OFFICIAL REPORT
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Environment, Climate Change and Land Reform Committee

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Tuesday 25 September 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

26th Meeting 2018, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (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:

James Hamilton (Scottish Government)
Megan MacInnes (Global Witness)
Dr Calum MacLeod (Community Land Scotland)
Jason Rust (Scottish Land & Estates)
John Sinclair (Law Society of Scotland)
Ann Stewart (Scottish Property Federation)
Charles Stewart Roper (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 25 September 2018

[The Convener opened the meeting at 09:31]

Decision on Taking Business in Private

The Convener (Gillian Martin): Welcome to the 26th meeting in 2018 of the Environment, Climate Change and Land Reform Committee. We have received no apologies. Before I move on to agenda item 1, I remind everyone to switch off mobile phones, because they might affect the broadcasting system.

Agenda item 1 is to make a decision on whether to take items 4, 5 and 6 in private. Do members agree?

Members *indicated agreement.*

Subordinate Legislation

Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 [Draft]

09:32

The Convener: Agenda item 2 is an evidence-taking session on a piece of subordinate legislation. I welcome to the meeting Megan MacInnes from Global Witness, Dr Calum MacLeod from Community Land Scotland, Jason Rust from Scottish Land & Estates, John Sinclair from the Law Society of Scotland, and Ann Stewart from the Scottish Property Federation.

We will move straight to questions. Having looked at your submissions, I note that most, if not all, of your organisations have commented on whether it is right to have separate registers for registration and for controlled interests. Just to start the conversation, I want to ask everyone on the panel a good opening question. Would consolidation of land registration data to include controlled interests be more effective than the creation of a separate register? Perhaps we can go from left to right on that.

Jason Rust (Scottish Land & Estates): Thank you, convener, and thank you for the opportunity to address the committee.

The starting point for Scottish Land & Estates in the early consultation was that having another register might be too much and that we should look to consolidate and include the information in the land register system. After all, we already have the land register and the register of sasines, and given the new registers that are coming on board to deal with abandoned and neglected land and sustainable development—the crofting registers and what have you—Scottish Land & Estates was concerned about the potential burden on the keeper of the registers of Scotland.

However, after discussions with the Scottish Government, we have come round to the fact that the direction of travel is the creation of a separate register, and our key concern now is to ensure that what is introduced is workable in practice and is as clear and transparent as possible.

Dr Calum MacLeod (Community Land Scotland): I thank the committee for the invitation to give evidence on this important issue in Scotland's on-going land reform journey.

Community Land Scotland's position is that, in an ideal world, it would have been useful to have all the information in a single consolidated and integrated register. That is clearly not the position, because there are several other registers that

separately hold information on various aspects of land ownership, tenure and so on. That being the case, Community Land Scotland suggests that the key challenge, as we said in our submission, is to ensure that the register that will be introduced as a result of the regulations is as cohesive, integrated and accessible as possible in relation to the information that is to be put in the register and, crucially, for its users. We will come on to discuss a variety of enforcement and implementation issues, but those are the critical elements.

As we said in our submission, CLS is pleased that, as far as we understand it, use of the register will be free, which is a helpful development. The key challenges relate to how the register will be implemented and the associated issues.

Megan MacInnes (Global Witness): I thank the committee for giving me the chance to give evidence. I am here to represent Global Witness only; I am not here in my capacity as a land commissioner, so nothing that I say should be taken as being the position of the Scottish Land Commission or the Scottish Government.

I will say something that very much reflects what the previous two speakers have said. Initially, Global Witness took the position that a register of who owns land in Scotland would be best placed as part of Scotland's existing land register. We agreed with the range of reasons why that approach would lead to the easiest access to the information. However, we are on a different path in terms of how the registers will now operate.

Our concern is that the register should be user-friendly and easily accessible to the general public, because the purpose of the register is to make the information more easily accessible, in the public interest. We hope that combining access to all the different registers through the gateway of the ScotLIS system will overcome some of the current problems about how the registers will be integrated.

That is our position. It is not what we initially recommended when the proposal was in the Land Reform (Scotland) Bill, but using the ScotLIS system as a portal to access the information is a good solution for the route that has been chosen.

John Sinclair (Law Society of Scotland): The Law Society's view is that there should be separate registers. The land register is a register of land ownership, whereas the register of controlled interests focuses on different issues. If we were to bring the ROCI into the land register, that would cause confusion and disrupt the land registration process.

I agree that accessibility is an important part of the issue. The information will be fragmented among separate registers, anyway—as well as the land register and the ROCI there is the register of persons of significant control and eventually there will be our register of overseas entities.

The Convener: You said that combining the registers would

"disrupt the land registration process."

Could you give us a bit more detail on what you mean by that?

John Sinclair: The concern is that the more information that does not relate to ownership that is put into the land register, the more confusion will be caused. There could, for example, be confusion about whether someone needs the third party's consent to do any transactions on the property. It would bring into the register issues that are not core to transferring land.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I wonder whether the register as it currently exists has already crossed that line. For the sake of argument, things such as the registration of the heritable right of access to a bit of land will be in the register, but that, of course, is not associated with ownership. Similarly, the granting of a real burden that relates to a heritable right of access on the part of another person will be in the register. Is the principle that there is information about other people that does not relate directly to land transactions already in the existing register?

John Sinclair: Yes. The register goes beyond ownership and deals with other real rights in land—real burdens, servitudes and securities. When the Land Registration etc (Scotland) Act 2012 land register was brought in, there was a debate about whether the status of matrimonial homes, for example, would be included. I think that, at that stage, the policy decision was made that the desire was to keep the land register real in the sense of including real rights, so servitudes, burdens, securities and ownership were dealt with, but not things such as non-entitled spouses.

A range of information can be put into a land certificate—about things such as public rights of way—that is not real in the same absolute sense as information about ownership, real burdens or servitudes, but which will still bind successors. I think that the issue with controlled interests will be that they do not tend to relate to real rights. Issues of influence and control are more nebulous. For example, there might be a concern that, if someone was listed as having influence or control, their consent would be required, but there is no hard legal analysis of why that would absolutely be required. That sort of information will invite people to ask more questions than is absolutely necessary. That sounds as though we are trying to hide information, but it is more about keeping the transfer of land simple and objective.

Ann Stewart (Scottish Property Federation): I thank the committee for the opportunity to give evidence on behalf of the Scottish Property Federation and its members.

There is a variety of views among the membership of the SPF. Principally, we think that pushing on with the completion of the land register will be a significant contribution to transparency of ownership, although I appreciate that we have a slightly different issue with controlled interests. Our clear view is that, whatever the process is, and whether there is a single register or a separate register, that process should be simple and straightforward and should not be a hurdle for or an obstacle to inward investment in Scottish land and property.

There is a lot of information that the registers must have—statistical information and so on—which, were the resource available, would allow them to establish quite a bit of information or to allow the interrogation of owners of land based on information that was already in the land register. However, I think that that is impractical from a resource perspective. It is, of course, harder to interrogate the register of sasines.

For simplicity, there is an appeal to having an extra box to tick on an application form or something of that sort that would populate a register with that information. However, that has to be tempered by the concern about access to the information, some of which would be commercially sensitive. How that information, whether it is in the land register or a separate register, can be accessed, by whom and for what reasons needs to be considered.

09:45

John Scott (Ayr) (Con): I will start where Ann Stewart finished, because I want to discuss the process of accessing information. Global Witness and Community Land Scotland highlighted that the process of accessing information in the register could be onerous. Ann Stewart has already highlighted concerns about that, and others might want to talk about their key concerns around the proposed process of accessing information. How could the process be simplified?

Ann Stewart: ScotLIS, which has been mentioned already, provides a potential model, because it has two tiers of access. It has open public access, which provides a limited amount of information, and it has registered-user access. At the moment, legal firms access ScotLIS through their registration for other services, application forms and all the rest of the things that we need for land registration. There is a paywall through which they go to download quite a bit of information, but there is still quite a bit of free information.

If ScotLIS is to be the receptacle for the information, or even just an element of the register, the slightly more restricted access level would mean that people with a genuine interest in accessing that information would have that step to go through before they could retrieve the information. That would be one approach.

