OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 29 May 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 29 May 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
18th Meeting 2018, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Donald Cameron (Highlands and Islands) (Con)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
Alex Neil (Airdrie and Shotts) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Joyce Carr (Scottish Government)
Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)
Dr Simon Cuthbert-Kerr (Scottish Government)
Joan McAlpine (South Scotland) (SNP) (Committee Substitute)
Andrew Ruxton (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 29 May 2018

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning and welcome to the 18th meeting in 2018 of the Environment, Climate Change and Land Reform Committee. We have apologies from Alex Neil; Joan McAlpine, whom I welcome, is here as his substitute. We will hear Alex Neil's declaration of relevant interests at a later meeting.

I remind everyone present to switch off mobile phones and other electronic devices, as they may affect the broadcasting system.

The first item on the agenda is for the committee to consider whether to take agenda item 8 in private and to reschedule agenda item 2 for an alternative meeting date. Do we agree to do both?

Members *indicated agreement.*

Subordinate Legislation

Environmental Authorisations (Scotland) Regulations 2018 [Draft]

09:31

The Convener: What is now the second item on the agenda is to hear evidence on the draft Environmental Authorisations (Scotland) Regulations 2018 from the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, and Joyce Carr, head of the Scottish Government's water environment team. Good morning. Do you want to make an opening statement, cabinet secretary?

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): I think that that would be helpful.

Obviously, effective environmental legislation is essential if we are going to continue to protect Scotland's natural resources, and our legislation has to be efficient and risk based to ensure that any associated burdens on business are proportionate. The draft regulations represent a significant step forward in providing more efficient, effective and risk-based protection of the environment.

The existing legislation for our key environmental regimes has evolved over a number of decades and, as a result, the current framework of environmental regulations has become more complex than it needs to be. The four main environmental regimes for water, waste, pollution prevention and radioactive substances currently have different procedures and timeframes for granting authorisation, carrying out monitoring, and taking enforcement action for non-compliance, and many sites have multiple authorisations, multiple inspections by different inspectors, and different monitoring arrangements. That is inefficient for the regulator and the operator. The new, integrated framework, for which the draft regulations are the first step, will create a common set of procedures for those core regulatory components.

The majority of the components that make up the new framework already exist in one or more of the existing four main regimes. For instance, the framework uses a similar tiered system of proportionate controls as that which was introduced in the Water Environment (Controlled Activities) (Scotland) Regulations 2005, which is now accepted as an efficient and successful approach. That provides a simple, transparent and integrated system that makes compliance easier and more straightforward for business.

The framework also includes a broader fit-and-proper-person test to strengthen the Scottish Environment Protection Agency's powers to ensure that the right person holds the authorisation. That will provide a level playing field for business and ensure that disreputable operators or criminals are unable to obtain or keep authorisations. It will also ensure that people and communities—and particularly those who are directly impacted by activities—are properly engaged in decision making.

In addition to the common set of procedures, certain technical provisions are required for each of the four main regimes. They will be contained in technical schedules.

We plan to implement the framework in tranches, starting with the provisions for radioactive substance activities, which are contained in the technical schedules to the draft regulations. The technical requirements for the water pollution prevention and waste activities will be added in subsequent tranches, so the committee has that to look forward to.

I am confident that the integrated framework will provide an effective and efficient approach to the protection of our environment, while minimising the burden for business, and I ask the committee to support the instrument.

The Convener: It strikes me, on reading through the instrument, that the fit-and-proper-person test is, in practice, a big improvement on what we have had until now. Is that a fair assessment?

Roseanna Cunningham: It probably is. That is one of the things that we were keen to do, partly because we had indications of issues arising out of the way in which things have been managed until now. It will basically streamline different approaches in different regimes, and that means that it will be easier across the entirety of that area of activity to see who would and who would not be a fit and proper person. SEPA will have a duty to grant or transfer an authorisation for a regulated activity only where it is satisfied that the proposed person is a fit and proper person to carry on the activity. There are some ways in which that will make SEPA more able to be proactive when it comes to waste crime and repeat offenders, and I would expect that to be welcomed by pretty much the majority of people—perhaps not the waste crime repeat offenders themselves, although that is as might be anticipated.

At the moment, SEPA can consider only environmental offences, but the framework will allow a wider range of offences to be taken into account. Involvement in serious organised crime demonstrates a disregard for the law, and we believe that people who show such disregard should generally not be considered fit and proper people to be carrying out certain activities. There will be other benefits, but the instrument is framed so as to create a better test and a test that works across all the regimes.

The Convener: Excellent. I will open the discussion up to members, starting with Stewart Stevenson.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to talk about the narrow issue of dealing with radioactive substances in the offshore sector. In your helpful letter to us, cabinet secretary, you refer to the preparation of a section 104 order under the Scotland Act 1998, and I have two questions relating to that. First, who has been looking after this area up until now? Secondly, will the section 104 order give ministers powers to change the regulations, or is it just a one-off to implement the particular regulations that are before us?

Roseanna Cunningham: I will ask Joyce Carr to answer that.

Joyce Carr (Scottish Government): Our ministers already have powers under the Radioactive Substances Act 1993. The section 104 order is merely to extend the new regulations to the offshore sector. It is simply that, in terms of procedure, because the Radioactive Substances Act 1993 is being repealed, we need to go through that process to ensure that the new regulations can apply to the offshore sector, as they do at present.

Stewart Stevenson: So the net effect is nil.

Joyce Carr: Correct.

Stewart Stevenson: Thank you.

Mark Ruskell (Mid Scotland and Fife) (Green): Cabinet secretary, you mentioned that one of the objectives of the draft regulations is to ensure that people are informed about and engaged in decision making. I wonder how that will actually take effect on the ground.

Let me give an example. Near Dunfermline, there is a former opencast coal site called Muir Dean, where distillery waste was being pumped into the ground over the weekend, causing an enormous stink. A few miles up the road is the Mossmorran ethylene plant, and in both those cases communities do not know who is responsible for regulating the sites. There is confusion about whether it is Fife Council or SEPA, and confusion about the current process of regulation under the Pollution Prevention and Control (Scotland) Regulations 2012. How will the new integrated framework allow communities to engage more in decision making? How will it look at the front end—the community end? If someone

has an environmental problem, how will it benefit them?

Roseanna Cunningham: Community councils, for example, were involved in the consultation, so the consultation reached into that area of activity at a basic community level. There ought to be a relatively widespread understanding that this change is in process.

I do not want to get drawn into attempting to discuss individual sets of circumstances. This would not be the right place to do that. I would expect, however, that there is a fairly widespread understanding that SEPA is likely to have a role and what that would be, and that local authorities will also have a role in some cases, depending on what the activity is. I would be surprised if most communities did not regard SEPA/local authorities as their first port of call when these things go awry.

Community councils have already been involved in the consultation and should be aware that it has been taking place and have a widespread understanding of what it means.

It is important to understand that the draft regulations bring together existing frameworks into a more coherent framework. I do not want to say that nothing has changed, but neither do I want to make it sound as though everything has changed. We are streamlining a process and making it easier and more straightforward, whether for people who are regulated or for those who have concerns.

Once the integrated framework has been rolled out, I expect that the process will become easier for people to understand, because they will not be dealing with different rules in different sets of regulations. I suspect that that is what has caused some of the confusion up until now.

Mark Ruskell: You referred to "SEPA/local authorities". The confusion may arise over where the responsibilities of each organisation start and stop. If I am in a community with an environmental problem, where do I go?

How will the integrated framework change the process, regardless of the issue, and make it more streamlined for the concerned citizen? Does it provide a new portal? At the moment, the responsibility seems to lie with one organisation and/or another. I would not know which one to go to.

Roseanna Cunningham: I would imagine that most people's first port of call would be SEPA. If it is a local authority responsibility, SEPA would direct the person to the local authority. The local authority obviously has lots of responsibilities, particularly because it is the planning authority and the environmental health authority.

