OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 3 March 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 3 March 2020

CONTENTS

ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

7th Meeting 2020, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*Finlay Carson (Galloway and West Dumfries) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Malcolm Combe (University of Strathclyde)
Alan Cook (Scottish Property Federation)
Gemma Cooper (NFU Scotland)
Diarmid Hearns (National Trust for Scotland)
Jennifer Henderson (Keeper of the Registers of Scotland)
Jon Hollingdale (Community Woodland Association)
Sandra Holmes (Highlands and Islands Enterprise)
Dr Calum MacLeod (Community Land Scotland)
Annie McKee (James Hutton Institute)
Gavin Mowat (Scottish Land & Estates)
Rachel Oliphant (Scottish Property Federation)
John Sinclair (Law Society of Scotland)
Hamish Trench (Scottish Land Commission)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 3 March 2020

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's seventh meeting in 2020. I remind everyone to switch off their mobile phones or, at least, to put them in silent mode, because they might affect the broadcasting system. We have received apologies from Angus MacDonald and Stewart Stevenson.

Agenda item 1 is to ask the committee to decide whether to take in private agenda item 5, under which the committee will consider the evidence that we will hear today on the draft Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 and the draft Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020. Are members content to take agenda item 5 in private?

Members *indicated agreement.*

Interests

09:33

The Convener: Agenda item 2 is a declaration of interests. I welcome our new committee member, Annie Wells, and record the committee's thanks to Rachael Hamilton, who has moved on, for all her hard work during her time with the committee. I ask Annie Wells whether she has any relevant interests to declare.

Annie Wells (Glasgow) (Con): Thank you, convener. I am very much looking forward to being a member of the committee. I have no interests to declare.

Subordinate Legislation

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

09:34

The Convener: Item 3 is evidence on draft regulations to establish a register of persons who hold a controlled interest in land.

We have two panels this morning, and the first of which is: Dr Calum MacLeod, who is the policy director of Community Land Scotland; Hamish Trench, who is the chief executive of the Scottish Land Commission; John Sinclair, who is from the property law committee and property and land law reform sub-committee of the Law Society of Scotland—put that on a t-shirt; and Alan Cook, who is the chair of the commercial real estate committee of the Scottish Property Federation. I thank you all for coming.

We have taken evidence on the subject previously. Quite a lot of work has been done on some issues that were flagged up early on, and changes have been made to the draft regulations. Are there outstanding loopholes in the regulations that might be problematic and to which we should draw attention?

Alan Cook (Scottish Property Federation): I can speak to that. The new draft regulations are, in a number of respects, an improvement on the first draft. We are pleased to see that a number of matters have been moved on in a positive way.

There is still a lack of clarity, which could result in the aims of the regulations not being fully satisfied, in relation to whether references to "significant influence" and "control" capture all the correct scenarios and circumstances.

The Scottish Property Federation's interest is in relation to commercial ownership of commercial land and buildings, typically in urban situations. It is important to make sure that the regulations and explanatory notes that accompany them allow for the scenarios that arise in such circumstances.

My concern is about circumstances in which there is influence that does not extend to legal power to direct, but which is nonetheless a strong influence that is exerted on the legal owners of the land—those whose name is on the title deeds.

For example, a shopping centre, office building or whatever might be owned by a Jersey unit trust—an offshore trust. That would be firmly within the regulations and is not an uncommon ownership scenario for tax-planning reasons, which are perfectly legitimate reasons to hold land. The Jersey trustees whose names are on the title are, however, not the people who in practice make the day-to-day decisions in relation to the land. Decisions in such a scenario are usually made by asset managers—typically, managers in a United Kingdom pension fund who have that locus by virtue of an asset management agreement that gives them responsibilities to look after the land, collect rent, find tenants and deal with everything that happens day to day, as well as to set broader strategy in respect of whether the asset should continue to be held or what else should happen to it.

The asset managers do not have power to make decisions on such things. They make recommendations to the trustees, who will invariably follow the recommendations. A recommendation to enter into a lease or to sell a property is followed, but legally it is not the pension fund asset manager who makes the decision.

It is not entirely clear how that would work in terms of how the defined terms "significant influence" and "control" are framed. The language talks about being "able to ensure" that an approach is followed, or having a power to "direct" activities. Those words do not appear to be on all fours with the scenario in which somebody is making recommendations that are expected to be followed but are not a legal power.

The Convener: The register will provide the tools for a person to contact the owner of a piece of land in which they might have an interest; people will be able to get contact details. However, there is an issue of transparency in relation to who is behind that and who has a financial interest in that land.

Alan Cook: That is right. The purpose of the regulations is to make it possible to find out who to talk to, so that there can be a proper discussion about the land. That person might be a pension fund asset manager, so the regulations ought to allow people to be directed to that person. That is not clear and would not be clear to an asset manager who was looking at the regulations in order to decide whether they would need to declare that they are an associate. The explanatory notes do not address that, either.

There was discussion at a previous meeting about whether giving advice might be enough, because that is not what the regulations say. I would be nervous about tinkering too much with the wording of the regulations in order to capture that. The more the wording is opened up, the more it will bring in people who should not be brought in.

The Convener: Where do you draw the line?

Alan Cook: The best approach would be for the explanatory notes to clarify application of the

regulations in those circumstances. We are not quite there.

Finlay Carson (Galloway and West Dumfries) (Con): Are you suggesting that there should be an obligation on whoever registers an interest—whether it is significant control or an influence—to provide information that might be asked of them, such that rather than getting mixed up with definitions of "significant influence" and "controlling interest", the situation would be quite simple: the named person on the register would have to be able to respond to the kind of questions that are likely to be asked.

Alan Cook: The difficulty is in identifying the right person in the first place, and getting that name on to the register. It is not clear that the right name will go on the register.

Finlay Carson: Is that down to the registry, or is it down to the organisation to make the decision? Is that a decision that people who provide the information should make, or should there be a definition of who the named person should be?

Alan Cook: Persons who have recorded ownership and who have a duty to register associates in relation to the land must make decisions based on the regulations about whether or not a particular person must be declared as an associate. At the moment it is not clear enough who should be declared as an associate.

John Sinclair (Law Society of Scotland): I agree with Alan Cook; there is an important need for more guidance to be provided on the regulations. One issue is that the concepts that we are trying to track—significant influence and control—are very difficult to define. The further the regulations go into that, the more inconsistencies are created and the more they refer to other, less clear, concepts. Given that, it might be difficult to make the regulations themselves any better, so clearer and fuller guidance should be made available so that it is clear what is and is not covered.

We also recommend that the drafters look again at the interaction between regulations 10(1) and 3(3). Regulation 10(1) obliges the recorded person to submit information to the register. Regulation 3(3) defines "the recorded person" as the person on the register. The previous drafting set out in more detail, in regulation 10(1), who was to submit information. It did not refer to the defined term, and therefore avoided creating that sort of circularity.

09:45

Hamish Trench (Scottish Land Commission): The core purpose of the register is transparency about control. That is about more than transparency on contact information; it is about transparency in relation to control and the power that is associated with land ownership in any circumstances. I reiterate how fundamental that is to Scotland's wider programme of land reform. It is striking how often still, in public meetings, examples are raised in which a key barrier to progressing a project is lack of clear information on ownership. Whether it be about vacant and derelict land in a city centre or of a bit of rural land, establishment of information on ownership is a very real issue.

The overall view of the Scottish Land Commission is that the register will be a huge step forward in providing that transparency, albeit that there is some complexity built in, given the nature of the current registers. We strongly support a good focus on ease of access to the information.

The Convener: We will come on to talk about that, but I will first bring in Dr MacLeod with comments on my initial question.

Dr Calum MacLeod (Community Land Scotland): The broader guidance will have to deal with loopholes in respect of associates and the control that they might have. That reinforces the importance of making sure that the efficacy of the regulations is monitored regularly. That has been brought up in submissions—in written evidence from Global Witness, for example. Issues, anomalies and loopholes will inevitably come through over time; we need to be vigilant for them. Guidance is critical with regard to issues that are not on the face of the regulations.

The Convener: There will be a lot of testing of mechanisms for accessing the register. The Government could get users to give it a go and find out where the difficulties lie, then reflect on that.

Dr MacLeod: Yes. I am sure that we will go on to discuss the variety of issues to do with how the different elements connect to ensure that there is no gap between implementation in practice and the fundamental policy intent—which Hamish Trench mentioned—which is transparency about land ownership because of ownership's implications for power relationships, sustainable development, and community and societal empowerment.

The Convener: You mentioned Global Witness. Megan MacInnes was invited to this meeting, but unfortunately could not make it. She has, however, sent a written submission in which she echoes quite a lot of the points that witnesses have made, and makes other points.

Claudia Beamish (South Scotland) (Lab): I have a follow-up question for Dr MacLeod, who spoke about monitoring the efficacy of the register. Should that be one of the duties of the keeper of

the registers of Scotland and, if so, how often should monitoring happen?

Dr MacLeod: The keeper herself will undoubtedly have a view about monitoring efficacy in how the register works in practice, but there is certainly a case to be made for the power to be given to the keeper because, as the convener said, it is critical to ensure that the regulations—as with any land reform regulations and other areas of public policy—deliver the intention behind the legislation, in spirit and in practice. That should be considered quite strongly. There are different perspectives on the regularity of monitoring, but annual monitoring would not be an unreasonable place to start.

The Convener: The tool will be available to Scotland's populace, so that they can find out who owns what and how they can get hold of them. Through reading a lot about it, and doing the work that we have, some committee members have a concern that only a property lawyer would understand a lot of the definitions. Are the definitions clear and accessible? Will anybody be able to understand them, particularly when someone has to declare an interest? We are not talking only about people who have miles and miles of countryside but about ordinary people who might have quite a small piece of land. We are not talking in every instance about people who are emperors of all that they survey. How accessible is the language in the draft regulations? How clear are the definitions?