John Scott: Do others have views on the difficulties in accessing information?

Megan MacInnes: Global Witness picked up on the issue in our submission. In our view, the model that has been proposed in the draft regulations is not particularly user friendly. The situation is further complicated by the fact that the draft regulations exclude certain entities that are currently involved in land, because of the fact that they already provide beneficial ownership information to other registers—for example, the register of people with significant control, or PSC register—at United Kingdom level.

The consequence is that a member of the public who wants to access information about who owns a particular piece of land will have to go through a number of steps. First, they will have to access the land register or the register of sasines to find out the name of the entity that is registered as the owner of the land, then they will have to work out where they can find the beneficial ownership information for that entity, and then they will then have to go to the correct register to access that information—the new register of controlled interests or the PSC register, for example.

A third layer of complexity has been introduced by the UK Government's proposed new regulations on foreign entities, which will create an entirely different register that will also be managed by Companies House at UK level.

That is not a very easy system for people to navigate—especially people without legal knowledge or advice. We have been supportive of the fact that it is free, and we certainly think that that reduces one of the barriers, but it is not the most straightforward way of accessing the information.

We are struggling to come up with simple ways by which the situation could be simplified, given the route that the Government has chosen to take, which involves the creation of a separate register and the exclusion of certain entities from the registration requirements. Those two elements inherently create complexities. It is difficult to see ways of simplifying those things within the draft regulations that are before us.

One element that needs further consideration is whether the balance between the need to avoid

the problem of double reporting—which was the justification for the exclusions—is balanced against the extent to which the public interest purposes of the regulations are being met.

Another consideration that I expect we will come to later, but which I want to mention now, is that there is a difference between information that is required by a register and information that is publicly disclosed. For example, at UK level, the PSC register requires some information to be registered, in that case by Companies House, but not all the information is publicly accessible. We could consider using such a two-tier system here, to address some of the concerns that Ann Stewart raised about commercial confidentiality. That is another possible solution, but without knowing the details of how the register will work—we do not yet have that in the regulations—it is difficult to know the extent to which that is a potential route for simplification.

Dr MacLeod: There is a temptation for me just to say, "What she said," but I will resist that and move on.

I am putting myself in the position of somebody who wants to use the register in practice, which I would have thought could be any of us, one way or another, and, frankly, it seems like a fairly daunting prospect.

Just as an observation, I think that it is correct to say that the committee had 12 written responses to its consultation. On the one hand, that might suggest a lack of interest in the issues or a lack of demand to know about them, but I think that the opposite is the case: it shows that the general public need to be better informed about—ironically—the information rights that they will have. A big public awareness issue will need to be considered. That is a more general comment about when the regulations come in.

On the accessibility of the register, Megan MacInnes is entirely correct about the potential mismatch between the register when it comes in and other ones. What electronic links can be put in place between the register and other ones? What type of information can be provided through specific instructions and so on? On the level of data that is provided, it would be helpful to have an open data perspective in the way in which the register is delivered in practice. That would enable people—primarily the public but also more specific stakeholders—to have access to as much of the data as possible within the bounds of the need to respect commercial confidentiality.

There are issues with how the data is accessed and the mechanisms for that. That is broadly our response, although I absolutely recognise the challenges in doing that.

The Convener: John Scott has a short question and, if I have time, I will come to Stewart Stevenson.

John Scott: I think that Mr Sinclair wanted to speak first.

John Sinclair: On accessibility, there are two general ways in which people will look at the register. One will be from the top down, looking at people who have controlling interests and whether one individual has a controlling interest over a large number of properties. The other will be from the bottom up, when somebody wishes to work out who controls a certain piece of land.

The accessibility of the register is key, as there is no point in having a register if it is not accessible and useful. For those two purposes in accessing the register, there are different issues with accessibility. With the top-down approach, where someone is looking to understand how much land is controlled by a particular individual, that would generally involve using the name-searching function. For that, it would be useful to have much the same information in the ROCI as is in the PSC register.

From the bottom up, ScotLIS—Scotland's land information service—is a wonderful thing and will only get better with time. The tool makes it easy to find land that is registered in the 2012 land register, but it is less useful when looking at sasine titles. For sasine titles, you are generally reduced to searching against a verbal description of the property, which can be difficult.

The point that I am moving towards making is that one of the issues with accessibility is searching against sasine titles, but the situation will get better over time. It will become easier to search the register as time goes on and the completion of the land register proceeds.

John Scott: Can you tell me, as a layperson, roughly how many registers there are likely to be, with the United Kingdom overseas entity register, the crofting registers, the existing registers and so on? Are we talking about five or seven? Obviously, we have to take disclosures into account, too, so what are we looking at here? How are people going to know which register to go to?

Megan MacInnes: I am afraid that I do not have a list but, off the top of my head, I can name, at UK level, the register of UK companies in Companies House and the new register of foreign entities. In Scotland, there is the land register; the register of sasines—although everything will, I hope, be merged into the land register; the register that we are discussing this morning, the crofting registers and all the other registers that the keeper is responsible for managing such as the various registers for the community right to buy and other burdens and certain registers that are for a

specific relationship with a piece of land. That is at least six.

John Scott: And it is enough to be going on with. Thank you.

Jason Rust: I should say that, in putting together our submission, we did not particularly major on the issue of physical access to the register. Our focus was more on the accessibility of the regulations themselves, which is almost the next stage.

The Convener: Stewart Stevenson has a small supplementary.

Stewart Stevenson: My question is specifically for Dr MacLeod. What would constitute proper commercial confidentiality, meaning that the information could not be disclosed? I can think of no such circumstances. There might be personal safety reasons, but can you give me an example of legitimate cause with regard to commercial confidentiality?

Dr MacLeod: Now that you have asked me, I cannot think of an example, so perhaps I should withdraw that comment.

The Convener: I wonder whether this would be a good question for Ann Stewart, given that she brought it up in the first place.

Ann Stewart: I can give you general rather than specific examples. Financial information could be confidential, because it could affect the way in which the market perceives certain organisations—

Stewart Stevenson: I am sorry to interrupt, but generally we are talking about first and second charges that would be registered with titles. However, they are registered precisely to ensure that they are a matter of record.

Ann Stewart: What I meant was information about the extent of shareholdings in a particular organisation by a person who has control—

Stewart Stevenson: I am sorry but, as a result of the Companies Acts, share registers are publicly accessible in real time.

Ann Stewart: For overseas entities, for example, there is a percentage that is similar to the companies register—

Stewart Stevenson: Under the stock exchange rules, there is a percentage at which you have to declare, and there are levels at which you have to bid for the rest of the company and so on—but let us not go there. All I will say is that that is a matter of public record, and I am struggling to see why there is a commercial reason for denying this sort of thing.

John Sinclair: The Law Society discussed a scenario involving a company that was about to be sold. If that company entered into exclusivity or lock-out agreements to prevent it from dealing with its assets, the other company that had entered into the arrangement would technically be an associate and would therefore need to be disclosed on the register. That means that there would be a public record of a discussion that, for legitimate reasons, could be seen as commercially sensitive and which would cause disquiet among the employees of the company—the registered proprietor—if the information got out.

Stewart Stevenson: How does that cut across the need to advise the stock exchange when it is a quoted company?

John Sinclair: I cannot comment on that.

Stewart Stevenson: Okay. We will move on.

The Convener: Megan MacInnes has a point to make on the matter.

10:00

Megan MacInnes: I made the reference to commercial confidentiality because registers often operate on two different levels and not everything that is given to a register will necessarily be publicly disclosed. The new register is trying to improve transparency around land ownership, because we currently do not know who owns some pieces of land. There is clearly a reason why some entities, up until now, wanted to remain anonymous, so Global Witness agrees with what is proposed in the regulations in that it is very important that there is a specific and narrow reason, simply relating to what is described in the security declaration, for what information should not be disclosed. We are happy with the specific information, such as name and contact address, that the regulations propose should be included in the register. It matches what is included in the PSC register and meets international standards. To expand any further the list of information that should not be disclosed would create loopholes that would result in the regulations not having the desired effect.

Dr MacLeod: I have a very brief comment in relation to Stewart Stevenson's question and what colleagues have said. The committee can probably tell that I am not the lawyer on the panel—I am the one in the cheap suit.