Unless you are proposing to take powers away from local authorities—I assume that you are not, although you may be—there will continue to be situations in which both the local authority and SEPA have a role. The regulations are not about setting up a one-stop shop. SEPA is most likely to be the first port of call for people with a concern and it will know whether it is better to direct the issue to a local authority.

In most cases, SEPA responds in one way or another. Although people may not always be content with the outcome or the results of what SEPA does or does not do, usually it will be the first port of call for the vast majority of people.

John Scott (Ayr) (Con): Will you expand on the missing of the transposition deadlines?

Roseanna Cunningham: Some of that was beyond our control. I am looking in my briefing for the detail of what happened, which was tied up with changes south of the border. It was not entirely our doing. We have written to the committee with some elaboration. There are various sets of United Kingdom regulations that cover a mix of reserved and devolved measures that could not be accommodated straightforwardly in existing regulatory positions—the requirement for a section 104 order is an example of that. We have been caught with an issue that has not really been of our making.

We have been advised by the Department for Business, Energy and Industrial Strategy that the European Commission is unlikely to do anything in terms of infraction in the UK before the year's anniversary of the transposition deadline. BEIS is also conscious that trying to align the different jurisdictions has been a problem. I do not know whether Joyce Carr will be able to say anything further. It is not about assigning blame, but we have been held to a timescale that was not entirely of our making.

09:45

John Scott: In your letter to the convener, you say that you will bring forward a consultation. Do you have a timescale for that? I presume that it will be a Scottish consultation.

Roseanna Cunningham: I do not know. Are you aware of a timescale for the consultation, Joyce?

Joyce Carr: The consultation will be brought forward as soon as is reasonable. My colleagues who deal with radioactive substances have been actively working on the consultation. The constraint is the legal resource to develop the draft regulations, so that is what we are waiting for.

John Scott: That constraint lies within the Scottish Government.

Joyce Carr: Yes.

Claudia Beamish (South Scotland) (Lab): I want to look at the other end of the community engagement and the role of the new regulatory regime as it integrates. Can you give us any reassurance about the feedback to communities on significant issues such as those relating to Mossmorran and the spreading of sewage sludge at Glentaggart in my constituency? What is the process whereby communities know what decisions have been made?

Roseanna Cunningham: SEPA is in the early stages of implementing a sector approach to regulation, and sector plans will be at the heart of everything that SEPA does. That approach is designed to develop confidence in the system so that people have easy recourse to the sector plans.

There is a 24-hour pollution hotline and a mobile phone app for members of the public. There might be a question about how many members of the public are aware of the hotline and the app, but I will ensure that questions are asked of SEPA about it perhaps needing to up its publicity activity on those resources, which are for reporting any possible pollution incidents. That should give reassurance to the public that when something happens, people are able to register an issue straight away. Communities have to be kept informed of incidents as they emerge and have clarity on whose role it is to respond.

In a sense, that work is constantly developing and I do not think that we will ever get to a point at which that is a perfect activity. However, I hope that the public are aware of the 24-hour hotline and the mobile phone app or, if they are not, that those resources can be brought to people's attention. Those resources allow people instant access to information and, once an incident is happening, that instant access is important.

I am aware that SEPA engages with people through public meetings, particularly in areas in which there are on-going situations, and I expect that that activity will continue. The authorisations framework will streamline and simplify the message that can be sent, but it will not change that activity.

Claudia Beamish: To take the example of Glentaggart, because I know quite a lot about it, could there be a commitment by the Scottish Government to put up any results and decisions on the SEPA website so that that can easily be accessed by the public? Perhaps that happens anyway—I do not know. If not, could it be done?

Roseanna Cunningham: We can certainly raise that issue. There is a provision for publicity notices.

Joyce Carr: That is not relevant here.

Roseanna Cunningham: Is it not relevant in this case?

Joyce Carr: SEPA publishes all decision making on its website.

Roseanna Cunningham: I was just reading from my notes about publicity notices, which are matters for the courts. There is a process by which publicity orders can be made but that is perhaps a big bit of artillery that is beyond what you are talking about just now.

It might be that people are not engaging with what is already available through SEPA, which suggests that SEPA needs to be a bit more proactive about what is already available. If all its decisions are published on its website, that should perhaps be better publicised.

The work that SEPA did around the flooding activity is possibly a case study of how well SEPA can manage the publicity around issues, so it might perhaps need to think about extending that particular way of dealing with things across a wider set of regimes.

Alex Rowley (Mid Scotland and Fife) (Lab): I know that you do not want to talk about specifics, but I can say in all honesty that, when you look at specific cases in Fife, you can see that there is a problem with regard to people's confidence in SEPA. For example, in Dunfermline, from Thursday to Sunday, the smell was so horrendous that people were being physically sick, but there was a lack of communication from SEPA and the council with regard to what was going on. Along with that, there is the fact that, although a final written warning has been given to Mossmorran, nobody understands what that really means, because SEPA has not issued detailed information about why it has issued the warning. Further, there is the fact that it took a year and a half to get a conviction in connection with the issue at the former naval base at Lathalmond, as well as the fact that SEPA will not clean up the area but has not published the details of why it will not.

Every time that I come across cases involving SEPA, I ask myself whether it actually has the power to act on behalf of communities, because, time and again, communities are let down. I hope that we can see more joined-up working, but a number of questions need to be answered on the problems that communities have with SEPA in cases in which SEPA seems to be either powerless to act or unable to address issues.

Roseanna Cunningham: There were a load of issues wrapped up in that which are not easy for me to unpack in the context of this conversation; not least of those issues is the fact that, once something goes into the judicial system, SEPA

does not have control of the timescale, as it has no control over court proceedings. I can answer in terms of generalities—for example, as soon as something goes into the justice system, the timescale is out of SEPA's control. However, I cannot address very particular sets of circumstances; I would just have to promise to write another letter.

If a case takes a year or 18 months to go through the court, it is not SEPA that is causing the delay; the normal court processes are slowing things down. I appreciate that that is frustrating for people, but it is what it is—and that applies to a lot more than SEPA. We need to be clear about which aspects of what we are talking about are within SEPA's control and which are not.

That suggests to me that some people think that we should revisit the legislation upon which SEPA was set up in the early years of this Parliament. I am not sure that that is a point to which I can respond off the top of my head without looking at a lot of the detail about individual decision making, so that I can understand why, in some cases, SEPA clearly believes that it does not have powers when it does have them.

Alex Rowley: What right does a community have to challenge SEPA? In the Lathalmond case there were convictions, but the mess is still there. SEPA will not clean it up because that would cost more than £1 million, and it says that the site is safe enough. The judge in the case was highly critical of SEPA—

Roseanna Cunningham: I am not familiar with the case—

Alex Rowley: What rights do communities have to appeal a decision of SEPA not to clean up a site?

The Convener: We are straying away from the regulations. However, Alex Rowley has made some interesting points. Cabinet secretary, will you write to us about the rights of communities, not necessarily in the case that Alex Rowley mentioned but in circumstances such as that? Also, will you respond to the point about what a final written warning constitutes?

Roseanna Cunningham: Okay. We can do that.

The Convener: Thank you. If Mr Rowley has no further points to make, it would be useful if you could write to the committee about the generalities, rather than the specific case to which he referred.

If members have no more questions, we move to item 4, which is the debate on motion S5M-12403.

Motion moved,

That the Environment, Climate Change and Land Reform Committee recommends that the Environmental Authorisations (Scotland) Regulations 2018 [draft] be approved.—[*Roseanna Cunningham*]

The Convener: I invite members to comment on the motion.

Mark Ruskell: I am quite happy to support the regulations. It makes a lot of sense to provide a more integrated framework and I welcome the first tranche of regulations, on radioactive materials.

