itself to that sort of approach, because the Forestry Commission struggles with market forces in the timber market. Taking anything off the island puts it at an immediate disadvantage, so it is likely that the commission will not plant in certain areas where it planted for different reasons in 1965.

Rob Gibson: That is one of two suggested routes for creating crofts but, so that they were not sold on in the market, there would have to be a condition that the crofts would remain perpetual tenancies under the new landlords. Would people on Arran be happy to accept that?

Duncan Mulholland: Yes, because they already do. People on Arran cannot buy houses anyway. They have to rent or get sheltered housing, so they are happy to stay in houses that they know they will never own. I believe that there are mechanisms whereby, if they pay a small part of the mortgage over 50 years for example, they will get to own the house. However, people will be thinking not of owning houses, but of finding somewhere to live where they work. We are talking not about the man who cleans the streets, but about teachers. Most recently, I heard that the port manager has had to leave his post. The situation is getting out of hand.

Rob Gibson: I address this question to Hamish Jack. Does anything in the existing crofting legislation prevent people from registering either their crofts or their small landholdings next to crofts?

Hamish Jack: All we need is the consent of our landlord, and that is not likely to be given without legislation.

Rob Gibson: So you want the Crofting Reform etc Bill to create that potential.

Hamish Jack: Yes. Most definitely.

Rob Gibson: My final question is for Matthew Hickman. I assume that Galloway has a lot of Forestry Commission land, which is the land on which you are thinking about creating crofting communities.

Matthew Hickman: Partly—although private landowners have shown some interest too.

Rob Gibson: Have they? Can you give us a little more information about that?

Matthew Hickman: Having read the information that I have shown them, individual landowners in Carsphairn have not backed away. However, they would want the right-to-buy question to be dealt with; they will not allow crofts to be created if people are to have an absolute right to buy them almost immediately. They would also want arrangements for the allocation of leases to be dealt with; they want the people who move in to be of positive benefit to the community, and they want that to be dictated in some way and not just left to a free-market free-for-all. We have experienced the free market in the policy on smallholdings and it has not worked.

Rob Gibson: In some areas, crofters are demanding area policies—policies that are managed at area level. Would you be looking for something similar in Galloway?

Matthew Hickman: Yes.

The Convener: Witnesses on the previous panel suggested that places such as Dumfries and Galloway and Arran do not really have the kind of community structures that would let crofts work. They said that crofting communities have long-established groups of townships, grazings committees and local structures. Would it be possible to establish community feeling, and appropriate local mechanisms and policies, in areas new to crofting?

Matthew Hickman: I made a note of what was said about there being no tradition of communal working outwith the crofting counties. I do not know where that idea has come from. Historically, all agricultural communities have worked communally—not only in Scotland but in England too. Well within living memory there was communal sheep shearing in Carsphairn. That has all gone within the past 30 or 40 years, but the idea of communal working is still there. In Dumfries and Galloway, the community councils are particularly active, and I see no reason why communal working could not happen. I work communally with my neighbours now. The idea is not completely dead.

Duncan Mulholland: The majority of the small landholders whom I represent all live within a stone's throw of one another. We all work together as it is. We are talking about only one part of Arran where one landlord is in charge of us all.

We need to work together. We share machinery; we share bulls; we share tractors; we share everything—so it would not be very difficult for us to share knowledge or to have some sort of communal agreement on any specific issues that were raised by the Crofters Commission, for instance.

The Convener: Hamish, are you confident that an appetite for crofting exists in the Spey valley and that enough community structures exist to allow it to become a crofting area with new crofts?

Hamish Jack: As I have said, quite a lot of registered crofts are on our neighbouring land. We have no township and no common grazings as such, but neighbours all pull together communally, one helping the other. That has gone on for generations and is likely to continue.

Nora Radcliffe: I wanted to ask Duncan Mulholland a question. We have focused on the areas that the three of you come from, but do you know of other areas where people would be affected by legislation on small landholdings?

Duncan Mulholland: I would be a very clever man if I did.

Nora Radcliffe: I just wondered whether, during previous campaigns, you had been in touch with people in other parts of the country. I represent a constituency in the north-east and I wondered whether you knew of a nucleus of people there who might be interested.

Duncan Mulholland: I have heard of such groups and I am surprised that they have not been in direct contact with the committee.

Nora Radcliffe: I have heard some expressions of interest.

Duncan Mulholland: I was hoping that you might be able to enlighten us about where the rest of the small landholders are. There are some learned friends behind me who know roughly where most of those small pockets are. I believe that Arran has the greatest concentration of them in a single area.

Nora Radcliffe: Thanks. I just wanted to clear that up.

Elaine Smith: We have heard that the high house prices on Arran make it difficult for people to live on the island. It has been suggested that the bill might open up crofting to the free market. Mr Mulholland, do you have any concerns about that? If that happened, might the situation in Arran get worse in the long run?

Duncan Mulholland: No. The stipulations that Matt Hickman mentioned mean that it is unlikely that for perhaps the next 50 years, until people see how the situation goes, any landowner will let a new croft be built on his land with the absolute right to buy. Certainly, the Forestry Commission will not want anything like that happening. It will probably want there to be a charity landlord or something that would oversee such an arrangement.

Because we know that such a market could develop, it will not be allowed to start. It will be up to the Crofters Commission to control that.

Elaine Smith: Do you think that the situation will have to be controlled by regulation, which would be overseen by the Crofters Commission?

Duncan Mulholland: Yes. There has to be regulation because the market forces in Arran are killing the place.

Rob Gibson: Your submission talks about the fact that small landholders often live in amalgamated units that are more than the 30 hectares that were set out in the original law. You ask for clarification of the situation. You say that 25 per cent of Arran's small landholders live on amalgamated holdings. What sizes are those holdings?

Duncan Mulholland: They are about 75 to 80 acres. Almost everyone started with holdings of 25 acres. Fifty years ago, everybody had 50 acres and most people have no records of where the other 25 acres came from. In the cases in which there are records or people can remember where the land came from, you find that the family that previously owned the extra 25 acres had no one to take over the property when the last owner died. Unfortunately, under current legislation, in such a situation, the buildings are taken by the landlord and the land is offered to the neighbouring small landholder. That happens to this day.

Rob Gibson: That is an important point. We will have to consider that in relation to the bill. We will have to change the set of regulations that deal with the conditions on legitimate small landholders becoming crofters.

Duncan Mulholland: It would be silly to leave out a small number. Twenty-five per cent of 16 is not a lot. The figures that applied at the beginning are outdated. They do not reflect what has been happening in modern farming.

The Convener: What sort of tenure do the members of the Spey Valley Crofters Association have?

Hamish Jack: The tenancies will have been inherited from grandfathers, fathers, uncles and so on. With regard to our estate, it would be wrong to describe certain landowners as bad landlords, because they are not; they simply want to utilise their resources. In many cases, they want to get the houses back so that they can sell them. I am sure that it would be possible to get £170,000 for the house and some of the holdings without doing

anything. The house is worth more than the land. However, I imagine that the majority of the houses will have been inherited and will be held under the 1947 lease.

The Convener: That is a helpful clarification.

I thank the three of you for giving us your interesting written evidence, which was useful in bringing local circumstances to life, and for answering our questions this morning. You are welcome to stay to listen to the rest of our deliberations.

11:00

Meeting suspended.

11:05

On resuming—

The Convener: We move on to our third panel. It, too, is interested in the creation of new crofts. I welcome Cameron Maxwell, the rural development adviser for the Forestry Commission Scotland, Councillor Drew Ratter, who represents Shetland Islands Council, and Agnes Leask, who is the joint president of the Scottish Crofting Foundation for the Shetland area. I thank you for your written submissions, which we have read. You will have noticed that they were referred to in earlier witness sessions. It is good to be able to read them in advance of a meeting.

Eleanor Scott: I want to ask Cameron Maxwell a bit about the reference to forest crofts in the Forestry Commission Scotland submission. That idea sounds exciting and interesting to me, but I want to go back to something that a previous witness said. In order to realise this vision for the use of forest land, do forest crofts have to be under crofting legislation?

Cameron Maxwell (Forestry Commission Scotland): Our understanding is that they probably do not. There are other ways of constituting forest crofts. We said in the submission that communities who want to do that sort of thing might choose a model other than crofting because woodland crofts might be only part of any development activities. Crofting might be suitable, but communities might decide to choose something else. If what is chosen meets a community's needs and aspirations, then it makes sense.

Eleanor Scott: Would there be advantages in having the option to establish holdings under crofting legislation?

Cameron Maxwell: I am not sufficiently expert in the technicalities of crofting compared with those of agricultural holdings to answer that.

Eleanor Scott: Can you briefly outline what a woodland croft might look like or the spectrum of activities that might be undertaken in it?

Cameron Maxwell: The spectrum of activities is what is important. Under Forestry Commission Scotland's national forest land scheme, we give communities the opportunity to buy land where the community can provide additional public benefit. Currently, communities can apply to buy land and divide it up to create affordable housing, communal woodlands and woodlands that they can lease for private working that might be linked with housing. The point is to give communities the opportunity to achieve their aspirations and whatever they believe will create community development opportunities. Certainly, affordable housing is an issue. We sell land to housing associations for affordable housing. There are also opportunities for woodland management and biomass. All such aspects are important, but ultimately the process will be community driven.