It is important to stress the policy thrust of the regulations and the introduction of the register in relation to transparency. To reiterate what Megan MacInnes said, it is important to keep the reasons for excluding information or access to information to a minimum.

I am sure that we will discuss this later in the session but, as is set out in the submissions, lots of reasons for not doing things are thrown up, but there are also important reasons for doing them. Over the past number of years, the committee and the Parliament have been trying to improve transparency and shed light on ownership, and I am sure that we all bear that important point in mind.

The Convener: I know that Ann Stewart wants to come back in, but there will be an opportunity for her to make her point later.

Richard Lyle (Uddingston and Bellshill) (SNP): Dr MacLeod referenced submissions, and there is a good one from the Law Society. The Law Society is certainly not happy with two particular paragraphs of regulation 2. It is of the view that the expression in regulation 2(a)—

"direct the activities of another"—

is open to wide interpretation. Similarly, it considers that regulation 2(c) is "open to uncertainty". The Law Society believes that adopting much of the language and terminology of the people with significant control regime might be misguided. I am sure that other witnesses might want to respond to that, but what makes John Sinclair believe that the wording in regulation 2 is open to wide interpretation? Why are the regulations as drafted not sufficiently clear to avoid uncertainty? [*Interruption*.] That is the first time that I have stumped a lawyer.

John Sinclair: The regulations are nebulous in concept and hard to objectively demonstrate, which does not really add much to the response. For example, regulation 2(c) says:

"significant influence is a reference to where a person is able to ensure that another person will typically adopt the approach".

As a rule to apply, that has lots of difficulties. The concept "typically" could require an analysis of a pattern of behaviour. If we are looking at patterns of behaviour, we have to consider what period of time we are looking at and the allowed degree of variance from someone always adopting the approach recommended. The phrase

"will typically adopt the approach"

means that it does not happen 100 per cent of the time, but is it 99 per cent, 90 per cent or 85 per cent of the time, or does it mean in relation to certain types of matters? There is then the juxtaposition of the word "ensure", which generally means that something is bound to happen, with the reference to someone "typically" doing something. There is difficulty in understanding how that wording will be implemented in practice.

I am not saying that we could come up with anything better as an absolute test, but it would be helpful to have fuller guidelines with examples and models of what counts as typical, if only because someone will be expected to decide at what point in time something has become a typical pattern of behaviour. Inevitably, in looking back with hindsight, there will be uncertainty about where the tipping point is between something being typical and something being less frequent. If this is going to be backed up or enforced with a criminal sanction, we are keen to have a simpler and more objective process to identify whether someone has committed or is about to commit an offence.

Richard Lyle: Do you have concerns about the measure extending to cover the role of the trusted adviser, which is often held by professional advisers? Are there other problems resulting from the use of terminology from the people with significant control register and, if so, how should those concerns be addressed?

John Sinclair: On how those concerns could be addressed, it would be better for us to produce a further written response than it would be for me to answer that off the cuff.

Richard Lyle: I assume that that would be at no cost.

John Sinclair: Yes—that is a second anomaly from a solicitor.

The point about a trusted adviser shows the difficulty with the boundaries. If a trusted adviser is good, more often than not and perhaps typically, the advice that they give will be followed by the client. That pattern of behaviour where there is a correlation between advice and action taken by the client does not necessarily mean anything other than that the advice is good and well measured; it does not necessarily mean that someone is exercising significant control. There is an exception for paid advisers, but that applies only when that is their only function.

Richard Lyle: I will finish up on this, unless anyone else has any comments. Do you have any problems with the use of the terminology from the people with significant control register?

John Sinclair: I would prefer to answer that in a further written response.

Richard Lyle: I look forward to it—thank you.

Megan MacInnes: I do not want to comment on the Law Society submission, but one of the ways in which the PSC register has overcome similar problems in trying to create clear definitions of quite nebulous means of controlling an entity and the decisions that are made about it is by providing specific examples in the explanatory notes to demonstrate situations that would and would not fall under the intentions of the regulations. One way of addressing the complexity

is to ask the Government for more examples in a further explanatory document.

On whether the PSC register terminology is useful for what we are trying to achieve in Scotland, I think that we take a slightly different position from that of other panel members, in that we think that the PSC register is a useful mechanism that Scotland can learn from. That is for two reasons. First, historically, the concept of beneficial ownership—whether we call it that or use other terminology such as "persons with controlling interest"—was not created purely for anti-money laundering and tax-focused efforts; it has a much older concept in law that is to do with the need to get clarification on one who enjoys the benefits of a property or of owning an asset without being the legal owner. That is the underlying concept.

The PSC register is a particular mechanism for bringing that concept into practice; the Scottish Government might be trying to use a different mechanism for a different purpose, but we are talking about a tool that would have the same effect of clarifying how benefit is gained from and control exerted over a property. We should not be distracted by this. A lot can be learned from how the PSC works and the terminology that is used, even though its purpose is to address money laundering and tax issues and the purpose behind these regulations is to make land ownership transparent.

As I have said, we need to be careful but, although the purpose might be different, the mechanism can be the same, and some very useful lessons can be learned from how the PSC register has worked up to now. Indeed, we have given some examples in our submission that we think the Scottish Government would do well to learn from to ensure that the register that we are discussing does not fall at some of the same hurdles. The issue is extremely complicated. It is not easy to set up such registers.

Jason Rust: On Richard Lyle's question about the linkage with the persons of significant control register, I agree with Megan MacInnes's point that, although its purpose might be different, that mechanism could be looked at. However, I note that, in paragraph 4 of schedule 1, which relates to compliance, there is a reference to another definition of persons of significant control, and we are concerned that people looking at these regulations might have to go and look at other regulations to understand exactly how they can comply with them.

The Convener: We move on to questions from Finlay Carson.

Finlay Carson (Galloway and West Dumfries) (Con): I will move on to part 2, which relates to how information will be laid out in the register, but I think that you have already been all over this question. How might the terms "controlled interest" and "significant influence" be misinterpreted? How can we know whether it is something that someone has set out to do? Do any further definitions or explanations need to be given in that respect?

On the back of that, do you think that there are any grounds for thinking that it might make it easier to avoid identification if the home or permanent address of the recorded person is not recorded?

The Convener: Who would like to tackle that first?

Ann Stewart: Can you repeat the question?

Finlay Carson: As I have said, I think that you have already covered my first question, which was about the instances in which the terms "controlled interest" and "significant influence" could be deliberately misinterpreted and whether more definitions should be set out in order to avoid that sort of thing.

Ann Stewart: From what John Sinclair has said, greater clarity on what the terms "significant influence" and "controlled interest" are supposed to mean would help. There will be instances when, in looking at a pattern of behaviour or at the relationship between owners and non-owners of a piece of land, one will not be able to say with certainty whether they are on that side of the line and fit the definition, or not. Simply because of the typicality of such behaviour, such difficult instances will arise.

As a result, there certainly needs to be something clearer: indeed, as John Sinclair suggested, we could use plenty of examples instead of having a definition that runs on for pages. I think that the legislation requires the explanatory notes to give reasons for such things, and examples help to clarify matters. At the moment, that sort of thing is absent from the explanatory notes.

10:15

John Sinclair: The test will always be nebulous, because we are dealing with "influence" and "control". The idea of using examples to give people better guidance about what will and will not satisfy the test is helpful.

On Finlay Carson's question about the home address, I think that the PSC register requires a home address and a service address. The purpose of the address is to allow identification of a person who has been named as one thing, as the person who has also been named as being another thing. An address being used to identify

an individual precisely is a useful tool. Whether it is a home address or a service address is less significant: the reasons for requiring the address involve identifying and contacting the individual, therefore as long as the individual is required to provide the same address for every entry on the register, the same result will be achieved.

The Convener: Claudia Beamish has some questions around that.

Claudia Beamish (South Scotland) (Lab): I would like to hear from other panel members first on that matter, because I might then not have to ask my questions, depending on how they respond.

Megan MacInnes: On use of a residential address as opposed to other ways of identifying the person who has the controlled interest, Global Witness believes that having only a month and year attached to the person's name—which is how the PSC register operates—does not provide enough information to ensure that one can definitely find the right person. There are a number of possible solutions to that.