Ahead of the next tranche, particularly the pollution, prevention and control regulations, I would like to learn how the approach will work on the ground and whether there will be improvements, in particular to environmental reporting for communities.

I mentioned the odour nuisance in Dunfermline, and Alex Rowley raised the issue too. On Thursday night, a post on Facebook was shared nearly 2,000 times, and if members read the threads they will see that there was continual debate about whose responsibility the issue is. People were asking whether the responsibility is SEPA's or Fife Council's, and whether anyone knows what is meant to be spread at the site, as opposed to what was actually spread. There are major issues to do with information flow.

Obviously, that case is not entirely relevant to the regulations that we are considering; it relates more to the PPC regulations, which will come later. When we get to that second tranche, I will be interested to hear what improvements SEPA will make and how it will make the front end seamless for communities, which often need information quickly.

Roseanna Cunningham: If members plan to refer to specific cases, it would be really helpful if we could get an indication of that. As members will appreciate, there are enormous differences from case to case, with every case probably turning on specific information. If I am to be helpful in such circumstances, it would help if cases were flagged up to us, so that we could do a little work to understand them and therefore, perhaps, be able to explain more clearly why a particular set of circumstances is what it is.

10:00

The Convener: Yes, but you have picked up on that point and perhaps you can also respond to us in the letter that you are going to write to the committee.

Richard Lyle (Uddingston and Bellshill) (SNP): Those of us who have been councillors would say that any pollution or smell is the responsibility of the council's environmental department, rather than SEPA, because the

council is on the ground. The council can then contact SEPA. There is a SEPA office in my constituency that I contact regularly if I have a problem. On this occasion, I agree with the cabinet secretary that that is what people should do.

Claudia Beamish: I support the regulations. In our previous discussion, we talked about the generality of the processes for community engagement right through to the feedback at the end. I hope that our earlier conversations will help with that, because it is very important if we are to have a Scotland that really involves its communities in the processes that protect them.

The Convener: No other members have any points or queries to raise. Do you wish to wind up, cabinet secretary?

Roseanna Cunningham: No, I think that our conversation has been sufficient.

Motion agreed to,

That the Environment, Climate Change and Land Reform Committee recommends that the Environmental Authorisations (Scotland) Regulations 2018 [draft] be approved.

10:01

Meeting suspended.

10:03

On resuming—

Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 [Draft]

The Convener: Item 5 is to hear evidence on the draft Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 from Roseanna Cunningham, Cabinet Secretary for Environment, Climate Change and Land Reform, and her officials, Dr Simon Cuthbert-Kerr, head of the Scottish Government land reform unit, and Andrew Ruxton from the Scottish Government legal directorate.

I understand that you have an opening statement that will also cover the other relevant instruments, cabinet secretary, and I invite you to make it now.

Roseanna Cunningham: The secondary legislation that we are discussing will bring into force part 3A of the Land Reform (Scotland) Act 2003, on the community right to buy abandoned, neglected or detrimental land. That is land that is wholly or mainly neglected or abandoned, or the management or use of which is causing harm to the environmental wellbeing of the relevant community.

It is very important to emphasise that part 3A of the 2003 act is not intended to be the first step that a community should take when trying to buy land in order to deal with any problems that the land might be causing. The 2003 act requires that the community should already have tried to buy the land through some other means and that, if the community claims that harm is being caused to its environmental wellbeing, it should have tried to fix that harm by going to relevant regulators—that relates to the regulations that we discussed under the previous item—before applying for a right to buy.

The right to buy is powerful and far reaching, particularly as it introduces an element of compulsory purchase. It will add to the existing community right to buy, which has operated successfully for more than 15 years. Most recently, we have had the successful community buyout of Ulva.

The affirmative regulations cover the more substantive elements of the package of instruments. They are largely concerned with the matters to which ministers must have regard when considering whether land is eligible to be purchased under the right to buy as well as the prohibitions that are placed on the owner while an application is being considered.

In considering whether land is eligible under part 3A, ministers must have regard to matters that are set out in the regulations. As part 3A is a compulsory right to buy, it is right that ministers have regard to a number of different matters when considering whether land

"is wholly or mainly abandoned or neglected, or"

is being used in a way that

"causes harm … to the environmental wellbeing of a relevant community."

Regulations 3 to 5 set out matters to which ministers must have regard in relation to the physical condition, designation or classification and use or management of the land.

Regulation 6 sets out the matters to which ministers must have regard in relation to environmental wellbeing. They include whether the use of the land has caused a statutory nuisance or whether the land has been subject to a closure order or notice under the Antisocial Behaviour etc (Scotland) Act 2004.

Regulation 6 considers whether harm is being caused to environmental wellbeing. Some stakeholders want environmental wellbeing to

extend to social and economic matters. That was debated during the passage of the Community Empowerment (Scotland) Act 2015, which inserts part 3A into the 2003 act. In assessing whether land is eligible for part 3A, some social considerations can be taken into account but only if they result in harm to a community's environmental wellbeing. It is important that we do not try to stretch the meaning of environmental wellbeing too far because, if we do so, it will break in court. However, I recognise the importance of social and economic matters being taken into account, and I have instructed my officials to explore ways in which that might be achieved.

Part 3A is a compulsory purchase right and we absolutely do not want that to interfere with individuals' homes. That is why land that is someone's home is excluded under the 2003 act. However, if that land is occupied under a tenancy, it is not automatically excluded. That allows a community body to apply for land even where there is a tenant in place, but part 3A does not interfere with a tenant's rights under their tenancy and the regulations take account of protections that are offered to tenants by other legal arrangements.

The first of the negative instruments—the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Compensation) (Scotland) Order 2018—sets out how any person, including an owner, who incurs additional costs as a result of complying with the 2003 act can claim compensation under section 97T of the act. The second—the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Applications, Ballots and Miscellaneous Provisions) (Scotland) Regulations 2018—covers a wider range of subjects that relate to the process that a community must follow when applying under part 3A, including the ballot that advertises the fact of the application and what costs a community body can claim from the Scottish ministers.

I know that the committee will have questions and I am happy to answer them.

The Convener: You touched on concerns that stakeholders have raised. Will you briefly talk us through the consultation that took place on the instruments and how stakeholders' views were taken into account in developing the regulations?

Roseanna Cunningham: Yes. There was a public consultation on all the instruments. It took place from March to June 2016, following the passage of the 2015 act. In total, 51 responses were received. An analysis of the consultation responses was published in September 2016. During January 2018, a series of face-to-face meetings was held with key stakeholders to discuss the draft regulations. Those stakeholders included Scottish Land & Estates, Community Land Scotland, the Community Ownership Support Service, NFU Scotland, the Cairngorms National Park Authority and various housing groups. Additional engagement with stakeholders and community groups has also taken place.

John Scott: Scottish Land & Estates has raised questions about this. There is apparently no longer a need for an owner to be informed of an intention to exercise a right to buy, which might have an impact on their ability to defend their position. There could be further implications if the owner is not aware that their ability to carry out transactions has been limited; they might fall foul of the law inadvertently in carrying out such transactions in good faith. Why has that been changed?

Roseanna Cunningham: Some changes were made after discussion with stakeholders. I do not know whether this is what the member is asking about, but a key change was made to the restriction period and a change was made in respect of balloting information. Perhaps the Scottish Government legal directorate will want to come in on this point.

Andrew Ruxton (Scottish Government): The point raised by Scottish Land & Estates was about the restriction period, which is set out in the draft affirmative regulations. As I understand it, the provisions relating to that were changed following discussion with stakeholders, so the restriction period now starts when an application appears on the register of applications by community bodies to buy land rather than when a person is notified.

I understand that the reason for that change was that, following discussions with stakeholders, we found that there was a small window between the Scottish ministers receiving an application and it being placed on the register in which it would have been possible for a transaction to take place without the buyer or seller being aware that the right-to-buy application or prohibition was in place. The change to the regulations closed that window.