John Sinclair: The Law Society has a concern about clarity and the risk of inadvertently criminalising members of the public for non-disclosure. We think that, for a large number of partnerships, there would need to be a recorded person under the regulations. From the public's perspective, we have more concerns about the understanding, knowledge and communication of the duties to register than we have about accessibility, particularly if the register is accessible through Scotland's land information service—ScotLIS—which, from my experience, is a very intuitive system that allows map-based searching.

Once a person is on the register, I do not think that the difficulties in getting consistency in people's understanding of what an associate is will have an impact. Once someone looks at the register and knows that there is an associated person, the reason for that person being an associate is less important at that stage than the fact that there is an associate. I do not think that the difficulties in relation to the definitions will have an impact on the public being able to access the register; the impact will be more on members of the public who should be registering.

Alan Cook: I agree with John Sinclair. What will be relevant to somebody who accesses the register will not really be the details of the regulations but the information that is on the register. The difficulty will be for people who are trying to work out whether they ought to declare and put themselves on the register in the first place. The difficulty will be exactly as John Sinclair said.

Finlay Carson: In relation to the consistency and completeness of the register, how important is how a person's name and address is recorded? How do we ensure that all the different registers tie up and that there is transparency? There is an argument about whether we should include email addresses. That would appear to be a simple addition to future proof the information and the way in which people respond to online data and so on. How important is consistency across the register?

Alan Cook: The inclusion of email addresses would not be helpful at all in future proofing the register, because email addresses come and go. If an email address is included as contact information, it will probably be an individual's email address, and they change. When we as lawyers write contracts, there is usually a clause that says how you go about serving notices on the person, and which includes their contact details. There is usually a lot of reticence over including email addresses as part of those arrangements, precisely because they come and go and because they might not exist if someone changes their internet provider.

Using postal addresses is a much more robust way of collecting the information. I would be nervous about using email addresses. There has been a suggestion that email addresses might be included as part of the information that is provided to the keeper—more for operational purposes than for the purposes of the official register. That is perhaps the approach to take.

Finlay Carson: That was certainly my thought. It would expedite any correspondence about the register, and it could help with verification and setting up the database initially.

What are your ideas about a unique reference number for associates? We have heard that one landowner or person might have a controlling interest in multiple pockets of land, which could be dealt with through having an associate number. What are your thoughts on the pitfalls or advantages of having a unique reference number for associates?

John Sinclair: We were in favour of Global Witness's suggestion of a unique identifying number, which is good for capturing instances in which an associate is associated with multiple

areas of land. We have a point about the fine tuning of the detail. There is an absolute requirement in the regulations to provide the associate's unique identifying number in the registration, but we would prefer there to be scope for providing the number only if it is known to the person who is making the registration.

Dr MacLeod: The issue of the postal address as a fundamental point of contact is important in that regard, although I agree that there is merit in the use of an email address at an operational level. The issue of consistency that Finlay Carson raises is fundamentally important across the board with regard to the register, and it fits in with various other elements, not least of which is compliance, which I am sure we will come on to.

Community Land Scotland is highly supportive of Global Witness's proposal that there be unique reference numbers for associates.

Hamish Trench: We absolutely agree that the unique reference number is the most appropriate way of ensuring the most consistency, although the keeper can obviously advise on the technical need for consistency. To come back to the core purpose of transparency, it seems that, when it comes to identification, the postal address should be the main focus.

Alan Cook: The SPF agrees that the use of unique identifier numbers is a good step forward. Previously, there were concerns about the requirement for disclosure of dates of birth. The original rationale for requiring that was to enable people to work out which John Smith somebody was among a number of John Smiths. Having a unique identifier deals with that and with the surrounding data protection issues.

The Convener: Does it allow people to hide behind the number?

Alan Cook: No, because it will still be clear who the person is, as long as there are adequate contact details that go with the unique identifier. If a particular John Smith has a unique identifying number, it still ought to be clear from the register how to contact that John Smith, and it will allow people to know that it is that particular John Smith and not another one.

The unique identifiers will also help with the searchability of the register. Perhaps the keeper can clarify this, but my understanding is that the register is intended to be searchable by associate or in other ways. A unique identifier will assist with the searchability of the register.

John Sinclair: My understanding is that the unique identifier is to be in addition to the other information that is contained on the associate and so will not represent a tool for obscuring the register.

To leap on to another area, with security declarations, it might in some circumstances make sense for the unique identifier to be an interim alternative to having the full details on the register. Currently, there are no circumstances in which the unique identifier could be hidden behind, but there may be a circumstance in which it would make sense to allow that to happen at least on an interim basis.

The Convener: Yes. We will come on to the security issue.

Dr MacLeod, do you want to come in?

Dr MacLeod: Yes, but it is on a different issue, so this is not perhaps the appropriate place to make the point.

The Convener: You can make it now.

Dr MacLeod: It is about consistency and accessibility for users as opposed to people or entities that are on the register. One point that has been made previously is that, although it is good that the register will be free to use, as the convener said, it can be daunting for people to access and navigate their way around such data. We support the point that Global Witness made in its submission about being able to access the register using an open data approach, whereby people can—as I understand it—go in and manipulate the data; almost at their leisure, people can take the data from the register, play about with it and use it in a more flexible way than is possible at the moment. That would be consistent with the persons of significant control register at a UK level. There is also an important point about the usability or the efficacy of the register from a user perspective, which we encourage where it is possible.

10:00

Finlay Carson: I will go back to the completeness of the register. In practical terms, to get an initial indication of how accurate the register is, is there a requirement for verification? When an entry is made in the register, a letter could be sent to the person who has registered an interest and they would be required to acknowledge that. On the simplest basis, the letter could say something like, "This is the information that the database contains about your land ownership. Can you confirm the information by returning the tear-off slip at the bottom?" Would that help give us confidence that the register held accurate information and was fit for purpose as soon as possible?

Dr MacLeod: That is an important issue, which was raised in the previous evidence session that some of us participated in, as well as in the session before that. The verification and validation

of the data is an important issue. At the moment, as we understand the regulations, the keeper can undertake a validation or verification process—I hope that I am not being too fast and loose in my terminology—if they are alerted by a third party. We have argued, as has Global Witness in its written submission, that the keeper should have the power to do that without the necessity to go to a third party. As the committee explored in its previous session on 4 February with the bill team and Scottish Government officials, there are potential practical ways to sort the verification approach—Finlay Carson talked about having a tear-off slip, and Mr Ruskell discussed verification using utility bills. There is a value in doing that, to ensure that the information is robust and will do what the policy intends it to do in practice.

Finlay Carson: I got the feeling that there was some resistance to that; I imagine that that is because of the resources that are required to do it. Is there resistance to initial verification? Is it simply down to the resources involved and cost of carrying out that operation?

Dr MacLeod: I suspect that that is the case. It would be easy to imagine that the resource implications are an issue.

John Sinclair: The Law Society would have a concern about ensuring that Registers of Scotland was properly resourced. To go from the function of a register to that of an investigative body is a big step, in terms of resourcing and principle. If that was to be the direction of travel, we recommend that the volume of resource that is required to make an effective difference with that sort of function should be looked at carefully, because it is not an easy thing to do.

When you look at the concepts of significant influence and control, you see that a lot of the information will be hard to verify objectively; you realise that it is hard to make the process effective, particularly from the starting point of the registration function. The other comment that we would make is that reviewing the structures of trusts and unincorporated associations is a different skill set, which is way beyond mine as a property lawyer. We therefore question whether Registers of Scotland would be the right entity to do that, given the nature of its function and the skill set that would be required. We have a similar concern about the Lands Tribunal being a point of reference. Its skill set is centred on property transactions, whereas the concepts behind significant influence and control do not actually relate to property.

The Convener: They are probably more forensic ones.

John Sinclair: They involve corporate accountancy and corporate structure—basically black magic that I know nothing about.

Hamish Trench: It seems that there is caution about both powers and resources in relation to the validation proposals. Even if validation across the piece is not possible in the short term, it seems to me that some form of testing will be required as we move forward which, realistically, would form part of a monitoring and review system. To build confidence in the consistency and accuracy of the register, it will be critical to carry out some form of validation as part of the monitoring and review process—at least through sampling or at some point during the early establishment phase.

Alan Cook: I add that there is already a mechanism for associates to agree that their name will appear on the register. That happens when the recorded person contacts them at the start of the process and gives them 60 days or whatever to respond and to confirm that they are the associate, after which the registration is carried out. I would be nervous about adding another layer of bureaucracy if there were to be a further stage in the process whereby the associate also had to agree that they were the right person to appear.

I agree absolutely with the comment that turning the keeper from being the holder of the register into a sort of policeman would be a big change, which would have implications for both resourcing and skill sets. I do not feel that that is the purpose of Registers of Scotland: such a responsibility should fall not there but on those who make declarations in the first place. Any enforcement regime should be based on those parties rather than the keeper having a responsibility to verify matters. By all means, there could be sampling if it were felt that it would give a sense of assurance that, overall, the system was working correctly, but that would not be the same as having an overall responsibility for validation.

Mark Ruskell (Mid Scotland and Fife) (Green): The system is effectively self-declaratory, with the threat of fines if people either submit inaccurate information or do not submit returns at all. What proportion of individuals who enter the register might end up submitting an incorrect registration and having to go through a verification process? Presumably we are talking about a very small number. Do you have a sense of how many people might be on the register and, of those, how many might require to go through a verification process?