Eleanor Scott: How do you envisage the affordable housing that is created remaining affordable and not being bought up by rich incomers who fancy living in the middle of a wood?

Cameron Maxwell: That sort of opportunity is attractive to people and that is why such housing sells for a lot. However, there are various mechanisms in place. There are opportunities to create rented housing and for community bodies to become registered social landlords or to work with charitable RSLs to provide social rented accommodation where there is not the right to buy. There is also the Communities Scotland homestake shared equity scheme and the rural housing burden, which was introduced by previous legislation to control the retention of housing, to whom it is passed on and, to an extent, the price.

The Convener: I know from previous professional experience that there was a pilot project in West Lothian called woodland crofts but, obviously, crofting legislation did not encompass the scheme. Was it successful? Has that been done anywhere else in Scotland? Is that what we are talking about here or did it just have the same title?

Cameron Maxwell: In a way it is horses for courses. Land and housing are attractive to people. My understanding of the woodland crofts in West Lothian is limited, but I understand that it related to trying to bring in new people to areas such as Whitburn in West Lothian, which suffered quite heavily post-industrially. What was being sought was landscape change, new housing and probably the introduction of new wealth. Some have said that that approach has been quite successful but you might describe it as a lifestyle

choice for people who want a bit of land and a house close to Edinburgh.

The Convener: So it had the romantic ideal of crofting attached to it, but not the legislative requirements.

Cameron Maxwell: You have to be clear about your objectives when you want to create such schemes.

The Convener: That is important.

Eleanor Scott: One of the elements of crofting is the common grazing. Would you envisage the woodland crofts having common woodland that would be managed communally?

Cameron Maxwell: That would be one of the opportunities. The land that we have may not be entirely suitable to create the house site, the inby land, the inby forest and the communal woodland. It may well be a mixture. If you want to create woodland crofts, part of such crofts may come from land that is already held within the community, part may come from the purchase of private land and part may be suitable Forestry Commission Scotland land. A communal woodland, if it can provide additional benefits, would be a good thing.

Maureen Macmillan: I wish to ask some questions of the panellists from Shetland. I was quite struck that the submissions from Shetland—one from Shetland Islands Council and one from the Scottish Crofting Foundation for the Shetland area—are very different.

The Crofting Foundation paper is negative about the bill and raises all the worries that the foundation and others have about it. Those concerns include the free market in crofts, the lack of democracy in the way the Crofters Commission is run and its role in planning, and even that at local level there would be a lack of democracy.

On the other hand, Shetland Islands Council welcomes what it sees as good parts of the bill, such as the creation of new crofts and the Executive's proposed new regulation about the proper occupier of a croft, which will regulate owner-occupiers in the same way as tenants. How can we get those two views to come together? It is obvious to us that there are issues in the bill that need to be addressed, such as the concern about the free market in crofts, but we need to know your thoughts about how we might do that.

Agnes Leask (Scottish Crofting Foundation): Our concern is the loss of crofting land to speculative development. In Shetland, there are quite a few owner-occupiers. Human nature being what it is, if you have no family to take over your croft, you will sell it to the highest bidder. That will be a person with money—in other words, a speculative developer who will turn the arable land of the croft into a building site, perhaps leaving the remainder of the croft to go to waste over the years.

Many crofts in Shetland are owner-occupied because crofters were given the right to buy. Shetlanders, being rather cautious, shall we say, thought that one way of securing a home for their family for the future was to purchase it and that then they could not be removed. In other instances, such as happened in my case, re-letting crofts was not allowed: they had to be sold because the estate was bankrupt. Anybody who wanted a croft had to buy it.

There is a dividing line between the council's interest, which is to build more houses, which we need in Shetland, and that of old crofters or crofters who are moving elsewhere, who put their croft on the market at a price that is beyond the means of any young person who might wish to take it on as an agricultural holding. A bridge could easily be built between the two, because although there is plenty of wasteland in Shetland that is suitable for building on, the quality arable land that could be cultivated is in short supply.

11:15

Maureen Macmillan: Have you considered what the Executive is proposing with regard to the proper occupier, which will regulate croft owners? Do you think that that will help?

Agnes Leask: I am perplexed by it. When I had to purchase the croft in 1958, I was told by the officer from the local agriculture office that I would be under scrutiny for the next seven years. The croft had been derelict before we acquired it and I was told that if I did not improve it, I would be forced to put in a tenant who would work it. Has the Crofters Commission lost the powers to make people who are sitting on land and doing nothing with it relet it?

Maureen Macmillan: You think that the commission has the powers to deal with owner-occupiers at present, but is not using them?

Agnes Leask: Absolutely. I have never heard of legislation that has taken those powers of regulation away from the commission. When we purchased our croft, the same powers were applied to owner-occupiers and tenants—in Shetland at any rate. The only difference was that a tenant crofter could get grants for fencing, reseeding and draining, while a croft owner could not get any grants at all. I know that at a later date—possibly in the 1960s—there was a change in the rules, which meant that owner-occupiers could get grants for reseeding, fencing and draining, but not for building work on steadings or new houses. The rules then changed again.

Perhaps now owner-occupiers can get all the grants that are available to tenant crofters.

Maureen Macmillan: Councillor Ratter, do you want to comment?

Councillor Drew Ratter (Shetland Islands Council): To explain how we arrived at our position, I need to go back a stage. Agnes Leask and I have been working together for many years and we usually end up agreeing—we will work on that outside this forum.

I refer the committee to what the Norwegian Government is doing. I am not saying that we should adopt Norwegian law, because we obviously live in the United Kingdom, but the Norwegian Government says that it is a policy imperative that people should continue to live in the remote and far-flung parts of the country. The Scottish Executive has the option of saying that too—everything else would flow from that.

The dynamism and energy in the Shetland community is a result of a good, healthy mixture of many generations of people coming in with ideas, energy and a desire to do things, and the people who live there. I can give you two examples of that. The Shetland economy had been in the doldrums for the bulk of the 19th century—it was an incredibly horrible place to live. When the herring boom began, a lot of people came from Scotland and got involved in it. Everything was on the up and up for a while and most of the big houses in Lerwick were built on the strength of it, although the herring fishermen and women got very little of the benefit.

The next big one that came along was the oil boom. Shetland had been doing a little bit better since the 1960s on the basis of industries that had already started to decline, such as the whitefish industry and the knitwear industry, which was extremely rocky and based on fashion.

In 1971, Shetland had a population of 17,000. By 1975 it is likely, although we do not know exactly, that it was down to more like 15,000. By 1979, there were 30,000 people in Shetland and when the construction boom finished the figure went down to and stabilised at about 23,000. It has been a little over or a little under that since.

The oil industry has been the guarantor of prosperity and it has kept people in parts of Shetland in which they would not otherwise have been. The policy imperative that Shetland Islands Council tries to stick to is that we would like to keep people in those areas, although that is not an absolute and it can be argued both ways. You could say that it is far better if there are not many people in remote and rural parts of the country because that is better for the environment.

We are at a fairly early stage in our discussions on the proposals in the bill. We are passing it out to concentric rings and we certainly will not do anything unless we get a high level of community buy-in to it, but we think that the possibility of creating new crofts is interesting. We should look outside the crofting areas, where there are people who aspire to have land and have ideas about what they might do and about new businesses that they might be able to create. If such people, from outside the crofting areas, can be offered a smallholding with a secure tenancy, pretty well the absolute right to build a house on the land and access to crofting grants and loans and SEERAD grants and loans, that is a tremendously good offer. In my view, people would again come in to add to the mixture and perhaps carry us forward to another increase in population and another increase in energy. That is ambitious, but if we make that decision, Shetland Islands Council would like to put some resources in and have a go. We would do so only on the basis of such a decision being made.

I remind the committee that other aspects of legislation across the work of the Scottish Executive would also need to favour the creation of new crofts. If that is going to be done across the crofting counties or elsewhere, a conscious decision would have to be made to put rural development resources and other resources into it, because it will not be a cheap option. However, it could be a tremendously good one for remote and rural parts of Scotland.

Maureen Macmillan: What about Agnes Leask's point that croft sites and houses could be sold on speculatively. She suggested that there is not enough regulation to prevent that from happening. Do you agree? Is that a problem?

Councillor Ratter: We have discussed the issue in detail and we believe that unless the right to buy and the right to assign are restricted, not many new crofts will be created. That is a pragmatic point.

A market has always existed in croft assignations and croft tenancies. The right to free sale of crofts was introduced in the original acts in the 19th century. The compensation scheme that currently operates was introduced in 1962 because there was no value in the crofts. It was not intended to create a ceiling; it was intended to create a floor so that people who departed from crofts got something. All that has changed is that value is now in the equation.

To be pragmatic, it would be very difficult to attempt to deprive people who are in that position of what they at least perceive as a property right that has been granted to them. If a system were introduced that took that right away, there would be great practical difficulties and resistance.

Existing crofters will resist quite strongly if you say, "We want you to pass the croft over to somebody and we want to limit the figure that you get to about 10 per cent of what you would get if you passed it over to someone else." As a crofter, I have a lot of sympathy with their position.

My family have always been crofters. Everything that is on the crofting land that my wife and I occupy and work—she takes on the bulk of the work—was put on by me, my father and mother, my wife and other members of my family. If people said that we had to give somebody that land for more or less nothing, we would resist that strongly. That is my personal view from the heart.

