The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 8 February 2012

Session 4

Wednesday 8 February 2012

CONTENTS

ECONOMY, ENERGY AND TOURISM COMMITTEE
5th Meeting 2012, Session 4

CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)
*Rhoda Grant (Highlands and Islands) (Lab)
*Patrick Harvie (Glasgow) (Green)
Angus MacDonald (Falkirk East) (SNP)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Stuart McMillan (West Scotland) (SNP)
*John Park (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jim Eadie (Edinburgh Southern) (SNP) (Committee substitute)
Fergus Ewing (Minister for Energy, Enterprise and Tourism)
Gavin Henderson (Registers of Scotland)
Matthew Smith (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 5

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 8 February 2012

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

Interests

The Convener (Murdo Fraser): Good morning, ladies and gentlemen. I welcome committee members, the minister and his team, and the public in the gallery to the Economy, Energy and Tourism Committee's fifth meeting in 2012. I remind all members to turn off all mobile phones and other electronic devices.

We have apologies from Angus MacDonald, and I welcome Jim Eadie as his substitute. Do you have any interests to declare?

Jim Eadie (Edinburgh Southern) (SNP): I have nothing to add to my entry in the register of members' interests.

Land Registration etc (Scotland) Bill: Stage 1

10:01

The Convener: Under agenda item 1, we will continue our scrutiny of the Land Registration etc (Scotland) Bill. I welcome again Fergus Ewing, the Minister for Energy, Enterprise and Tourism in the Scottish Government, who is joined by Gavin Henderson, the bill team leader from Registers of Scotland, and by Matthew Smith and Valerie Montgomery from the Scottish Government.

Before we ask questions, would the minister like to give an introduction?

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): Yes, briefly. First, I declare that I am still a solicitor registered with the Law Society of Scotland, although it is more than a decade since I was involved in any legal practice and I do not intend to engage in it at any time in the future.

Scotland has the longest history in the world of national public registration of rights in land. However, the general register of sasines, which dates back to 1617, is in need of retirement. The land register of Scotland, which was created under the Land Registration (Scotland) Act 1979 to replace the sasine register, is incomplete. Its completion is an important, albeit long-term, objective for the Scottish Government. Continuing to operate both registers indefinitely is inefficient.

As the committee is aware, the work that is involved in speeding up completion of the land register will be a time-consuming endeavour. The process might take decades, even with the reforms for which the bill provides. However, I firmly believe that accelerating completion of the land register is in our national interest.

Before I talk about elements of the bill, I want to pay tribute to the Scottish Law Commission for its outstanding work in developing many of the new policies that appear in the bill. It is clear that considerable thought has been given to the approach to the relevant law, for which I thank the commission.

The reforms in the bill provide for additional triggers for first registration. That means that titles will come on to the land register when they previously would not have done so. However, as the committee has heard, that will be insufficient in itself to ensure completion of the land register, as some titles will never transfer.

One principal tool in the bill for taking such titles into the land register is voluntary registration. The keeper of the registers of Scotland already has the

power to accept applications for voluntary registration, and few such applications are refused. Voluntary registration is a useful tool to stimulate economic growth in the legal sector, as it might very well provide work for junior young solicitors.

I understand that the committee has heard concerns from stakeholders about the power in the bill to undertake keeper-induced registrations. From meeting stakeholders such as Scottish Land & Estates, I know that that is a particular concern for large landowners in rural Scotland. Keeper-induced registration is an important tool that will allow the keeper to complete the land register. Without it, I would not be confident that 100 per cent completion could ever be achieved.

I offer the reassurance that, in relation to large and complex titles to land, keeper-induced registration will be used very much as a last resort. In particular, there will be no keeper-induced registration of large and complex land titles in this parliamentary session.

The Convener: Thank you. I am sure that we will explore some of those topics in more detail as we go through the issues that members wish to raise. We ought to start with the issue that you started on, which is the question of completion of the land register. I invite Chic Brodie to start off.

Chic Brodie (South Scotland) (SNP): Good morning, minister. You referred to the timescale for the completion of the land register. The policy memorandum states:

"Completion of the Land Register is considered to be the most important policy aim of the Bill."

Will you expand on what is meant by that?

Fergus Ewing: It is important to complete the register for a number of reasons of good public policy. First, it is inefficient to have the twin system of the sasine register and the land register. It means, for example, that solicitors who carry out conveyancing work in Scotland have to learn at university how to operate both systems, and put that knowledge into practice. I spent more than two decades dealing with, inter alia, conveyancing, which involved me spending many more hours than I would have wished studying old manuscript documents—the handwriting was often barely better than my own—that were written in a previous century, such as charters of novodamus, feu dispositions, feu contracts and occasionally even contracts of excambion and the like. I had to sit and read them for hours at a time.

The land register replaces all that with a tightly written single document called a land certificate. The system is simpler, better and more modern. It is therefore desirable from the point of view of not only the solicitor but the consumer that we have that system. Fees are a complex topic that is not really encompassed by the bill, but it stands to reason that if lawyers spend less time on and deal more quickly with a service such as conveyancing, the fees that they charge will, one hopes, be lower—I formulated those words carefully.

The land certificate will allow the registration fees to be reduced because the amount of time that the keeper and their staff have to spend in poring over old documents is vastly reduced. Of course, much of the cost of the work that is carried out by the keeper relates to first registration, when all the work that I have described needs to be done for the title to be transferred from the sasine register to the land register. On the grounds of cost and the smooth transition of necessary business relating to property, which is a fundamental requirement of a modern economy, the land certificate is therefore important.

Secondly, there is a public policy interest, in that the public have a right to know who owns the land of Scotland. Thirdly, there is an efficacy aspect, too. Putting it at its most basic, local authorities want to know where they are collecting their council tax from. That is not obvious from some sasine titles, but it is obvious from land certificates, which will give the name of the landowner and identify the extent of the land on a plan.

Those are some of the reasons why it is desirable and in the interests of public policy to move from the sasine register to a land register. However, I used the phrase "long-term objective" earlier, because it will take a long time to do this, I am afraid. I do not think that it would be doing any service to this committee or the Scottish public to say otherwise. I am reminded that in a different era when our counterparts in Westminster were considering this matter, the advice seemed to be that the Land Registration (Scotland) Bill, which was considered and passed in 1979, would result in completion of the land register in under a decade. However, that did not happen in 1990. I therefore do not think that I will emulate the predictions that were made by my esteemed colleagues in Westminster circa 1979.

Chic Brodie: I take the minister back to Westminster circa 1911, when Lloyd George, as a result of his desire to apply land value taxation, completed a register in four years by applying the appropriate resource. So far, in Scotland, after 30 years, only 21 per cent of the landmass is on the land register. Do you foresee any changes that will speed up the process as a result of the bill ?

Fergus Ewing: Yes, I do. I must admit that I am slightly flummoxed by Lloyd George's emergence in the debate. I suppose that I should say that Lloyd George might have known my father—it is certainly technically possible.

Back in the current century, the purpose of the bill is to have a series of triggers that, together, will hasten the process of completion of the land register. The member referred to the figure of 21 per cent but, to put the matter slightly differently, well over a million titles have been registered in Scotland. However, some of the largest landed estates have not been registered, perhaps because of the mode of ownership—some of them might be held in trust, which will not induce a registration. It is certainly true that only a small proportion of the land in Scotland is registered. We want that proportion to increase through the various triggers in the bill.

The keeper estimates that the effect of the triggers in the bill, in cumulo, is likely to result in 7,000 first registrations a year. I think that that is correct—I see that my officials are nodding, so it is correct. Incidentally, that compares with 104,000 transfers, including first registrations, last year, which is down from nearly 200,000 in 2006-07. It is important to set the issue in context. Because of the recession, there has been a diminution in sales and purchases in the property market. In 2006-07, there were 198,000 transfers, whereas, in 2010-11, there were 105,000. The keeper estimates that there will be an additional 7,000 applications a year as a result of the triggers in the bill, which will be a fairly substantial additional volume of work for the keeper.

Chic Brodie: You make the point, with which I agree, that it is a matter of public policy and efficacy to have the register completed as quickly as possible, and it will certainly be economically beneficial. The keeper has announced that Registers of Scotland has reserves of £75 million. I do not have too much experience in the matter, but is there not a question of resource? Should the keeper be encouraged to increase the resource capability so that we do not have to wait another 30 years for the completion of the register and can do it within a decade, as we have discussed?

Fergus Ewing: I am aware of the reserves, but those are required to meet eventualities. It is not as simple as saying that the money can just be used now. It cannot—a significant reserve must be kept for reasons that I am not sure are germane to the bill but on which I am happy to write to the committee. We all want the land register to be completed as swiftly as possible. That is a desirable objective, but the costs involved in moving to a completed register within a few years would be absolutely massive, so it would not be a practical task. In addition, were public funds to be used for such a process, they would, by and large, have to be taken from support for other public services such as health, education and police services. I, for one, could not argue that that would be correct.

For completeness, it might be helpful if Gavin Henderson commented on the reserves and the status of Registers of Scotland, which has a bearing on the question.

Chic Brodie: Before Mr Henderson does that, I point out that we do not have to consider only public funding—there is the issue of the level of fees that are paid for registration, which might be used as the basis of speeding up the process.

Fergus Ewing: The purpose of fees is not really to speed up the process—it has not been seen in such a light. In any event, the process of land registration is largely voluntary. The triggers are largely transactions, or sales and purchases.

It is quite a big step to move from that position to compelling landowners to register their property—that is what Mr Brodie's question implies. That would entail looking into issues of liability for the costs involved. It would also raise the issue of the European convention on human rights, which is never really far from our minds. We do not generally favour using compulsion, except as a last resort, and I have already made it clear that we do not envisage using it.

10:15

Chic Brodie: I am not suggesting that we use compulsion. The applicability of variable fees in inducing people to register voluntarily—not compelling them—might be a way of increasing the overall fee income.

Fergus Ewing: There is an incentive for large public and private landowners to register their interests in the land register. As members know, the table of fees is an ad valorem table of fees. In other words, the fees are based on a scale; they are not based on the actual cost of the work required for an application. The first registration of title of a large landholding of several thousand hectares in Scotland would require the keeper to do a considerable amount of work, and the cost to the keeper might far exceed the fee that the keeper is entitled to receive for that work. At the moment, there is an incentive for landowners to register their estates voluntarily.

The important point is that large landowners get a good deal from the keeper at the moment, precisely because the fees are levied not on the basis of the cost of providing the service but according to an ad valorem table. I have therefore advised, and perhaps encouraged, Scottish Land & Estates and certain other representatives of large estates that this might be a good opportunity for them to take advantage of the existing level of fees. By doing so, they will, in some cases, generate so much work—the work involved requires a substantial number of hours—that they will contribute to retaining junior solicitors in

Scotland in employment or to larger firms taking on junior solicitors. In other words, there is a potential economic opportunity that could lead to jobs being created or preserved to a modest but significant extent by holders of large tracts of land in Scotland deciding to register their land voluntarily.

I make that point because, when I came into my post, I was looking for opportunities to create jobs in Scotland, and this is one of those opportunities. I made the point very clearly in the meetings that I had with stakeholders before the bill was introduced to Parliament. The point is a minor but important one. We should all be looking for opportunities to create employment in Scotland.

The current maximum fee of £7,000 offers a good deal for many significant and large landholdings in Scotland. I think that landowners should take up the opportunity, and we are encouraging, rather than requiring, them to do so. If they do, they will benefit society by providing work for lawyers, whether in the Forestry Commission or private practice.