Alan Cook: The background documentation on the register said that the Scottish Government had tried to quantify the number of people who might be caught by the verification process, but that it had had a great deal of difficulty in doing so. That

is the very problem: how can the extent of the lack of transparency be quantified?

I am sure that the number will be in the thousands. However, we must distinguish between those who, inadvertently, do not get things right, or do not do them in the first place—we must be cautious in responding to such cases through the criminal aspects of compliance measures, which I am sure we will come on to—and those who deliberately choose either not to register or to register giving false information, who will surely form a small subset of the overall number.

It is the same with anti-money laundering legislation. There is a framework around ensuring compliance with that. People who are determined not to comply will not comply anyway, but for this issue, that will be a really small subset. The threat of criminal sanction is important and people will be mindful of it.

Mark Ruskell: Obviously, it is difficult to stick a number on this, but are we talking about tens or hundreds?

Alan Cook: Are you asking about those who will inadvertently fail to comply?

Mark Ruskell: I mean the cases that would need an investigation to be carried out.

Alan Cook: I am just putting a finger in the air, but it could easily be hundreds up to thousands. It is very difficult to tell how many trustees out there will not realise that the names on the title deeds are not the same as the names of the actual decision makers, for example.

Mark Ruskell: You mentioned a sampling regime, which could be another approach. There could be random sampling in an investigatory process to make sure that the information that is being submitted is accurate. How would that work? That feels more manageable in terms of the potential role of the keeper. Would that involve a certain proportion of cases? Is there a precedent elsewhere for an effective sampling regime?

Alan Cook: I cannot think of any precedents. It is an element of enforcement, really. There would be some difficulty in expecting the keeper to fulfil that function to the extent of asking for background information and the documentation that demonstrates that the declared associate is the correct person. As John Sinclair said, that could involve hundreds of pages of corporate documentation. I suspect that the keeper does not want to go there and I do not think that the keeper would have the skill set to do that. The keeper can speak for herself, but I think it would be quite an unfair thing to ask her to do.

Mark Ruskell: You mentioned it—I just wondered whether you had thought through exactly what it would mean and who would do the work.

Alan Cook: I do not know whether someone other than the keeper needs to be tasked with that. I hesitate to mention the Crown Office, for example, because that would start us off in the direction of considering who we want to prosecute.

The Convener: Is it a case of getting the procedures and registers up and running and then having an on-going review of whether they are meeting the objectives? That would prompt a decision on whether we need to have anything like that.

Alan Cook: That is perhaps a more proportionate approach. The register will find its way and will be deemed, in broad terms, a success or a flop. If it does not fulfil its functions, there will be some understanding at that point of why it has not done so. The reasons why it might not have fulfilled its functions should then be targeted. That is probably more important.

The Convener: John Sinclair wants to come in.

John Sinclair: What I was about to say has just been said. The monitoring and checking would be a very good thing, but it should be done from the perspective of achieving the policy objectives rather than the successful application of the particular roles. The monitoring and checking would not be done by Registers of Scotland; it would be done externally with more of a view to the policy objectives being met rather than the actual application of the roles.

Finlay Carson: Do the regulations and guidance need to set out more clearly the responsibilities and arrangements for non-compliance? A community or an individual might send a letter to the person who was registered as having the controlling interest, and get no response. Does the process of enforcement, or the process for how non-compliance would be investigated, need to be clearer? It has been suggested that the keeper should not have that responsibility, so which body should undertake that forensic corporate investigation? Is it clear in the regulations how that would play out?

10:15

John Sinclair: I am happy to be corrected on this, but I think that the process is an application to the Lands Tribunal for Scotland. That process can be cumbersome and expensive.

Finlay Carson: Are you saying that what has been suggested is not fit for purpose and that there needs to be something else, or someone else, that looks at non-compliance and works out the corporate black magic?

John Sinclair: I am going to regret using that term.

I would not say that what has been suggested is not fit for purpose; rather, it is simply too early to say how the approach will work. There is something to be said for the formal process of going to the Lands Tribunal for Scotland to deal with a concern from a third party. It might make sense to have a less formal process, but I do not think that the Law Society of Scotland has considered that question.

Alan Cook: There are two aspects to non-compliance: submitting a return without the right answer and not submitting a return at all. We have to be clear about that distinction. Trying to verify the information that has been submitted is one thing; not complying and not submitting at all is a different thing. As I have said, that can be because of inadvertence or it can be deliberate. I suspect that people who deliberately evade the rules or deliberately give a false return will be a really small subset.

The Convener: Are you satisfied with what has been put in place in respect of giving people a period of time from when the register has been set up? As has been said, we do not want to criminalise people who have genuinely made a mistake.

Dr MacLeod: I think that that has been extended from the first iteration of the regulations. It is clear that we do not want to criminalise somebody who has inadvertently made a genuine mistake. However, I am intrigued by John Sinclair's corporate "black magic" phrase. One of the problems is that a number of entities have been doing a vanishing act for quite some time. It is really important that we ensure that we are able to track their ownership and controlling interests.

We are exploring various elements of how the validation and enforcement process might work in practice. It is clear that there are different views on that, but there is a critical point. I slightly take issue with the relationship between the policy intent and the regulations because, ultimately, the regulations will give flesh to the policy intent. We need to ensure that, in practice, there is a clear line between what is desirable and what we get. Whether the keeper has that responsibility and whether things are done on a sampling basis to be potentially explored further down the line in monitoring, I would not necessarily have thought that it is beyond the wit of humankind to come up with a solution on how to take a sampling approach. However, who does it has to be confirmed.

The Convener: We will move on to security. Our former committee colleague Richard Lyle opened up a lot of questions about that. Are we protecting people who might be vulnerable and have an interest in land? If they are on the register and their identity is out there, it could be used by people who might want to perpetrate harm on them. Are you content with what has been put in place on that? An early discussion seems to have been teased out in the next draft of the regulations. Are they fit for purpose?

John Sinclair: We have a few concerns about the way in which the regulations are currently drafted. At present, there is a 60-day period for the provision of evidence. Failing that, there is a direction that the security declaration is to cease to have effect.

Our concern is the hard cut-off, which would leave the details of either the associate or a person connected with the associate in a public register. That is adverse, and there might be circumstances in which more than 60 days should be given for the provision of evidence. Regulation 16 provides for the keeper to ask for more information, but there is a lack of clarity on how the period in which that information can be provided sits with the fixed 60-day period. We would welcome greater flexibility in relation to the former period.

We also note that, when a security declaration is made, the associate has to send it to the recorded person. Without fully mapping the circumstances in which a security declaration could arise, there is a question as to whether it would always be appropriate for the recorded person to have the details of the security declaration, particularly if it was not in connection with the associate but with a person who is connected with the associate.

We would welcome a declaration in the registration that the recorded person was not aware of their associate having any need for a security declaration, which would be an added layer to keep it in people's consciousness.

The Convener: That is helpful. Are there any other thoughts on the security of potentially vulnerable people?

Dr MacLeod: I reiterate that anybody who is vulnerable should not have their position compromised in any way.

As it stands, we are comfortable with the definition of who is involved in security declarations. We would not want that to be expanded any further, which Global Witness also said.

Finlay Carson: Is the Lands Tribunal of Scotland the most appropriate body to look at appeals regarding security declarations? One of the issues that was raised was domestic abuse. Is it appropriate that the Lands Tribunal would be the ultimate arbitrator in such decisions?

John Sinclair: That is not necessarily in the skill set of the Lands Tribunal, which is a tribunal based on property.

On whether creating more flexibility in relation to the security declaration should be perceived as a loophole, the range of people who are able to claim a security declaration is defined and it is hard to see how it would be used as a tool to subvert the register. Therefore, there should not be a concern about the security declaration being used as a loophole.

Claudia Beamish: I have questions on the criminal offences that relate to the regulations, and on the difference in fines for similar offences across the registers. For instance, there is a £10,000 fine related to the register of persons of significant control, whereas the fine under the regulations could be £5,000. What is the deterrent effect of fines and of the criminality aspect? Comments from the panel on that or on other aspects of criminal offences would be helpful.

Hamish Trench: Consistency in the sanctions would be appropriate. I understand the argument about whether £5,000 or £10,000 would be a deterrent in the circumstances that we are talking about because, in practice, such financial sums might not be significant. It seems appropriate to have consistency in the signals that the fines send but, fundamentally, I agree that the criminal sanction appears to be the most significant element of the sanctions.

Claudia Beamish: What would be an appropriate and proportionate fine? I understand your argument about consistency—we all do—but if the fine for somebody attempting to hide goodness knows what was to be more than £10,000, what should the figure be?

Hamish Trench: The difficulty is that it is probably impossible to put a figure on what would be proportionate in different circumstances with different partnerships, companies and structures. I come back to consistency being a pretty good basis.

Claudia Beamish: Do other panel members have a view?

Dr MacLeod: The issue of consistency is fundamentally important. As the committee has noted and as has been discussed previously in evidence, there are UK-wide registers that have a larger fine regime. From our perspective, it seems logical to have consistency in the deterrent. As I understand it, the fines can go up to that amount, as opposed to being fixed at that amount.

At the committee's previous evidence session on the issue, there was discussion of the policy intent of the register of controlled interests compared to that of the persons of significant control register, for example. Fundamentally, certainly for Community Land Scotland, the policy intent is one and the same. It is about transparency and ensuring that people have that fundamental right to access information. Personally, I am not sure—and Community Land Scotland as an organisation would not be sure—that the policy intents diverge in that sense, so it makes sense to have consistency across the board. In terms of a consistent approach, there is also the UK register of overseas entities, which is mentioned in Global Witness's submission.