Agnes Leask: I agree with Drew Ratter. When the day comes—as come it will soon, if none of my family wants to carry on the croft—I will look for the highest value that I can achieve for my croft. I know that market value cannot be restricted, but the Crofters Commission could place safeguards on the crofting aspect of crofts, such as a limit on where houses can be built. At the moment, everything depends on the local council's planning permission for house sites. Councils need house sites so, as often as not, the quality of the land is not considered—whether land would be better kept as arable land or should be used for housebuilding is not examined. If a strong Crofters Commission said, "Look, there's a small area of wasteland on that croft. That can provide two house sites, but no more, because the rest of the croft land is more important for agriculture," that would cap the market. It would not stop a free market, but it would take out the speculative development element.

I am all in favour of creating new crofts. At the moment, a tenant crofter can purchase their croft after several years. However, if new crofts fell into the wrong hands—those of people who want them only for development—creating them would be a pointless exercise.

Councillor Ratter: What Agnes Leask said put into my mind exactly what I want to say. If members want to damage the market and to reduce croft prices in the Highlands and Islands, the ball is at their feet. The reasons why house sites throughout the Highlands and Islands are incredibly expensive have nothing to do with the availability of land and everything to do with the tremendously rigid and process-driven planning system. If that did not exist, we would not have £100,000 house sites in Lochaber, which is perfectly absurd.

As far as I can see, the situation will worsen. For all the time that I have been a member of Shetland Islands Council, we have taken a fairly pragmatic view of giving people houses: if people have access to a bit of land on which they want to build a house to live in, we have always been inclined to grant that. However, a pincer movement is coming to stop that—it largely involves people being closely scrutinised for declarations of interest and not being local members, as well as the Planning etc (Scotland) Bill, which will limit the size of planning boards. At some point, rigid adherence to the process will be the only option that is available to us. The result will be that current house-site prices in Shetland—house sites are available for prices that are not high and which I am sure most members would consider to be a bargain—will cease to exist. The market is starting to take off now.

If the Parliament wants to reduce values, it should reduce the restrictions on obtaining planning permission to build houses and create more crofts, and the Crofters Commission should apply strong and direct regulation to tackle what Agnes Leask talked about—absenteeism and multiple occupancy. Through involvement in the Scottish Crofters Union and the Crofters Commission for a long time, I know that in a place such as the Western Isles, the bulk of assignations are still family assignations. At the same time, there are about 600 or 700 absentees. Something can be done there. People who pay high prices for assignations are in the minority. The Parliament could do a lot about that.

Working on the proper occupier definition is a sound thing to do. As we say clearly in our submission, I do not think that owner-occupiers and tenants should be treated differently.

If we could go back to day one and start again, we might set up a system like the one we are proposing for new crofts, under which the right to buy and the right to assign are restricted, but it is a different matter to take those rights away from existing crofters. Strasbourg is a lovely town and it would be nice to spend some time there, but that proposal would cost a lot of money.

11:30

Mr Brocklebank: In a sense, this discussion is a microcosm of the debate that we have been engaged in since the beginning of the evidence-taking process. In the community in Shetland, some people see the positive aspects of the bill and others say that we are looking at the end of the crofting system as we have known it.

What is the point of crofting legislation? Was not the purpose of the Crofters (Scotland) Act 1886 to retain that land for crofters in perpetuity, throughout the generations? Does not the proposed legislation seriously undermine that basic intention?

Councillor Ratter: My reading of history is that the 1886 act came about after a lot of work by the Irish Land League and the Highland Land League

to try to ensure that small landholders were not absolutely at the mercy of predatory landlords, who treated them brutally. Whether we will get predatory landlords coming back into the equation and treating us brutally again is an open question. However, circumstances have changed vastly. As I said before, we are consensual in Shetland and, until we get consensus on this really big move, I can say that we will not be doing it. However, we need to understand that the situation has moved on and view the new legislation as being a genuine tool for real rural development. As I said, we need to get you to see that within a broader framework.

The money that is being invested in rural development and the consultation on the new rural development plan are encouraging stasis. Most of what is in the plan will encourage people such as me to take the money that is coming through channels such as the less favoured areas fund, the single farm payment scheme and other environmental schemes and do little else. However, if you said, "We wish to create public goods" and used that money as an incentive to ensure that they were created, I would get up and attempt to do something along those lines. We are extremely responsive to policy instruments of that kind. That is worth bearing in mind.

Mr Brocklebank: Is not the situation analogous to what happened when Margaret Thatcher decided to allow council-house tenants to buy their council houses? That move took those houses out of public ownership in one generation and we have seen a lot of difficulties as a result. Might not such a situation arise if the perpetuity system that I have described comes to an end?

Councillor Ratter: As I have said, the various acts that have been passed since 1886 have already more or less created the circumstance that you describe. There is a question about whether that situation can be changed.

Although I have never been an admirer of Margaret Thatcher, I must be fair. Her policy decision had a tremendous impact on public housing and caused there to be a lack of it, but I have to say that the capital that flowed into communities created a certain dynamism—

Mr Brocklebank: Or flowing out of a community—

Councillor Ratter: If someone in a crofting community parts with their assignation for a large sum of money, that money will, generally, circulate within that community. I know that I am giving serious hostages to fortune when I say that, but there is more than one line that can be pursued in that regard.

Rob Gibson: Agnes Leask, you have been a crofting assessor. The section on regulation and democracy in your submission makes it clear that you are concerned that the bill proposes that a panel should appoint such persons rather than their being elected by the people who know the area that the assessor would represent, which is the practice at the moment. Could you tell us a little more about your thoughts on that?

Agnes Leask: I feel great disquiet and uncertainty about this matter. I discussed it with the 15 other assessors during a meeting in Lerwick. We are all concerned about it. Will the panel be made up of three people, five people or some other number? Will the people who are appointed know the differences between various areas? Shetland is similar to other crofting areas in that, if you go 2 miles down the road, you can be in a community with different problems, strengths and weaknesses from the one that you just left. The assessors feel that we cannot operate fairly with any fewer people than are on the ground already. We do all our work voluntarily. We cost the Crofters Commission only the price of a stamp on a letter to notify us of a decrofting or a change of tenure and a stamp to take our reply back to the commission. We are extremely economical.

We would like there to be elected representatives. It does not matter whether they are called a panel or assessors but it is important that they are elected by the local crofting community's grazing committees and so on. That will ensure that they are people who know the area. We simply cannot operate with any fewer assessors than we currently have. Recently, an assessor retired and his area was lumped in with my area. Twice, recently, decroftings have occurred in that area and I have had to telephone the previous assessor to get the details from him because I do not know the area all that well. Another assessor told me that the same thing had happened to him. An extra area was lumped in with his area and he had to consult the previous assessor when issues arose.

Crofters look to the Crofters Commission to be their protective ruling body, but they see that the close ties that they have with it are being lost. Eventually, there will not be anybody who will have or listen to grass-roots knowledge about crofting problems, strengths and weaknesses in the various areas. That is where the concern comes from.

Rob Gibson: That is the issue for the assessors. We are told that there is a likelihood of new crofts being created. If that is the case, it seems logical that there will be a need for more assessors, not fewer. That is a point that I take as a given.

If the crofting community has the knowledge, it will want to create area policies for the

development of crofting in areas such as Shetland. Would that best be done on an elected basis or delivered from on high?

Agnes Leask: From an assessor's point of view, I believe that that should not be done from on high. No matter how clever or educated a person is, it would be impossible to get someone to understand all the various situations in the various areas in the space of a meeting. There must be local representation. As I said, whether the groups are called panels or something else, the members must be elected and there should be no fewer than 16. As more crofts are created, perhaps we should think along the lines of the situation a couple of years ago, when we had 18 assessors. Local groups can feed into the work of the assessors. Crofters are rather reluctant to push themselves forward to take on any position. We do not want to lose the assessors, as they are the one contact on the ground who crofters can speak to in their mother tongue, shall we say, which allows them to get their ideas across better.

Councillor Ratter: There is no doubt that Agnes Leask is right that some kind of grass-roots representation is required. I speak for Shetland Islands Council when I say that something has been lost in the past few years as a result of the dilution of the use of assessors and the withdrawal of any kind of area responsibility on the part of commissioners or board members of the Crofters Commission—or whatever we are these days. If we are to achieve what we need to achieve, that link needs to be reconstituted, although there is no reason in the world why there should not be variations in how that is done. We need to consider grazings committees or township committees and assessors and work out a system that will best develop area policies from the grass roots. Ultimately, the policies will have to be agreed with the regulating body, which will be the Crofters Commission, whatever form it is in, after which the Crofters Commission will regulate and police those policies.

The only point in Agnes Leask's submission with which I disagree is the suggestion that board members of the Crofters Commission should be elected. There are two options: in an ideal world, we would have robust impartial regulation; or we can have elected board members. In my view, we cannot have both. I could not be an elected board member, because it would be incredibly difficult to consider the policy and then make and carry through decisions that are against it. The body needs to have an appointed board.

Rob Gibson: You mentioned the Norwegian situation. I remind you that Norway has area agriculture committees, which are for small areas and are made up of local people who take decisions that affect their neighbours. You suggest that that would somehow be impossible in our society.