One of the problems with using a residential address relates to security concerns, which must be recognised. An alternative solution, which the Government has been recommending, involves the creation of a unique identifying number for each natural person the first time they enter their information on the register. That unique identifying number would be the way by which one could check whether the person had registered later in the register because they have a controlled interest in relation to another piece of land or property.

Jason Rust: I agree with the points that were made by Anne Stewart and John Sinclair about the importance of the explanatory document and using examples. Scottish Land & Estates is concerned not only about part 2, which we mentioned earlier, but about part 1 of schedule 1. Our concern involves the ambit of the regulations and the extent of the categories of people to whom they will apply. The explanatory notes say that a cohabiting partner or spouse would be exempt, but that is not necessarily clear from the drafting.

We also have concerns about the issue of professional advisers, which we discussed earlier. In many instances, a professional adviser in a paid capacity might be exempt, but in situations in which an adviser acts as an executor, or what have you, they might not be exempt. It would be useful to have those issues clarified through examples in the explanatory document, or by having a list in schedule 2 of the types of persons to whom regulations would or would not apply.

Stewart Stevenson: I see an analogue with the regulations under the Companies Acts concerning shadow directors. There is a lot of case law around that. Is that a reasonable place to look for whether the regulations should or should not apply to someone?

Jason Rust: I would need to check that and come back to you. Certainly, there will be other examples out there. Essentially, what we are after is something fairly straightforward. It might not be possible to take something off the shelf, especially if it relates to another piece of legislation.

Stewart Stevenson: It might be worth stating that I am not a lawyer; I am a mere mathematician.

Claudia Beamish: As we have heard, the main purpose of the regulations relates to the public interest. There is a range of reasons for that; an important one is about accessibility for people who might want to further their interest in purchasing land. Land transparency is fundamental to that.

I want to tease out the issues about a service address and whether the address goes only as far as the professional adviser—which is in no way to disparage professional advisers, who also need protection. There seem to be all sorts of different ways in which people could, if they wished—I stress "if"—hide what they own or hide that they are the owner, and not just at the point of sale, which involves complex issues, but in a general sense. Those problems exist in Scotland, so what is the best way to be most sure that we can find the owner of land? Are there lots of ways that need to come together? Perhaps that is an unfair question. There might be security reasons, such as confidentiality issues relating to a person who has been the victim of domestic violence, but I do not think that there would be commercial reasons for not disclosing information. Let us tease out those issues a bit more.

Dr MacLeod: That is an important point. I cannot see a reason why that type of information should not be fully accessible to the general public on the basis of an important and powerful public-interest rationale. Many rural and urban communities throughout Scotland look to buy land under community ownership, including people in the membership of the organisation that I represent. In order for communities to do that, in some instances they need to know who has the controlling interest, so the public-interest test is clear in relation to such cases. The committee would not expect Community Land Scotland to mount a convincing argument for why a member of the public or a community group or organisation should not have as much access to the information as possible.

In practice, what type of data does that mean should be included? We echo previous comments about ensuring that the points of access and the

types of information are as full, robust and verifiable as possible.

Ann Stewart: There is a bit of a difficulty. Claudia Beamish gave the example of individuals trying to find out who owns land because they are interested in buying it. However, there are many reasons why people might want to find out who owns land. The regulations do not really address the fundamental questions of who we are trying to find and why we are trying to find them. Depending on the circumstances—it might be that the person is interested in buying land or that they want to find out who can deal with a tree that has fallen on their garage—the person to contact might be different. To say that there is one solution that will fit them all—

Claudia Beamish: What possible reason could there be for secrecy and lack of transparency? I do not understand what there is to hide through not disclosing land ownership.

Ann Stewart: Earlier, we talked about residential addresses, which is how we came to this issue, and there is a security aspect to that. People might well be perfectly happy for others to know that they are the owner of land, but might not necessarily want somebody to come up to their front door.

The Convener: That is a different thing. I think that Claudia Beamish is talking about the identity of the person.

Claudia Beamish: It is also about contactability.

Dr MacLeod: For long enough, the answer to the question "Who owns Scotland?" has been, "Pass." That is not acceptable in a progressive democratic society, which is what Scotland is and what we, as a country, hold ourselves up to be. In that context, it should be perfectly possible and not difficult for interested parties to find out such basic information.

The Convener: Megan MacInnes wants to make a point, and I will then move on to Alex Rowley's questions.

Megan MacInnes: I agree with Claudia Beamish and with what Calum MacLeod has just said. We should and must be able to know who, ultimately, owns the land. However, witnesses' concerns about the regulations go much deeper than the question that has just been asked. It is not just about whether it is a service address, a residential address or an email address, or about whether sending an email is better than sending a letter—as the committee discussed previously with the policy team.

We have some questions about the fundamental way in which the regulations are structured such that they will not let us know who owns the land. For example, it is not clear whether the regulations will always be able to disclose the natural persons—the human beings—behind the land. In some cases, that will only end up taking us to yet another non-natural legal entity. That is demonstrated in the regulations' diagram 4, which ends up with a trustee and goes no further. Andy Wightman's submission shows a control structure that will take us round and round in circles.

We are concerned about what is being proposed here and at UK level for the PSC register and the 25 per cent voting threshold. For example, the 25 per cent voting threshold might mean that we would end up with a number of entities holding less than 25 per cent and therefore not being required to disclose the natural persons who have the interest. That is one area in which we think the regulations are not clear. As drafted, they will not let us get to the natural persons.

Another concern is that the way in which the regulations are drafted means that it is not clear how a member of the public would know whether the register of persons holding a controlled interest is complete. As far as we can see, the drafting means that there will be no way of knowing whether there is not a recorded person or associate registered for a piece of land, and it will not be possible to know whether that is because the information should be there but has not been registered, or because there is no eligible recorded person or associate.

It will not be possible to have a complete picture of the extent to which what is in the register is incomplete or complete. That information is just not available for the missing plots of land.

The Convener: How do you see that problem being solved?

Megan MacInnes: It goes back to the question of how the proposed register relates to the land register and whether the ScotLIS portal will be able to give a clearer indication or flag up a title of land for which that information is missing, or for which there is not an eligible recorded person or associate. At the moment, there does not seem to be a procedure in the regulations to enable us to say that.

The Convener: A number of members want to come in on the back of what you have said. We will take some short supplementary questions before I go to Alex Rowley for his questions.

Stewart Stevenson: I want to explore the cases in which we do not wish to disclose the owner. Women's refuges are an example, although they are not the only one. People can appear on the electoral register without an address for safety reasons. If the number of people who are secret is small and they are secret for specific reasons, does that not carry with it the risk of identifying

what is being concealed? Sir Humphrey Appleby said:

"He that would keep a secret must keep it secret that he hath a secret to keep."

In other words, the fact that something is shown as not disclosed might disclose. How do we deal with that quite difficult issue of the instances when we must not disclose?

The Convener: One person can answer that, then Finlay Carson will ask his supplementary.

Stewart Stevenson: It is probably Megan MacInnes.

The Convener: We are running out of time. Does somebody want to answer that, with a "Yes, Minister" quote?

Megan MacInnes: I am afraid that I am not going to be able to give you quotes.

All that we can do at this point is learn from how things have worked in practice for the PSC register. The number of agreed exemptions for those purposes—the terminology is different in the security declaration, but the purpose is the same—is extremely small in respect of those who go through the request and agreement process. There is possibly a problem if a person is able to tell that there has, with a particular plot, been an agreement that information be redacted, but that does not tell us why and, most important, it does not disclose the information that the person has asked to be withheld. That security barrier still exists for protection of information.

10:30

Finlay Carson: Regulations 6 and 7 relate to the protection of and access to the ROCI, but they do not refer to a recognised independent security standard. How would you deal with any concerns that there might be about the security of the information and access to it?

Megan MacInnes: Global Witness does not have too many concerns about security. We think that what is currently in place is adequate, but we have concerns that it might be misused. Therefore, our recommendation in our submission is that, to match the PSC register's operations, the keeper should be required to report annually the statistics on the number of exemption requests that they have received and how many have been accepted. That would ensure that the mechanism is functioning and fit for purpose.