Under the current right to buy, the community body must write to the owner of the land as well as the Scottish ministers, so they will receive notice at the same time—it is not that the Scottish ministers will write out as they do currently. The concern was that, if the prohibition period started when the person was notified, there was a small window between that notification and the application going on to the register in which it could have been unreasonable to expect owners to be aware of the application process. Starting the prohibition period from the point at which the application goes on the register is a bit fairer to owners, because it is clear at that point that that is when the prohibition period starts and anything that happens before that is not affected by the prohibition. That is slightly different from what the

regulations said previously, and the change tries to address that concern.

John Scott: I should declare an interest as a landowner.

Notwithstanding what you have said, you do not appear to have convinced Scottish Land & Estates of the reasonableness of your argument. You are swapping what might be an unreasonable position in your view for an unreasonable position in other people's view.

10:15

Roseanna Cunningham: We have tried to bring clarity to the legislation and to have no more than a short space of time—no more than a day—in which people could argue that they were unaware of a situation having developed. Given that we are talking about people's property rights, the need for absolute clarity is important, so we have attempted to introduce that into the legislation. One could argue that the change will not necessarily make everybody happy, but it now removes any hours of dubiety, which might have emerged from the way in which the provision was originally drafted.

John Scott: As we are in the business of making things absolutely clear, if it is now to be incumbent on a community to make an owner aware of its intention to buy and it does not do so—for good reason or none—will that render its application invalid?

Roseanna Cunningham: Yes. Duties are placed on people, and the one that is placed on a community body is to make such a notification. I am looking to my officials for absolute confirmation of that. The community body—as well as the Scottish ministers—will now be required to notify the owner of the land. The existing right to buy does not work like that, but this one does. We are talking about the introduction of a compulsory right-to-buy element so we need to have absolute certainty for those who are in ownership of the land. We must also keep in mind that we are talking about land that is neglected, abandoned or in a detrimental state.

John Scott: For further clarity, what happens if—in the interim, and in good faith—the owner carries out a transaction before they are aware of the community's right to buy?

Roseanna Cunningham: The point about the change is that the restriction on the owner will now begin when the application appears on the register of applications rather than when the person is notified.

John Scott: But you can see my point, notwithstanding that.

Roseanna Cunningham: I can see the point. You are saying that between, say, noon on Tuesday and 9 am on Wednesday, an owner could effect a quick sale to avoid the restriction.

John Scott: Or they could do that in good faith. Things are done in good faith without there being—

Roseanna Cunningham: In effect, that is what we are talking about. We are talking about a very narrow window, which is precisely the kind of thing on which we want to bring clarity. The prohibition period now starts the minute that something appears on the register.

John Scott: But an owner would require to check the register in order for them to be informed of that position before they receive a letter notifying them of it. In the reality of the world—

Roseanna Cunningham: No—they are to be notified by the community body and by the Scottish ministers.

John Scott: In due course, but after the application has appeared on the register, so, in reality, rather than the window being from noon on the Tuesday until 9 am on the Wednesday, it is more likely to be noon on the Wednesday, Thursday or Friday before the owner is notified.

Roseanna Cunningham: In discussion with stakeholders, that was the concern about the way in which things had been drafted. By shifting the prohibition period forward slightly, we are now closing the door to that uncertainty and making it begin on registration. That is in direct response to the concern that you are expressing today.

Stewart Stevenson: I point out that I am an owner of land beyond my household.

To summarise the previous point very simply, someone can sell their land up until the moment that they get a notification from a community body of an intention to proceed.

Roseanna Cunningham: Technically, you can sell your land up to the point at which the restriction period starts, which is when the entry appears on the register. However, ministers and the community body are obliged to inform the landowner.

Andrew Ruxton: Under the provisions at the moment, when the community body applies to the Scottish ministers, a copy of that application must be sent to the landowner at the same time. The prohibition will not take place until the Scottish ministers say that the application should be placed on the register.

Roseanna Cunningham: A copy of that instruction goes to the owner as well. When we instruct that the application should go on to the register, we send a copy to the owner. The owner

is kept informed within that small space of time. However, to be crystal clear, the formal prohibition period starts when the application appears on the register.

Stewart Stevenson: So there is communication with the owner of the land that is additional to what prevailed before.

Roseanna Cunningham: Yes.

Mark Ruskell: Will there be guidance on the interpretation of the regulations and, if so, when will that come out?

Roseanna Cunningham: Yes, there will be guidance and I expect it to be available to communities shortly. We have already engaged directly with communities and other organisations and we will continue with that activity while the guidance is developed.

I would be loth to commit officials to a timetable, but the senior official here may be able to give us a bit more detail.

Dr Simon Cuthbert-Kerr (Scottish Government): We are looking to bring guidance in as soon as possible after the regulations come into force, which will be in late June or early July.

Mark Ruskell: Was there a reason why you could not provide draft guidance to inform our scrutiny of these regulations? There seem to be some issues with interpretation and it might have helped if we had had draft guidance.

Roseanna Cunningham: There has been a great deal of discussion about some of the drafting of the regulations. I think that, if we had tried to produce guidance, it would have been premature and would not have been particularly helpful. It would probably have had to be revised in any case.

The Convener: If we have exhausted that particular point, John Scott has a further question.

John Scott: Scottish Land & Estates raised another issue with regard to forestry in a letter to us, stating that

"there is no reference to forestry plans, which ... in ... a rural context"

can be quite significant. For example, post felling, land could appear to be abandoned. Should that be covered by the regulations?

Roseanna Cunningham: If land is deemed to be eligible, issues such as forestry plans and so on are taken into account in the overall consideration of the application anyway, as part of the public interest test. The regulations set out matters that ministers must have regard to, but that does not preclude other matters from being taken into account, as long as they are relevant to the various statutory tests.

Owners are asked to provide comments on the application, which gives them the opportunity to comment on any and all matters that they consider relate to the specific situations that are raised. Those comments are considered as part of the ministerial decision-making process. The issues that are being raised are things that I would expect to see an owner flag up as part of their provision of comments to the minister.

The existing right-to-buy process involves a ministerial decision, but this is much more of a subjective decision-making process for a minister. All that information will be gathered in and taken on board before the minister makes a decision, but it will very much be the responsibility of the owner to make sure that they bring to the table all the issues that they think are important in respect of the land.

John Scott: I hear what you say, but I am not sure that I am filled with confidence when you tell me that the process is more subjective than it was before.

Roseanna Cunningham: Under the pre-existing community right to buy, as long as communities go through the set process and fulfil all the various conditions—unless there is a complicating factor, such as a late application—the strong likelihood is that they will have their applications agreed. Because of the nature of the particular process that we are discussing, a huge range of issues must be taken into account. We cannot legislate for every single one of them, because every single circumstance will be different. Every single application that comes before a minister will be different from any previous application, so there is a wider ministerial decision-making power than currently exists in the definition of the present right to buy.

The Convener: A forestry plan would be a relevant consideration.

Roseanna Cunningham: Absolutely. The point about that is that owners are effectively invited to put forward anything that they consider to be a relevant consideration, in the knowledge that it will be looked at as part and parcel of the whole balance of decision making in a particular case.

John Scott: I am grateful to you for that helpful explanation.

I want to ask about why some of the transparency has apparently been taken out of the balloting process, in that it is no longer regarded as appropriate to share ballot information with those who have a vested interest in asking for it, which the 2003 act suggested would be reasonable.

Roseanna Cunningham: The option to request ballot information from a community body was

removed because of legal concerns about data protection issues. However, provision of information to Scottish ministers is already provided for in the 2003 act. As such, we believe that ministers will be able to request information where necessary. Rules of evidence would allow another party in an appeal to request such information if need be.

John Scott: I see. Thank you.