Another thing that is of considerable interest and that my organisation would support is the potential for the completion of a submission to the register of controlled interests to be a prerequisite for undertaking certain administrative and financial transactions on the land register, which I think Global Witness has suggested. There will be different views on that proposal, but it would add another element to the suite of available enforcement powers in relation to ensuring compliance with the register, which in effect is a fundamental aspect of our relationship with land in Scotland.

John Sinclair: Convener, would it be appropriate to respond on the references to controlling the administrative functions of the land register at this point?

The Convener: Yes.

John Sinclair: The Law Society is not in favour of that. The same issue came up with the register of overseas businesses, and our concern is that we would end up punishing the wrong person. One possible consequence of the proposed provisions for the register of overseas entities is a scenario in which a good faith purchaser settles a transaction, pays money to the overseas entity—in this case, it would be the recorded person—and then finds that their disposition, for whatever reason, is rejected due to a historical non-compliance, for example. If the disposition is subsequently rejected by the keeper and needs to be re-presented, we would then be retesting compliance with a register that the controlled person would think that they no longer needed to be on because they had sold their property.

We think that the proposal would increase costs and add risk to good faith purchasers in Scotland. The register of overseas entities tracks a slightly different thing, as it deals with beneficial interest or beneficial ownership of property, whereas the RCI deals with the control of property. By the time that the original recorded person has conveyed the property or has delivered a disposition, they are no longer relevant, so there is no on-going interest in who had control of land at a particular point in time rather than in still trying to track through who has

the beneficial interest in the land or the proceeds from the sale of land.

The other differential between the RCI—

Claudia Beamish: I am sorry, but can you say a bit more about that? I do not really understand what you mean—as a layperson, I am just not catching up.

10:30

John Sinclair: The proposed register of overseas entities looks at beneficial interest in land, which is both control of and financial interest in land, whereas the RCI is about transparency and control of land, and not necessarily financial interest in land.

If you are looking at control, once a disposition has been delivered and the title is being transferred, that control has gone. There is nothing left that needs to be controlled or understood in relation to that land. The point of sale and the transfer are less significant in the RCI than they are in the register of overseas entities.

The other difference is that, if you are dealing with an overseas entity, it is very clear that that is the case. There are a lot of transactions that you can green flag and about which you can say, "I don't need to think about this." However, the register of controlled interests in land could apply to every single transaction other than those involving the excluded parties that are listed in the exceptions. Every time that you wanted to buy a property, you would know that you would not get the disposition registered unless the person was a recorded person—if they should be—and you would need to go through the process of retesting the recording for every single transaction. That would be an inefficient administrative burden, particularly if it was being imposed at the point of sale, where there is no longer the on-going function of having the owner recorded on the RCI.

Alan Cook: I have a couple of comments, the first of which is on the level of fines. It is not necessarily correct to compare the level of fines to the level of fines for other things. I completely agree that transparency is the overall purpose of this register and other registers, and that transparency is required for different purposes. Do not get me wrong: I do not want to detract at all from the importance of transparency in relation to land ownership, but I do not think that there is a straight read-across between that and global money laundering and financial crimes. If someone is determined not to comply, the level of fine will not make the slightest difference to them.

That takes me on to the nervousness about the automatic criminalisation of people who are inadvertently not complying, just because they have not realised that they have a responsibility. One of our proposals—it is not a feature of the regulations, unfortunately—is that, before criminality is triggered, some sort of notice should be served on the person that gives them warning that they may have failed to comply with the regulations, and that not responding to that would be a criminal act.

For example, we can compare the regulations to land and buildings transaction tax. Not submitting an LBTT return does not automatically result in a criminal act, even though we are talking about tax compliance, which is extremely important. The criminality element comes in at the level of fraudulent evasion and much more serious elements, rather than just being automatic. We have a concern about the automatic criminality that the regulations would introduce.

The Convener: Has that not been tackled in the revisions to the regulations?

Alan Cook: It is still automatic, and that is the problem.

Finlay Carson: I am looking for clarity. The committee previously recommended that the completion of the register should be a precondition for undertaking other administrative and financial changes or transactions relating to land, which should, we thought, clarify responsibility for the registration. Mr Sinclair, am I right in saying that you suggested that that would be overburdensome, or do I have the wrong end of the stick?

John Sinclair: Yes.

Finlay Carson: Yes, I have the wrong end of the stick or yes, it would be overburdensome? [*Laughter*.]

John Sinclair: Yes, we consider that it would be overburdensome, particularly in relation to dealing with third parties for value, whether that is for security or a disposition.

Alan Cook: I will just add, perhaps on the more legalistic side, that we would be nervous about introducing that sort of requirement for compliance before someone was able to sell or deal with the land. If consideration was ever given to introducing that into regulations, I do not think that it could just be thrown in there; a lot of care and thought would need to be put into it. It is a feature of the proposed UK regulations on beneficial ownerships of overseas entities, on which there has been on-going consultation, to which the Law Society has made representations. It would be really important to take care on that, because you might start messing up things such as people's ability to get good title and the way that the land registration system works.

Dr MacLeod: I broadly echo part of that point in relation to the monitoring of the implementation of the regulations. The implications of having such a prerequisite might be bottomed out—at some point, if not now—and consideration given to what the benefits and potential challenges might be.

The Convener: Mark Ruskell has questions on that and other issues.

Mark Ruskell: We have had a good discussion about preconditions. The only thing that I would add is a question about whether there are certain administrative or financial changes around which it would be easier to create a precondition of registration. We have mentioned the sale of land, for example, and John Sinclair has articulated what the challenges might be with that. I wonder whether an element of preconditionality could be introduced and then, as Dr MacLeod said, we could monitor that and seek to extend it. Ultimately, this is about power relationships in relation to land. If I was buying a piece of land, I would want to know what all those relationships were.

Dr MacLeod: Without making any claim for originality whatsoever, I merely reiterate the suggestions in that regard that are made in Global Witness's written submission, which relate to mortgaging or remortgaging a property and other changes to the title deeds of the property. Those are potential areas.

Hamish Trench: The principle of that kind of cross-compliance approach is pretty sound, and it is fundamental to the responsibilities that go with land ownership. Equally, though, I understand the risks of immediate adoption at this point. The issue should certainly be looked at in the early phase of introducing the register. As I understand it, part of the motivation behind considering the matter is about ensuring compliance, so we should perhaps build that kind of thinking into the monitoring and review process and be ready to analyse where the most appropriate and effective cross-compliance leverage points might be.

John Sinclair: On the reference to administrative actions on the register, there are very few things that get registered that do not involve two parties. For every action on the register—unless it is something such as a discharge or standard security, where the second party has no on-going interest—the second party will always have an interest in knowing that the deed is registered.

The other thing to remember is that the registration is not an instant process; it takes place over time—it will always take at least some time to register. If there is a requirement that, at a particular point in time, the recorded party must be fully recorded on the register, it will simply create a degree of uncertainty. It is very difficult for a purchaser to know that the recorded person has complied with their obligation to register. In a classic sale transaction, when you pay your money and get your disposition, you want to know that there are no barriers between paying your money and receiving real title to your property.

If a condition is brought in whereby you get title to your property only if the recorded person is fully and properly recorded in the register, along with all their associates, it is hard to see how you can ever be 100 per cent sure that a person is fully recorded. Where the recording is based on trust documentation, other documentation or voting rights, that can be tested, and you can almost get to a position in which you can bank the documentation to ensure that there is compliance—

The Convener: Fundamentally, it is putting liability on a person for something over which they have no control—is that the issue, or would people just not even go there?

John Sinclair: Basically, yes. The other way of putting it is that the person who bears the cost and risk of non-compliance is not the non-compliant person, who has just received their money.

The Convener: Okay.

Mark Ruskell: There seems to be a requirement for some kind of gate-checking process. If I were purchasing a piece of land, I would expect a lawyer, as part of due diligence, to look at the register of controlled interests and at least make me aware of that. Obviously, I could do that myself, but surely the register will become an important part of land transactions in Scotland, in the interests of transparency.

John Sinclair: I can test that the person with whom I am contracting is the registered owner of the land, and I can test that the disposition that is presented is signed. I cannot test whether the person who sold me the land has a contract or indeed an arrangement.

The expanded guidance in schedule 1 in that regard relates to overseas entities, not to individuals. As a lawyer, I know and understand what a contract is, but I am not sure about an arrangement that is not a contract. There is expanded guidance on what an arrangement is in relation to overseas entities but not in relation to individuals. Can I test whether there is an arrangement or whether, in the context of a particular arrangement, there is control or significant influence? The answer is no, I cannot. I have no objective way of testing that. That means that I cannot say to a client, "I can guarantee that this disposition will give you title." It might not be possible to register the disposition, because the seller might not be fully registered under the RCI.

The Convener: Can we move on to access to the register? We are running out of time.

Mark Ruskell: Yes. This will be my final question. The committee has heard views on how the register will function, and I understand that ScotLIS incorporates 20 separate registers. I am thinking about potential users. How can the data be used in an open-data format? For example, if I want to identify who owns parcels of land or has a controlled interest—such as an options agreement with another family company—in relation to land in the Stirling area, will I be able to find the person's unique identifying number and search using it? Will the system then come up with little parcels of land so that I can see where the individual's monopoly interests lie? Is that how the process will function? Will the various databases and registers operate seamlessly so that I can see ownership and controlled interests?

Alan Cook: It would be nice to think that the system will work in that way. ScotLIS is a good and accessible resource that works well in enabling people to access information in the broader sense.

The use of unique identifying numbers for associates will help with the searching process. At present, under the land register, a degree of searching of names is possible in order to see what properties a named person owns. I would have thought that a similar search process would be achievable in respect of registered associates, as opposed to named owners on the title deeds of land. It ought to be possible to cut the searching in a different way. As John Sinclair said, ScotLIS is a good and intuitive system, and there is every expectation that searching the RCI will be similarly intuitive and accessible.