I do not know whether other panellists have comments on or suggestions about strengthening the security procedures.

The Convener: Alex Rowley has questions on a different theme.

Alex Rowley (Mid Scotland and Fife) (Lab): The Law Society of Scotland stated in its submission that there needs to be up-front clarity on the types of owner and tenant who are exempt from the regulations. Who should be caught by the regulations and who should be exempt? Is it correct that the regulations should apply to all those with a controlled interest?

The Law Society gave examples. It said that there does not seem to be any difference between

"a local sports club and a large commercial organisation, or between small family partnerships and major pension fund trusts."

The Scottish Property Federation said:

"The investors or beneficiaries of a collective investment fund may also be somewhat removed from controlling the fund and this does raise the issue of what the Register of Controlling Interests will achieve."

Do the panel members share those concerns? Who should be caught by the regulations? Should there be exemptions, and should there be differentiation between sports clubs and pension fund trusts?

Dr MacLeod: I will not rehash what I said, but I go back to my answer to Claudia Beamish's question. The exemptions should be the bare minimum. To take on board the security issues that we have already discussed, the system needs to be as wide ranging as possible in relation to the data that is collected on the register and who is on it, for the reasons of transparency, democracy and accountability that were rehearsed earlier. It is that fundamental.

Ann Stewart: That leads on to the issue that Calum MacLeod touched on earlier, which is how people know whether they are supposed to be doing something and putting information in the register. Strictly speaking, everybody who owns land would have to wade their way through the regulations to find out whether they were supposed to be doing something. It is important for people to know whether they have to do something, given the severe penalties that could apply if they have a duty under the regulations and fail to comply with it.

The examples that Alex Rowley gave from the Law Society and others suggest that it should be easy and very obvious to people whether they need to worry about making an entry in the register. That should be clear and posted up front. For example, a husband and wife should know that things are fine and that they do not have to worry if the title is in just the husband's name or just the wife's name; the same applies to people who are in a partnership, but all the partners own the land.

It is not so much about people saying, "That's fine—I'm exempt"; it is about people knowing that

they do not have to do anything, or understanding the circumstances in which they have to put something on the register so that they do not end up guilty of committing a criminal offence, which is quite a severe penalty just for owning land.

Stewart Stevenson: Does Ann Stewart's answer cover both registered and unregistered partnerships? The very nature of unregistered partnerships means that the details are not known.

Ann Stewart: It is not that the details are not known—one would hope that the partnership would know who its partners were. I am talking about a different approach. There will be many people who, quite innocently and inadvertently, fail to comply with duties under the regulations to put information in the register, for no reason other than that they are oblivious to it.

Megan MacInnes: I am not going to answer Alex Rowley's question specifically. Global Witness has different concerns about whether the regulations capture those who should be caught. We are worried that the complexity of the regulations will create potential loopholes that might be exploited by those who want to continue to remain anonymous for the reasons that they have not made the information public before.

In our experience, there is—unfortunately—a small proportion of lawyers who make a living out of helping entities that want to remain anonymous or avoid certain regulations and who find loopholes in order help them do so. We welcome the fact that the regulations are drafted in a very inclusive way, so that the entities that are excluded are very limited. We hope that that approach will enable the keeper and the Scottish Government to ensure that, even if new types of corporate vehicles are created in the future, such vehicles will still be captured by the regulations to ensure that ownership by those who want to remain anonymous does not simply move into corporate entities that are not covered. The breadth and scope of the regulations is important in ensuring that there is flexibility to adapt to the type of structures that might be created in future.

Dr MacLeod: There is a clear difference between arguing for entities to be excluded from the register and giving people the information that they need to have confidence about whether they need to do something in relation to registering. The emphasis should be on the latter and giving people the information and confidence to make the decision about whether they should be registering, in the broader interests of disclosure, as we have already discussed.

Jason Rust: To go back to Mr Rowley's question, we agree that the regulations should be applied across the board. In our submission, we note some contractual arrangements that have been omitted, such as secure agricultural tenancies under the Agricultural Holdings (Scotland) Act 1991.

Our only caveat is that when it comes to criminal sanctions, we should bear in mind that the regulations cover large pension fund trusts as well as small family partnerships and local clubs.

John Sinclair: I have two points to make. First, the nature of the test is so wide that how it applies to a local sports club will be very different from how it applies to an investment trust. That is where the guidance and publicity could be helpful, particularly for people who may not know that there is legislation out there that could be relevant to them.

Secondly, on people being excluded from the regulations, a particular issue that came up in our discussions was the role of executors. If the idea is that people should remember, when their spouse or family member dies, to update the register of controlled interests, they are likely to be unintentionally criminalised for no real benefit. It would make some sense to have a carve-out for an executory that is simply being run through its administration.

Richard Lyle: Most of what I was going to ask about has been covered. There is a section in the Land Reform (Scotland) Act 2016 that allows for a security declaration. Nowadays, security is paramount. How should the keeper prioritise security in the registration process? Would the witnesses like their addresses to be published for all to see? Alternatively, should it just be possible to contact someone's lawyer—Mr Sinclair will like this suggestion—for a fee?

The Convener: Who would like to go first? The issue has been covered, to an extent, but further comments are welcome.

Richard Lyle: Honestly, would you like your home address to be published for all to see?

Dr MacLeod: Personally, that would not bother me. It is possible to find out my address from the electoral roll, so I would not have a problem with that.

Richard Lyle: Members of Parliament can ask for their addresses to be withheld from the ballot paper, and I am pushing for that to be done for councillors. As Stewart Stevenson reminded us, people can be on the electoral roll without having their address shown on it. The concern is that people could come up and chap on your door.

I would like the witnesses to be honest. Would you like your home address to be published for all to see? I would like each of you to say "yes", "no" or "pass".

Dr MacLeod: You have had a "yes" from me.

Megan MacInnes: From Global Witness's perspective, a better solution would be if people were able identify those with controlled interests and to map the extent of their interests across different pieces of land through the use of a unique reference number. That would be better than having to cross-reference further information to make sure that it was the right person.

As far as I know, although the PSC register requires the residential address to be provided, that information is not disclosed. The information that is disclosed on the PSC register is a service address, not a residential address. That takes us back to the question whether the register can function with a two-tier system, whereby some information is held that is not disclosed, or whether all information that is registered is automatically disclosed.

Richard Lyle: I will cut to the chase, because I know that the convener wants me to hurry along. Would that be the answer, Mr Sinclair? If you were my lawyer and I owned the house—or a tree or whatever—next door to someone, they could go to the register, through which they could contact you, and you could say, "Okay, we'll get that dealt with." Is that the answer, or am I barking up the wrong tree?

John Sinclair: I think that it is the answer. If the purpose of the address is for identification and contact, the address needs to work.

Richard Lyle: That arrangement would safeguard the person. The address of a firm, rather than the individual's home address, would be provided, and the firm could be contacted. We are not talking about a tax haven or things that we have heard about on television. I can go to the valuation board's register to find out where a business is located. If someone wants to contact me, I am quite happy for them to contact my lawyer. In that way, it would all be done and dusted. Is that right?

10:45

The Convener: We are a bit tight for time. Unless anyone has anything else to say on that, we will move on.

Richard Lyle: Sorry. I think that I got the answer.

John Scott: I have a relatively straightforward, daft-laddie question. It appears that we are moving towards further disclosure of everything, yet in the Parliament we are also concerned about data protection and compliance with the general data protection regulation. Is the proposed legislation compatible with existing legislation?

Megan MacInnes: Global Witness's understanding is that there are exemptions in the GDPR that enable member states to continue to disclose such information if the statute existed prior to the introduction of the GDPR. On the sequencing, our understanding is that the proposals are compatible with the GDPR, because they were already introduced in statute.

Jason Rust: Provided that the register is compatible with existing data protection laws, we are comfortable with it.

A more general point on disclosure, which is almost a caveat, is that, somewhat perversely, the more information that you seek, the less transparent the process or system can sometimes become, because it can be easier to conceal the really pertinent information or it can make information harder to find. Although we want as much transparency as possible, we need to bear in mind the potential dangers, not of too much transparency, but of too many requirements to disclose lots of information, some of which is ancillary and not relevant or not what people are interested in, to the extent that key things are harder to find for the accessing public.