Finlay Carson (Galloway and West Dumfries) (Con): Has there been any engagement with communities that may wish to use the provisions, and do you have any indication of how many applications could come up in the coming months? Practical examples would be helpful. I know that you are aware of the issues with Drummore harbour. Do you think that the provisions will assist that community in moving things forward? At the moment, the community is getting very little help from the Queen's and Lord Treasurer's Remembrancer and other Scottish Government bodies to progress its application. Will the regulations make the process easier?

Roseanna Cunningham: The community is not currently taking forward an application under the regulations, which have not yet been brought into force. I have just indicated that it will be hard to set down a concrete list of rules that will apply right across the board, beyond what is written in the papers that are before you, because in every case there will be individual issues that will require to be dealt with. The community land team has been raising awareness of the regulations, which has included engaging directly with communities. For example, workshops were run at the Community Land Scotland annual conference just a week or so ago.

We know that a number of communities are planning to use the new regulations, but we do not have an estimate of how many applications might be made or where they will come from, so it would be a pointless exercise for me to try to hypothesise on any individual potential application that might exist in the future. Whether the community that is involved in the process that Finlay Carson has raised chooses to have a look at the new rules will be a matter entirely for it. However, I need to remind everybody that they are not a first resort set of rules; in a sense, they are a final resort set of rules.

The Convener: Let us open out the discussion. Joan McAlpine wants to ask a question.

10:30

Joan McAlpine (South Scotland) (SNP): Many of the communities that you have referred to will have been heartened by the definition of "harm to environmental wellbeing" that the previous Minister for Environment, Climate Change and Land Reform, Dr Aileen McLeod, laid out during stage 3 of the Community Empowerment (Scotland) Act 2015. That is raised in Community Land Scotland's briefing to the committee. Originally, Dr McLeod said that she wanted the definition of "environmental wellbeing" to be broad, and she suggested including

"cases where the use or management of the land causes ... harm to the community such as ... boarded-up shops"

or

"unoccupied housing".—[*Official Report*, 17 June 2015; c 116.]

A community group in my constituency is very interested in buying back the high street, and it will have been inspired by Dr McLeod's laying out of that definition.

Community Land Scotland says that the regulations that you have laid are so tightly drafted, with land having to be seen as being subject to environmental protection notices, that it might not be able to go forward with its plans. What reassurances can you give to such organisations that we have not backtracked on the legislation?

Roseanna Cunningham: I cannot go into the details of discussions that took place three or four years ago. I was not involved in them, so it is difficult for me to refer to the details of those conversations and how they have been construed. However, the regulations will allow communities to take action where the use or management of land is causing harm to the community's environmental wellbeing. They will also allow some social considerations to be taken into account where issues lead to harm to environmental wellbeing.

The environmental wellbeing elements of the regulations will provide powerful opportunities for communities. However, the term "environmental wellbeing" has a particular meaning in law, and it is not possible to make it mean something beyond what that is. I know that stakeholders are keen to ensure that a wider range of issues can be taken into account when the eligibility of land is being determined. Therefore, rather than trying to fit those concepts into a definition of "environmental wellbeing" in the knowledge that that is likely to be subsequently rejected, it is better to explore other options for how we might achieve those ends, because we still want to achieve them.

There are two potential ways to look at the matter. One option is to amend the 2003 act so that specific issues can be taken into account. I have asked my officials to look at ways in which that can be done effectively. The other potential option is to look at the regulations that will emanate from part 5 of the Land Reform

(Scotland) Act 2016, on "Right to buy land to further sustainable development".

We are actively pursuing other ways to manage the matter. If we try to press ahead with the pre-existing idea that environmental wellbeing can be stretched as far as people currently want it to be, it will come apart at the first test. That would not help anybody, because we would end up in a situation in which the first challenges led to failures.

Joan McAlpine: How can the committee have confidence that we can make things work? Would it not be better if we waited to see what your officials came back with once you have had the time to consider how we can make that happen?

Roseanna Cunningham: I presumed that the committee would want the regulations to be brought into force as soon as possible, while we explore ways in which we can ensure that what I know people want to apply applies. If the regulations do not come into force now, there will be nothing for communities under the right to buy in question, and I assume that most communities—and, as I understand it, Community Land Scotland—want them to go ahead.

Joan McAlpine: Community Land Scotland suggested some new drafting for the regulations in the appendix to its submission, which I am sure that you are aware of. Was there a problem with its suggestions?

Andrew Ruxton: The issues in question were considered by the Government. The main issue is a vires issue, which is to do with whether the concepts that are set out are things that relate to a community's environmental wellbeing. There is a secondary concern about the width of some of the concepts and the fact that that might create a European convention on human rights issue for owners of land in being able to arrange their affairs in such a way that they do not fall foul of the regulations in how they use their land.

The main issue for some of the wider considerations, such as economic or social wellbeing, is that, as the cabinet secretary said, they involve a stretching of what can be done under the current primary legislation, which relates only to environmental wellbeing. The primary legislation tries to widen that by saying that harm to environmental wellbeing can include harm that has an adverse effect on the lives of persons in the relevant community; in recognising that, it is not strictly focused on environmental concerns. It takes into account the impact that those environmental concerns can have on the lives of people in the community.

Joan McAlpine: People are encouraged by the fact that the primary legislation does that, but have you tested the regulations? The land or building in question must be subject to a closure notice, an antisocial behaviour notice or a statutory nuisance notice. Have you explored the instances in which such notices are issued? It is my understanding that those circumstances are quite tightly defined. How many antisocial behaviour notices or statutory nuisance notices are issued? In my community, there are constituents who come to me about land the use of which any reasonable person would think was creating a statutory nuisance, yet the local authority does not issue nuisance notices.

Roseanna Cunningham: I remind members what I said in answer to an earlier question. The process that we are discussing is not meant to be a first resort; it is meant to be a process that is used when all other avenues have been exhausted. Instead of leaping straight to it, people should try to fix the harm first. There is perhaps a tendency for people to presume that what is proposed is a right to buy that they can go to as a first resort, but it is not designed to be that—the primary legislation says that it is not designed to be a first resort.

If I were in a community body's position, I would look very carefully and widely at what had and had not been done in respect of particular properties and what other processes and routes were already available. This is not designed to be a first choice of action. There is a danger that people might become caught up in the notion that it is a first resort, but it is not.

The Convener: Several members are keen to come in on that specific point.

Finlay Carson: I have a question off the back of Joan McAlpine's example. In a previous evidence session at the committee—I apologise, but I cannot remember exactly when it was—I asked whether the regulations would give community bodies the right to buy flats above high street shops that had been abandoned and so on, and I got the feeling that that was exactly what the new legislation could do. It appeared that the provisions would allow communities to make decisions about the adverse effect that such abandoned flats have on people's lives. However, it sounds as though you are backing off from that position.

Roseanna Cunningham: No—what you describe remains the case; the legislation may very well allow for such things. However, it would depend on the specific circumstances and issues that relate to a particular property. I know that some properties end up being used for illicit purposes and that antisocial behaviour orders might be in place, but that would all be part and parcel of the individual circumstances.

I am trying to make the point that in much of the discussion there is a presumption that communities can go straight to the right to buy, but that is not the way in which the provision is designed. It was never intended to be a first resort. In the case of the hypothetical block of flats, there might very well need to be some years' worth of action to address an issue, before use of the provision becomes the appropriate way forward. Other means have to be tried and exhausted first.

I remind people that other right-to-buy options are also available and that the provision on abandoned and neglected land is not the first right-to-buy measure. There is currently a right to buy in urban communities that can also be brought into play. The provision adds something, but is not the be-all and end-all and was never intended to be.

A hypothetical block of flats could have a whole set of issues that might mean that the new provision was applicable; equally, those issues might not be enough, or there might not have been enough activity to address them so as to exhaust the other options before getting to the right-to-buy stage. That is the point of the regulations.

Stewart Stevenson: I am looking at section 79 of the Environmental Protection Act 1990.