Hamish Trench: Only the keeper and her colleagues will be able to say exactly what is possible immediately, but we strongly support the use of ScotLIS as the way into the system. Almost regardless of the underlying databases, we strongly support working towards ScotLIS being the entry layer that draws things together. I agree that the search functions are critical, and I fully expect that area to develop over the next couple of years.

Dr MacLeod: As Hamish Trench said, at present, few people know how the process will work in practice, but ScotLIS should clearly be the entry point for people who want to access the information. I am not sure what the state of ScotLIS is at present, but in the past its usability and flexibility have been criticised. Andy Wightman, for one, has been quite critical in that regard. The system must be user friendly and accessible.

Finlay Carson: The Scottish Government has stated that it has no concerns about the capacity of Registers of Scotland, the Lands Tribunal for Scotland or Police Scotland with regard to establishing the RCI or the management of omissions, inaccuracies and so on. Do you have any concerns about the capacity of those organisations or the skill sets that are in place?

Alan Cook: It depends on what we ask people to do. For example, if we ask Registers of Scotland to verify whether an associate ought to be declared in relation to land or whether the associate is correct, it will have to either write to the person, ask them to confirm that and take it at face value, or dig into the underlying information, which could open up a whole world of legalistic documentation, corporate structures and offshore arrangements. At present, Registers of Scotland does not do that.

I have no particular knowledge of Police Scotland in this context, apart from the fact that it is concerned with financial crimes. The issues that we are talking about touch on that realm, and the investigation of such issues involves a specialised skill set. You would have to ask Police Scotland about the extent to which it has the capability and the resource to deal with that, and that goes for Registers of Scotland, too.

We should bear it in mind that nobody will pay to access the register, so the cost of the capacity that we are talking about will have to be funded from internal resource. We must be mindful of that with regard to what we expect the organisations to do.

The Convener: We have gone over our allotted time, but is anything outstanding that you would like to flag up to us? Does anything stand out as an on-going concern with the draft regulations? It seems not. Given that we have covered a lot this morning, I will bring this session to a close. Thank you for your time.

We will have a brief suspension to allow a change of witnesses.

10:49

Meeting suspended.

10:53

On resuming—

The Convener: Welcome back. We will continue to take evidence on the draft regulations to establish a register of persons holding a controlled interest in land, and I welcome the keeper of the registers of Scotland, Jennifer Henderson.

You were in the public gallery during the earlier session and I imagine that you listened with great

interest to our colleagues' reflections. I would like to address ease of access to the register. We have asked about that previously and we know that you intend that the register will sit in the ScotLIS system and will be easy to access. Would you like to reflect on any of the comments that the previous panel made on that?

Jennifer Henderson (Keeper of the Registers of Scotland): ScotLIS has distinctly improved in the past year. We have released a public version that allows the public to search by map and access title information directly. We have overcome some of the previous criticisms of ScotLIS and we have become used to responding to the public's feedback on how to improve the system.

In building the register of controlled interests, we will always go through the Scottish Government's digital first approach, under which we will work with users, such as people who need to put information in and those who want to get information out, and design a system that works for them.

We certainly anticipate that ScotLIS will be the logical place to put the register. The way that ScotLIS works is that the different land-based registers appear as a layer. The user will click on a box and it will say, "Show me where there are register of controlled interest entries" or "Show me where there are land register entries". ScotLIS seems to be the logical place for someone to search by a piece of land. The regulations also provide for me to allow searching in other ways, such as by the name of a person that someone is interested in, or by the unique reference number. The user testing will build on all of that, and we will endeavour to make the system as intuitive to use as possible.

On the point that laypeople will need to be able to use the system, particularly for putting information in, we recognise that a spectrum of people will need to submit information to the register, and we do not want people to need particular professional expertise in order to understand what to put in. We will use a test and develop the register on that basis.

On getting information out, if someone in the street wants to know about a piece of land that is up the road, they will want to be able to access the register of controlled interests in an easy and intuitive way, find the information that they need and do what they need to do in following it up and contacting the relevant people. We will aim to enable that as we go forward with the system.

The Convener: Another access issue is cost. Have you reflected on the comments that we have heard about ease of access in terms of cost, particularly if someone's search leads them to another register that has an associated cost?

Jennifer Henderson: It is worth setting out clearly that there are no plans to have a fee for submitting information to the register of controlled interests or getting information out. It is true that there is a fee for accessing information in the land register. One of the improvements that we have brought in in the past year is that, if a piece of land is on the land register, a member of the public will have to pay only £3 to download the title sheet for it. That is a huge reduction from £30 and an improvement from the person having to ring up our customer services.

As the committee will be aware, not all the land in Scotland is on the land register yet, and it is more complex if land is held on the register of sasines. In such a case, the person still has to ask us to dig out the ownership information, and there is a higher fee of £16 plus VAT for that. We aim to get all the land on the land register by 2024.

It is within the gift of ministers and Parliament to set our fees for access to information. If they wished to consider changing the price for accessing information on the land register or the register of sasines, they would do so in consultation with me.

Finlay Carson: I was not going to ask this question, but my ears pricked up when you said that people might be able to search the register by someone's name. How closely will you look at the principal reason for searching the database? I would be concerned if the general public, a newspaper or whoever was able to search for someone's name and the database would come up with a list of registered ownerships. That is not what the register was set up for. The Sunday newspapers could search for a celebrity or a VIP in order to create a story. Are you aware of the potential unintended consequences of allowing broad searches of the information?

Jennifer Henderson: Provision is made for name searching in the draft regulations. I do not have an opinion on whether that is appropriate, but I understand that the information commissioner is being consulted on whether there are any reservations. The feeling is that, in order to deliver the transparency that the register of controlled interests is intended to deliver, if someone says, "I know that John Smith is the recorded person and I want to understand who his associates are", we need to provide for John Smith to be searched for, because the register would otherwise not deliver the transparency that it needs to deliver.

We do not currently provide for members of the public to search for names on the land register. People cannot go into ScotLIS, type in the name

of someone they are interested in and find out where they own land. Solicitors have access to that functionality because, if they are operating for a client, they need to double check that they have identified the correct information, but we deliberately do not provide that function for the public on the land register.

The Convener: Mark Ruskell has some questions about the keeper's role.

11:00

Mark Ruskell: You will know that we discussed with the previous panel validation, verification and monitoring, and also sampling. We do not want to overburden you with investigatory requirements, although investigations might be required in some circumstances to get to the bottom of an inappropriately lodged or missing entry. What are your views on that? What do you see as your role? Do you see it as the role of other bodies or individuals to perform some of those functions?

Jennifer Henderson: It is clear from the way that the draft regulations are structured that a duty is not being placed on me at the outset to verify data. As I have said in evidence before, I can do a lot to validate that, if someone submits an address, it is a real address, but I cannot verify that Joe Bloggs really lives at that address. The draft regulations provide that, if someone alerts me to a potential inaccuracy, I may follow it up. As you heard earlier, however, I would rapidly go beyond the competence that we have in Registers of Scotland if I was asked to look at complex company structures and determine what that information says. The appropriate authorities to investigate such things are the Crown Office and the police.

We can make it simple for people to notify me of inaccuracies. A question that has come up is how we will know whether the register is doing its job. With all the systems that we build, we constantly monitor whether people are able to do what they want to do. We can make it easy for people to tell us whether they can find the information that they are looking for. With our other registers, we already have a system that makes it easy for people to notify us of inaccuracies. It would be easy for us to say that, if someone has got information from the register of controlled interests and they think that there might be an inaccuracy but they have had no joy in trying to contact the people concerned, we will make it simple for them to kick-start the process.

As is provided for, if I was notified of an inaccuracy, I would write to the recorded person and ask them to confirm that the information that I was holding was correct. If they said that it was, that is as far as I would take it. If a third party firmly believed that the person was not providing accurate information, they would need to escalate the matter to either the Lands Tribunal for Scotland or the police for further investigation. Those are the appropriate authorities to look into such cases in more detail.

Mark Ruskell: That is very much a reactive approach to monitoring. Do you see Registers of Scotland taking a proactive approach—a suggestion was made about sampling, for example—or will you be reliant on that reactivity?

Jennifer Henderson: I would have the same reservations about competence. Let us say that the regulations provided for me to sample a bunch of records and write to people saying, "Are you really who you say you are? Can you prove to me that you are a real associate?" Even if we assume that I would get something back—nothing in the regulations would compel people to supply me with the information that I requested—I would be hard pressed to interpret it.

John Sinclair and Alan Cook rightly made the point that we do not currently have the skill set to undertake that investigatory function. I could hire corporate lawyers and have them on standby to do such investigations, but I do not think that it would be a good use of public resources to do that. However, it is clearly for Parliament to determine how far it would like me to take investigations and for the Scottish Government to ensure that I am resourced accordingly to do that.

Mark Ruskell: What do you see as effective monitoring? We discussed earlier the monitoring of the policy objectives, if you like, but do you see monitoring going beyond that? If it is just about policy objectives, what do you see as your role in that?

Jennifer Henderson: We can certainly build into the system the ability for people to confirm whether they have been able to do what they wanted to do. The most likely case, I think, is that someone who is interested in a piece of land will want to find out who to talk to in relation to it. As a first pass, the question will be whether our system has given them what they need—yes or no—and the next question will be whether they have been able to get in contact with the people. If they have not, there should be a straightforward process for the person to raise a concern that the register might not be accurate.