The Convener: Do you mean things such as addresses?

Jason Rust: It is not so much about addresses. More generally, sometimes, the more information that is being sought—

The Convener: What would you class as "ancillary"?

Jason Rust: Under the regulations, the register will identify the associate, the arrangement and the contact details. We need to make it straightforward for people to access the register and see that the information is there. Obviously, we do not want a register that is full of lots of legalese or technical information that does not help the public.

The Convener: So it comes back to the accessibility issue.

Jason Rust: Yes.

Stewart Stevenson: I have some brief questions on accuracy. I observe that I have literally just now checked Companies House and found that there are 162,752 directors entries for James Stevenson—my Sunday name is James. There are also 71 James Stevensons in the public part of the electoral roll in Edinburgh and 699 in the 1935 valuation register. Those numbers illustrate the point that, if somebody wants to find a particular James Stevenson, it is important to have accurate and complete information. How will we know that what is in the register is accurate? As the system is structured, the duty to be accurate will be entirely on the person submitting the registration. How might we spot information that is not accurate, or will that be impossible?

Megan MacInnes: That is another issue that we have thought about quite a bit. The current proposal is to give the keeper limited powers to verify the information on the register and investigate the extent to which it is correct. Fundamentally, if we have rubbish going into the register, we will not be able to access useful information. Global Witness has done a substantial amount of analysis of the extent to which the problem has occurred with the PSC register, and we think that there are important lessons to be learned for the register here about data validation and verification. For example, the original PSC register had a data-free input, which meant that people could put in anything that they wanted in any of the answers. As a result, there were 500 different spellings of "British" under nationality, people listed their nationality as Cornish, more than 2,000 beneficial owners entered their date of birth as 2016 and others had dates far into the future, such as the year 9000.

There are clearly some problems with a free text input system, but from our perspective, the solution to this situation has two levels. The first is what we call data validation, which makes it simpler for information to be correct at the point of receipt. For example, instead of having a free text system, there could be multiple drop-down menus with, say, age prompts to ensure that people do not put in a negative age. Data validation systems can also be integrated so that checks can be made on, for example, a UK postal address to verify that the address that is being put into the register actually exists. Another way of approaching this would be to ensure that, when the data was being entered, the recorded person and associates would have to provide proof of identity, if they were natural persons, or for non-natural entities, some kind of evidence of ownership and control of a particular piece of land.

The second level is verification, which we see as a separate stage. If data validation is the point of entry—the point at which the information is received into the register—data verification is about how the keeper is able to ensure that the data is and continues to be accurate. For example, the register could be aligned with European Union money laundering regulations, which provide helpful guidance on member states needing to ensure that the information in question is accurate, current and adequate and require entities that already conduct customer due diligence such as accountants, estate agents and banks to inform the national authorities—or, in this case, the keeper—if they find that the beneficial ownership information that they have been given is different from what is in the register. Even though they apply to money laundering and the PSC register, new guidance and regulations coming out of the EU provide useful tools that the keeper can use to ensure that the information that is being entered is and continues to be correct.

Stewart Stevenson: That was quite a long answer, but one of the questions that I have about the core of what you propose is whether it creates a legal responsibility for the keeper that is presently absent. At the moment, it is very clear that the legal responsibility lies with the person who is submitting the information. Is there not a danger in moving responsibility to the keeper to, in particular, keep things up to date, which will be formidably difficult? I simply observe that I worked for a bank for 30 years, and it took us 10 years to work out how many customers we had. We knew how many accounts we had, but it took us that long to work out the number of customers, precisely for the reasons that have been described.

Megan MacInnes: It might well be that the way in which the responsibilities of the keeper are described in these regulations will have to be changed, but that brings us back to the fundamental question of what the register is for and how we ensure that it is fit for purpose. Global Witness is worried that, if some changes are not made, the register might end up with information that is unhelpful.

Stewart Stevenson: Let me make a tiny point. Given that Companies House does not verify the information that it receives, and given that much of the ownership information will relate to a company, the fact is that, particularly in those areas where there is a lack of clarity, requiring clarity here will not necessarily create the clarity that we desire.

I saw John Sinclair dying to come in here, convener.

John Sinclair: I simply wanted to point out that, at the end of its response, the Law Society suggests giving the keeper the ability to ask for information. At present, the keeper is a relatively passive party to this, and we would be concerned about making the keeper an active party. After all, it is hard to see the keeper ever having the resources that are required to actively investigate matters, particularly those involving foreign entities. The question, then, is whether there is some intermediate step whereby, instead of the keeper dealing with information that is presented to them, it is at least possible for the keeper to actively choose to make a request for information.

The Convener: Mark Ruskell has a series of questions.

Mark Ruskell (Mid Scotland and Fife) (Green): We have touched on the sanctions that should apply for non-compliance. There are two groups that do not comply: entities that, to maintain their anonymity, deliberately do not register; and entities that inadvertently do not

register. Global Witness and Community Land Scotland suggested in their submissions that, for the group that seeks anonymity, a £5,000 fine would be insufficient to deter non-compliance. Will you explain that? Do you have evidence to show why such a level of sanction would be insufficient?

Dr MacLeod: Community Land Scotland echoes many of Global Witness's points about the aspects that we have discussed today. Our firm view is that sanctions need to be appropriate to ensure that entities that should make submissions and should register do so.

As a ceiling for a fiscal enforcement measure, £5,000 might not be terribly significant in practice for some entities that seek not to register. I read with interest what civil servants told the committee a few weeks ago about the scale of sanctions that are available—they said that the Land Reform (Scotland) Act 2016 would need to be amended to increase the level. For the bigger picture and the grander scheme of things, avoiding a fine of £5,000 is not necessarily a significant incentive to register for some parties that might have an interest in not doing so for whatever reason. The scope for that sanction needs to be opened up.

On the question whether criminal sanctions should be available, our view—I know that not everybody shares it—is that they should, because that is an important element of ensuring that the register does what it is intended to do, which is to increase transparency and enhance the process. We encourage the retention of such sanctions in the regulations.

Megan MacInnes: The sanctions are an important part of the regulations. Our view on the maximum of £5,000 was based on looking not at evidence on the ground but at how the level compared with fines in other legislation. The Land Registration etc (Scotland) Act 2012, which is about the land register, sets a statutory maximum of £10,000 for fines; likewise, the PSC register sets a higher threshold for fines of £10,000. The fines that the regulations propose for non-compliance by providing false or misleading information are not in line with those in relevant comparable legislation.

If changing the maximum fine would require a change in the 2016 act, that raises the question whether that route can be gone down or whether other types of sanction could be created to deter people who were unwilling to provide the right information for this register from not complying.

Mark Ruskell: What would such other sanctions be?

Megan MacInnes: In our submission, we suggested that

"completion of the RCI registration process ... should be a pre-condition for undertaking other administrative and financial changes ... or transactions relating to the land, for example: ... when entering a title into the Land Register; ... when mortgaging or re-mortgaging the property;"

or

"when any other changes are made to the title deeds".

11:00

The explanatory notes to the draft regulations say only that it is not proposed to make completion of the register a precondition of land registration but do not say why, so we are not clear why such preconditions have not been introduced. It is interesting that the draft registration of overseas entities bill, which is the UK's proposal for a new UK-wide register of foreign entities, will make having proof of registering in that register a precondition for foreign entities to make changes to their title in Scotland. We cannot see any reason why that requirement could not be introduced into these regulations, if there is concern that opening up the 2016 act to change the upper threshold of fines is not possible at this stage.

Mark Ruskell: I will look at the issue from another perspective. Mr Sinclair has already raised the issue of proportionality. A pension fund is very different from a small partnership or somebody who is acting as an executor on a will. How should the regulations be applied proportionately to those who innocently and inadvertently fail to comply?

Ann Stewart: A suggestion might be to have a two-stage process. Rather than mere failure meaning that the offence has been committed, people who fail innocently should have the opportunity, when it is brought to their attention and before the penalty kicks in, to rectify the position and submit whatever information or changes they failed to submit. They would no longer have the excuse of ignorance and would be given a reasonable period of time within which to rectify the matter, so that they would not be automatically criminalised through inadvertent failure. However, they could choose to become criminalised if they failed to attend to an explicit notification that there was something that they should do.