Roseanna Cunningham: I am afraid that I did not bring my copy with me. [*Laughter*.]

Stewart Stevenson: I have mine in front of me. The definition of a statutory nuisance in section 79(1)(a) is:

"any premises in such a state as to be prejudicial to health or a nuisance".

There is, of course, more to it than that, but that definition is a helpful starting point.

A village that was previously in my constituency before the boundaries were changed had a derelict building on its high street that was accepted as being a nuisance by the local authority. The difficulty was that the owners were hidden in Panama and it took 10 years to find the decision maker. Based on my experience, I suspect that there is enough power—to which we are adding today—to deal with the most egregious cases, such as those that we have been discussing, but that does not address the particular issue of finding the owner, which is often the key to reaching a resolution—perhaps before the point of invoking the regulations that we are discussing. Ultimately, that issue can be solved only by communication, rather than by the law. Is that a fair comment?

Roseanna Cunningham: Yes, it is.

I suspect that most members have experience with properties whose owner has been lost in the mists of time. Even managing to track an owner to the Bahamas—

Stewart Stevenson: It was Panama.

Roseanna Cunningham: —or wherever, would be an advance on some experiences that we have had.

Establishing ownership can be an issue; it is an existing issue for local authorities that are trying to progress compulsory purchase orders. Difficulty in establishing ownership is an underlying problem in any such process and it is not a problem that we can fix overnight.

10:45

Stewart Stevenson: The problem of foreign owners may not be one that this Parliament can fix.

Roseanna Cunningham: That is the case in relation to foreign-registered owners.

The Convener: A number of members want to come in. I will summarise where I think we are—the cabinet secretary can correct me if I am wrong. Notwithstanding the concerns that have been expressed—which I understand, having served in the previous session of Parliament—if we do not support the regulations today, there will be nothing to allow progress to be made, and it could be some time before the Government works through the concerns, as the cabinet secretary has committed to doing, and replacement regulations are produced. Potentially, a number of projects might therefore not be brought to fruition. Is that what you are saying, cabinet secretary?

Roseanna Cunningham: Yes. If the draft regulations are not supported, the right to buy—for any of the reasons set out in the regulations—will not be available.

We have had an interesting discussion about a number of communities that will be in a position to take action, even with the regulations as drafted. I assume that most of them would like to reach that position sooner than will be the case if we halt everything to wait for a solution to the bigger problem. That is the reality.

None of us wants to be in the position that we are in. Ideally, I would be able to make words or phrases mean whatever I want them to mean. The committee has experience of this kind of discussion in dealing with previous legislation. The courts will apply the normally understood meaning of words: that is where we are. We run into difficulties when we attempt to stretch the normally understood meaning of words, so we must find a different way to fix the problem.

We have had a good conversation about how the regulations might not be as restrictive as they look at first glance.

Claudia Beamish: I want to build on that conversation. I still have concerns, having been involved in taking evidence on the 2015 act in the previous session of Parliament. As Joan McAlpine has already highlighted, Dr Aileen McLeod made a commitment at stage 3 of the act, saying,

"I reassure members that the definition of environmental wellbeing has a wide meaning and encompasses some social considerations."—[*Official Report*, 17 June 2015; c 118.]

I listened very carefully to what the cabinet secretary said and I understand that there can be legal challenges to any law. First, in what I hope will be my brief line of questioning, it would be helpful if the cabinet secretary could clarify the definition in law of "harm to environmental wellbeing", which I understand made the Scottish Government decide to back away from the draft regulations that were under discussion, and which have now been withdrawn.

Roseanna Cunningham: This conversation highlights where some of the difficulties lie. The feeling is that a court might construe the phrase "environmental wellbeing" in a particular way, and not necessarily as widely as we all might want. When we looked into the matter, it became clear that some of the "social considerations" that Dr Aileen McLeod talked about are still applicable—we have talked about some of them today.

The definition currently includes antisocial behaviour orders, which have been imported, so we are beginning to look at wider social considerations. Stewart Stevenson's helpful reference to the Environmental Protection Act 1990 suggested another wider definitional opening than people might be thinking of. We are all trying to get to the right place; the issue is whether we can do it in precisely the way we first thought that we could do it. That is where the problem arises. We now have to find a different way of achieving exactly the same end.

Claudia Beamish: I understand what you are saying and I agree that effective legislation is important. That is why I have concerns about the possibilities. You said that your officials are looking at the 2003 act and part 5 of the Land Reform (Scotland) Act 2016 in relation to sustainable development. As we all know, we are dealing with complex issues. I am concerned that if the investigations do not come up with an answer, the regulations will not be the effective legislation that Dr Aileen McLeod and those of us who were involved in the process then were expecting.

I will highlight to you the three things that have, I understand, been withdrawn from the previous draft. Please correct me if I am wrong. In the earlier draft, regulation 6 said:

"the extent, if any, to which the use or management of the land has, or is likely to have, any detrimental effect on—

(i) the amenity and prospects of the relevant community;

(ii) the preservation of the relevant community or its development;

(iii) the social development of the relevant community;"

From my perspective as a lay person who went through the bill process and spoke in debates, I do not understand in what ways we would be risking court challenges by including those aspects. For that reason, I am concerned about the regulations' being supported today. I agree that they represent a last resort, but that does not mean that we must risk getting it wrong.

Roseanna Cunningham: We will not get it wrong by supporting the regulations today. In relation to those wider issues, our point is that their inclusion will simply take us beyond any reasonable definition of environmental wellbeing, so the definition would fall apart in the court.

Claudia Beamish is shaking her head. I am sorry, but—

Claudia Beamish: That was my understanding.

Roseanna Cunningham: That is the reality in which we have to live. If the regulations were to end up in a court, the court would say that environmental wellbeing is not all the things that we might want it to be. Even a Parliament cannot override that.

Claudia Beamish: I am not suggesting that, cabinet secretary. I am asking what definition is being used that prevents the inclusion in the regulations of those subparagraphs from the previous draft. How can I, in good faith as a member of the committee, vote to agree to the motion on the regulations when I do not know whether the other two possibilities that your officials are working on—also in good faith—might give us the answers that communities need?

Roseanna Cunningham: If the committee does not vote to support the regulations today, that will be a matter for the committee. However, there will then be nothing available.

Claudia Beamish: I understand that.

Roseanna Cunningham: We have had a discussion today about what can and cannot be done under the regulations as drafted. If the regulations are not supported, none of what could be done will be available to any community, although many properties that communities are considering would fall within the regulations'

definition and way of approaching the issue. We all want to get to the same place, but what Claudia Beamish is proposing is not how we can get there. I cannot ask Parliament to support regulations that would have to be struck down because they were simply beyond the bounds of what is legally possible for us.

Claudia Beamish: It is not only Community Land Scotland that has raised concerns. We also took evidence on the 2015 act from the Development Trust Association Scotland, the Community Woodlands Association, the Scottish Community Alliance and the Scottish Land Commission, and Dr Aileen McLeod gave the commitment that I mentioned. I find myself in a difficult position today, and I need that to be recorded officially.

The Convener: None of those other bodies has come back and raised concerns about the instrument.

Claudia Beamish: I am sorry if I was not clear, but my understanding from Community Land Scotland is that the provisions that have been removed were also endorsed by those other stakeholders. I am simply saying that that puts me in a difficult position.

John Scott: Certainly, parties other than Community Land Scotland are voicing concerns, including Scottish Land & Estates and Historic Houses. Given what Claudia Beamish has just said and the quotation from Dr Aileen McLeod that she mentioned, it is worth noting that Dr McLeod went on to say:

"we were not able to consult fully on extending the right to buy beyond what I have proposed in the Government amendments in the group. If Parliament were to widen the circumstances in which communities can acquire ownership of land through compulsory purchase, we would want to be clear about the evidence of the harm that the proposals would address and to consult on that to find a proportionate solution."—[*Official Report*, 17 June 2015; c 118.]