We believe that, for the vast majority of pieces of land, there will not be a controlled interest. If someone is interested in a piece of land, the land register will take them straight to the owner, there will be no register of controlled interest entry and the person will be able to go straight to the owner to have a conversation. That system already works very well. The new system will augment that

for situations where people sit behind the owner providing direction on what they do, and we believe that we can build a system that will allow the user to easily get in touch with those people.

The Convener: In the earlier evidence session, Alan Cook flagged up that there might be a gap relating to people such as asset managers, who might be in control of a pension fund or trust fund. What is your response to that?

Jennifer Henderson: My view is that the regulations as drafted provide a reasonably broad definition of "associate", as someone who gives direction or whose direction is usually followed in relation to decisions that are made on land. If the purpose of the regulations is to provide maximum transparency about who controls decisions on land, we want a broad definition. In the example that Alan Cook gave, if an asset manager makes recommendations that are usually followed, it will be for the recorded person who owns the property—I think that the example that was given was a shopping centre—to decide whether they consider that person to be an associate and, if so, to record them appropriately. The associate's contact details would be provided so that when someone wanted to get in touch with them, they could.

A number of points have been made about the need to get the system up and running and then to understand how it works. We will know quite quickly whether people have drawn the right boundary around whom they consider to be an associate. If someone gets in touch with the recorded person and their associates to have a conversation about a piece of land, and at that point the recorded person thinks, "Hang on a minute, I need person X to be involved in this discussion, as well," that should set off an alarm bell that person X should have been registered as an associate. I imagine that we will iterate a little as people realise that they should have included someone whom they had not thought of in the first instance. However, we will not know that until we get the register up and running.

Claudia Beamish: I take on board the concerns about things being onerous and costly, and I do not want to imply that the keeper should do a lot more monitoring, but—to build on the discussion that we have had today and previously—should there be a power to monitor and review, after a certain period, how the new register is working and whether it is delivering the policy intent of providing transparency? If so, how often should that happen, and who should do it?

Jennifer Henderson: As with any policy that is introduced, it will certainly be valuable to monitor whether the system is working, and to adjust it, if that is required, through updates of the regulations. Various parties will have a part to play in that. Day to day, I could monitor use of the register, its effectiveness and whether people can find the information that they need. We could easily track and monitor the number of security declarations and the number of notifications of inaccuracy, which is the sort of data that will show us whether the process is delivering the policy intent.

I will give an extreme example. If every person who uses the register and tries to contact a recorded person or associate gets no response and notifies me of inaccuracy, and if my follow-up gets no response, that will clearly show that the system is not working. Alternatively, if almost everyone who tries to get hold of such people gets a response and has a constructive discussion, we will be able to say that the process is broadly delivering the policy intent. We might then need to consider what we need to do in order to follow up on the small number of cases for which the system is not working.

Sanctions exist. There can be investigations that could lead to criminal prosecution, if necessary, for those who fail to comply. Such cases would need to be followed through. The regulations make good provision for encouraging people to comply, and they provide sanctions for people who do not.

Claudia Beamish: Should there be a duty to collate information and data and to report that in the public domain? So that you understand my question, I note that you have explained very clearly that you intend to do that.

Jennifer Henderson: Clarity about duties is always helpful. If the committee wants clarity about what monitoring should be done on use of information, it would be helpful for that to be included in the regulations. In building a system, it is good practice to ensure that it is working. I am sure that Scottish Government colleagues have plans to monitor the effectiveness of the regulations when they are in force.

The Convener: You said that you are going through user testing. Will you provide more detail on what you will do, when the tool is up and running, to publicise it and to let people know what they have to do to register their controlled interest?

Jennifer Henderson: It is important that that starts well before the tool is up and running. We do not want to pre-empt the parliamentary process—we want to wait until we have the final version of the regulations before we start publicising widely—but we will work closely with Scottish Government colleagues to ensure that everybody who should be caught by the regulations knows what they need to do, when they need to do it and how they need to do it.

Registers of Scotland is fortunate in that we are well connected to communities of lawyers, accountants and so on across the country, many of whom are likely to be among those who advise people. We have a good social media presence, and we run conferences around the country. We can support the Scottish Government to publicise the fact that the system is coming and what people will need to do.

There is another opportunity in that as we start to develop the system, the user testing will do a lot to raise awareness. We will be calling for volunteers to get involved in designing the system and we will ensure that, in doing so, we access the most representative types of user. We hope that that will spread the word effectively that the system is coming, so that people will want to be on board in ensuring that it is well designed and meets their needs. We will do everything that we can to achieve that.

I welcome the fact that the updated draft regulations provide for an extended transition period. We will publicise as much as we can before April 2021, when it is planned that the system will be introduced, but people have all the way through to April 2022 to comply. We will continue to publicise extensively once the system is up and running, and we will monitor how much use it is getting and so on.

Finlay Carson: You have covered most of the points that I was going to raise. I will ask about the difference between verification and validation. Is there a need for validation in the most basic sense? You think that that will be done once the system is up and running, but I would have liked to have seen a sample, as Mark Ruskell mentioned, or for Registers of Scotland to have sent out a simple notification to say, “This is the information that we have,” to ensure that, in practice, people respond at the right time. At the end of the letter trail, we want a person at the address to respond in a timely manner. On that basis, I would like some validation of the data. Are you confident that the public who use the system from day 1 will say whether it is working?

Jennifer Henderson: I think so. I highlight that, in the regulations, the primary onus is on the recorded person to submit the details of their associates, but the regulations will also place a clear duty on associates: if a person is aware that they are an associate but has not been told that they have been added to the register of controlled interests, they should do something about that. That provides a fail-safe such that if a recorded person submits information but misses someone out, and if we do the job that we want to do on the publicity campaign, the person who has been missed out will think, “Hang on. I was expecting to be added to this thing”, and so will get hold of the recorded person and ask them to submit their information.

We have enough people checking. As I said, once the system is up and running and people start to use it, we will rapidly be able to establish whether the information is correct. If it is not, the follow-up sanctions are clear in the regulations.

The Convener: A couple of issues about the security declaration were mentioned during evidence from the previous panel. I noted concerns that John Sinclair mentioned on the hard cut-off point. There are also sensitivities around an associate knowing that a person has a security declaration. Can you respond to those concerns?

11:15

Jennifer Henderson: A cut-off is needed because otherwise there would be an endless cycle of people saying that they will get the evidence in a minute, so 60 days feels like long enough.

The recorded person would submit the information and tell their associates that they have done so. Given the gravity of the reasons for why a person would want to put in a security declaration, if an associate were to feel that they needed to put one in, they would do so pretty quickly. If follow-up is needed, there is a very comprehensive list of evidence that people can provide to back up why they need a security declaration. I think that 60 days is a more than adequate amount of time for people to supply it.

The regulations make provision for me to consider things that are outwith the set list of evidence. If an associate were in the very unlikely situation that they could not get their hands on any of the things on the list of evidence, they can write to me to explain why and what alternative evidence they could offer. It feels to me as though 60 days is a perfectly adequate amount of time for that to happen. Otherwise we could end up with an open-ended process in which security declarations could pend indefinitely.

I cannot comment in detail on the question about an associate notifying their recorded person that they are putting in a security declaration. I am not sure whether they would have to send all the detail or do anything other than tell the recorded person that they are submitting the declaration. I would have to check the regulations. If there is concern that the regulations as drafted will mean that a person would have to expose the details of their security declaration to their recorded person, and that that might cause a problem, it would be for Scottish Government officials to look at that and to consider tweaking the regulations.

The Convener: From this and previous discussions with you, I get the sense that you have an open-door policy and that arrangements around sensitivity are at your discretion; if there are any sensitivities, you are available to manage them.

Jennifer Henderson: Yes. The regulations make provision for that: they say that I will "look at other evidence" as I "consider appropriate". I would not want to expose the details of someone who has a valid reason for a security declaration without having gone through the appropriate process.

It is also worth saying that there is an appeal process and a stand-still in the regulations. Therefore, if a person submits a security declaration and I get back to them to tell them that they have not provided me with sufficient evidence, or that I have not seen the evidence that I need to see, they can appeal that decision. While that appeal is going through, their details will still be withheld from the register. That is another mechanism to ensure that no-one who should not be on it goes on the register for security reasons.

The Convener: Do any other members have questions to ask?

Finlay Carson: I have a couple.

You have touched on the fact that the other database that you hold is the register of sasines, on which some land registry information is held that is yet to be transferred. How will the process work in practice, and are we likely to see an RCI that is completely populated online on the day that it starts, or will some entries say that they need to be updated or that it is necessary to refer to something else?

Jennifer Henderson: That is a great question. We have thought about what we will do about land that is currently still on the register of sasines

In the application, I defined that our experience shows that sasine descriptions are sometimes quite hard to interpret. Therefore, one of the things that we are considering and most definitely want—this, too, will be part of user testing—is whether the recorded person could also, when they submit information, supply a written definition if it is a piece of sasine land.

We are also considering providing a simple mapping tool that would allow people to click on a map and draw exactly which bit of land they are talking about. Therefore, when people search, it would make no difference which register the land is on. They will be able to look at a map and say which bit of land they are interested in; whether it is a sasine title or land register title would be invisible to them. The situation will be easy for land register titles, because there will be a title number that people can quote, but we have already started to think through how we can make things as accessible as possible when people know what bit of land they are interested in.

It is helpful that, having released the ScotLIS public version, we have already released a very simple "draw on the map" tool. When the public are interested in a title that is not on the land register, they can draw on the map and send it to us with a request to look in the sasine register for it. The system would tell us that there is an RCI entry for it that we can surface for them. We will flesh out all of that in user testing, but we think that our solution is fairly elegant.

Finlay Carson: On that, we understand that the register will be free at the point of access. However, as you have laid out, people will request information that is not on the RCI initially—it will be on the register of sasines or some other database, for which there is currently an access charge. How will you work through that issue?