The Convener: Does Gavin Henderson want to come in on the question of the keeper's reserves?

Gavin Henderson (Registers of Scotland): The minister asked me to make the point that Registers of Scotland is a trading fund, so a reduction in fees in one area might well result in an increase in fees in another. Although we might well want to incentivise certain types of application, such as applications for voluntary registration, the consequences might well be an increase in fees in other areas. Those things have to be weighed and balanced.

The Convener: Does Mr Brodie have a supplementary question?

Chic Brodie: No, but I should like to come back to the issue later, if I may.

The Convener: I want to follow up the minister's last point about the cost of first registration. In some the evidence that we heard about the prospect of keeper-induced registration, concerns were raised about the fees that would be charged. The minister said that there was no intention of having keeper-induced registration in this session. Furthermore, he acknowledged that in Scotland many properties on large estates do not change hands, and will probably never change hands, because of the way that estates are constituted—that is, they are held in trust. Likewise, many other types of land, such as that held by statutory bodies, including local authorities and the Forestry Commission, and by churches, community groups and unincorporated groups, will probably never change hands, or at least not for a long time. Therefore, the only way to get them on to the register is either to incentivise voluntary registration by having reduced fees or to go down the road of keeper-induced registration.

One of the issues that came up in relation to keeper-induced registration, if it were to happen as a last resort, was whether it was equitable to charge a fee for that. Even if there were no fee, there would often still be a cost to the landowner, because as part of the registration of a complex title, the keeper may have a large number of questions to put to the lawyers representing the landowner, and a substantial degree of work will be involved. Similarly, when a land certificate is issued, it has to be checked very carefully. It is not just a question of the fees but of the actual cost to the landowner in legal bills. Has any thought been given to having a provision in the bill whereby keeper-induced registration should involve not only a zero fee but the payment of reasonable expenses to the landowner to compensate them for the work that would be involved?

Fergus Ewing: Let me answer that with three points. First, I have already said that a very good deal is currently available for large estates through the ad valorem table. There have been developments in other services provided by the state whereby fees are charged on a cost-recovery basis. There is no policy of moving from ad valorem to cost recovery, but there is considerable benefit in large landowners availing themselves of reasonable fees for a service that would, in many cases, cost very much more than the amount that they pay the keeper.

Secondly, on keeper-induced registration, the registration process does not affect the status of the ownership of the land. The owner will be the owner of the land by virtue of a sasine title. It is not necessary for the landowner to employ a solicitor, and therefore it is not obligatory for the landowner to incur any fee. If the keeper, in carrying out keeper-induced registration, makes an error, under section 80 of the bill, the keeper must pay compensation for the reimbursement of reasonable extra-judicial expenses incurred by a person in securing rectification of the register, so that provision is already in the. bill.

Thirdly, many old sasine titles are such that the holder of the land may not be absolutely certain of the extent of the land they own. That is not the case with a land register title. There can therefore be considerable benefits to a landowner in a keeper-induced registration, a voluntary registration or a first registration, because they will then have a clear title that is based on the Ordnance Survey map and which, in most cases, is registered with the keeper without exclusion of indemnity, and so can be used for securitisation purposes. The title can then be much more readily used in marketing, for example, should an area be sold off for housing development. It is a much

more straightforward business to sell off an estate of, say, 30 houses where the title is already registered in the land register than to have to pore over all the old documents with solicitors doing the extra work involved in that. There are benefits, too; we must see things in the round.

The Convener: I know that Patrick Harvie wants to come in with a supplementary, but I should like to pick up on your second point, which is absolutely fair. You said that there is no requirement on somebody whose land is being registered on a keeper-induced basis to employ lawyers to look at that, but we have heard evidence that suggested that many people would want to do so—indeed, they would be advised to do so. It is right that if there is an error in the land certificate, the reasonable costs of rectifying that should be borne by the keeper, but how is somebody who is dealing with a very large estate to know that there is an error unless they employ their own lawyers to do a thorough check?

We have heard in evidence that some large estates have had thousands of split-offs over the years, so the situation is remarkably complex. A landowner in that situation would surely be well advised to employ their own legal advice to correspond with the keeper and keep a check on what the keeper is doing.

Fergus Ewing: Ultimately, if I were to accept the argument that you advance and act upon it, the state would assume responsibility for the legal fees of large landed estates in the public and private sector in Scotland. That is not an initiative for which I have any great appetite.

Patrick Harvie (Glasgow) (Green): I seek clarification of a point that the minister made in his introductory remarks. You said that there would be no substantial keeper-induced registrations during this session of Parliament. From my reading of the section that will introduce keeper-induced registration, it is simply a power that the keeper is given. Nothing that I can see says whether there could be ministerial control over that power. Is it the intention, as you suggested in your introductory remarks, that ministers will instruct or forbid particular keeper-induced registrations?

Fergus Ewing: No. That is not an approach that I take in working with the keeper. The keeper and I enjoy excellent working relations; it is therefore not for me to "forbid" the keeper to do things.

Patrick Harvie: Can you explain the meaning of your remark when you seemed to make a commitment on behalf of the Government that there would be no substantial keeper-induced registrations in this session of Parliament?

Fergus Ewing: Yes, I can. It is important that we work with everybody involved to secure the best and, indeed, the swiftest practical transition from the register of sasines to the land register. I think that that will best be done in the way that we are going about it.

Patrick Harvie: I am sorry, but that does not seem to answer my question. Who will decide whether a keeper-induced registration is to take place? Will it be the keeper or ministers?

Fergus Ewing: These are matters of law, but also of policy as to how the law is applied, so we work together on them. We wish to encourage owners of substantial land holdings in Scotland to transfer their properties to the land register and to do so in a process of amicable negotiation and co-operation.

I have therefore pointed out—I think helpfully—to representatives of some of the largest landowners in Scotland that they currently have a very satisfactory deal, which I have recommended they consider very seriously. The impression that I have from the fruitful discussions that have taken place at various meetings is that those points have been well received and that there is a willingness to consider more registrations of land than there perhaps have been in the past.

Mr Henderson is anxious to make a point that is supplementary to what I have said. If he might be permitted the opportunity, that might help Mr Harvie.

Gavin Henderson: Can I clarify the question? Patrick Harvie asked—first in legal terms and, secondly, in administrative terms—whether the power to do a keeper-induced registration is with the keeper or the minister. The bill gives the power to the keeper, not to the minister—although the keeper is, of course, an office holder in the Scottish Administration and is answerable to Scottish ministers as part of the democratic process. As a consequence, the keeper and the minister have made agreements about a number of things with regard to the strategic direction and what should happen. The minister has made it clear to the keeper that he expects there to be no keeper-induced registrations in this session of Parliament and the keeper has agreed to that.

Patrick Harvie: I am grateful for that clarification, although it seems to slightly change how I read that section of the bill. The bill states:

> "Other than on application and irrespective of whether the proprietor or any other person consents, the Keeper may register an unregistered plot of land or part of that plot."

When I read that provision I assumed that ministers would not give directions to the keeper on the exercise of that function.

Gavin Henderson: That is not what I was suggesting. I was suggesting that there is an agreement between the keeper and the minister.

Patrick Harvie: Okay. Thank you very much.

10:30

The Convener: I seek clarification on the level of fees, which you have just mentioned. You referred to the fact that, at present, the fees are set on an ad valorem scale. Does not the bill provide for a change to charge time and line for complex transactions? I am looking at paragraph 69 of the policy memorandum.

Fergus Ewing: At the moment, the fees are charged in relation to an ad valorem table. It is our intention to consider the matter in due course and to return to the committee on a number of issues relating to fees in general, but in relation to a statutory instrument. I do not know whether Mr Henderson has anything to add on that.

Gavin Henderson: Am I right in thinking that the question was about whether we are moving towards time-and-line charging for registration?

The Convener: Yes.

Gavin Henderson: As you know, the fee power in the bill is subject to affirmative procedure, and ministers will want to consult stakeholders on what an appropriate level would be before moving to time-and-line charging for only some—if any—properties. I understand that consultation on the use of the fee power will take place over the summer and that the committee will be required to vote through any fee order that is made under the bill.

The Convener: Thank you for that clarification. In looking at the policy behind the bill as a whole, I was struck by what the minister just said about the low-fees incentive for voluntary registration. However, if you are going to return a little later with a changed fees structure, that incentive might not be around for much longer.

Rhoda Grant (Highlands and Islands) (Lab): I am slightly puzzled. At the moment, there is a good deal for large landowners who want to register, but you are talking about introducing a different fees structure, which you will consult on in the summer, and one imagines that registration will become much more expensive. Does the keeper have the capacity to deal with a rush of large landowners who decide that it is financially expedient for them to register now, before the new fees structure comes in? That rings alarm bells with me.

Fergus Ewing: That is a reasonable question, which we have considered at various stages, including before the bill came along. There has been a diminution of nearly 50 per cent in the number of applications, including first registrations, that the keeper has considered. Formerly, there was a backlog and a delay in the completion of many titles—you will know about that, convener—and there is still work to be done in some cases, often for good practical reasons. However, it has been possible to address that backlog because fewer applications have been coming in for the past few years because of the recession.

The question whether the keeper would be overwhelmed by many voluntary registrations is a reasonable one, although I understand that the keeper has the discretion to accept or not accept voluntary registrations; therefore, an element of discussion and negotiation could be pursued. I am pretty confident that the keeper will be able to cope with the voluntary registrations.

We do not know quite what the appetite for registering will be among public and private sector landowners. We would like them to register and we encourage them to do so. That is the process that we are pursuing; not compulsion, but negotiation and encouragement. It would be a good thing, especially in the parts of Scotland that Rhoda Grant and I represent, if more of the land were on the land register. That would be desirable and fairly popular in places such as the Highlands. I think that the keeper has the capacity to deal with those matters, and it is intended that Registers of Scotland will build capacity over time—although they need to run the ship efficiently at the moment with the staff that they have. That has been a difficult area for the keeper in recent times, as you will appreciate.

It is a fair question, but I am confident that the keeper will be able to handle the additional workload. We have indicated the number of extra applications that we envisage being made, and the keeper has the legal power to say no to voluntary registrations, were Registers of Scotland to be overwhelmed by the work. However, I do not think that that is likely.

Keeper-induced registration is not only applicable to large estates and Forestry Commission land. It is also an important tool for completing the registration of modern housing estates where, for example, 29 out of 30 houses may have been registered in the land register and the keeper is keen to complete the process of putting the housing estate on to the land register so that no parts of it are still on the register of sasines. That is a practical example of keeper-induced registration that makes obvious common sense. There are other such examples. I say that because we have focused, perhaps unduly, on one general type of landholding in Scotland, although there is a great variety of types of landholding.

Chic Brodie: In an article in *Journal Online* in October, to which you and the keeper contributed, the keeper stressed the importance of the land register to the Scottish economy and spoke of it

"underpinning a property market worth over £20 billion."

It is interesting that she also says that she

"rejected only 70 out of over 1,000 applications for voluntary registration"

last year.

We talked about fees, but can anything else be done to promote voluntary registration? The keeper says that she wants

"to encourage an open-door policy to requests for voluntary registration."

What more can be done to raise the profile of the public policy need and economic need in order to generate more voluntary registrations?

Fergus Ewing: Discussion in Parliament is a good way of promoting the opportunities, which I have now described on several occasions and will continue to describe.