I am not sure whether that consultation has ever taken place. Has it?

Roseanna Cunningham: The consultation that followed the passing of 2015 act was set out in March 2016.

John Scott: Was environmental wellbeing included in that?

Roseanna Cunningham: The consultation would have been on the regulations as a whole.

John Scott: I see.

Stewart Stevenson: Regulation 6(1)(a) includes the words:

"whether the use or management of the land or any building or other structure on the land has resulted in or caused, directly or indirectly, a statutory nuisance",

and regulation 6(2) states that

"'statutory nuisance' means a statutory nuisance within the meaning of section 79(1) of the Environmental Protection Act 1990".

I find that we are importing from section 79(1) of the 1990 act quite a long list of statutory nuisances in order that we can empower communities to act. As I have found in my constituency, communities have had to follow a tortuous route using the local authority and the existing legislation and without having a direct power.

Is it the case that by importing that definition of "statutory nuisance" from the 1990 act, we will give a direct power? Whereas previously it was local authorities that were enabled to take action when there were statutory nuisances, now communities will be able to take action when there is a nuisance to

"the amenity and prospects of the relevant community"—

for example from a derelict building—or to

"the preservation of the ... community and its development".

I am not quite so clear about "social development".

Community Land Scotland makes the point that

"Environmental wellbeing is not being defined in the bill"

because it wants

"it to have a broad meaning".

However, to restrict the meaning to the 2003 act and not look at the 1990 act's provisions that define "statutory nuisance" is where there is a bit more to the matter than what Community Land Scotland has been saying to us.

Roseanna Cunningham: That has, in part, come out of our conversation. The regulations will allow far more leeway than there would be if we were to look at the issue in a very narrow sense. The regulations import direct reference to other legislation including, interestingly, antisocial behaviour legislation. That brings into the regulations quite a lot of the things that communities would like them to include, and it does so quite explicitly. That opens up the potential for communities to act.

11:00

That will mean that communities have to think carefully about building a case, and will have to be able to show that the nuisance falls into one of the categories. However, the inclusion of the categories means that the rationale for any action can be wider than people might have thought, at first glance.

The Convener: Mark Ruskell and Angus MacDonald want to come in on that point. After that, we will need to move on.

Mark Ruskell: The issue that we are discussing again emphasises the need for guidance. I acknowledge that you have given a commitment on the timescale in which that guidance will be produced, but I would like a couple of other commitments on timescales. You mentioned two reforms: the possible amendment to the 2003 act and a look again at part 5 of the 2016 act, on sustainable development. When will those reforms be made?

On a related point, none of us sitting here today can predict exactly how the regulations will pan out, whether they will restrict communities that have a good case for applying under the compulsory right to buy from doing so, and whether they will provide a robust legal definition that will allow a case to proceed through the courts. I am interested in how the implementation of the regulations will be monitored. Further, if the regulations do not fulfil the original intentions that were set out by Aileen McLeod, what is the prospect of there being an opportunity for us to look again at the definitions?

Roseanna Cunningham: I have already given a commitment to consider the other options. At the moment, regulations around part 5 of the 2016 act are pencilled in to be made next year. However, I do not know whether, if those become a suitable vehicle for doing something, next year is a reasonable timescale, particularly if the issue also has to be looked at in the context that we are discussing today. It is difficult for me to give you a timescale for the regulations around part 3 of the 2016 act, because the work around that involves a long, hard, serious look at all the issues before any regulations are drafted.

The guidance on the regulations will have to be explicit about the issues and the other statutory references that have been brought into play, so that people understand the variety of things that they can consider in relation to this kind of right to buy. Community bodies will need to be able to read the guidance easily and clearly, and we have committed to having that guidance done by the summer.

You asked about the monitoring of impact and performance. You should not forget that these things will land on my desk, so I will be able to see—very quickly, I presume—whether people are beginning to use the process. At that point, we will be able to ask questions such as are asked at the moment about the number of right-to-buy applications that have been made over the past however many years, and we will be able to break down all the information on whether they were withdrawn late or whatever. There will be a constant ability to establish how often the provision is being used, and I presume that, after a period of time, we will also be able to see the success rate of the process.

Further, the Scottish Land Commission will be able to play a role in monitoring its impact and performance. I have asked the Scottish Land Commission to look at the number of lay applications in the normal community right-to-buy scenario, because it worries me slightly that communities are leaving it late to submit their applications. If issues began to arise as a result of that, asking the Scottish Land Commission to do a piece of work on that would be an option, too.

I expect the monitoring to be on-going—as we continue to monitor the performance of the normal right to buy, we will continue to monitor the performance of this right to buy, too. The monitoring will begin almost as soon as the first applications appear, so the process will start almost immediately.

Mark Ruskell: Assuming that the regulations are supported, is it realistic to expect monitoring ahead of the part 5 redefinitions, so that we can assess any impacts of changes in the definition of sustainable development in the early days of the regulations?

Roseanna Cunningham: This is an entirely demand-led process—I am entirely in the hands of communities about how quickly they begin to feed in applications. If I get relatively early applications, the answer is yes. However, if applications do not come forward for a while, as communities consider whether this right to buy is the appropriate way forward or whether there is another route for them, I cannot say yes. I expect that at least some of the applications will come forward before we are in the process of producing the sustainable development regulations, next year.

Mark Ruskell: If part of the issue is applications not ending up on your desk because communities are put off, how would you monitor that?

Roseanna Cunningham: We would do that as we currently do. We always tell communities that, when they first consider anything under the right to buy, they should get in touch with the Scottish Government's community land team, who will immediately start to give assistance, which is what they do at the moment. Communities are in touch with the community land officials, usually from a very early part of the process, and I expect and hope that that will continue to be the case. When communities start to think about the right to buy, they should be in early conversation with community land officials.

A couple of members have cited an example from Dumfries. However, to my knowledge, the community has not yet contacted officials. I strongly urge it to do so at the earliest possible opportunity, because officials can often steer the

community in the right direction, which helps an application to go through much more smoothly than it might do if a community goes off in the wrong direction.

Angus MacDonald (Falkirk East) (SNP): It is fair to say that we all want to see the key policy intention being underpinned. I will develop the monitoring point. Community Land Scotland has called for a review of the effectiveness of the regulations in meeting the policy intentions within three years of their implementation, should they be supported today. It has also called for a further commitment that the Government will make any necessary amendments to the regulations and/or the primary legislation to ensure that the community right to buy underpins the original policy intention. Is there any commitment or intention to do that?

Roseanna Cunningham: I am sorry—is your first question about whether there will be a review in three years' time?

Angus MacDonald: Yes.

Roseanna Cunningham: I remind everybody that, three years from now, we will just have had an election, so that is a slightly problematic timescale.

Angus MacDonald: That is what Community Land Scotland is calling for.

Roseanna Cunningham: I understand that but, three years from now, we will just have had an election. We want to keep the regulations under continual review, so that people can see that they are working—perhaps better than they thought. I would not want to have to wait for three years before I flagged up—for example, to the Scottish Land Commission and officials—that issues were beginning to develop.

The danger of setting a requirement for a formal review in three years' time is that, between now and then, we would just be letting things chunter on. I am not sure that I want to be in that place, because, at the same time, we will be developing other regulations and will need to constantly check how the community right to buy regulations are working in practice as we consider what else we can fix to widen the approach. The two things will be going on side by side.

You asked about the timescale for making other regulations, and I indicated that the sustainable development regulations are due next year. If they are considered to be the appropriate route, people might be delayed by a couple of months but probably no longer than that. If it is a question of coming up with an entirely new route, I would not like to be tied to a timescale, but it would be reasonable to say that the issue can be sorted in the current parliamentary session.

Joan McAlpine: Cabinet secretary, you have made it clear that, if we do not agree to the regulations, there will be nothing in their place. That is why I will support them despite serious concerns about them.