The Convener: I apologise that we have to move to our final question, which is from Alex Rowley.

Alex Rowley: Should foreign entities that are beneficial owners of property across the UK be included or excluded, and why?

Megan MacInnes: From Global Witness's perspective, we are in a tricky situation because of two pieces of regulation being consulted on—this

register and the new UK-level register. It is too early to say whether the Scottish regulations should exclude those entities, because we understand that the UK regulations have not yet defined exactly what types of foreign entities will be included in the UK register. It is managed by Companies House; we expect that it will include mainly corporate entities and will not include trusts, for example, so Scotland's register should still include foreign trusts. It is too early to be able to say that they should all be taken out; we need to wait to see what the UK will do and exactly what foreign entities will be covered by its regulation and new register before knowing what to exclude from this register and put into schedule 2 to these regulations.

John Scott: I am not certain whether this question has been answered. Should professional advisers be explicitly excluded from schedule 1? Could I have a quick yes or no from the panel.

John Sinclair: Professional advisers are generally excluded when they act only in the capacity of a paid professional adviser. The difficulty will be whether a person is acting for a company and is also on its board.

John Scott: As an executor.

The Convener: As there are no other questions, I thank everyone for giving evidence today. The evidence has been comprehensive.

11:05

Meeting suspended.

11:10

On resuming—

European Union (Withdrawal) Act 2018

Ionising Radiation (Basic Safety Standards) (Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2018

Justification Decision Powers (EU Exit) Regulations 2018

The Convener: The third item on our agenda is evidence taking on a proposal by the Scottish Government to consent to the UK Government legislating using powers under the European Union (Withdrawal) Act 2018 in relation to UK statutory instrument proposals.

We are joined by Charles Stewart Roper from the Scottish Government and James Hamilton, solicitor for the environmental branch of the Scottish Government's rural affairs division. I welcome you both.

John Scott: Good morning, gentlemen. In the event that there is a deal that includes a transition period, will there require to be changes to the provisions in the regulations? What will those changes be and how will they be achieved?

Charles Stewart Roper (Scottish Government): No, the changes will not come into force until exit day, whenever that is. If there is a transition period, all that we will have done is to get the regulations ready early. The changes will still need to be made, but they will not come into force until exit takes place.

John Scott: Excellent. Could the Scottish Government give more detail about which reserved and devolved responsibilities and/or powers are relevant to the regulations?

Charles Stewart Roper: There are two sets of regulations. The Ionising Radiation (Basic Safety Standards) (Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2018—they are very snappily titled—is a set of regulations for environmental protection under the basic safety standards directive that provide for protection of the public and the environment from radiation in the environment. The powers that pertain to us under those regulations are mainly about levels of acceptable contamination and setting standards for clean-up and decontamination.

The powers are both reserved and devolved. Obviously they are devolved to Scotland in terms of the amount of radioactive substance legislation that is devolved to Scotland, such as the contaminated land regulations. The instrument

makes no change to the balance or exercise of the powers. It just updates the references so that the regulations stay effective in the event of exit.

The powers in the Justification Decision Powers (EU Exit) Regulations 2018 generally would only be exercised at a reserved level but, in principle, they could also be exercised at a devolved level if somebody wanted to do something with radiation in Scotland only, which is an unlikely eventuality. Again, the changes to the regulations make no change to the balance of reserved and devolved powers; they merely update the way in which they can be exercised to make sure that they are still exercisable after exit.

John Scott: Are you, as a representative of the Scottish Government, satisfied that the regulations will receive the appropriate level of scrutiny at Westminster?

Charles Stewart Roper: Yes, I am. As you know, we are the first to bring one of these consent notifications to the committee. My colleagues down south have been working hard to be ahead of the wave of measures that are being introduced by Westminster. These regulations will receive the appropriate level of scrutiny. They have already had quite a lot of revision and checking at official level in Whitehall and, obviously, we have checked them for our interests.

Given that they are designed merely to maintain the status quo of how the regulations work, I think that there will be sufficient interest to ensure that that is the case.

11:15

Stewart Stevenson: Can you confirm my understanding that a special procedure has been introduced for these EU regulations, with a new committee at Westminster, which means that there will be at least that level of scrutiny of the detail of this legislation and other similar regulations under the European Union (Withdrawal) Act 2018?

James Hamilton (Scottish Government): Yes.

Stewart Stevenson: That is fine. Thank you.

Claudia Beamish: I want to focus on the Scottish Environment Protection Agency's functions. Will the functions of SEPA be impacted by the introduction of the new regulations? If so, has this been discussed with SEPA?

James Hamilton: My understanding is that SEPA's functions will not be impacted. SEPA's regulation of radioactive substances is under the Environmental Authorisations (Scotland) Regulations 2018. The effect is that before SEPA can authorise a practice involving ionising radiation, it has to be justified. That justification regime will continue to sit alongside the regulations, with all the existing justified practices, so there will be no effect.

The other instrument deals with the parts of the basic safety standards directive which I do not think impact on SEPA. Again, all that we are doing is seeking to maintain the status quo, so there will be no impact on SEPA's regulatory activities.

Claudia Beamish: Are there any implications for the transportation of any of these materials? If so, what might they be?

Charles Stewart Roper: Transportation of radioactive substances is a reserved matter. I am not aware of any changes needing to be made to the transportation regulations, but UK Government colleagues will be assessing whether they need to make any changes to them.

Claudia Beamish: Are you aware whether the Scottish Government has received any representations in relation to the regulations and the intention to consent to UK ministers making regulations on behalf of the Scottish Government?

Charles Stewart Roper: I do not think that it has, because the clear intention is just to maintain the regulatory systems as they currently are. There has been limited consultation on these regulations but that reflects the fact that there is nothing really to consult on. We are merely acting with our UK colleagues to ensure that the current regulations, which work effectively but quite quietly in the background, can continue to work effectively in the future.

Claudia Beamish: Lastly, are there any enforcement functions under the current regulations that require to be transferred to any Scottish or UK body as a result of the EU exit process? I think that I know the answer, but I would like to get it for the record.

James Hamilton: There are no functions that require to be transferred; there is no impact on the existing functions of Scottish regulators.

Claudia Beamish: That is helpful—thank you.

Mark Ruskell: To follow on from that, can you explain how the enforcement functions that exist at the moment in the Euratom treaty under article 106a will be replicated with these regulations on exit?

James Hamilton: Sorry—can you ask me that again?

Mark Ruskell: How will the enforcement functions that are currently within the Euratom treaty be replicated on exit from the EU?

James Hamilton: I will have to respond to that question in writing, I am afraid.

Charles Stewart Roper: If you mean the enforcement functions of the treaty—

Mark Ruskell: In relation to environmental protection.

Charles Stewart Roper: The directly applicable law, which is in regulations, will become either UK law or Scottish law, as relevant, and will be fixed of any deficiencies. Where we are talking about enforcement under the treaty—the requirement that we comply with the treaty—once the UK leaves the treaty, we no longer have that degree of enforcement.

As I am sure you are aware, there is a much wider discussion about how we will provide that sort of underpinning environmental law in the UK and Scotland in future. My colleagues are thinking about that much wider issue, which is to do with the future assurance that environmental laws in general are up to scratch. That assurance is currently given by our membership of the EU and Euratom, and there are on-going discussions about how that should be done in future.

Mark Ruskell: So there is no clarity at the moment about who will carry forward all the aspects of the enforcement function. Is that right? SEPA has a role but—

Charles Stewart Roper: Sorry, maybe I have confused you. That is entirely clear in relation to the enforcement of the individual sets of regulations. In Scotland, it is SEPA for the radioactive substances regulations and, for transport, it is the Office for Nuclear Regulation. There is no doubt about the enforcement of our domestic regulations. The only point on which there is still discussion relates to the fact that, at the moment, our regulations have to comply with the Euratom treaty, in the same way as other environmental regulations have to comply with relevant directives under the EU treaties. There is still a discussion about that wider issue of assurance of environmental law in future, but there is no doubt about the continued enforceability of all our domestic systems of regulation.