The parliamentary bill process is also a good opportunity. I hope that the committee members will be persuaded of the approach that I have adopted and will consider the bill process to be a means of encouraging voluntary registration and encouraging landowners to move forward. I hope that that will form part of the committee's recommendations. I also hope that we can unite around that purpose and that, although there is a role for keeper-required registrations, compulsion will be considered an undesirable way to go about a task in which there are legitimate interests on both sides.

In addition to that, I mooted the general idea of voluntary registration with Scottish Land & Estates Ltd, the Law Society of Scotland and representatives of the Royal Institution of Chartered Surveyors at a conference to which a number of landowners came. I could see that it was a new idea, even to many of the learned friends who were present and who are well represented at such conferences.

I have done a fair amount to try to promote the benefits and value of registration, but a lot more can be done. The Parliament's proceedings will play a major part in that.

The legal profession as a whole has, perhaps, the greatest propensity to act in the matter because solicitors act for long-standing clients whom they can encourage to register their properties voluntarily and, no doubt, can do so offering reasonable fees.

The Convener: I am sure that all solicitors charge reasonable fees, as you know, minister.

John Wilson (Central Scotland) (SNP): My question concerns the speed of registration. Unfortunately, some written evidence that we received this week from First Scottish Group after the keeper's evidence last week raises questions on some of the issues surrounding registration.

In the middle of a paragraph that relates to the keeper's information technology system, the submission alleges that

"Experienced Land Registration staff are now scarce at the Keeper's office after the second round of early retirements/voluntary severance (well over 200 senior/experienced staff have already left) and this is already having a serious impact."

Will the minister comment on that and assure us that, once the bill has been enacted, we will be able to implement it because the keeper's office will have the appropriate staff in place to do that and to help to speed up the registration process? Everyone seems to be keen for that to happen.

Fergus Ewing: The question is perfectly fair. It is plain that the administration and smooth running of Registers of Scotland are matters primarily for the keeper, but the keeper must meet efficiency targets that the Cabinet Secretary for Finance, Employment and Sustainable Growth sets. In addition, we have put it on the record that the keeper has a reduced case load. It is plain that steps had to be taken to address that and the keeper has acted to do so.

However, at the same time I can answer with confidence Mr Wilson's question by saying that the keeper will have the capacity to do the work that presents itself. It is not an easy task, because the keeper does not control the volume of work, which is affected by a number of factors including the property market, recession and the economy. I have looked at the statistics and I think that the keeper has taken sensible measures to deal with the difficult financial situation that faced Registers of Scotland in the light of a case load that fell by almost 50 per cent in some respects.

Steps had to be taken to ensure the smooth running of Government and the efficient use of public resources. However, as I said in response to Rhoda Grant's question, we are confident that the keeper has the capacity to deal with the workload in the times ahead. She is also building up capacity to cope with that, in particular the complex work that is required in relation to examination of title.

John Wilson: I thank the minister for his response.

The Convener: The next topic is public access to the land register.

John Park (Mid Scotland and Fife) (Lab): One main policy issue that you mentioned was improvement of public access to, and the availability of, information on the register. We have been given examples, in particular from England and Wales, where it is simple for individuals to pop

a postcode into a website and find out detailed information about land ownership and registration. That would obviously be desirable in Scotland, mainly because we want to improve public awareness and availability of the land register and access to it. Can any measures be implemented in the bill and through policy developments that would improve access to the land register for members of the public?

Fergus Ewing: At present, members of the public can apply to Registers of Scotland to search the register and the search is carried out by a member of the keeper's staff on behalf of the applicant. That can be done in a number of ways. I assure the member that it can be done by e-mail, and members of the public are also free to attend a Registers of Scotland customer service centre, so it can be done online or in person. I have always found the keeper's staff to be uniformly courteous and helpful to members of the public, which is appreciated.

The fee that is charged will depend on the information that is sought and the number of searches that are required. The typical fee is between £11 and £14 and a nil result attracts no fee. Individuals or businesses that require more regular access for commercial purposes, such as surveyors, estate agents or solicitors, can set up an account with the keeper's registers direct service. You have had evidence from the searchers, Millar & Bryce. It uses that system, which allows it to conduct its own searches using the same system as the keeper's staff. It is free to set up a registers direct account. There is a fee of £3 per search and a nil return does not attract a fee.

In response to a consultation in 2007, stakeholders made it clear that charging a fee for access is appropriate. Otherwise, home buyers would have to subsidise searchers. Given the constraints that we face, I do not think that that would be correct. I hope that that has reassured you that the current system is fairly good and provides ready access to the public, to enable people to search the register and obtain the information that they need or want.

10:45

John Park: Thank you for clarifying how the system works. I have dealt with constituents who have tried to access information from the land register. The process, particularly for identification of land, can be complicated in comparison with the process of accessing much other public service information that is available online.

In England and Wales, people can identify land through a postcode search and there is a check-out process whereby they pay at the end of their search. The system is a little easier for individuals to use. In my experience, there are barriers to working out exactly how to access the information, so improvement of any kind would be beneficial.

In his evidence, Andy Wightman disagreed with the minister's point about passing on the cost to people who access the information, particularly people who are using it to buy and sell property. He thinks that there should be no charge if there is to be an increase in the amount of land that is registered, and if we want wider public access to the information. Will the Government consider such an approach, in connection with the keeper?

Fergus Ewing: We consulted on the issue in 2007, as I said, and concluded that a fee is appropriate. If there were no fee, home buyers would be subsidised by the keeper.

I will be happy to be proved wrong on this, but I think that it is reasonable to say that a common reason why individuals want to access the land register of Scotland or the general register of sasines is not to study title deeds but to find out how much a property was sold for. That is generally the information that people want to check out. If I am right about that, the information is usually being sought for a commercial purpose—that is, to enable someone to decide how much to offer for a house.

That is a perfectly fair inquiry to make, but it is also fair to say that in the overall scheme of things in public services in Scotland—the national health service, teachers, the police and fire services and so on—such inquiries are not a top priority for the taxpayer to pay for, one way or another. A fee is reasonable. We want fees to be as low as possible and consideration is being given to improved IT systems in that regard. Of course, in developing any IT system we want to ensure that it works.

John Park: You made an interesting point about how people are generally trying to find information on house prices. That service is provided free of charge by other organisations that access the information. I was thinking more about community groups and individuals who are looking at land ownership with a view to doing something in their community and who might find the process a little difficult.

I accept that someone has to pay, somewhere along the line. However, the point has been well made about the availability of such information. I am sure that information is made available in other parts of the public sector without its attracting a charge. I understand the point that the minister made. The cost must be absorbed somewhere.

Fergus Ewing: Thank you.

The Convener: If nobody else wishes to comment on that topic, we will move to the next

one, which is a non domino titles. The minister may be aware from evidence that the committee has heard that this topic has created a lot of interest. We have two areas of questioning, the first of which relates to section 42 of the bill and modification of the current system. The second area of questioning will be on broader policy issues in which some committee members have an interest.

Section 42 will bring in a new provision: somebody wishing to register an a non domino title will have to show that no one has possessed the property for the preceding seven years. The provision has raised concerns, mainly from a practical point of view. How do you prove a negative? A couple of weeks ago, we took evidence from the keeper of the registers of Scotland, and she was not entirely clear herself about the sort of evidence that would be sought in order to support such a registration application. Do you acknowledge that practical difficulties may arise because of specification of the seven-year period? Where did the figure come from? Is there anything particularly magical about seven years? If not, might the matter be reconsidered? Might the seven-year requirement be dropped altogether, or might a shorter period be substituted for it?

Fergus Ewing: I am aware that the committee has considered this issue, and that it has arisen in evidence. Under the law of prescription, a person who has registered an a non domino deed in their favour needs 10 years of peaceful possession of the land, without judicial interruption, in order to obtain full title to it. As you suggest, the bill puts three additional requirements in front of a person who is seeking to register such a disposition—a prescriptive claimant. The claimant must satisfy the keeper, first, that the land has been abandoned for the previous seven years; secondly, that he has occupied the land for the year preceding the application; and thirdly, that the true owner of the land has been notified.

You asked who had recommended the seven-year rule. I understand that it was the Scottish Law Commission. I also understand the possible problems with compliance with the first rule, in practice. When will the keeper be satisfied that land has been abandoned for seven years? It has been explained to me that the seven-year period can be proven fairly easily in types of a non domino disposition in which, for example, a family farm has been passed down the generations and there is a missing link in title, such as a missing will, and in which an a non domino disposition has been used to correct the title position. However, in a development-type scenario, to prove seven years of abandonment may be more difficult.

The bill includes a power to change the seven-year period in regulations. Therefore, if the problems were realised, scope would exist to amend the requirement by subordinate legislation. However, I would like to go further than just saying that if the bill were passed in its current form we could amend the requirement later. In the light of the concerns that have been raised, I have decided to remove that particular duty from the bill.

The Convener: Thank you—that was helpful clarification. It dealt very satisfactorily with the committee's and with witnesses' concerns.

That first discussion having been shortened considerably, we can move on to consider broader issues and a non domino titles more generally. As you will know, minister, we have heard evidence from Andy Wightman. I believe that Patrick Harvie wishes to put a question.

Patrick Harvie: Is there not an argument in principle that someone who wants to acquire a piece of land that they do not own ought to pay for it?

Fergus Ewing: Yes—unless it is a gift or a transfer without consideration. However, generally speaking, the answer is yes, and, generally speaking, that is what happens.

Patrick Harvie: If a piece of land has no identifiable owner, whom would the prospective buyer pay under the arrangements that the Government is presenting in the bill?

Fergus Ewing: The need for a non domino dispositions is a mystery to many lawyers, including me. I did not encounter one in more than 20 years of practice. However, the need arose in order to deal with situations for which the system did not really provide proper title. To have a system of property rights, we need a system for registering deeds, and to assume that a perfect system could arise by happenstance would be to make a big assumption. Most countries do not have such systems of registering title. Fortunately, we have had a system since 1617, which has been developed and improved ever since. I am sure that the convener will remember from his time in practice that some of the titles and descriptions that were used in the early days were a model of brevity but not clarity. For example, there is the three merk land of old extent—goodness knows what that sort of description can be taken to mean.

Part of the problem—and where a non domino has been the solution—is the imperfect nature of the land register for historical reasons that we can readily understand and which would have been the case in countries all over the world. Where there are imperfections in the land registration system, there must be a means of tackling them. As I understand it, that is why a non domino dispositions have arisen. However, I never encountered one or had to do one when in practice.

To try to put this into perspective for the committee, I asked for and got some statistics on the number of such dispositions: I am told that, of 110,000 title transfers over the past 12 months, 127 such applications were received. To put that in context, such applications represented 0.1 per cent of transfers, and 99.9 per cent were applications where the acquisitions will have been for full value.

It is important to set that in context, because otherwise those who are following this engrossing debate about a non domino dispositions may get the wrong end of the stick, to put it baldly. I do not know whether Mr Henderson wants to say something about a non domino dispositions, because it is a long time since I studied them, I am happy to say. He will have studied them more recently, so he may have a fuller knowledge of them.

The Convener: Before I let Mr Henderson in, I observe in passing that, in my days in practice, I dealt with several a non domino dispositions, usually just to clear up ambiguities or disputes in the title internally. I do not know whether that says something about my client base compared with yours when we were both in practice,—we will leave that hanging.

Gavin Henderson: We know that a non domino is a useful tool. You may agree with that point, convener.