Jennifer Henderson: I clarify .that if there is a controlled interest in land, people will be able to get everything that they need to know from the RCI, and that will be completely clear.

If a person knows where the piece of land is, they will go into the system and click on the map. The system will say that there is an RCI entry that includes the recorded person and their address and all the associates and their addresses, so they could get what they need. If there is no RCI entry—and, therefore, no controlled interest, no recorded person and no associate—ownership information would be needed. Therefore, one would go into our normal system, in which, as I said a moment ago, we charge for basic ownership information. However, if there is an RCI entry, it will not be necessary to go into the normal system for stuff on either the sasine register or the land register to get the required information.

Finlay Carson: Okay. Thank you.

Mark Ruskell: Is there a link between the level of sanction that will be applied through the regulations and the accuracy of the register?

Jennifer Henderson: The sanction of a criminal record for non-compliance is significant. The vast majority of people will not want to criminalise themselves by not complying and not providing information.

I appreciate that there has been some discussion about the level of the fine, on which I cannot comment. Much more significant is that people will get a criminal record if they do not comply. That will put most people off not complying. I think that the register will be accurate.

I note that Companies House thinks that it has 98 per cent compliance on its register of people

with significant control, in terms of people submitting information; that is the sort of level that we should be aspiring to.

The Convener: Are you content that there are provisions in place for people who have made a mistake—people who for a genuine reason have not responded? Is there sufficient leeway in order not to criminalise people who have no malicious intent?

Jennifer Henderson: According to the letter of the regulations as drafted, there is no leeway. When a person has not complied, they will technically have committed an offence. I note that the Scottish Property Federation has suggested a sort of two-stage process whereby we would, if we were to become aware of an omission, notify the person. If they were then to comply, that would be the end of it. If the committee wanted to be sure of such a process, that could be included in the regulations.

It will be for Police Scotland and the Crown Office and Procurator Fiscal Service to decide the extent to which they would be interested in following through with criminal sanction. If, at the very beginning of an investigation, the person said, "Oh, blimey! Sorry—I didn't mean to miss that out. I'll get it sent in immediately," I would be highly surprised if the police and the COPFS were to press on with that. However, that is not something for me to give an opinion on in detail.

The Convener: My colleagues are satisfied that they have heard everything that they need to hear. I thank the witness for her attendance.

11:24

Meeting suspended.

11:39

On resuming—

Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 [Draft]

The Convener: Item 4 is the draft regulations to establish a right to buy land to further sustainable development. We have a rather large panel for this round-table evidence session. It will not be as formal as an evidence session, so we have been able to invite a lot of guests, and 10 people will give evidence.

With that in mind, I remind witnesses that microphones are controlled by broadcasting; you do not have to press any buttons, because it is all done for you. The best way to make a point is to raise your finger and my clerks and I will make a list and get round to you. That also goes for members when they want to ask a question or intervene.

I will begin by introducing myself and we will then go round the table. My clerking team will stay in the background, as they do so beautifully. Just indicate who you are and who, if anyone, you are representing.

I am the convener.

Malcolm Combe (University of Strathclyde): I am from the University of Strathclyde.

Rachel Oliphant (Scottish Property Federation): I am from Pinsent Masons LLP and I represent the Scottish Property Federation.

Annie Wells: I am an MSP for Glasgow.

Gemma Cooper (NFU Scotland): I am from NFU Scotland.

Sandra Holmes (Highlands and Islands Enterprise): I am from Highlands and Islands Enterprise.

Mark Ruskell: I am an MSP for Mid Scotland and Fife.

Hamish Trench: I am from the Scottish Land Commission.

Jon Hollingdale (Community Woodland Association): I am from the Community Woodland Association.

Annie McKee (James Hutton Institute): I am from the James Hutton Institute.

Dr MacLeod: I am from Community Land Scotland.

Claudia Beamish: I am an MSP for South Scotland and shadow cabinet secretary for climate change, environment and land reform.

Gavin Mowat (Scottish Land & Estates): I am from Scottish Land & Estates.

Diarmid Hearns (National Trust for Scotland): I am from the National Trust for Scotland.

Finlay Carson: I am the MSP for Galloway and West Dumfries.

The Convener: I would like to start with the consultation process. I have the consultation documents in front of me. How content have you been with that process? Do you feel that the views and concerns that you put forward have been taken into account?

Who would like to go first? There is always that tricky moment before anyone wants to come in.

Gemma Cooper: We are very content with the process that was undertaken. The Scottish Government has been good to deal with, and it looked at and took a lot from existing legislation. We are fairly content with the majority of things, because the Government has taken a pragmatic approach.

The Convener: This is the last piece in the right to buy jigsaw. Do you feel that your concerns about that gap have been addressed?

Rachel Oliphant: Yes. We felt that we were well consulted and the Scottish Government community land team also engaged with us beforehand, particularly on abandoned, neglected or detrimental land, and took into account our concerns about ensuring that the prohibition on sale kicks in only once the notice appears in the register of applications by community bodies to buy land. When they deal with land, that addition makes it a lot easier for our members to know when the prohibition starts.

The Convener: Are there any other reflections?

Dr MacLeod: Community Land Scotland very much echoes those comments; the Scottish Government officials have been excellent in terms of their level of communication and the opportunities to input our views into the process, for what, as you say convener, is an important part of the jigsaw of community rights to buy.

Gavin Mowat: We are of the same opinion; we welcomed the engagement by Scottish Government and the fact that it drew a lot from its previous legislation, including on abandoned, neglected or detrimental land—a lot of that experience has come into this regulation.

The Convener: Are you content that the definition of sustainable development is nailed down enough to ensure that, if people want to apply for the right to buy, they know what they have to do to fulfil the criteria for sustainable development?

Diarmid Hearns: One of our concerns is that sustainable development was not defined in the Land Reform (Scotland) Act 2003, nor is it in the text of the regulation. It is a challenge for both applicants and owners to know what the test for that is. There are good international definitions of the term, so it would be good to get some appending text to say what the Scottish Government means by sustainable development.

The Convener: And that could be some guidance around the definition of sustainable development and some examples of cases.

11:45

Malcolm Combe: The definition of sustainable development has been a recurring theme since the Land Reform (Scotland) Act 2003, parts 2 and 3 of which deal with the right to buy. The difficulty with definitions is that they can trap people as well as be useful. I will give an example that might seem strange from the insurance sector, where no definition is provided of what an insurance contract is. If a definition were to be provided, people would try to make sure that they did not fall within it, because that would allow them to work around it and to exclude themselves from regulation, for example.

The definition of sustainable development is a problem, but it has been recognised as a problem in previous iterations of the legislation. The question is whether now is the time to do something about it. Some people would argue that we are where we are and that, having not done anything about the issue in relation to the previous three community rights to buy, it would be incongruous to suddenly do something about it now and try to capture sustainable development in a form of wording that might leave some people dissatisfied. It is a prickly issue that is tough to resolve.

The Convener: Another issue is who will be the arbiter of whether someone conforms to what is meant by the phrase, which is undefined.

Rachel Oliphant: I agree that it would not be helpful to define sustainable development in legislation, but more detailed guidance would be welcome, along with examples of what would fall within the definition.

Hamish Trench: I appreciate that it is always tempting to define sustainable development, but it is probably quite risky to do so in legislation. It seems to me that the meaning of sustainable development and, indeed, of the public interest are

likely to shift over time. Given how important and fundamental this right to buy is, it needs to be able to reflect changing circumstances. Therefore, in my view, sufficient clarity should be provided on the relevant considerations in the regulations, but there should also be guidance that can change over time.

Jon Hollingdale: I think that what constitutes sustainable development will have to be judged on a case-by-case basis. It is not possible to define which activities or which piece of land would be suitable before knowing what the proposal was going to be. We probably all agree that Scotland needs more affordable housing and that the provision of affordable housing would further sustainable development, but it would not if it were provided on St Kilda, the top of the Cairngorm plateau or lots of other places. The judgment must be made on a case-by-case basis. If we try to make it before we get real applications that make real proposals, we will trap ourselves.

The Convener: That comes back to Malcolm Combe's point, which was that a definition could exclude people unintentionally.

Annie McKee: I agree with all the points that have been made so far. The opportunity is here for communities to do something innovative. We want to open up that opportunity and be flexible in how we identify and understand sustainable development, but that conversation must take place at the local level and with ministers. Therefore, further guidance and worked case studies would definitely be helpful.

Dr MacLeod: One of the issues with sustainable development—I say this as someone who taught a number of courses on the subject at the University of Edinburgh, where it would be possible to have a three-day conference on the meaning of sustainable development—is how wide ranging its parameters are. Therefore, it would be unhelpful, as other colleagues have said, to have a statutory definition of it.

As far as the intent of legislation is concerned, the public interest is fundamentally important as the overarching determinant of how sustainable development is interpreted and implemented in practice, and I think that the regulations and the Land Reform (Scotland) Act 2016 do a good job in providing some parameters, such as economic regeneration and other criteria. A case-by-case approach to interpretation allows for the concepts of the public interest and the common good to be moved from the policy intent to the practicalities of implementing and interpreting this right to buy in practice.

Diarmid Hearns: The Scottish Government is already a signatory to the UK shared framework on sustainable development, which gives a lengthy description of what sustainable development constitutes. There is already an accepted definition of what sustainable development is.

In the Planning (Scotland) Act 2019, a purpose for planning was included in legislation for the first time, which included sustainable development. The 2019 act refers to the management of land

"in the long term public interest."

We are getting clearer about how we are working towards the future. We are not talking about a short-term fix—we are trying to define such concepts and what they mean in practical terms—so it would be good to see a clear definition.