Councillor Ratter: I do not suggest that it is necessarily impossible. The system has been tried—in the early 1990s, there was a fairly long-running experiment in the Western Isles, which was led by Agnes Rennie, who was the commissioner for the area at the time. Perhaps the communities were approached in the wrong way but, in the end, the response that came back was that they wanted a disinterested regulator to take certain decisions so that they did not have to fall out with their neighbours. In my opinion, the same would be true in Shetland. We would prefer to have somebody at a higher level to kick in those circumstances. Small communities have to be highly consensual or they become intolerable places in which to live. I accept that decisions are made locally in Norway, although I do not know the details. However, in my experience, people at the grass roots in small rural communities in the crofting counties do not desire such a system. For the reasons that I have outlined, it would be difficult to make that system work.

Rob Gibson: The situation might be different in other areas, because communities may have different responses to the system.

11:45

Councillor Ratter: That is conceivable. The Western Isles have by far the largest number and Shetland has the second-largest number of crofters in a definable area. My idea of area policies is that they would perhaps arbitrarily break the crofting counties into, for example, three or four areas, which would be covered by broad policies. Policies must be developed by consultation and consensus—it is a matter of policing by consent. Unless people have broadly internalised and accept regulation, they will pursue every single point through every legal channel that they can and gum up the works for ever. Nobody should believe that regulating such a complex system is easy or ever will be easy.

Rob Gibson: Finally, appointments to the Crofters Commission have been made for more than 50 years. We have heard plenty of evidence that, during that time, the appointed boards have not made the commission work—I refer to keeping the register of crofts up to date and developing crofting in a way that benefits the future by having a clear set of records, for example. Why should an elected board be any different? Could it be different? Will it be much more imperative for it to sort out problems because it comes from the grass roots?

Councillor Ratter: An argument about that could be had. I think that the Crofters Commission

has done substantially better since the early 1990s. The spectrum is not from terrible to perfect, but from worse to better—I would not be prepared to try to argue otherwise. Sir Crispin Agnew has made the serious constitutional point, which the committee will discuss later, that the commission would be a privatised tribunal. We are talking about a body with a sort of quasi-judicial role. Ideally, a high-quality body that is separated and appointed rather than elected could do things better. I am sure that we could debate that matter and the good points that could be made on the other side of the argument.

Elaine Smith: Many of the questions that I wanted to ask have been answered. However, does the panel have an opinion on the period for clawback after the right to buy has been exercised? We discussed that matter with a previous panel.

Councillor Ratter: The previous panel answered the question fairly well. The current legal device through which people are nominated to avoid clawback is effective. I am a crofter and everything on our land was done to it or put on it by our family over several generations. Nothing was put on it or more or less any other crofting land by a landlord. I would prefer there to be no clawback at all.

Agnes Leask: I do not disagree with the rule. My niece now has my old family croft, which my grandafther improved beyond all recognition. When he took on the croft, most of the arable land was practically useless, but he trenched it and built stone drains, which was a tremendous job. He did that more than 100 years ago. Succeeding generations must recognise what was put into the croft to make it what it is.

Perhaps the Crofters Commission has a weakness now that did not previously exist, because houses are being allowed to be built on the best-quality land. A brand new house was built for the current tenant of the croft on one of the best-quality fields that my grandfather drained, when it could have been built on the rubbish land a few metres away. Young people were taking on the croft—and good luck to them—but to me it did not seem right that good land should be sacrificed for a house. As Drew Ratter said a minute ago, we cannot have local people arguing against each other. We want an arm's-length body that can make such decisions. If the Crofters Commission had been protective of quality croft land, it would have viewed the croft before planning permission was granted. It should be the first body to view where a house is to be built and say, "No, a house cannot be built on that plot of land, but the land 20m away is poor quality, so you can move the house two lengths of itself." That would protect the good land and take the argument out of the community; the community would not decide whether a house could be built. If the Crofters Commission said that a plot could not be decrofted, there would be no question that planning permission would ever be given.

As I see it, things are the wrong way around. It used to be that before someone could build a house on a croft, the land had to be decrofted or they could not apply for planning permission. I am speaking from experience. In the days before I became an assessor, a lady who owned her croft—a rarity in those days—sold a plot of land. When the person who bought it applied for planning permission, the council said that the land was croft and asked if it had been decrofted. She applied for a decrofting and officers came out from the local agricultural office in Lerwick, viewed the land and said, "No way. You are not getting decrofting on that. The quality of it is too good." The purchaser had to be handed back her money.

Why is it that the local councils now have the last say on where houses can be built? If the Crofters Commission is going to be a body that protects crofting, it should have the authority to say whether someone can build a house or not—it should not stop a house being built on a croft but should pick the land that has the least agricultural value for the site.

Elaine Smith: That is interesting. At the end of your submission, you say that that there is a

"need for crofting legislation to address many issues in crofting"

and what you have just been talking about might be one of those issues. You also ask,

"can this Bill be fixed to address them?"

That is what the committee is trying to do at this stage. We are taking evidence so that we can make suggestions to the Executive, and that is why the questions that we are asking today and the answers we are getting are important.

My final question is also for you, Agnes. Your submission says:

"The perception from crofting communities is that the Bill in its present form will destroy crofting."

It also talks about crofts as "a freely marketable commodity". Why would the bill in its existing form make crofts freely marketable commodities?

Agnes Leask: I cannot see anything in the bill that will protect croft land. If the bill said that the Executive was going to take back the power to regulate what land can be used for building and what is to be preserved, I would support it. However, as it stands, I see no protection at all for croft land.

If my family was not interested in my croft, human nature being what it is and considering that

I took a derelict croft and made it into a reasonable croft—I would not say that it is fantastic—I would want the highest price I could get. There is a big demand for houses in my area because it is not too far outside Lerwick and it is a nice, quiet, rather scenic area; in fact, we think that it is beautiful.

I know for a fact that I could sell the most easily accessible arable land for £30,000 or £40,000 per house site, which would result in three acres of arable land all under houses. If you multiply the figures—you would get approximately four houses to an acre—I would do quite well, thank you. However, it would mean the destruction of that entire croft, because the rest of the land would be as well returned to common grazings for all the quality that it would have.

The Convener: That chimes with something that Drew Ratter said earlier when he was a bit scathing about the new Planning etc (Scotland) Bill. He said that the bill would prevent Shetland Islands Council from having sensible housing policies. I wonder how things will work. On the one hand, Agnes is saying that the Crofting Reform etc Bill should not allow decrofting or the sale of crofting land for housing when the land is good arable land and should be used for crofting. On the other hand, Drew is saying that the crofting bill is a good bill but that the planning bill will cut across it. Should not proper planning policies provide housing both for people who just want to buy or rent a house and for people who want to live and work on a croft?

We have learned that the Crofters Commission is not sufficiently involved in consultations during the planning process. If it were involved, it could say either, "We want more land to be developed for housing," or "We don't think that this particular application for housing should be approved because this is valuable crofting land." Do we not have an opportunity to link the two challenges but to be clear about who does what?

Councillor Ratter: Yes, there are clearly opportunities. It is a crude understatement, but the gist of my argument is that not enough cross-cutting thinking about development is going on and that too much thinking is going on in silos, as if the bills did not have any effect on each other.

Making the Crofters Commission a statutory consultee on planning matters is a possibility that should be explored. Issues could be settled at policy level. I usually kick against excessive focus on process, but it is conceivable that this process could actually work. In Shetland, by and large, we developed the zoning policy in consultation with local communities. There has been a lot of heat in one particular area, but across the rest of Shetland the zoning policy has been fairly uncontentious. If we were forced by legislation to be much more robust about refusing planning permission on land that is zoned to have no housing, many of the problems could be solved. The two processes would have to engage; we would have to do a lot of groundwork; and we would need the legislative hooks to hang things on. That is not impossible.

Agnes Leask talked about the days after the war when we had a United Kingdom food security policy so that good agricultural land was protected by law. We live under a UK Government that says, in effect, that regulation should be reduced. If we have a change of Government, the new Government will also say—whether it is actually done or not—that regulation will be reduced. At this stage in the cycle, no Government will reintroduce a policy that designates classifications of agricultural land and says that housing will never be permitted on some of them.

As we were saying earlier, we have to make different parts of legislation operate more closely together. There could be a formal link between the Crofters Commission as the regulating body and the council as the planning authority. That would allow us to extract most of the benefits that we want to extract. It could be done.

The Convener: That is food for thought.

Nora Radcliffe: Agnes Leask said that if someone wants to designate land as a house site and then to build a house, the land has to be decrofted. Would that mechanism allow decisions on where houses should be built to be made in the light of crofting interests, rather than in the light of wider interests?

Councillor Ratter: At the moment, it is the opposite way round: the Scottish Land Court has made it clear to the Crofters Commission that the need for planning consent for housing is the main driver and will always trump whatever the Crofters Commission does.

All the agencies in the Highlands and Islands—not solely the crofting agencies—say with one voice that the shortage and the cost of housing in rural areas is the worst problem that our society and economy labour under. At the moment, the Crofters Commission will not grant permission for decrofting until planning consent has been obtained. If planning consent has been obtained on a piece of land, and if the Crofters Commission then receives an application for decrofting that is opposed by the crofting community—as happened in Shetland at Ocraquoy in Cunningsburgh not very long ago—it is now perfectly clear to the Crofters Commission that, if it attempts to protect that piece of land for the long-term use of the crofting community, its efforts will be overturned by the Scottish Land Court.

The Convener: That is a good point to end on because this issue has come up a couple of times with different witnesses.