To answer Patrick Harvie's question about who sells land that is not owned, I say that there is no such thing as ownerless land in Scotland. The Crown owns the land that is not owned by anyone else. I understand that the Queen's and Lord Treasurer's Remembrancer, who administers ownerless land in Scotland, can provide a Crown grant of such land to a person and transfer ownership for value or as a gift.

Patrick Harvie: So the question is simply how the Crown should handle that, or how such land should be handled. Correct me if I am wrong, convener, but I do not think that we have had any evidence from anyone to suggest that there should be no mechanism for dealing with the small number of circumstances in which land does not have a readily available or identifiable owner. Everyone accepts that there should be a system; it is just a question of what is the fairest and most appropriate system.

On the various alternatives that we have heard, some people have suggested that there should be a period of advertising so that other interested parties could come forward, including the local community, which might say that it has as legitimate a stake as a commercial developer in a piece of land. It has been suggested that there should be a process of assessing the various interested parties and that land could be put up for auction. It has also been suggested that there should be a process that is similar to the way in which lost property is dealt with, whereby the finder might have the opportunity initially to pay for the lost property that they have reported to the police but, if they do not want to do that, the property can be sold or disposed of otherwise if no one wants to buy it.

There are therefore various options that could be used for ownerless land. Of the various options, how many were considered during the drafting of the bill and why were they ruled out?

11:00

Fergus Ewing: I would have to go back and check to what extent the keeper considered fully all the options. I will give Gavin Henderson a bit of time to think about that. I must say that that aspect was not uppermost in my mind when considering the bill; what was uppermost in my mind was the bill's financial cost, as it is an important matter for the public purse. The bill was introduced after long deliberation by the Scottish Law Commission and the Registers of Scotland, so a great deal of thought was put into it. I therefore have every confidence that the bill is absolutely necessary and pretty much in a robust and good state.

Patrick Harvie is correct that there has to be a system for the 0.1 per cent of cases that we are talking about that are a non domino. He mentioned advertisement. There are two types of a non domino cases—speculative and non-speculative. There is the case of the farmer when nobody bothered with a will because it was assumed that the land would pass down the family through generations and that is exactly what has happened. Do you really want to have advertisement of farms in those circumstances? Would that not be an invasion of privacy? It would certainly be unwelcome among the farming community and it would also be intrusive and disproportionate. It might also encourage speculative claims that would not otherwise be made.

I find the proposal that there should be auctions quite extraordinary. Are we really suggesting that the person with the deepest pockets should be able to claim and secure ownership of land in Scotland? That seems to be a very strange proposal.

Having said that, I accept that it is a perfectly fair question. I cannot say how much time was spent considering all those options before the bill was introduced, but I can say with absolute candour and honesty that, before the bill was introduced, I spent zero minutes and zero seconds studying the issue that has been raised. That is

simply because it seemed to me that there were far more important matters of public policy to consider.

Gavin Henderson: The Land Registration etc (Scotland) Bill is about registration law and property law to the extent that it affects registration, but it does not challenge a number of underlying assumptions in Scottish property law. As the committee's expert adviser will know better than I, prescription has existed in Scots law for hundreds of years. It is outwith the scope of the bill to challenge those assumptions, as the bill is not about reforming the law of property in Scotland; it is about land registration and the completion of a land register. Reforming property law may well be a matter for a bill in the future, but it is not something for this one

Patrick Harvie: It is perhaps a little disturbing that the minister says that he gave not one second's thought to this aspect of the bill. Given that the committee has clearly scrutinised this aspect of the bill in more depth than the minister did before he introduced the bill, I hope that he will be willing to be open-minded if and when amendments are proposed to the relevant sections.

The Convener: That is a matter for the minister to consider.

Fergus Ewing: I am always open-minded.

The Convener: I am sure that you are.

For members' information, I have been advised that the Scottish Law Commission did not look at the issue in any detail when it produced the report that led to the bill—I suspect for the reason that Mr Henderson mentioned, which is that it did not regard the matter as being within the scope of its work.

Mike MacKenzie (Highlands and Islands) (SNP): I have a further point, although the issue has probably been covered quite well. Can the minister envisage a situation in which the suggestion that Andy Wightman made could be used vexatiously to blight development that is benign or very useful. I am thinking about affordable houses being built in a community where there was desperate need for such houses. The public auction system that has been proposed would in effect create an opportunity for someone to buy what might be a ransom strip. Does the minister share my concern that, if that route were to be followed, it could be quite damaging?

Fergus Ewing: To be fair to Mr Wightman, he gave a wide range of evidence. I am not sure to which part of it Mr MacKenzie is referring. I do not want to respond unless I am clear which of Mr Wightman's recommendations Mr MacKenzie is criticising.

Mike MacKenzie: It is Mr Wightman's suggestion that land of uncertain ownership should be advertised and subject to a public auction.

Fergus Ewing: It does not seem to me that that is a sensible way ahead. However, I have said that I am open-minded. If the committee believes that the suggestion is one on which we should spend time, I am happy to do that and to study it in all seriousness, because Mr Harvie is correct that there has to be a system.

I am confident that the system that we have is a good one. The point about establishing rights by prescription is that, by definition, the proof is difficult, because it will not necessarily appear in a document; what is required is proof of physical activity, such as possession of a property, which requires evidence from individuals. As far as I can recall, affidavit evidence used to be required to be given to the keeper to prove that a prescriptive right could be established to the keeper's satisfaction. From research that I carried out earlier this morning, I understand that the keeper changed that process for the understandable reason that oral evidence can be contradicted. The mere provision of an exclusion of indemnity by the keeper is the state giving an insurance policy, which should not be readily granted and certainly not where there cannot be a reasonable degree of certainty that the keeper will not face a call on that indemnity. Practice has changed and the keeper now requires a judicial declaration of such a prescriptive right before she will accept an application for a prescriptive right.

I hope that I understood that; I never professed to being top of the conveyancing class at the University of Glasgow. I understand that that is the policy.

Matthew Smith (Scottish Government): That is the policy for prescriptive servitudes.

Fergus Ewing: The establishment of servitudes is a difficult area by nature, but the keeper pursues a correct policy that is based on the need for certainty, and that policy has been tightened up. Indeed, I am surprised that the policy was not introduced in 1979 because the process was always open to serious challenge.

The Convener: Patrick Harvie has a brief supplementary point and then we will move on.

Patrick Harvie: Just for the record, I am keen that the evidence that we have heard is not inadvertently misrepresented. To be clear, although in giving oral evidence Andy Wightman discussed the possibility that auction might be appropriate in some circumstances, though not all, the proposal that he has given us in written evidence is that there could be a period of advertisement and investigation, during which time

other potential owners, including the Crown, might be legitimately able to lay claim, and that

"Only after the expiry of this period should the Keeper have any power to admit an a non domino deed for registration."

That leaves discretion with the keeper under certain circumstances to admit an application, but only after advertisement and the opportunity for other legitimate claims to be laid.

The Convener: Thank you. You do not have to respond to that, minister.

Rhoda Grant: I have a question about process. The bill has provision on the registration of a non domino titles. I need clarification of what Mr Henderson said about property law. My understanding is that someone can take on a title by prescription only when the title is registered so, in a way, registration rather than property law almost governs this point in law. Am I right or wrong, or does another piece of legislation cover it? If the committee wants to amend this point in law, can we use registration or do we have to plough back into previous legislation?

Gavin Henderson: To clarify what I thought I said—the *Official Report* will show whether I did—the bill relates to property law only as it is affected by registration law. Land registration decisions can give real property rights to individuals. To my mind, the line between what is in the bill and what should be for other legislation is the fact that registration decisions that affect property rights are in the bill but other topics, such as abolishing prescription, for example, are outside the scope of the bill. The Government might want to consider that in a lot more detail before looking at amendments.

The Convener: For clarity, determination of the scope of the bill for stage 2 amendments is in my gift and in the Presiding Officer's gift for stage 3 amendments.

Rhoda Grant: What other legislation covers prescription?

Gavin Henderson: The Prescription and Limitation (Scotland) Act 1973.

The Convener: If members are content, we will move on. The next topic is the resolution of disputes, on which we have heard quite a lot of evidence.

Mike MacKenzie: The minister might not be aware that we have heard a considerable amount of evidence to suggest that all is not perfect in the current system and that it has errors, which range from typos to more serious errors. Given that it is expected that the bill will speed up and increase the number of registrations, does the minister agree that a relatively low-cost and quick dispute resolution mechanism might be appropriate, especially as part of the bill's focus seems to be to remove such a role from the keeper?

Fergus Ewing: That is a pretty technical area, so I would prefer to let Mr Henderson give evidence on it. I have not studied that aspect of late.

Gavin Henderson: As I understand it, the way in which the bill operates will mean that the keeper may register something if it is manifestly clear but, where it is not clear, the keeper will not, for example, change the register to remove an error. However, as you know, there is provision in the bill to appeal against a decision of the keeper to the Lands Tribunal for Scotland. It would then be for the Lands Tribunal to resolve the question as to whether the keeper should have changed the register. There is therefore already a process in the bill whereby the Lands Tribunal can review a decision of the keeper.

Mike MacKenzie: I was not necessarily referring exclusively to errors by the keeper. I was referring to the panoply of potential errors, which include surveying and conveyancing errors as well as keeper errors. We have heard evidence that the system has a number of errors, such as mapping inaccuracies. There is an intention to move from Ordnance Survey plans and maps to a cadastral plan, which I assume and hope will be more accurate. All such activity inevitably gives rise to errors, some of which are historical and some of which are without blame. However, there should be a reasonable mechanism for relatively simple errors, but perhaps not the most complex or disputatious errors, to be resolved quickly and at low cost. Has any consideration been given to that?

Fergus Ewing: Mr MacKenzie has referred to a wide range of errors, some of which will be errors in the register. Of course, some errors can be corrected by the parties involved if they make appropriate application for that to be done by agreement. However, it is not the role of the keeper to be a judge. The keeper is the keeper and it is not her role to adjudicate on property rights.

Parties may not agree about, for example, the alignment of a boundary between two houses, which I recall is an issue that used to arise frequently when I was in practice. The boundary line might not be shown accurately in the land certificate, but that can be corrected by agreement between the parties in a process that the keeper will try to facilitate. The situation is often complicated if the security rights have to be amended as well and permissions obtained. However, be that as it may, there is a procedure.

Where parties do not agree, though, section 99 will allow the decisions of the keeper to be

appealed to the Lands Tribunal, which I think is the most appropriate forum for that. The fee is £52 for the submission of the application and the fees for each day of the hearing are £155, so it is not without cost. However, I think that it is a better way than going through the civil courts, although that is a matter of judgment. I have asked the keeper to explore with the Lands Tribunal in advance of stage 2 whether anything more can be done to ensure that the Lands Tribunal resolves disputes, especially boundary disputes.

I have not come on to the other aspect of Mr MacKenzie's question, which I think is regarding the use of the Ordnance Survey map as a base map, but I am happy to do so if asked.

11:15

Mike MacKenzie: I have a concern about rural areas because, as we have heard, the scales used in maps of rural areas tend to be much less precise than the scales used in maps of urban areas. Given that a lot of the land that has not hitherto been registered appears to be in rural areas, that seems to be a reason for introducing a reasonable dispute resolution mechanism or a mechanism to resolve not only disputes but uncertainty.