Mark Ruskell: In effect, that is the wider question about who watches the watchers.

Charles Stewart Roper: Yes.

Mark Ruskell: That is the bit that still has not been decided on.

Charles Stewart Roper: Yes—it is still under discussion.

Richard Lyle: Good morning, gentlemen. The Ionising Radiation (Basic Safety Standards) (Miscellaneous Provisions) Regulations 2018 are described as containing "definitional references". It is proposed that the regulations will be corrected by replacing definitions that refer to a directive with the text of the definitions. Which definitions in the regulations require to be changed and what will the definitions be once amended?

James Hamilton: The definition that requires to be changed is the definition of "orphan source", which currently refers to the definition of "orphan source" in the basic safety standards directive, which itself relies on other terms that are defined in the basic safety standards directive, including "licence" and "authorisation". Those terms themselves rely on the definition of "competent authority", as a licence or authorisation has to be granted by a competent authority, and the competent authority has to be in an EU member state. That has the effect of undermining the definition of "orphan source". A new definition of "orphan source" will be added, and some other definitions will be added to support that.

The other impact is that, instead of a reference to article 102 of the directive, we are introducing the principles in that article in a schedule to the regulations. To support that schedule, BEIS—the Department for Business, Energy and Industrial Strategy—has had to introduce two new definitions: a definition of "protective measures" and a definition of "remedial measures", which are equivalent to the definitions that currently exist in the basic safety standards directive.

Richard Lyle: Why will the remainder of the definitions in the regulations continue to be operable post-Brexit? Where the 2018 regulations refer to lists of acceptable materials, is it the intention to remove all references to the directive and its supporting annexes so that if, for example, the directive is amended or superseded, the new regulations will be completely delinked?

James Hamilton: It is not the intention to remove all references to the directive. BEIS will have carried out an exercise to identify references to the directive that will create deficiencies, which include things such as references to things happening in member states. Where there are other references to the directive that do not create those sorts of deficiencies, the view is that those can still work effectively.

With regard to the future, references to directives in domestic legislation will take effect at the date when the regulations come into force. Alternatively, in the case of ambulatory references, the effect of the European Union (Withdrawal) Act 2018 is to freeze the ambulatory reference at the exit date. Changes to the regulations after the exit date obviously will not refer to directives, but there are mechanisms in place to address those concerns.

Richard Lyle: Depending on when that exit day is, is it the intention to transfer the annexes fully into UK law or Scottish law?

James Hamilton: I am not sure that there is a straightforward answer to that question. There are various places in domestic law where we already refer to the annexes for those requirements. To that extent, they already form part of domestic law. The change that will happen on exit day is that such changes to address deficiencies will take effect. I gave the example of ensuring that "orphan source" does not become a deficiency and that the reference will continue to work effectively after exit day. There will still be some references afterwards. We are looking to fix the issues to make sure that things still work effectively from exit day.

Finlay Carson: My question refers to the Justification of Practices Involving Ionising Radiation Regulations 2004, which draws upon the European Communities Act 1972, which gives the UK and Scottish ministers the powers to make specific regulations. What is the process under the 2004 regulations for approval of practices involving ionising radiation? What is the Scottish ministers' role in that and how will the process change after the amendments are made?

Charles Stewart Roper: In addition to the regulations is a memorandum of understanding between the Administrations that defines the way that consultation works under the regulations. There is full and close consultation on any proposal that comes forward to ensure that, when something is being agreed at the UK level, the devolved Administrations are fully involved in that decision. That carries forward the memorandum of understanding and the whole system carries forward as it currently functions, and it functions satisfactorily. In fact, these decisions are quite rare. The recent examples have been about reactor technologies for a generation plant. Such decisions do not come up often but a full administrative process is in place in support of the regulations to ensure that, before any regulation is made by UK ministers, there is thorough consultation with us and the other devolved Administrations.

Finlay Carson: What is the scope of the new power that will replace that in the 1972 act? Will it have any limitations?

James Hamilton: The new power is essentially equivalent to the existing power. It is limited in its scope by the 2004 regulations. In essence, it is to document a decision of the justifying authority that a practice is to be justified.

The most recent draft of the statutory instrument that we have seen includes some limitations on that, essentially to make it clear that the power can be used only for the purposes of making a justification decision. The scope is therefore exactly the same.

Finlay Carson: You might have answered my next question. What parliamentary procedures will be exercised in the UK and the Scottish Parliament?

James Hamilton: I would have to double check that. I am almost sure that it would be the negative procedure but I would have to double check.

The Convener: I have a question about the situation post-Brexit. Has the Scottish Government considered the possibility of standards diverging from those under the directive, such as when new evidence becomes available? How might the UK and Scottish Governments participate in Euratom research past that point?

Charles Stewart Roper: To take your first question first, you are essentially asking if standards evolve at the Euratom level, will we follow? Generally international standards for radiological protection are set at the higher level of the International Atomic Energy Agency, which is a United Nations body, and are then reflected in EU directives. Our intention and that of the UK Government is to keep an eye on developments at IAEA level and to move with changes to the international standards, at least as fast as the EU does. That should not open up over time a divergence in standards between us and the Euratom structures because the intention is that, in the post-exit world, we will both be following the lead of the IAEA.

On future participation in research, the UK Government's white paper said that it wanted to seek a very close working relationship with Euratom, including on research. That will be a matter for negotiation—and like all negotiations, it awaits its place in the list of importance—but there is a very clear intention on the part of the UK Government to try to negotiate continued involvement in Euratom's research activities.

11:30

Mark Ruskell: As a follow-up to the earlier discussion about enforcement and wider governance, does the IAEA have any governance function with regard to states?

Charles Stewart Roper: There is a looser reporting obligation. We report on our national programme for radioactive waste and, as far as our participation at a UK level is concerned, we are consulted on matters, and Scottish policies and practices feed into that. The IAEA also does periodic regulatory reviews—indeed, one is due in the next year—in which experts from other IAEA countries are recruited as a team to test our regulatory systems for effectiveness.

That is an external review. It does not quite have the teeth of a Euratom review, because there

is no risk of infraction, but it is hard to conceive of any situation in which we or the UK Government would not respond to a recommendation from an IAEA review. It fills many of the roles with regard to external checks on our practices and the quality of our regulatory systems.

Alex Rowley: Has the Scottish Government had discussions with the UK Government about whether it intends to ensure that the principles of the basic safety standards directive are brought into UK law?

Charles Stewart Roper: The existing regulations reflect BSSD standards, and the recent transposition exercise ensured that UK regulations were all up to date with the more recent directive. They are now in UK law, and there is no intention on the part of the UK Government to immediately change it. Its stated intention is to maintain the standards as they are, and we have no indication that it wishes to diverge from that.

Alex Rowley: So that means—

Charles Stewart Roper: It means that the BSSD standards will roll forward into UK law. Indeed, they are already in UK law, and they will not be taken out of it. What the UK Government is doing is fixing references in our law to ensure that the standards are still effective once we exit and that we have regulations that work in a free-standing way but which have the same standards as those in the BSSD.

Angus MacDonald (Falkirk East) (SNP): Has the Government identified a package of measures that might be required to arrest deficiencies in legal instruments that transpose the BSSD? Can we expect to see more notifications in that package? If so, any information that you can provide—for example, on scope and timescales—would be helpful.

Charles Stewart Roper: I do not anticipate any more notifications of UK deficiencies, including those involving devolved competences, in the radioactive substances regulations. I think that what has been identified is it.

We might need to make a few changes to deficiencies in our radioactive contaminated land regulations, which we will do on the longer timescale of what we still expect to be the transition period. However, they will likely come forward in a wider wrap-up instrument that will fix minor deficiencies across a range of regulations rather than in a free-standing instrument.

The Convener: As members have no more questions, I thank the officials for coming along today.

At our next meeting on 2 October, the committee will take evidence from the keeper of the registers of Scotland on the regulations to establish a register of persons holding a controlled interest in land. We will also consider our work programme and a report on the 2019-20 budget.

As agreed earlier, the committee will now move into private session. I request that the public gallery be cleared as the meeting is now closed to the public.

11:34

Meeting continued in private until 12:51.

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