This has been an extremely interesting session, but I will wind it up now because our fourth panel of witnesses has been waiting patiently. I thank the three witnesses on our third panel for giving us some very interesting evidence. As happened last week in the Western Isles, we have had an illustration of the strong views that are held. The committee will have much to think about as we come to our conclusions on the Crofting Reform etc Bill. Your contributions have been extremely helpful.

12:01

Meeting suspended.

12:04

On resuming—

The Convener: Our final panel has particular expertise in crofting law. I welcome Sir Crispin Agnew of Lochnaw and Duncan Burd, who represents the rural affairs sub-committee of the Law Society of Scotland. As with previous panels, we will not hear opening statements from the witnesses, but we have very much appreciated being able to read in advance their thoughts in their written submissions. I anticipate that colleagues will want to follow up a number of points.

Rob Gibson: I am interested in the fact that Sir Crispin Agnew's submission dwells on the role of the chief executive of the Crofters Commission. The submission suggests that, as the current chief executive has been involved in the drawing up and execution of the bill, he could face a conflict of interest in future if he remains chief executive. Will Sir Crispin expand on that?

Sir Crispin Agnew of Lochnaw: The issue arises out of the Davidson v Scottish ministers case. As chief executive, Mr Rankin is the driving force behind the bill and has given evidence to the committee on what "purposeful use" means. Therefore, if I appear before the Crofters Commission to represent someone who puts a different interpretation on the meaning of that phrase, an issue of fairness will arise. An ordinary member of the public would assume that Mr Rankin would advise the members of the commission on what he considers to be the proper meaning of "purposeful use"—I could give similar examples. An issue could arise as to whether, under the European convention on human rights, the person had received a fair hearing before the Crofters Commission, and the case might need to be appealed to the Scottish Land Court. It causes me concern that the person who is promoting the bill will advise commissioners on what the bill means when they sit in their judicial capacity as members of the tribunal that is the Crofters Commission.

Rob Gibson: Should the Scottish Executive take serious cognisance of what might happen to the newly constituted Crofters Commission?

Sir Crispin Agnew of Lochnaw: Each case will turn on its own facts, but the issue will tend to occur in the context of the person promoting the bill giving a particular interpretation of what he considers the bill was intended to achieve. If people then argue before the tribunal that that is the wrong interpretation and that the bill actually means something else, they might find that their judge is the same person who gave advice to Parliament on the bill's meaning.

Rob Gibson: The submission mentions that the Crofters Commission is a tribunal subject to the Tribunal and Inquiries Act 1992. Does that mean that the chief executive is, in a sense, a judge?

Sir Crispin Agnew of Lochnaw: No, the commissioners are the judges. However, the commissioners take advice from the officials of the commission about the issues. I do not know whether such an argument would be successful, but I know that I would have it in my back pocket when advising anyone who wanted to take a case to the Crofters Commission.

Rob Gibson: Your submission cites the 2005 case of Davidson v Scottish ministers. It looks as if such a case has already gone all the way.

Sir Crispin Agnew of Lochnaw: Yes. The case of Davidson v Scottish ministers involved a bill that had been promoted by the Lord Advocate, who had explained to the House of Lords what he thought a particular clause in the bill was supposed to achieve. He then turned up as the judge who determined what that clause meant.

Maureen Macmillan: That is not a true analogy, because the chief executive of the Crofters Commission does not act as a judge.

Sir Crispin Agnew of Lochnaw: No. However, the Crofters Commission is a tribunal where things are less formal. The chief executive is an official of the commissioners and one presumes that the commissioners will take advice from the chief executive on how they should fulfil their functions. Commission staff present papers to the commissioners when the commissioners have hearings on various issues. I know that the situation is not entirely comparable, but the question is how a fair-minded bystander would view the situation if, for example, a person argued before the commission that "purposeful use" meant X and the commission's chief executive has previously given evidence to a committee of the

Parliament that it means something different. Would the fair-minded bystander be concerned that the chief executive might have influenced the commissioners as to the proper meaning of that phrase?

The Convener: That is an issue for the Executive to mull over. Your evidence is technical but thought provoking. I suspect that we will test the question with the Executive and ask to what extent it has considered that issue; that might be the way to handle it.

Nora Radcliffe: It should be said that we would expect commissioners to take whatever advice and evidence they receive with the appropriate dose of salt, as we always do.

Sir Crispin Agnew of Lochnaw: I am not saying that the commissioners will be influenced or that they will not do their level best to act fairly, but the European convention requires that the matter be judged by the reasonably knowledgeable bystander. I am not making suggestions about, or casting aspersions on, the commission.

Nora Radcliffe: I think that a reasonable bystander would assume integrity, but we will let the issue lie.

The Convener: We will consider the matter, which is out there as an issue. Sir Crispin has raised it with us, so it would be reasonable for us to raise it with the Executive. The information is helpful.

Rob Gibson: Sir Crispin will have heard the previous witnesses' evidence about small landholders. It appears that we could deal with the whole question of small landholders by amending the bill so that it amended other legislation. From what Sir Crispin has heard, would creating crofts be a better option for small landholders on Arran?

Sir Crispin Agnew of Lochnaw: That is a policy matter. It might help the committee if I were to explain the historical background. The Crofters Holdings (Scotland) Act 1886 introduced security of tenure for crofting in some parishes in the crofting counties. The Small Landholders (Scotland) Act 1911 extended the 1886 act to apply to the whole of Scotland, so crofting was established throughout the whole of Scotland, governed by the 1886 act.

In 1955, the decision was made to float off the crofting counties to a slightly different regime, although it is not very different—the small landholders acts and the Crofters (Scotland) Act 1993 contain many similarities. Add-ons have been made in the crofting areas, the main one of which is the crofting right to buy. I have given opinions on small landholdings in Arran, near Stranraer, near Glasgow airport, in Aberdeenshire and quite a number of them in the north-east, so pockets of small landholdings still exist. The landlord of most small landholdings was the Scottish Office, which sold off most of them in the 1970s, so only small pockets are left here and there.

Under the 1911 act, the Scottish ministers have the power to create more small landholdings by taking over land with or without agreement. If they exercised that power, we would have a crofting regime that was without the right to buy but which was governed by the same rules and regulations as are in the current crofting regime. It is not for me to express an opinion on whether extending that is a good thing. Arran could be added, but I understand that some small landholdings in Arran are larger than the acreage that is proposed in the bill. I know of a holding in Arran that is 1,000 acres: it has an extensive grazing area. If the regime is to be extended to Arran, it should be extended to all holdings, irrespective of their size.

Mr Alasdair Morrison (Western Isles) (Lab): I will refer to issues raised in paragraphs 4 and 5 of Sir Crispin's submission. We are in the business of taking evidence and framing legislation, yet Scotland's foremost expert on the relevant law says that the process is severely compromised, which is a fundamental point.

How compromised is the process, given the involvement of the chief executive of the Crofters Commission being the lead civil servant on the bill? If the situation were to change and we were to revert to the normal situation—that is, with a dispassionate civil servant in charge of the legislative process—would that change the dynamic that you have outlined in paragraphs 4 and 5 of your submission?

12:15

Sir Crispin Agnew of Lochnaw: Paragraph 4 is on a totally separate issue.

Mr Morrison: In my second question, I was going to ask you to explain that point. I ask you first to deal with paragraph 5.

Sir Crispin Agnew of Lochnaw: It just occurred to me that I would consider taking up the point that is outlined in paragraph 5 on behalf of a client if I was appearing at a hearing before the Crofters Commission—for example, if I was promoting a construction of a particular section of the bill that was different from what had been said to the committee as to the meaning of it. Whether or not I would be successful remains to be seen. However, it is something that I, as a lawyer, would have in my back pocket to consider.

The Convener: But you might have lost the element of surprise now.

Sir Crispin Agnew of Lochnaw: I think what I am really saying is that it is not a sensible point to be able to take.

The Convener: I think that we get that.

Mr Morrison: The second sentence of paragraph 4 says, in relation to the Tribunals and Inquiries Act 1992:

"This appears to me to raise significant constitutional issues, in that this is the first example of a 'privatised' judicial body since pre 1747."

Discuss.

Sir Crispin Agnew of Lochnaw: The Heritable Jurisdictions (Scotland) Act 1746 abolished all the private jurisdictions where sheriffdoms were hereditary and restricted to families and so on. The local hereditary sheriff got all the profits of justice. That is why that date is referred to.

The Crofters Commission, unlike other administrative bodies—such as a local authority licensing board—is an administrative body from whose decision there is an appeal to the sheriff. The Crofters Commission, by statute, is a tribunal. It is to be one of the legal courts of the land.

The jurisdiction of most courts flows from the Crown—they are bodies that derive their authority from the Crown. The Crofters Commission is to be a body corporate with no connection with the Crown, yet it is still to be subject to the Tribunals and Inquiries Act 1992 as a legal tribunal, like the Employment Tribunals Service, the Pensions Appeal Tribunals for Scotland and various social security and other tribunals. That body corporate will be exercising a judicial function that is subject to the 1992 act. That seems to be an issue of constitutional law. Practically, it probably makes no particular difference, but people need to think about the matter. Are we going to privatise justice and put it out to people based in what are to be bodies corporate that have no connection with the Government or the constitutional position of Parliament in a broader sense?

Mr Morrison: In the final paragraph of your submission, you cover what you label a "general issue". You write:

"it is very difficult for lawyers to get access to Scottish Acts or UK Acts and Statutory Instruments that are amended by the Scottish Parliament".