Fergus Ewing: This is a very important area of inquiry for the committee to pursue. It is not a straightforward area. In the interests of openness, I should say that a former constituent—he lived in Lochaber, which I no longer represent—pursued the matter tenaciously and diligently over a number of years. I pursued it on his behalf as his MSP, before I became a minister with this portfolio. The issue has therefore been considered fully and in great detail by myself and the keeper. The conclusion is that the Ordnance Survey map is fit for purpose. The Law Society of Scotland and the Royal Institution of Chartered Surveyors have both said that that is the case.

The OS map has been the base map since the introduction of the land register in 1981 and, for the vast majority of titles, there has not proved to be a problem with basing them on the OS map. Obviously, the boundaries of land register titles may follow features on the OS map, but they will do so only when those features agree with the legal title. An obvious example is that the legal boundary of a title may well exceed a physical boundary, such as a fence.

I think that Mr MacKenzie's point is that errors of that type are more commonly found in rural areas where the OS map is prepared on an insufficiently adequate scale and therefore there is a propensity for error or the chance of greater error than there may be for OS maps of urban titles. As I understand it—I am not a technical expert in this area—that is more or less agreed. The keeper has therefore recently set up a mapping group with Ordnance Survey, the RICS and the Law Society to deal with mapping issues.

I believe that the committee has a copy of the keeper's report of December 2011, which addresses these matters in greater detail. They are important matters to get right. I have given you our broad response, but we are happy to work further with the committee on this important and complex issue to ensure that we serve rural Scotland as we do urban Scotland.

Rhoda Grant: I have a question about an issue that could lead to disputes. I understand that when, for example, a right of access into a new estate or the like is to be registered, it has its own title and obviously that refers to the different properties that have rights over it, but it is not recorded on the title of the home that has the rights over it. Could that lead to disputes? The same is true of burdens, rights of servitude and the like. They are not always recorded on each title that they affect. Is this the right way to do it? Would it be better to have a title that gives the last word on all the rights that pertain to that property?

Fergus Ewing: I am sorry, as it is probably my fault, but I did not quite understand that question. Did Gavin Henderson understand it?

Gavin Henderson: Can I clarify whether I understand the question? Is the question about whether the provisions on shared plot title sheets in the bill are appropriate and whether everything in relation to, for example, pertinents or extra parts of land that relate to a property should be on the initial title sheet?

Rhoda Grant: Yes—that is part 1 of my question. I maybe tried to fit too much into my question in the interests of time.

Gavin Henderson: Can I answer that question first?

Rhoda Grant: Yes.

Gavin Henderson: The provisions on shared plot title sheets in the bill are intended to make the land register clearer, not more difficult to understand. That means that, when you look at the map, you can tell which areas are shared areas and which are not. In addition, the title sheet will have a mutually enforcing cross-reference to the shared plot title sheet. We should therefore not miss out shared areas or mislead people when they look at the title sheet. They should be able to see what the shared plot title sheet is. We think that the process is robust.

Rhoda Grant: You do not think that the process is complex or that it could give rise to registration problems where shared access remains with the previous owner.

Gavin Henderson: The shared area will transfer automatically with the sharing plot on transfer of the main premises.

Rhoda Grant: The second part of my question is connected—although perhaps not clearly so—and concerns burdens and rights of servitude, which tend to be more historical and are not always recorded on both titles. They might be recorded on the title for the property over which an individual might have rights, but they might not be recorded on another title to show the individual that they have right of access. Does that not cause problems and disputes?

Fergus Ewing: Mr Smith will be able to answer that.

Matthew Smith: Historically with servitudes there has to be a burden and a benefited property or a dominant and servient tenement. Up to 2003, there was no requirement to record or register a servitude against both properties, but that requirement was introduced in the Title Conditions (Scotland) Act 2003 and now, for a servitude to be created, it has to be recorded or registered against not only both properties but all the affected properties. If a road leading to a house runs across five other properties, it will be registered against the house that has the benefit of it, but it will also be registered or recorded in the general register of sasines against all the other properties. The 2003 act solved that problem.

Rhoda Grant: We received evidence that it caused problems and could lead to disputes, but that might have been the case prior to the passing of the 2003 act.

Matthew Smith: On first registration, all the prior burdens, deeds and rights in a title are examined. If any servitudes burdening a property are evident from previous titles or the titles that are recorded in the general register of sasines, they should be shown on the title sheet. Again, the deeds that are submitted for registration should narrate any rights in the title and any servitudes that the property might benefit from. If the servitude is in the deeds, it should be represented in the land certificate.

The Convener: As the meeting has been running for an hour and 20 minutes and the minister has other pressures on his diary, I suggest that we move on. The deputy convener has a question about the new criminal offence created in section 108, which has caused some concern.

John Wilson: As the convener suggested, we have received some interesting oral and written evidence on section 108. The keeper has indicated her preference for it and in its written evidence the Association of Chief Police Officers in Scotland supported it—although I point out that ACPOS has been reluctant to provide oral evidence on the matter and that, in fact, no one from the association has given oral evidence to the committee. Given the views expressed in the written submissions, particularly those from legal organisations such as the Law Society of Scotland, why does the minister think that section 108 should be in the bill? Is such a provision crucial when the issues in question, particularly the unlawful behaviour of solicitors and other agents acting on behalf of property and land purchasers in Scotland, might be covered by other legislation?

Fergus Ewing: Mr Wilson raises an extremely important matter. We spent a great deal of time on it before the bill was introduced, primarily because the Law Society of Scotland, whose advice we take very seriously, believed that section 108 was not necessary. We respectfully disagree; indeed, we think that it is extremely important and should be included in the bill. Our position is based on advice from the Lord Advocate, who supports the offence and, like the Scottish Crime and Drug Enforcement Agency, believes that it is necessary.

Plainly, the new offence created by section 108 is designed principally to deal with fraud, of which mortgage fraud is the main example. The relevant fraud authority has estimated that mortgage fraud in the United Kingdom costs £1,000 million a year. The problem is massively significant and has substantial repercussions for the ordinary consumer, because lenders must obviously implement all due safeguards against fraud and they need to be satisfied that the state is doing everything possible to protect them and the public against the tiny minority of professionals who may be engaged in assisting or carrying out such illegal activity.

I recently met the director of interventions at the Law Society. She has been routinely appointed for 20 years as judicial factor of law firms when there have been instances of professional misconduct, including fraud. When discussing mortgage fraud with me, she told me that in her professional opinion the biggest issue in bringing fraudsters and their solicitors to account is that the Crown has difficulty prosecuting mortgage fraud. The Lord Advocate's advice is that the new offence that section 108 creates will address such difficulties to an extent. He referred in particular to the recklessness element of the offence.

I understand that the Law Society's view is that the creation of the new offence is not appropriate and that in any case the element of recklessness is not appropriately incorporated or sufficiently clear. In fact, it stated in its written submission that the inclusion of recklessness in the provision is not compatible with the rule of law. Perhaps I can respectfully draw the Law Society's attention to

section 89(1) of the Housing (Scotland) Act 2006, which states that an offence is committed if a person

"knowingly or recklessly makes a statement ... in an application for a grant or loan ... which is false in a material particular".

There is also section 42 of the Marine (Scotland) Act 2010, which states that an offence is committed if a person "makes a statement" intentionally or recklessly that is "false or misleading" in an application for a marine licence. We came across another relevant example in the Reservoirs (Scotland) Act 2011.

I give those references because it seems to us that, despite the Law Society's objection to the term or concept of recklessness, it is a well-established part of law. Equally, the Law Society takes exception to the phrase "all due diligence" in section 108(3) and argues that it is not sufficiently clear. I understand from a search that my officials carried out that there are 113 different acts of the United Kingdom and Scottish Parliaments where the phrase "all due diligence" currently applies, which seems to me to be a fair amount of precedent.

The matters to which I have referred are serious and I hope that we can persuade the Law Society that the offence created by section 108 should be incorporated in law. Needless to say, honest solicitors, who are the overwhelming majority, have absolutely nothing to fear and section 108(3) makes it clear that that is the case. I strongly believe that it is extremely important to create the new offence. I think that that is the view of not only the Lord Advocate and the SCDEA but the Council of Mortgage Lenders, whose views we need to listen to very carefully; if we do not, the risk is that the costs for checks and diligence that the consumer must pay to lenders before they get a mortgage will rise.

It is therefore not a cost-free exercise, but it is an important one. We must recognise that there are difficulties in prosecuting fraud—that comes with the territory. Because of its nature, it is not a crime that is easy to prosecute or to prove, so we must take every measure possible to address that. I imagine that committee members will readily see the strength of the arguments that I have outlined, which I commend to the committee.

11:30

John Wilson: I thank the minister for his response, but I must draw to his attention the latest written evidence from the Law Society of Scotland, in which the society responds to the keeper's evidence to the committee on 25 January. As the Law Society points out, the keeper said:

"Obviously, section 108 has been included in the bill on the advice of the police force, those who are responsible for dealing with serious crime and the Lord Advocate. Indeed, the judicial factor in the Law Society of Scotland has taken the view that the section is a necessary and helpful addition to the tools that are available to combat fraud."—[*Official Report*, *Economy, Energy and Tourism Committee*, 25 January 2012; c 873.]

The Law Society's response to that is:

"This statement is incorrect in so far as the Judicial Factor of the Society has given no such view that the section is either necessary or helpful."

It would be useful if the minister provided clarification on that in further written evidence to the committee. The Law Society of Scotland has challenged the keeper's statement about the judicial factor. Clarification would be helpful for the committee so that we can fully understand exactly where the arguments for including section 108 are coming from. Based on the Law Society's written submission, the arguments are not coming from it.

It has been pointed out that the equivalent offence in England and Wales is confined to cases of intentional wrongdoing. Is it the minister's intention that the bill should introduce a more strenuous regime that criminalises conduct that is unintentional but reckless? There is an argument that some issues for solicitors and lawyers might be a result of unintentional activity rather than deliberately criminal activity.

Fergus Ewing: I do not see the issue in that way—I do not see a sort of competition about who has a more severe approach to fraud. I can say with total certainty that my counterpart south of the border in the Westminster Government wishes to take every practical and sensible step to combat fraud. That is what section 108 does. To be fair to the Law Society, its point is that other offences and measures currently provide the protection that the proposed offence seeks to provide, but we respectfully disagree. That is for the reasons that I have stated. The Lord Advocate, who after all is the person who is responsible for prosecution in Scotland, states that the new measure will make it more straightforward and less complicated to prosecute cases where necessary.

I am absolutely convinced that section 108 is necessary. In any event, if the Law Society's argument is that the offence is duplicatory, is that such a serious argument? If the offence is included in the bill, what is lost? Nothing. We will simply give the Lord Advocate the option of charging someone with that offence rather than another one. I hear what Mr Wilson rightly says about the Law Society. I do not seek to speak for any officer of the Law Society, although it is open to the committee to decide whether to obtain such evidence. However, I do not approach the process as in any way an adversarial one with the Law Society. Just before Christmas, I had an amicable

meeting with representatives of the Law Society at which we discussed the matter.

As the minister, I am determined that we do everything that is necessary to tackle fraud. If the Lord Advocate says that section 108 is necessary to prosecute fraud in Scotland more successfully and effectively and to protect the public—which means not only preventing people from becoming victims of fraud, but preventing the indirect consequences of that fraud for the wider consumer—it would be irresponsible of me, as the minister, to take any approach other than the one that I am taking.

Jim Eadie: I have listened carefully to the minister, and I would like to test the assertion that he is always open-minded. My question is about the application and scope of section 108. The Law Society has reservations about introducing that provision. One of its concerns is that the measure covers not only money laundering and mortgage fraud, which the minister addressed in detail, but any error or omission on any subject. Is the minister prepared to consider the scope of section 108 again?