Your answers to me and Stewart Stevenson about the broad options that are open to communities were helpful. In many communities, there are empty buildings that are not being used for criminal activities or illegal parties. They are not overrun by vermin and they are wind and watertight. However, they are lying empty because of land banking, and they are causing serious social harm to communities and community development. Will the regulations help in such cases?

Roseanna Cunningham: I hope that we can develop a way of dealing with cases like that through legislation. That is what we are trying to do. However, we must be mindful of the need to keep the Parliament within the law and ensure that what we do is legally robust and compliant with the ECHR. Everyone loves the ECHR when it suits them, but people are not so keen on it when it begins to be a problem for them, as is the case in such circumstances.

My officials have handed me something to read, and my eyesight is so poor that I will have to hold it at arm's length if I am to read it. The regulations provide that "use or management of land" includes consideration of

"the length of time that the land, buildings and structures have, as the case may be—

(i) been used or managed as identified under paragraphs (a) and (b); or

(ii) not been used or managed for any discernible purpose."

Therefore, the fact that a building is not being used or managed for a discernible purpose can be considered.

Joan McAlpine: That is helpful.

Roseanna Cunningham: The point that is emerging is that the guidance needs to be clear. It will have to refer to other legislation and other considerations, but it should make clear what people can take into account, and it should put everything together simply and straightforwardly in one place so that people can think about whether the regulations give them a route forward.

As I have said twice, there will have to have been other attempts to fix the problem. A community must have considered other ways of proceeding. Could it directly approach the owner? It must have exhausted other actions before it resorts to this right to buy—that is something else that we must make crystal clear in the guidance. If people are in touch with officials, the officials will

flag that up and will ask them what they have done already. Those officials will then be in a position to say, "Yes, you have done what we expect you to have done and it is now appropriate to proceed with this community right-to-buy application."

The Convener: I am conscious that members have one or two more questions. I suspect that Stewart Stevenson has one on mineral rights.

Stewart Stevenson: Yes, indeed. As the committee's self-appointed geek—

Roseanna Cunningham: You are every committee's self-appointed geek.

Stewart Stevenson: Indeed, cabinet secretary.

On 6 March, I raised issues about mineral rights. All I need say is that I am content with the rewording that has resulted from that, which more clearly separates mineral rights from other rights. Of course, in legal terms, mineral rights are rights to land, although it is not what we would commonly identify as land. I thank the minister and her officials for responding to my geekish inquiry of a couple of months ago.

11:15

Roseanna Cunningham: There is nothing that I need to add to that.

The Convener: As there are no other questions, we move to the debate on the motion.

Motion moved,

That the Environment, Climate Change and Land Reform Committee recommends that the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 [draft] be approved.—[*Roseanna Cunningham*]

Claudia Beamish: From the evidence that I have heard, I do not feel able to vote for the motion. The evidence has given me some reassurance about the two areas of work that the Scottish Government will take on in future in relation to the 2003 act and in relation to sustainable development under part 5 of the 2016 act.

I appreciate that the issues are complex and I have listened carefully to the arguments that the cabinet secretary made about the risks to communities of delaying the secondary legislation. However, the legislation must be clear and effective and I cannot vote for the motion because I would be letting down a considerable number of stakeholders in relation to regulation 6. Especially as the issue is a complex backstop, I cannot vote for the motion without hearing about the other arguments and having some reassurance on them.

Stewart Stevenson: It was helpful to have the cabinet secretary confirm that the regulations imported some existing provisions, but created new powers for communities to use them and did not leave their use confined, as it previously was, to local authorities or other statutory bodies. In particular, it strikes me that importing an understanding of statutory nuisance into the regulations gives us the confidence that communities have a backstop power and that we are adding useful powers.

I encourage colleagues who are wrestling with doubts on the regulations at least not to oppose the regulations at this stage, even if they wish to withhold support for them because, from the discussion, we seem to have a shared view that the regulations take us forward. We differ only to some modest extent as to whether they take us sufficiently far forward or whether that can be seen only in the context of subsequent legislation.

John Scott: It is remarkable that this affirmative instrument has satisfied neither members who are in favour of a right to buy nor those who are against it. I am not certain about the instrument at all. It is possibly a work in progress. I am still making up my mind as to whether I should support it, because it is incomplete. The cabinet secretary says that it is a matter of urgency, but it has been a matter of urgency since 2003.

Roseanna Cunningham: I am not aware of any stakeholders who want the legislation to be withdrawn or for it not to go through today.

The Convener: From my perspective, the consensus is that we are not in an ideal situation, but that by not supporting the legislation we would be letting down very many more stakeholders than if we were to support it. Cabinet secretary, given your commitments to explore other means of achieving the desired outcome, I will, with some concerns, support the legislation.

Do any other members wish to comment?

Alex Rowley: Convener, you have just made a point about commitments that have been given. People perhaps felt that about Dr Aileen McLeod's assurances back in June 2015.

Richard Lyle: Committee members have mentioned several projects in the last wee while. If we do not support the legislation, those projects will be totally stopped and the members who voted against the legislation will need to go back and explain why they did so. I will support the legislation because I think that we have to move forward.

Mark Ruskell: I sense a lot of disappointment that the legislation does not meet the intention that Dr Aileen McLeod laid out several years ago. There is a shared frustration all round: everybody

in this room wants an effective statutory instrument to come in, one that will give the strongest possible backstop powers to communities to bring neglected and abandoned land and buildings back into use.

On balance, I am prepared to support the legislation. Today, I have heard some commitment about regulations being pencilled in. I hope that they can be inked in, so that we will know when the legislation is coming and can timetable it. Then, as a committee, we will be able to go back and look at the first year of operation, see how it has been doing, get evidence from stakeholders and, I hope, look forward to a tightening up of the other aspects of legislation that are needed to enact fully what was promised several years ago. I will back the regulations as a small first step towards delivering what communities in Scotland need, but there is obviously a lot more to do to build on that and deliver what we all recognise as an important power.

The Convener: As no other committee member wishes to comment, I ask the cabinet secretary whether she wishes to wind up.

Roseanna Cunningham: No. I have said everything that needs to be said.

The Convener: The question is, that motion S5M-12209, in the name of Roseanna Cunningham, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cameron, Donald (Highlands and Islands) (Con)
Carson, Finlay (Galloway and West Dumfries) (Con)
Dey, Graeme (Angus South) (SNP)
Lyle, Richard (Uddingston and Bellshill) (SNP)
McAlpine, Joan (South Scotland) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Ruskell, Mark (Mid Scotland and Fife) (Green)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Beamish, Claudia (South Scotland) (Lab))
Rowley, Alex (Mid Scotland and Fife) (Lab)

The Convener: The result of the division is: For 9, Against 2, Abstentions 0.

Motion agreed to.

The Convener: I suspend the meeting for a few minutes to allow the cabinet secretary to depart. I thank her and her officials for their time.

11:23

Meeting suspended.

11:25

On resuming—

Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Compensation) (Scotland) Order 2018 (SSI 2018/137)

Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Applications, Ballots and Miscellaneous Provisions) (Scotland) Regulations 2018 (SSI 2018/140)

The Convener: The fifth item on our agenda is consideration of two negative instruments. I invite comments from members.

John Scott: The same arguments and same uncertainties surround these instruments as the draft regulations. I still have particular concerns about them. However, we are where we are.

The Convener: Does the committee agree not to make any recommendations in relation to the instruments? Are we agreed unanimously, bearing in mind the concerns expressed by John Scott?

Members *indicated agreement.*

The Convener: At our next meeting on 5 June, and subject to the publication of our report, the committee will take evidence from the Scottish Government's European Union environment and climate change roundtable. The committee will also consider a petition on drinking water supplies in Scotland, subordinate legislation on the use of microbeads and the "Code of Practice on Litter and Refuse (Scotland) 2018".

11:27

Meeting continued in private until 12:43.

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