That seems bewildering.

Sir Crispin Agnew of Lochnaw: Let us consider the Crofting Reform etc Bill. If SEERAD had not produced its print-off of how the legislation will look once it is amended, we would be sitting down with the 1993 act, trying to write in pencil corrections, including all the little insertions of "and" and so on. That is a difficult exercise, particularly in relation to Westminster acts of Parliament. An act may have been amended by the English Parliament, and the Scottish Parliament may also have amended it, and we have to try to fit the pieces together.

I have been told of a prosecution under the Wildlife and Countryside Act 1981 in which the prosecution, the defence and the Royal Society for the Protection of Birds all had different versions of how they thought the act had been amended. There are various bodies such as Westlaw UK that publish updated versions of acts once amendments have been made. However, the fact that they tend to do that for English acts, but not for Scottish acts is becoming more of a difficulty. We are such a small legal community that the money is not available to have updated acts published.

In England, it is possible to obtain updated versions of Westminster acts. The Lord Chancellor has a website that allows acts and all the amendments that have been made to them to be run off. It is increasingly difficult to do that for Scottish acts, especially for acts that were passed at Westminster and which have been amended in Scotland and in England. The Animal Health Act 1981 is an example of such an act. It has been amended by the Animal Health Act 2002 and is about to be amended by the Animal Health and Welfare (Scotland) Bill. It will be possible to obtain from various websites the original act with all the English amendments pasted in, but it remains to be seen whether that will be possible for the Scottish amendments that are made to the act. Finding out what the Wildlife and Countryside Act 1981 now says following the passing of the Nature Conservation (Scotland) Act 2004 is a nightmare.

SEERAD has published a document that shows how the 1993 act will be amended by the bill—I assume that members have copies of that document. Unless SEERAD updates it and produces a consolidated version of the legislation, it will be very difficult for people to find out what the law is.

Mr Morrison: You are making a plea for better housekeeping.

Sir Crispin Agnew of Lochnaw: I am making a plea for someone to provide a Scottish website that keeps the Scottish acts up to date and is readily accessible, not only to lawyers, but to the general public.

The Convener: That is an interesting point of principle. We have a copy of a document that the Executive gave us, which shows how the 1993 act will be amended by the bill. I think that it is available on the Executive's website.

Sir Crispin Agnew of Lochnaw: I also have a copy of it, but I hope that once the bill has been

passed, a consolidating bill will go through the Scottish Parliament.

The Convener: The alternative would be to put an updated version of the 1993 act on a website so that anyone could access it. That is a point of principle that we might want to raise with the Executive. We are talking about providing transparency and clarity on the laws that we pass for people outside the Parliament who have not followed our deliberations. Sir Crispin Agnew has made a helpful suggestion on an interesting subject. Although it relates to the bill that we are considering, it has more general implications.

I invite Duncan Burd to comment from the Law Society's perspective on any of the issues that we have discussed.

Duncan Burd (Law Society of Scotland): The society would always defer to Sir Crispin on European human rights issues, which are a specialised area.

On general housekeeping, from a purely practical point of view, it is a nightmare to locate and interpret Scottish legislation. My own field is rural communities, for which the Wildlife and Countryside Act 1981 is important. I have had interpretation difficulties with that act and I waste a great deal of time trying to find out the correct answers. If there was a readily accessible website that provided consolidated versions of acts, the legal profession would leap at the chance of using it.

Sir Crispin Agnew of Lochnaw: It is not the acts that are passed that are the problem. Difficulties arise when an act that has already been amended for England is amended differently for Scotland.

The Convener: You could not have made your plea more effectively. We will take it on board and consider what you have said.

I will let Ted Brocklebank ask some brief questions, because I know that he must leave at 12.30.

Mr Brocklebank: My points relate to what Sir Crispin Agnew said about housekeeping. I was intrigued to discover from the part of your submission in which you talk about cottars that, under the 1993 act, anyone who lives in the crofting counties—that includes all Invernesians—who has let someone stay in their house

"for free or for a rent of only £6 per annum, is vulnerable to the 'cottar' exercising a right to buy under section 12."

That will send a shiver down the spine of many people in the Highlands. You suggest that the bill should tidy up the relevant part of the 1993 act and make it clear that that provision on the right to buy applies only to houses in crofting townships and those on crofting estates.

Sir Crispin Agnew of Lochnaw: Yes. I made that suggestion because, at the moment, the 1993 act says that anyone who occupies for free a house in the crofting counties has a right to buy it.

Mr Brocklebank: To your knowledge, has that right ever been exercised?

Sir Crispin Agnew of Lochnaw: I know of one case in which somebody allowed a family member to stay, then they all fell out and the croft was bought as a cottar house.

Mr Brocklebank: So the legislation should be tidied up. The other issue is also a housekeeping one. As we know, the National Trust for Scotland has made land over for crofting at places such as Balmacara. You suggest that other trusts, such as the John Muir Trust, should be specifically mentioned in legislation.

Sir Crispin Agnew of Lochnaw: Yes. Such reference could also include, for example, crofting community bodies that have bought. The 1993 act says that a crofter has an absolute right to buy his croft house and that he may buy the croft land. However, there is a defence, which arises when a purchase is not in the interests of the sound management of the estate or when it would cause hardship to the landlord. When consideration is being given to whether a purchase is in the interests of the sound management of the estate of a National Trust property, one can have regard to the purposes of the National Trust as part of the overall consideration of whether the Scottish Land Court should refuse consent to the purchase. The National Trust, which was constituted by a private act of Parliament, was the only such body around in 1976, which is why it was included in the legislation.

I just wonder whether it might be appropriate that the Scottish ministers be given the option of allowing other trusts or community bodies that own land to have their aims and objectives taken into account when the Land Court is considering whether it should refuse permission for a purchase. In a way, that goes back to what the previous panel said about everybody selling and having the right to buy and the problems that that causes.

Maureen Macmillan: I want to follow up Ted Brocklebank's point. Other panellists, both here and in Stornoway, proposed that rural housing burdens, for example, could be used to protect crofts.

Sir Crispin Agnew of Lochnaw: Yes, indeed. There is no reason why planners could not do that. For example, there is often a planning condition that someone can build a house on a farm only if it

is to be occupied by somebody involved in agriculture. That is a common planning condition and I can see no reason why planners in the crofting counties could not grant planning permission for a house on a croft on condition that it was occupied by somebody actively involved in crofting.

The problem is that different people regulate different areas. The Crofters Commission is often blamed for things that have been decided elsewhere. If planners decide that land that happens to be croft land should be zoned for housing, a landlord is entitled to resume it or, if they are an owner-occupier, to have it decrofted, if that is in the public interest. Case law suggests that if planners decide that it is in the public interest that land should be zoned for housing, that is a good reason for taking it out of crofting.

Maureen Macmillan: That is something that we could address in amendments to the bill.

Sir Crispin Agnew of Lochnaw: Indeed. On the right to decroft and the right to resume, someone can resume for the good of the estate or the croft or in the public interest. I think that the bill would add community interests and other things to that. Those provisions apply to decrofting as well. We should remember, of course, that a crofter has an absolute right to decroft his croft house.

That brings me on to another matter that I should have mentioned, which is that people often decroft their crofts or croft houses to be able to borrow on them. A person can have a standard security only over an interest in land that can be recorded in the land register, and only leases of 20 years or more can be registered. I was on a Crofters Commission committee that thought about amendments to the 1993 act before the Scottish Executive took up the issue.

If the bill allowed standard securities to be granted over crofting leases, which would require the Conveyancing and Feudal Reform (Scotland) Act 1970 to be amended, lenders could lend on the value of a crofting lease, which is almost a lease in perpetuity and is worth just as much as the decrofted land. After all, people pay almost as much for an assignation as they pay for vacant land. Such an approach would get rid of the need to decroft.

12:30

Maureen Macmillan: That point will be important in our discussions on whether crofting provision should be extended outwith the crofting counties, but without the right to buy. It would be good if people were able to access a mortgage without having to decroft.

Sir Crispin Agnew of Lochnaw: The problem is that because, in law, a crofting lease runs from year to year, it cannot be registered in the land register of Scotland. However, if the 1970 act were amended to allow lenders to lend on a crofting lease, the banks would be quite happy because, as I said, the value of the assignation is almost the same as the open market value of the land.

Maureen Macmillan: How do you feel about the way in which the Scottish Executive is dealing with interposed leases? It has asked the Scottish Land Court to rule on the matter, and the committee has heard that the position must be resolved urgently. How long will it take the court to rule on the matter, particularly if the decision is subject to an appeal?

Sir Crispin Agnew of Lochnaw: I must declare an interest. As I have been instructed by Mr Duncan Burd for Pairc Crofters Ltd, I will probably be on the other side of the case in the Scottish Land Court. Mr Burd beat the crofters to it in asking me to act for him.

I do not know how long the court will take to rule on the case, because I do not know when the application will be lodged. However, one would expect to have a hearing before the Scottish Land Court in six to nine months, with a decision made three months afterwards. Any appeals must then be made within a month to the Court of Session, which usually hears appeals 18 months after they are lodged. I am sure that everyone could speed up the process if requested to do so in the public interest, but that is the sort of timeframe that we are talking about.

Maureen Macmillan: So, even with the best will in the world, the process will still take months.

Sir Crispin Agnew of Lochnaw: Yes.