Fergus Ewing: Of course we are happy to consider the wording of the section. That is part of the process of scrutiny. I hope and expect that the committee will address that at stage 2.

If the wording of the section can be improved, of course, we are ready to do that, as all Administrations have been during the passage of any bill through the Parliament. It is relevant to point out that section 108(3) specifically provides a statutory defence for a person who is charged with an offence, which is

"that the accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence."

If the Law Society's argument is that the reference to an error might criminalise activity of a trivial or technical nature, I assure you that no one would prosecute on such matters. Plainly, however, we need to ensure that we get the terms of the legislation right. It is not the Government's intention to criminalise administrative or other errors.

Jim Eadie: In fairness, I think that the Law Society's point is that there may be professional service that, although unsatisfactory, falls short of being fraudulent. It is concerned that the scope of the bill is too wide and would criminalise those practitioners whose service falls below the expected standard.

Fergus Ewing: That is a serious point and we will take it seriously.

My attention has been drawn to the word "materially" in section 108(1)(a). For the offence to have been committed, the person must have made

"a materially false or misleading statement in relation to an application".

It could be argued that that does not address the precise point that Mr Eadie has fairly raised. Although we disagree with the Law Society on the principle, we have a common interest and agree that, if there is to be an offence, it must be correctly stated and should not go further than is necessary and appropriate. I am grateful to Mr Eadie for giving us the opportunity to clarify that.

Jim Eadie: I am sure that the committee and the Law Society appreciate that helpful clarification.

When you come to address all the points that have been raised, will you also address the following point, which has been raised by the Law Society? It is of the view that

"it may be no easier to prosecute recklessness conduct under the proposed new offence as it is with intention, under the existing criminal law offence of fraud."

Will you also look at that, please?

Fergus Ewing: We will certainly look at it, but we formed our view after I consulted the Lord Advocate specifically on these issues. We were aware of the strength of the Law Society's view and of its range of objections, some of which Mr Eadie has fairly pointed out. The Law Society takes a different view. The Lord Advocate takes the view that the term "recklessness" and the concept of recklessness will allow him to prosecute, which must be a good thing. There are safeguards in section 108 and, if they need to be tightened up, we are happy to look at that. However, there seems to be a difference in principle between the approach that the Law Society or its committee has taken and the approach of the prosecuting authorities. We are backing the Lord Advocate and the SCDEA.

It gives me no pleasure whatever to say that the SCDEA has advised that there are 291 individuals identified as professional facilitators and specialists who provide vital advice and support to crime groups in Scotland, and some of those individuals are solicitors. It is a serious matter, which we will seek to address in working with the committee and the Law Society in the passage of the bill.

The Convener: Thank you, minister. I am concerned that, when we took evidence on the issue, we received no evidence from the SCDEA, the CML or the Lord Advocate. We received written evidence from ACPOS, but it was unable to send anybody to the committee to support that verbally and to be scrutinised. It is interesting to hear you quote all those bodies in support of your

position, but we have not seen any of that evidence. It would be extremely helpful if you could let us have the evidence to which you refer before we conclude our stage 1 report. We need to see it. It is disappointing that the committee was unable to get anybody from any of the bodies to which you refer to give us oral evidence in support of your position.

Before I bring in other members, I will ask a follow-up question, which comes back to the Law Society's concern. As you will know, the money laundering regulations already place stringent requirements on an intermediary such as a solicitor in terms of their actions on behalf of a third party in financial transactions. What additional steps would a solicitor require to take when they submit an application for registration of a title, over and above what they are required to do by the money laundering regulations, in order not to be caught by the provision on recklessness in section 108?

Fergus Ewing: Our advice is that the new offence will enable the Lord Advocate to prosecute cases of fraud more readily and that it will go further than the existing provisions. The offence is based on an analysis of the incidence of fraud and the way in which fraud occurs. It is also based on analysis of cases, some of which are current and which I therefore cannot talk about, but details of which I have had explained to me. The offence deals with practices in relation to fraud and examples of fraud that are, usually, carried out at the expense of mortgage providers on a very large scale. It is based on the determination of the prosecution authorities to use every possible means to stamp that out.

That is the advice that I have received from the Lord Advocate. The advice specifically refers to the provision on recklessness being a useful tool. The provision is based on the fact that solicitors are the gatekeepers to the land register and therefore they are generally in a privileged position and have a responsibility to act as officers of the court, particularly in relation to patterns of fraudulent behaviour when a series of transactions mean that, for any reasonable solicitor, alarm bells should be sounding.

The argument that the convener and the Law Society have quite fairly put is that there are already measures in place that provide protections. Solicitors must, for example, exercise the requirements of the money laundering regulations to ascertain the identity of clients. We believe that the new offence will further equip and assist the prosecuting authorities in Scotland to take action when formerly it has not been taken.

Incidentally, we do not believe that the offence provision will have any effect on solicitors who are doing their job diligently, properly and honestly. In that respect, we do not think that there is any argument of substance against the inclusion of the new offence in the bill.

The Convener: That is very interesting minister, but it is not really an answer to my question. What practical steps does an honest solicitor require to take, over and above what they are required to do under the money laundering regulations, to ensure that they do not face criminal prosecution if acting in good faith?

Fergus Ewing: None.

The Convener: So why is the legislation necessary? If solicitors are already committing a criminal offence by breaching the money laundering regulations, why do you need another offence that says the same thing?

Fergus Ewing: When I used the word none, I was seeking to refer to the question of what extra things solicitors will require to do. They will not require to do anything else. I thought that that was the question that you were asking.

Solicitors must comply with the money laundering regulations and must show that they have done so by having evidence on file. For example, as I am sure you will recall, they must copy their client's passport or driving licence or other evidence of identity and put it on file to show that they know who they are dealing with. I recall examples of cases, before the regulations came in, when clients assumed a false identity to try to perpetrate a fraud. That is one reason why the money laundering regulations were brought in.

Solicitors actively require to keep on file evidence to show that they have complied with requirements such as the money laundering requirements and that, for the very sensible reason outlined, they know who their client is. It may sound rather obvious but, in practice, when a solicitor is dealing with business over the phone it is quite easy for fraud to happen. I am sure that in the past it would have happened regularly. A busy solicitor who was dealing with matters over the phone might never have seen the client. That may well have happened, but it is plainly not desirable and the money laundering regulations deal with it. Solicitors have to keep records on file.

I answered in the way that I did to make the point that all that a solicitor has to do to avoid any possibility of facing prosecution for the offence is act honestly, properly and diligently. They do not have to make any notes on their file, but they must act honestly, properly and diligently in the execution of their business.

11:45

The Convener: Right. I want to be absolutely clear. If a solicitor follows what is required under

the money laundering regulations, he will have a defence against the charge of acting recklessly under section 108.

Fergus Ewing: I was just giving an answer to the question what the solicitor is required to do not to fall foul of the regulations.

The Convener: You will appreciate that the Law Society of Scotland was concerned about that. In its evidence, it was quite clear that its concern is that a solicitor who acts in good faith but is duped by a fraudster client will not want to face a criminal offence for acting recklessly. It wants to know what practical steps a solicitor needs to take to ensure that they are not caught in that trap and are not prosecuted for an offence when they have done nothing wrong. They might have been caught out by a wicked third party for whom they are acting. The danger is that the definition of "recklessness" may catch them. You have just said that a solicitor requires to take no further steps other than comply with the money-laundering regulations. If that is the case, that is reassuring, although it calls into question the point of section 108.

Fergus Ewing: I do not think that it does, because we are looking at potentially different types of criminal activity. Not all criminal activity is carried out by solicitors who are ignorant of their client's identity. Frauds can be carried out by a solicitor as part of a conspiracy with a client.

The Convener: But that would not be recklessness; it would be a deliberate act.

Fergus Ewing: Or wilful blindness as to the consequences.

Patrick Harvie: I love it when lawyers talk to lawyers. [*Laughter*.]

I want to move on to a related issue rather than ask about the specifics that are being discussed, so other members may want to come in first.

The Convener: Okay. Does Mr MacKenzie want to follow up on the point that we are discussing?

Mike MacKenzie: Yes. I want to follow up on the effect on property-buying or property-selling members of the public who legitimately go about their business and the steps that solicitors have to take. Given what we have heard from the Law Society, solicitors may feel that it is necessary to ensure that they are in an unimpeachable position at all times. We have talked about the money-laundering regulations. I tried to open a bank account in the branch of a bank in which I already hold three accounts. The member of staff who dealt with the matter was my cousin, whom I have known for 50 years. My difficulty was that I was unable to get there in person to show the bank my passport, which it already holds copies of, I believe. People will appreciate that such an approach sometimes causes difficulties. I have a personal concern about the crime of identity theft and think that sometimes there is a perverse consequence of that, but my general concern is about the implications for the property-buying public of any measures that solicitors may think that they have to adopt to protect themselves.

Fergus Ewing: As I said in answering a previous question, we do not think that the provision will have any effect on solicitors who do the job honestly and diligently, and we do not believe that the offence should or will have a negative impact on consumers who are seeking legal advice. Obviously, when a client's actions should raise a solicitor's suspicions, it will be the solicitor's duty to take appropriate action. Once the solicitor has done what we would expect any professional in their shoes to do, there is no reason for them to withdraw from acting for a client.

We do not expect there to be any ensuing difficulty for consumers. On the contrary, unless we take every measure to tackle fraud, we may well see the CML and lenders in general increasing costs to protect and cover mortgage providers against the incidence of fraud that is perpetrated by very few people.

The argument is readily understood in relation to insurance companies. We all know that our insurance premiums are inflated by the amount of insurance fraud that goes on—anyone who has thought about it knows that to be broadly true. If there was no fraud against insurance companies, our premiums would be a lot lower. The position is not so obvious in relation to the provision of mortgages, but lenders have to protect themselves and, by definition, they will focus on the instances of fraud that there have been and then go to the nth degree to protect their future dealings and loans against such eventualities. I am just making the point that the danger lies in not taking all necessary measures to protect the public against fraud, not in taking them.

Patrick Harvie: The minister tells us that his intention is to deal principally with mortgage fraud and we have discussed the practical application of section 108. Was any consideration given to a wider range of issues, including criminal activity such as money laundering and tax evasion and legal tax avoidance, which has attracted a long overdue degree of political attention across the political spectrum?

Andy Wightman gave evidence on the issue of true or beneficial ownership, citing comments made in the review of the Land Registry in England and Wales on the problem caused by the lack of any record of the true or beneficial owner. It said:

"the fact that the Registry neither records on the Register nor knows who the true owners of property are becomes ever harder to defend"

in the context of crime and money laundering, tax compliance, law enforcement and regulatory enforcement. The review went on to say:

"Without such information, the transparency of land registration must always be seriously qualified."

Andy Wightman also tells us

"Such concealment also formed part of the background to the Mohammed Al Fayed court case against the Inland Revenue Commissioners in 2002 where the Special Compliance Office of the Inland Revenue had launched a Who Owns Scotland project to try and investigate the tax affairs of landowners in Scotland who had registered land in offshore jurisdictions."

A couple of approaches have been suggested in evidence: either there should be a requirement to register the true and beneficial owner; or restrictions should be put on registration in the name of companies or entities that are not registered in European Union member states. It is acknowledged that we might not be able to achieve a perfect position, but those approaches might go a significant way towards reducing the opportunity to use land deals to avoid tax or make use of offshore tax havens.

Can we have the minister's response to the options presented in the evidence that we have heard?

Fergus Ewing: Which particular options?

Patrick Harvie: One option is to require the true and beneficial ownership of land to be registered as part of the land registration process. Another is that registration should not be accepted in the name of an entity that is not registered in an EU member state. That would go some way towards reducing the opportunities for tax avoidance and criminal activity such as money laundering.

Fergus Ewing: First of all, we are determined to stamp out criminal activity, and I hope that my earlier evidence has indicated that we are nothing less than 100 per cent determined to use the powers that we have in this Parliament to do precisely that. We do not have powers over taxation so we cannot address issues relating to tax avoidance. I wish that we did but we do not, so we cannot. We also cannot do so through the bill, because it is not to do with tax avoidance; it is about the registration of property.

That said, I will respond to the two options that Mr Harvie has presented. The land register shows the owner of a property and, in some cases, a property is owned by limited companies, trusts or other vehicles that do not reveal the beneficial ownership. For example, if Marks & Spencer owned a shop in Sauchiehall Street, in Glasgow, the land register would not require there to be appended to the title sheet a list of all the shareholders in Marks & Spencer. If it did, the cost of the registration process would rise significantly. When a limited company owns a property, the owners of the company are not required to be marked on the title sheet, and the situation is similar for property that is owned in trust.

On Mr Harvie's first option, ultimately the land register is concerned with the registration of ownership of property, not with amending property law. If Mr Harvie wanted a requirement that the beneficial ownership be shown, property law would have to be amended to take account of that. We do not think that that would be a sensible exercise to pursue, for reasons that are obvious from the example that I have just given. Those who want to inquire about the owner of a company can do so through other means such as by applying to the register of companies and obtaining the company file. Indeed, that is what people do. With respect, what Mr Harvie suggests does not seem to be within the ambit of the bill; it is a matter for reform of property law and, possibly, taxation law.

On the second option, I understand that Mr Wightman proposes that it should be incompetent to register title to land in the name of any legal entity that is not registered in an EU member state. I am not in favour of such a proposal, even if it is within the scope of the bill—I have not looked into that question, but I suspect that it would be answered in the negative—because there would be a significant risk that introducing such a system would have a negative effect on investment by companies that are registered outwith the EU. Yesterday, I visited two major employers in Ayrshire—aerospace companies that employ nearly 1,000 people each. I do not know whether the US companies that own those companies own the land on which the factories that I visited are built, but I would not want to discourage them from increasing the excellent investments that they have made in Scotland, which provide many valuable jobs for our citizens.

Also, it is unclear whether, if we took that action, we would take land by force from those who refused to set up an EU company or whether we would seek to confiscate or nationalise land that was owned by non-EU entities. That would be the logical determinant. Nor can I see the difference—in theory, at least—between a company that was set up as a tax vehicle within the EU and one that was set up outwith the EU for the same purpose. Why is outwith the EU bad and within the EU good? It seems slightly strange to think in those terms, and I do not. In short, I am absolutely not in favour of such a proposal and do not think that it would be workable even if it were relevant, which I suspect that it is not.

The Convener: You could have cited the example of a piece of land in Aberdeenshire that a certain Mr Trump, or his organisation, is currently in ownership of.

Patrick Harvie: I think that I am right in saying that, in that example—as in very many examples of overseas development—a domestic legal entity has been established as the owner. For any legitimate foreign investor whose interest in owning land in Scotland many of us would welcome, that is the normal course of action and would not pose a barrier.

Notwithstanding the argument about foreign investment, is the minister open to a debate—in the context of either the bill or a different legislative vehicle—about addressing the other questions of property law that he identified in the early part of his answer? He and I share the hope that, in the very near future, the Scottish Parliament and the Scottish Government will take responsibility for and will have to deal directly with the consequences of tax avoidance for the Scottish finances. We do not have the legal power to deal with tax law at the moment, but we can ensure that property law and land registration law do not give rise to loopholes for those who would seek to exploit the system and avoid paying the taxes that most people would expect to pay in their ordinary daily lives.

12:00

Fergus Ewing: I am always happy to have a debate, convener.

The Convener: Thank you, minister. We need to cover a couple more areas, so how is your timetable? Can you stay for a few more minutes?

Fergus Ewing: Yes.

The Convener: Fine. I want to deal briefly with the question of electronic registration. Mr Brodie has a question on it.

Chic Brodie: Section 92 of the bill deals with electronic documentation and has provision for electronic registration. Given all the conversations that we have just had about fraud etc, how much importance do you attach to that?

Fergus Ewing: I am sorry, but can you rephrase the last sentence of your question?

Chic Brodie: How much importance do you attach to the provision made in the bill for electronic registration?

Fergus Ewing: It is extremely important. Electronic registration is an effective and much swifter way of dealing with the conveyancing process. Conveyancing law was developed before the invention of the internet and e-mail and it used to involve a cumbersome, long-winded and protracted process of lawyers exchanging paper documents. Plainly, electronic technology is extremely useful and has already been put to good use. Work is on-going to determine which other legal documents should be capable of being self-proving in electronic form under the bill's provisions. The provisions will allow Scotland to come into line with the e-commerce directive and—I am told—the e-signatures directive. I confess that I have not studied either of those directives in any detail, so mea culpa.

Electronic enablement of the conveyancing process will also allow lenders and others to streamline their processes. That is important because it can simplify what has become the complicated process of obtaining a mortgage. For example, when I was first in practice, loan instructions from the Bank of Scotland might be on one sheet of A4, but when I ceased practice, which was about a decade ago, I got a telephone directory of rules that I had to study and if as a solicitor I did not follow them, I had to pay for any mistakes that arose.

So, anything that we can do to protect the public and make the process simpler is generally better. I should say that, at the request of the Law Society, Registers of Scotland has already, with the automated registration of title to land process that was launched in 2007, made considerable progress along that route.

Chic Brodie: I have a point on the ARTL process that may refer to an administrative rather than a policy issue, so perhaps it might just serve as an aide memoire for Mr Smith. We heard from the CML that the ARTL process is not fit for purpose. Before you and the keeper were in your positions, minister, a contract was signed in 2004 with Registers of Scotland for £66 million. However, the current cost of the contract is £132 million. Last year, £3.1 million was written off in the accounts and £17.1 million-worth of change notices were issued between 2004 and 2009. The situation is very serious. The provisions in section 92 of the bill are predicated on the success of electronic documentation and electronic signatures. I do not expect you, minister, to respond to what is an administrative issue, but will you ensure that whatever systems are in place will wholly support the bill's provisions?

Fergus Ewing: Plainly, we all want IT to be effective and I am acutely aware, from general reading, that IT projects have not always been a huge success. The member refers to a number of figures that I think relate to matters that are slightly outwith the province of the bill but which are, nonetheless, matters of considerable concern. I believe that those matters may be under consideration by the Public Audit Committee.

ARTL has to date cost £6.7 million, which has come from the Registers of Scotland trading fund. ARTL was designed with a particular market in mind—remortgaging and related discharges of standard securities. When it was designed, the remortgage market was buoyant and Registers of Scotland was kept busy with such applications. That is plainly no longer the case. The potential benefits of ARTL have not been fully realised, perhaps in part at least because of the slowdown in the Scottish remortgaging market. However, those who have used it for transactions have made significant savings, given that ARTL fees are lower than those for paper-based transactions.

ARTL has shown that secure electronic registration is possible, which needed to be demonstrated because there were doubters in the legal profession—as there were, incidentally, when the system moved to typewritten documents instead of handwritten documents. I think that I am right in saying that lawyers back then doubted whether the typeface would not fade in such a way that the print would fade and become indecipherable, so there have always been luddites in the legal profession—now and then.

Chic Brodie: With all due respect, it is unfair to suggest that Conveyancing Direct, the Scottish Property Federation and the CML are luddites when it comes to the use of IT systems.

I am concerned about any complacency going forward—although I am sure that there will not be any—if we have to develop a new system to make the bill a success. It is incumbent on the keeper to ensure that that happens. The example I gave is historic, but the sums that I mentioned are in the report by the Auditor General, which was published in November 2011. Those who some may think are luddites should be fully involved in producing a new system or, indeed, successfully implementing and upgrading the existing one.

Fergus Ewing: I was thinking of myself and a tiny minority of solicitors, not making a general smear of the profession in general.

The member is correct. It is plain that IT must work and that it must be effective and economic. There has been a propensity for IT projects to go very sadly wrong. Let us make no bones about that. The Public Audit Committee will no doubt look at the matter you mentioned. It is beyond the scope of the bill, but I am determined to work with the keeper to ensure that the lessons from introduction of the ARTL system are learned to assist with the implementation of any successor system and to help achieve more effectively and readily the bill's objectives.

I do not know whether I have covered everything or whether Mr Henderson or Mr Smith have anything to add.

Matthew Smith: My only comment is that ARTL was developed along with the Law Society and the CML. It was designed with them in mind and with their input. The people at Registers of Scotland did not come up with ARTL on their own; it was considered with the Law Society and the CML.

There are lots of checks and balances in the system, because it was the first time that there had been electronic registration in Scotland, or in Europe—I think that the only other such system was in New Zealand. ARTL was a baby step and, as such, it had checks and balances in it. Those have proven to be problematic because they make it less workmanlike than it should be.

Chic Brodie: I accept that. I am just raising a flag; it is the CML that said that ARTL is not fit for purpose.

Matthew Smith: It was involved in the development of ARTL.

Chic Brodie: That is fine. We do not want to get into that sort of argument. All I ask is that, for the success of the bill, we ensure that going forward—not going back 10 years, although it beggars belief that we would sign a contract of that size for 10 years without having any checks and balances in it—there is robust, properly serviced involvement and participation of users, so that we do not have the sort of comments that we have had from previous witnesses.

Matthew Smith: As was done with ARTL will be done with any future electronic registration systems. Users will be involved and the invaluable or expensive lessons that have been learnt from ARTL will obviously inform any future system.

The keeper recently employed a new IT director who has been bringing in new members of staff for what is called an intelligent client function. When the systems were being developed in 2004-05, we did not have that in-house, but we do now. Rather than an outside supplier leading on such matters, people from Registers of Scotland will lead on them and undertake appropriate procurement.

Chic Brodie: Okay. Make sure that it works this time.

Stuart McMillan (West Scotland) (SNP): Regarding ARTL and the bill, I suggest that you have as much buy-in as you can from the industry, particularly from those who do the work on the ground. I suggest that a range of companies—large, small and medium-sized—should be allowed to offer input on the system. We have heard oral evidence in which the word "clunky "was used to describe the system. I referred to the bill while I was chatting to a lawyer at an event in the Parliament. He also used the word "clunky" about it, which surprised me. Clearly, the current system is not operating as we would like it to.

Going forward, you will need maximum buy-in and you will need to gather as much intelligence as possible from across the industry.

Matthew Smith: We understand that. Legal firms such as Thorntons and Peddie Smith Maloco were involved in the development of ARTL and are, obviously, bulk conveyancers. When we are developing a new system, we will consult widely and get people involved, including the users, so that the criticisms that have been laid at our door will not be laid there in the future.

Stuart McMillan: I am also conscious that new hardware or software immediately becomes out of date when it leaves the factory because of the speed of developments and so on, so I fully accept that it is difficult to future proof hardware and software. I worked in the IT industry for a while, so I understand and accept that there are difficulties. At the same time, I hope and expect that whatever system comes in will be continually and regularly improved—not necessarily every week or day—to ensure that it remains up to speed and is as robust and efficient as it can be.