Maureen Macmillan: Is it appropriate for the Executive to legislate on interposed leases—it intends to use the bill to amend the Land Reform (Scotland) Act 2003—while the court case is going on?

Sir Crispin Agnew of Lochnaw: That is a matter for the Scottish Executive. However, the issue is perhaps not as simple as it has been made out to be. It has been said that the proposed legislation has been introduced as a means of avoiding the matter. Interposed leases were put on a statutory footing in Scotland by the Land Tenure Reform (Scotland) Act 1974. Under the Crofting Reform (Scotland) Act 1976, which introduced the right to buy, and section 16(5) of the Crofters (Scotland) Act 1993, the crofter can buy out both interests where there is an interposed lease. The issue has been known about for a long time.

Many Scottish estates have operated on interposed leases for many years and for all sorts of reasons. For example, a family company might

lease an estate to a family member for a fully commercial rent—if it is not fully commercial, there are various tax implications. Overseas companies that own land in Scotland often set up a British company and give it an interposed lease.

I have been involved in a situation on a crofting estate in which the crofters and the landlord have agreed to set up an interposed lease to share the income stream from a wind farm development 50:50. In exchange for that, the crofters gave up their right to a one-off payment when the land was resumed because the wind farm development could not go ahead unless payment could be made in instalments. Such a measure is being introduced in the bill. That is an example of an interposed lease where the people of a community buy an area, which they are perfectly entitled to do. As members know, the position of a community is different from that of crofters—everybody in the community can vote, provided that 20 per cent are crofters. In such a situation, a local community can therefore buy out the crofters' and the landlord's interests in an interposed lease, depriving the crofters of their income stream, which they took on in exchange for giving up the one-off right to a payment on resumption. The Scottish Land Court grants the resumption order on the basis of that overall agreement.

There is another concern. How can one buy out a bit of an interposed lease if such a lease covers a whole estate, of which the crofting interest is just a small area? The legislation must provide for such situations.

In quite a lot of wind farm developments, the developers have been given an interposed lease because they wanted the security of such a lease so that they could then spend their money on planning applications, studies and all the rest of it. People might decide to exercise the right to buy out the developer's interposed lease because that creates the opportunity of getting a better deal from some other developer.

The issue is not simply about trying to avoid the provisions of previous legislation, because lots of interposed leases existed for perfectly legitimate purposes long before the Land Reform (Scotland) Act 2003 came in. I do not know why the Executive did not consider interposed leases, particularly when they are covered in previous crofting legislation.

Maureen Macmillan: The Executive is trying to remedy the situation now.

Sir Crispin Agnew of Lochnaw: It is trying to remedy what it perceives to be a problem, but I do not think that it has fully understood the wide range of uses of interposed leases that exist beyond those about which it appears to be concerned.

Maureen Macmillan: That issue was raised by a previous panel of witnesses, who thought that there were both beneficial and prejudicial interposed leases, but wondered how one distinguishes between the two in law.

Sir Crispin Agnew of Lochnaw: Yes, how does one?

Maureen Macmillan: I was hoping for some hints from you.

Sir Crispin Agnew of Lochnaw: If one plans to buy out an interposed lease, one has to pay for the value of that lease. What was the intention of the Land Reform (Scotland) Act 2003? Was it to allow the crofting communities to buy out the crofting interest and the agricultural value, if you like, so that they could develop them, or was it to give them the opportunity to buy out the whole value of an estate? If it is the latter, they have to pay not only for the agricultural value but for the potential development value that may exist in the interposed lease. At the moment, crofters have no rights to the minerals or to the sportings, but they have been given specific rights to buy out sportings, minerals and so on.

Maureen Macmillan: Does Mr Burd wish to add anything?

Douglas Burd: Sir Crispin has covered the matter. The Law Society has no particular view, but I specialise in wind farm leases. The interposed lease to which Sir Crispin alluded is the model that is found at Edinbane. In that situation, an extremely benevolent landlord came to the crofters and suggested an interposed lease as the correct way to advance. On the back of that lease, the share issued to the crofters was tied specifically to the crofts. In respect of any instalment compensation, the Law Society would like to ensure that the share goes to the croft and not to the individual who is in situ at the time that the development takes place. That will ensure that the community gets the benefit of the income stream over whatever period the development takes place.

I can offer a personal observation on another point that Sir Crispin made. In Sleat, the landlord, Clan Donald Lands Trust, which is a community landlord, has brokered a deal with a wind farm developer. It follows the same model as the Edinbane agreement, but non-croft land has been thrown into the equation. In buying out an interposed lease, there will be the difficulty that non-croft land as well as croft land is involved. Potential difficulties could be created. A lot more thought and input are needed from all the various agencies from which the committee will be hearing.

The Convener: I have a question about the amendments that the bill will make to the Scottish

Land Court Act 1993. I do not know whether you have read the evidence that we have received from others, but we have received representations about changes that should be made to the act. We received suggestions about raising the age of retirement for court members to 70; removing the requirement for there to be a Gaelic-speaking member of the court; and providing for part-time appointments. As legal experts, do you have any views on those suggested changes or other thoughts on how the Land Court might be changed?

Sir Crispin Agnew of Lochnaw: Given the coming legislation on age discrimination, I do not see any reason why the retirement age for court members cannot be raised. I think that the chairman can continue until the age of 70, so I cannot see any reason why the court members should not do so. It would be a great mistake to take away the requirement for the court to have a Gaelic-speaking member, because some of the older members of the crofting community have Gaelic as their first language and the Gaelic Language (Scotland) Act 2005 is trying to encourage the use of Gaelic. On part-time members, there is a provision to appoint a part-time chairman. Sheriff Macleod is presently acting as a part-time chairman along with Lord McGhie because of the increased volume of work that is before the court.

On the proposals in the bill, as I understand it, the Land Court is to be given a right of appeal against any Crofting Commission decision. In effect, the court can rehear the whole case. It is more than just an appeal court; it can deal with a case on appeal, or reconsider it. There is a policy issue with regard to whether the Land Court should be an appeal court and limited to judicially reviewing decisions of the Crofters Commission—by considering whether there was an error of law, whether the commission has breached natural justice or whether it has acted unreasonably—or whether it should have full power to rehear a case. The fact that the court is, in effect, being given scope to rehear the whole case is causing concern; I heard on the grapevine that the Scottish ministers are reconsidering whether the court should have a more limited right of appeal.

I have no particular view, but if the case is opened up again, it means that each appeal will be made on the basis of asking the Land Court to reconsider the whole case, which will make the process more expensive and lengthy. There should be a provision that in certain circumstances the Land Court would have the right to rehear the case if it decided that there had been a breach of natural justice, which meant that the commission could not deal with the case fairly. Without such provision, the Human Rights Act 1998 would be breached.

12:45

The other thing that concerns me—I raised this point when I appeared before the committee on the Agricultural Holdings (Scotland) Bill—is that we are now getting a diversion of jurisdictions and means of appeal. If you appeal on a crofting issue, you ask for a special case to be stated at the Court of Session. If you are dealing with an appeal under the Agricultural Holdings (Scotland) Act 2003, you have to appeal within 28 days under a totally different procedure. Under the Agricultural Holdings (Scotland) Act 2003, the Scottish Land Court has been given the jurisdiction to give damages, pronounce interdict, and pronounce orders for specific implement and a whole range of orders that it does not have under the Crofting (Scotland) Act 1993. If a crofter thinks that a landlord is exercising the reserved rights of the landlord under schedule 2 to the Crofting (Scotland) Act 1993, he has got to interdict the landlord in the ordinary courts and then take the question of whether the landlord has the right to do that to the Land Court.

It would be appropriate to consider trying to consolidate the powers of the Land Court so that they would apply to both crofting and agricultural holdings and so that the methods of appeal and so on would all be the same. I have been involved in a case in which somebody used the wrong procedure because they thought that everything had been changed to appeals, whereas it was still special cases. The situation just causes confusion and makes for difficulties. This is a plea for simplicity. It would be sensible for the Land Court to have jurisdiction to make orders—practical orders such as interdicts, specific implement and damages—when issues arise between landlord, crofter, the Crofters Commission and so on.

The Convener: That sounds like a sensible suggestion.

My final question is about the relationship between the Crofters Commission and the Scottish Land Court. Do you have a view on recent decisions of the Land Court that overturned some of the commission's decisions on decrofting and its attempts to regulate decrofting? Brian Wilson said in evidence that he found that surprising, because he thought that the Land Court was undermining the Crofters Commission's role in regulating crofts and particularly the decrofting area. Do you have a view about the relationship between the two?

Sir Crispin Agnew of Lochnaw: The Crofting (Scotland) Act 1993 specifically makes provision for the Land Court, on appeal, to reconsider the Crofters Commission's decisions on decrofting. The Land Court considers whether the Crofters Commission has approached the matter correctly in terms of the law. If the Land Court thinks that

the commission has not approached the matter correctly in those terms, it will overrule its decisions. The Land Court is not second-guessing any discretion that the Crofters Commission has; it is deciding whether the law allows a decrofting in those circumstances. The act says that you can decroft if it is for the good of the croft or if it is in the public interest. You have to have regard to whether there is a crofting community in the area—that has a specific legal meaning. You then have to decide whether, as a matter of fact, there is demand for crofts in the area. It is not really a matter of second-guessing, but that is the jurisdiction that the Land Court has been given. If that jurisdiction should be removed, that is a policy matter, but at the moment, the amendments to the act give the Land Court a right of appeal against all Crofters Commission decisions, except those for which specific provision is already made. Section 25(8) of the 1993 act gives the right of appeal against a decrofting direction to the Land Court. That has its own special legal rules, which are different from the new rights of appeal.