Matthew Smith: I believe that the reasons why ARTL has not been updated or has not been running as well as it could are related to problems that are inherent in the IT contract. As I said, the keeper has taken steps to deal with that. I therefore hope that any electronic systems that come along in the future will be more robust and flexible and will allow for development. As you said, IT systems become obsolete; we have a digital mapping system that was developed in 1996, for example. Technology moves on, so it is time for the technology in Registers of Scotland to move on as well.

Gavin Henderson: I know from speaking to our new IT director that the intention is not to have an order for a new system that will then be developed at some later point and might end up being "clunky". The idea is to have smaller packages of bespoke products that are continually developed and innovated on so that they meet the needs of our customers—small and large firms of conveyancers. The idea is to have a bespoke system for each type of application and customer.

The Convener: Thank you. Just in terms of a final—

Fergus Ewing: Can I make a point, convener? I understand that evidence has been given to the committee by solicitors to the effect that the ARTL system has limited application, and that some have said that it is not fit for purpose. In the light of the questions from committee members and the evidence that you have heard, I will ask the keeper to explore further the issues with me, and we will come back to the committee when we have had an opportunity to do that. We all have the common aim and desire to ensure that these matters are properly dealt with, as Mr Brodie and Mr McMillan have argued quite correctly.

12:15

The Convener: Thank you. That is very helpful.

The last issue that we want to cover briefly—if we can—is registration of common land.

Rhoda Grant: Andy Wightman pointed out that common land tends to disappear, because it is not registered as common land and disappears due to prescription by other people. We raised the issue with the keeper and she told us that there is no reason why common land could not be registered. The problem appears to be who registers it and who pays for that registration. Has the minister given any thought to adding to the bill a provision on who would register common land and who would pay for its registration?

Fergus Ewing: I have looked at the matter, but it is an area of particular difficulty and complexity so, in consequence, I will pass on that question and Mr Smith will give you perfect answers.

The Convener: That is a high threshold to set.

Matthew Smith: The answer depends what you mean by common land. People can have a title to common land. For example, 50 people can own shares in a salmon fishing—that is common land. The people who have the titles and own the shares are the people who will pay for it to be registered.

If you are talking about common land as in commonties, that is a much more peculiar concept to deal with, because a commonty does not have an owner. Although people have the benefit of the right and there may be ownership, it has been lost in the mists of time in Scots law. There was a division of commonties act in the back end of the 17th century, so obviously they existed at some point, but whether they still exist to this day is another matter. Mr Wightman has pointed out that a title in Carluke refers to a commonty. However, the commonty itself is not registered and nobody has tried to register it so far.

The answer to the question is that the owners of the land would pay for its registration. If the owners cannot be identified, it may be that the way to do it would be by a keeper-induced registration, when the proprietorship section of a title sheet can be left blank, because the proprietor is unknown. In the case of a commonty, if it is truly land that is owned by no one, although people have the benefit of the use of it, that may be the most appropriate way to register the land.

Rhoda Grant: I think that the argument would be that it is owned, but by the community in

general rather than by an individual. The problem, particularly with prescription, is that if you leave the owner out, or even if you say that the owner is unknown, somebody can start using that land and take it over with prescription, so it is lost to the community.

Matthew Smith: For a registered title to an area of common land for which it was not clear who the owner was—the proprietorship section was blank—someone who wanted to get a prescriptive title on the land would have to go through the tests in the bill. Obviously, as we have said, the seven-year requirement is to be dropped, but they would have to prove that they had occupied it for a year and had notified the true owners. If the true owners of the land are the community and it has 50,000 people, the person would have to prove that they had contacted those 50,000 people before they could get their prescriptive title. That is quite a high bar.

Rhoda Grant: It is not if the 50,000 people are not able to register the land in their ownership prior to that.

Matthew Smith: But if they are the true owners of the land and somebody else wants to register a title, for a prescription to run that person would have to find out who the true owners are, notify them and have their consent.

Rhoda Grant: You are turning the argument on its head. If, for example, common land was used as a sports field, the community might decide that it wants to build showers, changing rooms and whatever on it. If the community applies to the lottery for some funding for the project but the keeper of the registers will not register the land in common ownership, how can it raise funds to have something built on the land when it cannot prove ownership? The situation becomes extremely complex.

Matthew Smith: That is not a registration issue; it is a property law issue. The register can show only people who have real property rights and who can prove ownership of property under property law. If the people in a community who have the right to common land can prove that right, they can have a registered title to it.

John Wilson: There is an issue to do with land that has been gifted to people or a community, and which the local authority holds in trust. The law on that has been tested. If the local authority decides to carry out development work on that land, who has the right to decide what happens on it? That question comes up. There have been a number of cases in which land has been gifted to the people—Hamilton palace grounds are an example of that. The grounds were gifted to the people of Hamilton and the local authority held the land in trust. It then decided to put a shopping development on the site and the people objected, but the courts ruled in favour of the local authority. How can we resolve that common-land issue?

Gavin Henderson: I echo what Matthew Smith said. The land register is for registering land rights. Where it is clear that someone owns the land, it will be registered. If a court determines that a local authority owns a piece of land, the keeper of the register will register the local authority as the owner. The keeper is an administrative body, not a judicial authority, and it would be for the courts to determine such cases.

Matthew Smith: In those instances, the land is slightly different from a commonty, say, or land that is owned by people pro indiviso. Someone has set aside the land and said that it should be for the benefit of the community. The council is the administrator of the land for the community, so the council will hold the title, but it will be held in trust. If the council is not in the trust of the community, that is not really a matter for land registration; rather, it is a matter between the people and their council.

The Convener: It is clear that some of those issues are outwith the scope of the bill, which deals with land registration. If the committee were to write to you with thoughts on the registration of common land, minister, would you look at that?

Fergus Ewing: Of course.

The Convener: Thank you. We have an issue to do with subordinate legislation, but in the interests of brevity, we will write to you about that rather than raise it today.

As members have no final pressing questions that they want to ask, I thank the minister and his officials very much for their attendance and their comprehensive responses to our questions.

I suspend the meeting for five minutes.

12:23

Meeting suspended.

12:30

On resuming—

European Commission Work Programme

The Convener: Item 2 is consideration of the European Commission work programme. I invite our European reporter, Stuart McMillan, to introduce his paper.

Stuart McMillan: Thank you, convener. First of all, I thank our colleagues at the Scottish Parliament information centre; our committee clerk, Joanna Hardy; and the Parliament's European officer for helping me to put the paper together.

The options that are available to us and the areas for consideration are fairly self-explanatory. The paper itself is split into sections on energy and the economy. In the energy section, I have set out six possible areas that we might do some work on and in the economy section, I have set out only two or three. I do not intend to go into each area—after all, we have all had a chance to read the paper—but I am certainly happy to answer any questions.

Before I do so, I should say that I received a letter this morning from Joanna Hardy about the European and External Relations Committee, which had written to the Scottish Government. In her letter, Joanna enclosed Fiona Hyslop's response dated 21 January to the convener, Christina McKelvie, and it appears that we and the Government seem to be on the same page with regard to the areas that we should be considering. Of course, it is entirely up to committee members to decide what we should look at and any further action we should take.

Chic Brodie: What do you think we should look at? As Stuart is the committee's European reporter, he will have a better feel for what is happening in the wider discursory environment.

Stuart McMillan: To be perfectly honest, I think that we should look at everything. It is very difficult to narrow things down. For example, the energy section of the paper alone sets out six different areas that affect the policies that the Government and the Parliament might want to take forward for our country, and legislation that has already been passed. As we know, energy and energy conservation will be vital in moving Scotland forward, particularly given their role as economic drivers.

With regard to the final issue in the paper—finance and banking—I realise that there was a banking inquiry in the previous session and that earlier this year we had an evidence session on what is going to happen in that sector. However, as we read and see every day, things are still very much in flux and, on this issue, the committee really needs to keep its eye on the ball.

From a purely personal point of view, I am particularly interested in state aid, given what has happened to the shipbuilding industry and the fact that orders that Scottish yards should have got have gone elsewhere. Of course, the issue of regional state aid has wider implications, and it is certainly an area that we need to examine closely and, where appropriate, participate in.

Chic Brodie: That is very helpful, but can we prioritise this list according to where we can have the biggest input and where we can make the biggest return? It is great to talk about banks and I wish that we had some immediate influence over that area, but I think we will make a bigger contribution and, possibly, get a more immediate return if we concentrate on energy issues. Might that be true?

Stuart McMillan: Although the paper sets out a range of recommendations, my personal recommendation is that the committee write to the Scottish and UK Governments on all the issues in the paper in order to establish what they have done so far, what they intend to do and what discussions they have had. With that information, we will be in a better position to prioritise the areas on which we want to do more work on or get involved in. After all, the committee meets only once a week and has to deal with other items in its work programme. If we wanted to do all the work, we would have to meet Monday to Friday, which would simply not be feasible. If we have more information from the two Governments, we will be able to prioritise what we consider to be the most important areas.

Patrick Harvie: I can see the benefit in communicating with both Governments before we take a view on the matter. However, given the comment on page 1 of the paper that

"The European and External Relations Committee"

wants to

"compile ... the committees' priorities"

and hold a debate in February or March on the work programme, I am not sure that we have the time to do that.

My personal bid is for a particular emphasis on two energy areas, the first of which is the offshore North Sea grid, which comes under the "Internal Energy Market" heading. Not only is the issue relevant to the Scottish Government's targets—after all, we are not going to be able to achieve the required level of penetration of renewables unless we can trade energy efficiently across several

jurisdictions—but the fact is that we cannot simply wave a magic wand and make it happen. It requires co-operation and financing at multinational and Europe levels.

The second area that we should emphasise is energy efficiency, which is consistent with the committee's work programme. When we have discussed the issue, there has been almost unanimous emphasis on the relationship between fuel poverty and energy efficiency. We can learn a great deal from other European countries that have similar climates and have achieved far more than either Scotland or the rest of the UK has been able to achieve.

The Convener: That sounds reasonable.

I suggest a two-fold approach. First, the suggestion that we write to the Scottish and UK Governments on all the subjects is perfectly sound, so we should go ahead and do that. With regard to the European and External Relations Committee's timetable for a response, I realise that it might take a few weeks to get any responses back so, in the circumstances, I wonder whether Stuart McMillan can liaise further with the clerks and SPICe to come up with more concrete proposals.

I know that we cannot possibly cover every topic in the paper in anything like the detail it deserves, so we need to prioritise the areas that require further scrutiny. Initially, we will write to both Governments on all the matters and see what responses we get. I suggest that, once we have received responses and he has met the clerks and SPICe, Stuart McMillan circulate another paper to members and we will try to agree by correspondence further action. We will also need to find out from the European and External Relations Committee the timetable that it is working to with regard to getting a response from us.

Does that sound satisfactory, Stuart?

Stuart McMillan: Sure—I am happy with that.

The Convener: Thank you very much. We now move into private session.

12:39

Meeting continued in private until 13:02.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should e-mail them to official.report@scottish.parliament.uk or send a marked-up printout to the Official Report, Room T2.20.

The deadline for corrections to this edition is:

Monday 20 February 2012

Published in Edinburgh by APS Group Scotland

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format available
ISBN 978-1-4061-8296-5

Printed in Scotland by APS Group Scotland