The Convener: There are a lot of detailed issues there that we might want to follow up with the Executive and the Crofters Commission when they appear before us.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): Why, in your view, has it been so difficult to establish an accurate register of croft land?

Sir Crispin Agnew of Lochnaw: Over the years, the Crofters Commission has kept a record that goes back to a return that was made by the landlord in 1955, which gave information on the croft, the name of the tenant, the acreage of the croft and the share in the common grazing. The record was never map based. I am the chairman of the crofting law group and we have discussed the matter with the commission over the years. It has simply not had the funding to map the crofts. I understand that the commission asked the Scottish Office or the Scottish Executive if it could have the integrated administration and control system maps as a basis for a register, but it was told that it could not be given those maps because of data protection. The commission has a reasonably accurate record of what is a croft and who is the tenant, but that record is not map based, so one does not know the exact area of the crofts; for example, it gives a description such as, "Croft no 1, extending to 10 acres and three shares in the common grazing."

That raises one of the issues that I mention in my submission. The legislation can say that a croft is a croft if it has been on the register for 20 years, but there is also land that is not on the register. I have given two examples of Scottish Land Court applications, because they happen to have been reported, but I am involved in two other cases. In one of those cases, the people who run the village shop are trying to sell it, but a crofter has said that it is part of his croft. Even though it has been occupied separately as the village shop since 1915 and has been sold a number of times, a local crofter has now come along and said, "Sorry, it's part of my croft, and it was in 1886, so I want half the current sale price, please."

That sort of dispute can affect a lot of individual houses that are now said to be on the common grazings. Such issues never arose before 1976, but they are arising now because the crofters are entitled to a share in the development value when land is sold. That affects a lot of little people on the fringes of crofting communities or on common grazings. They may have been living in a house, or a house and garden, that has apparently never been crofted for as long as people can remember, and yet people can come out of the woodwork and say that it is part of a croft after all.

Mr Ruskell: What reason was given for the refusal to allow the Crofters Commission to use the IACS maps? Was it because of confidentiality under the Freedom of Information (Scotland) Act 2002?

Sir Crispin Agnew of Lochnaw: I understand, from casual discussion rather than from any more formal information, that the request was refused under data protection legislation. In addition, a lot of crofts are part of a larger IACS holding, so the IACS maps would not necessarily provide a map of a particular croft. There are numerous Land Court cases—usually between the two crofters involved rather than between the landlord and the crofter—about the boundaries of crofts. Disputes about the boundaries of the common grazings regularly go to the Land Court, so I am pleased that the bill provides for the Land Court to fix commonsense boundaries if there is no evidence of the actual boundaries.

I do not think that the Crofters Commission can be blamed for not having a good register. The commission is faced with a register that starts off with a name and an acreage. That register has never been map based and the commission has never been given either the authority or the money to make it map based. It cannot write to the crofter and say, "Thank you. We've received your assignation. Please provide us with a map." It would cost quite a lot of money to make a map to the standard that would be required for land registration. I do not know what the cost would be, but I have heard figures of £100 or £150 being quoted for the production of a reasonably accurate map by a surveyor.

Duncan Burd: The norm would be £100 plus VAT.

Sir Crispin Agnew of Lochnaw: The Crofters Commission has no right to demand that the crofter submit a map.

Nora Radcliffe: What priority would you give to the production of a map-based register? Is it important for that exercise to be undertaken?

Sir Crispin Agnew of Lochnaw: It is very important. Perhaps Duncan Burd can say more, but I have heard from many solicitors that the matter causes immense problems in ordinary conveyancing in the Highlands, particularly near to or in crofting townships.

Nora Radcliffe: As part of that mapping exercise, there would almost have to be powers of decision when there is no historical evidence or, as you mentioned, if someone has run the village shop since 1915 or has lived in a house for a long time. Decisions should be taken about such matters as part of the mapping exercise.

Sir Crispin Agnew of Lochnaw: Yes. The boundaries should be fixed as part of that exercise so that there is certainty.

The Convener: Okay. I want to wind up the session.

Rob Gibson: May I ask a follow-up question?

The Convener: If it is very brief.

Rob Gibson: At the outset of the land reform process, it was stated that a totally map-based land register for Scotland would cost, I think, £300 million. You suggest that it is important to have such a map-based register for crofts, although whether it would be good to have such a register for everything else is a matter of interpretation. Given the modern mapping methods that have been developed in the past 10 years, could a map-based register for crofts be produced much more cheaply using aerial photographs?

Sir Crispin Agnew of Lochnaw: I am not sure that aerial photographs would show the boundaries. That is the problem. However, every time that an application was made to the Crofters Commission to register an assignation, a transfer or a sale, the person could be required to provide a map of what they claimed to be the boundaries. The map might not be definitive, but it would at least represent a claim. A requirement could perhaps be introduced that grazings committees and landlords would agree a map of the boundaries of the common grazings by a particular date and register them. If they could not agree, they could go to the Scottish Land Court to have the boundaries determined.

Rob Gibson: Is it not the responsibility of landlords to know what land their tenants have?

Sir Crispin Agnew of Lochnaw: They often do, but the problem is that because there is so little return from the crofting areas the landlord probably knows the outer boundaries but is not really concerned about the internal ones. The return from a crofting estate is such that it costs landlords more to administer it than they get back in rent.

Rob Gibson: I could ask many more questions, but I see that the convener is getting jumpy.

The Convener: I am. We started at 9.30 this morning.

We have had four excellent and extremely helpful evidence sessions, in which we have dealt with some of the big-picture issues and gone into the detail of many of the legal implications of the bill. We have also established how the bill relates to previous legislation. The final session has given us a flavour of how the legislation might be interpreted in the future. I thank the last witness panel.

We will continue to take evidence on the Crofting Reform etc Bill at our next meeting, which is on Monday at 2 o'clock in the Corran Halls in Oban.

Item in Private

12:59

The Convener: Under agenda item 2, the committee is asked whether it agrees to consider a stage 1 report on the Crofting Reform etc Bill in private at all future meetings until we have agreed the report. That is what we usually do with reports on bills, because it allows committee members to discuss in detail the issues that witnesses have raised. Mark Brough tells me that we are likely to consider our draft report at the meeting after our final evidence session in Inverness. It would help us to plan that meeting if we knew that that item would be taken in private. Are we agreed?

Members *indicated agreement*.

Subordinate Legislation

Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2 (SE 2006/44)

13:00

The Convener: Agenda item 3 is subordinate legislation. We have one document to consider, which is subject to annulment. Members may recall that the committee considered a related document, the Contaminated Land (Scotland) Regulations 2005 (Draft), at our meeting on 7 December, when we took evidence from the Deputy Minister for Environment and Rural Development. The purpose of the draft guidance is to draw attention to the entry into force of changes to the contaminated land regime. The Subordinate Legislation Committee considered the guidance and had no comments to make on it. Do members have comments that they wish to make?

Members: No.

The Convener: Are colleagues therefore content with the draft guidance and happy to make no recommendation to the Parliament?

Members *indicated agreement*.

Sewerage Nuisance (Code of Practice) (Scotland) Order 2006 (SSI 2006/155)

The Convener: Agenda item 4 is subordinate legislation. We have one statutory instrument to consider under the negative procedure. We have received some comments from the Subordinate Legislation Committee, and members have the relevant extract from that committee's report. Members will note that this is the final element of bringing into force the statutory code of practice on odour from waste water treatment works. We pressed the Executive hard to develop the code of practice after considering petitions during our scrutiny of the Water Environment and Water Services (Scotland) Bill, and it is good to see the order being produced. Funding has been provided in the quality and standards III programme to address problem sites. It is good to see the completion of this work. Do colleagues have any comments to make on the instrument?

Mr Ruskell: It is important that petitioners in communities throughout Scotland realise that submitting petitions to the Scottish Parliament can result in legislative change that improves their lives. This is a classic example of that process, which I will use to encourage people in my region to bring more petitions to the Parliament to secure changes that will improve their environment.

Rob Gibson: I echo those thoughts. I hope that the money that has been made available under Q and S III will be enough to deal with the very large task that is involved. When Susan Deacon came along to the committee with the petitioners, we realised that they were highlighting only one of many such circumstances. I hope that all the people in those circumstances will be satisfied in the shortest time possible.

The Convener: I thank colleagues for those comments. I take it that members are content with the instrument and happy to make no recommendation to the Parliament.

Members *indicated agreement*.

Annual Report

13:02

The Convener: Agenda item 5 is consideration of the committee's annual report for the year 7 May 2005 to 6 May 2006. Members have a draft of the report in front of them. It is in a tightly set format that has been approved by the Conveners Group and is strictly limited in its length and content. The report is basically a factual record of the main points of our work over the past year. We need to sign off the report today to meet the publication deadline. Do colleagues have any comments?

Members: No.

The Convener: I was hoping for that response. The procedure should be straightforward. The plan is to publish all committee reports on the same day, so that members of the public can see what work is being done across all the parliamentary committees. They will see that we are being kept extremely busy with our investigations and inquiries, as well as with legislation from the Executive. I thank the clerks for preparing the report for us.

Meeting closed at 13:03.

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