Finlay Carson: I will give an example and I would like to find out whether the witnesses think that it would count as sustainable development. There is a community of 30 houses in the middle of a wood that is a long way from anywhere, and the social landlord decides to put four of the houses on the market because it cannot afford to bring them up to the new insulation standards. The community wants to buy them to stop Airbnb people buying them and affecting their ability to send their children to the local school. Would that fit the criteria for the right to buy for sustainable development?

Sandra Holmes: It would. We must look at the context. If a small community loses people, that can have a significant impact on wider service provision. You cannot pin down sustainable development. It must be looked at case by case and in context.

Community buyout projects are diverse, from something as small as one building plot up to buying a whole island or estate. Getting a definition to encompass all those considerations would mean writing chapters.

As Malcolm Combe mentioned, there has been a consistent understanding of sustainable development since we first had the community right to buy and the crofting community right to buy. I am not aware of any challenges to the definition, or of any problems that have been created in practice. A number of community right to buy applications have gone successfully through the process.

Dr MacLeod: Communities may be a long way from anywhere, but they are all close to somewhere. We want fragile remote and rural communities to be able to sustain themselves and to develop sustainably. As Sandra Holmes said, access to services, especially to affordable housing, is very important. That is the life-blood of a community. Sustainable development is social, economic, cultural and environmental.

Jon Hollingdale: I agree with my colleagues. Finlay Carson's example was about a landlord putting houses up for sale. We are talking about what would happen if a landlord refused to sell and also refused to do anything positive. In that situation, it would be clear that it would further sustainable development if the community were to take on houses that were not being brought up to spec.

Malcolm Combe: There might be an existing device in Scots law that could be used to help in that example. It is possible to insist on a rural housing burden being imposed under section 43 of the Title Conditions (Scotland) Act 2003. You have to encourage people to constitute a rural housing body so that there can be a burden in their favour, but it is a possible alternative to using this legislation.

Sandra Holmes reminded me of something that is important in existing community buyouts. As one of the lawyers in the room, I will mention human rights. The European convention on human rights is hardwired into the Scotland Act 1998. The existing community rights to buy, most notably in the Park litigation on the east coast of Lewis, involved discussion of human rights. The lack of a definition of sustainable development was not held to be an issue. I am simplifying grossly, but it was not a problem with reference to article 1 of the first protocol, which is about peaceful enjoyment of possessions, or with reference to article 6, which would deal with a landowner getting a fair hearing.

It is good to have a discussion about sustainable development, but having a definition of it is not required by the way in which human rights law has been interpreted to date in Scotland.

The Convener: Communities have a right to buy in order to have a sustainable development project. We have seen communities use all the land reform tools available to them to gain control of land. From speaking to constituents, I get the impression that that can be onerous. I would like to know how you think that this right to buy legislation might help.

Jon Hollingdale: The burden comes in two ways. The first is in the rules under part 5 of the 2016 act, which set significant tests for the community in relation to future harm and benefit and to the exercise of the right to buy being the only, or the most practical, way of furthering sustainable development. Then there are what we might call the process burdens. We think that, in order to get to the stage that is covered by part 5, community bodies will have had to go through the processes in part 2 of the 2003 act and have an existing community right to buy registration in order to have the prohibition on transfer—otherwise, it would be just too easy to avoid the legislation.

At the moment, there are probably vanishingly small numbers of eligible community bodies, because of the way in which the 2016 act has been framed. We cannot change that through the regulations, but it is notable that almost no community bodies out there already have in their constitutions the powers to use the legislation. In the first instance, such bodies will have to change their constitutions to enable them to do so, and then they will have to go through the part 2 processes, followed by those in part 5, so theirs will be a long and probably quite testing journey.

Annie McKee: My colleague Rob McMorran and others, including Malcolm Combe and Jon Hollingdale, carried out research for the Scottish Land Commission that reviewed community right to buy mechanisms and evidenced how onerous the earlier mechanism was. As Jon has already mentioned, bodies have to constitute themselves in a certain way and then work through part 2 in order to achieve part 5, which are all processes that rely heavily on community effort and volunteers. Anything that could support such processes more would be worth while. It would not necessarily make them easier, but it would provide opportunities for facilitated discussion with landowners or resources to work through them from a legal perspective, which would be a good thing if it encouraged greater community engagement with the land-owning sector.

Dr MacLeod: I agree that undertaking such processes is onerous for communities. In such circumstances there is not a willing seller, so it is understandable, for all sorts of reasons, that a high bar is set. However, it is important that it is not set too high. Ten years ago, I led post-legislative scrutiny of the Land Reform (Scotland) Act 2003, on behalf of the Parliament. One of the clear findings from that study was that the demands that were placed on communities by part 2, and especially by part 3 on the crofting community right to buy, were extremely onerous. We have seen subsequent changes in the legislation since then. No one will ever get such matters right first time, but we need to be mindful that we do not make the challenges disproportionately difficult.

Rachel Oliphant: I agree that such processes will be very onerous for community bodies. If I might speak about my personal experience, I live in a community that exercised the community right to buy under part 2. We were lucky, in that among our community were an architect, an accountant, a lawyer and lots of retired people who had the time to put our application together, sort out funding and subsequently maintain the property. We bought it in 2008, so we are now a good number of years on. Our bid has been very successful, and we very much appreciate having had such an opportunity, but I can see that it could be very hard

for other communities without the resources that we had.

The Convener: That is a familiar story.

Rachel Oliphant: However, I should say that the community land team is very helpful to everyone in such situations.

Hamish Trench: Calum MacLeod has already covered the first point that I was going to make, which is that, inevitably, the bar will be fairly high, given that this is compulsory. However, it is also helpful to consider the wider context. If our collective aim is to normalise community ownership as a realistic option for communities across Scotland, we will not achieve that through establishing rights to buy—those will never be the usual way in which every community will acquire land and buildings.

We should not underestimate the important role that the right to buy plays in shifting the dynamic and changing the culture and the balance of power in discussions. Our success is probably more because of the level of negotiated transfers that take place. However, clearly, where the backstop of the right to buy process is needed, it must be usable and accessible.

The Convener: It might not happen often, but the right to buy is always there if access has not been achieved through other means.

12:00

Sandra Holmes: I will build on Hamish Trench's point. Any community buyout is a long journey if the right to buy is used, and it is an even longer journey if compulsory purchase is involved. Getting the appropriate balance of rights is an issue, but the fundamental point is that, although the process is onerous and a long journey for communities, it has to be workable. The crofting community right to buy was enacted in 2004 but to date has never been used to fruition. However, through bringing parties together, it has facilitated the transfer of crofting estates from private to community ownership. It would be great for a crofting community right to buy to be successful, just to prove that the legislation works. Likewise, it is imperative that this legislation is deemed to be workable in practice. If it is not, its presence in the background would be helpful, as Hamish Trench said, but it would not be the go-to legislation. I work with communities all the time and we would never see it as a starting point, but the leverage that it can offer to bring parties together is hugely beneficial. We now have all these rights to buy, but the vast majority of community purchases have happened through negotiation. That is the right place to be, but we need the right to buy to provide the wider framework and backdrop to encourage those facilitated purchases.

The Convener: It is the final piece in the jigsaw, but the other jigsaw pieces are probably more the go-to.

Gemma Cooper: I agree with the majority of what has been said. It is important to emphasise that, for our members in particular, this will change the conversation. We have been speaking about a community right to buy, but this is actually a compulsory purchase, so it is potentially quite uncomfortable for our guys.

I agree that the hurdles need to be proportionate. I appreciate that the process is difficult at the moment, but when a community takes on an asset, that is permanent and it needs to be looked after long term, as my fellow speaker has identified. Having high hurdles is not necessarily a bad thing, because they relate to how serious the community is about looking after the asset in future.

I emphasise, as did Hamish Trench, that success is not measured on the number of times that the right to buy is used. It should be about negotiated transfers without having to use the right to buy, but it is obviously a backstop.

Rachel Oliphant: Gemma Cooper has made the point that I was going to make. If the community cannot work together at the application stage, it will not be able to maintain the property in the future. It is good to establish at the outset that it has that ability.

Diarmid Hearns: I agree with Hamish Trench. The process can be a bit onerous, but it is probably there as a backstop, rather than as a frontstop, as it were. It has changed the dynamic, including what the options are. For a charitable landowner, that might be not be ownership but might leasing an alternative site. The process opens up a discussion, and I would measure success not in terms of zero-sum transfer or non-transfer but in terms of different ways of doing things. Having the right to buy as a backstop is valuable.

The Convener: We will move on with some questions from Finlay Carson.

Finlay Carson: This question is on a subject that has been contentious in the past. It is about the types of occupancy or possession relating to tenancies. Do the provisions on occupation or tenancies adequately cover all possible eventualities when we are looking at the right to buy? Malcolm Combe might want to answer with regard to human rights.

Malcolm Combe: The starting point would be that a sitting tenant, to an extent, will not be affected by the transfer of their landlord's interest. In the response that was submitted while I was working at the University of Aberdeen, I made a

point of saying that the regulations are drafted in such a way that they include an exhaustive list of the tenancies that are caught. I wonder whether the list should be non-exhaustive in case something has not been caught. My concern about the drafting is that there is a danger of being trapped in a definition.

As I said, for the currency of the lease, the tenant should not be directly affected by the transfer of the landlord's interest, at least in law. There might be a different dynamic given the new personality that they have to engage with.

Finlay Carson: The nature of a list is that attention is drawn to what is excluded and not what is included. Are the implications of the definitions of the likes of tied accommodation adequately understood?

Malcolm Combe: From my perspective, they are, but I say that as someone who has been swimming in legislation on private residential tenancies. I have written a bit about this with Professor Peter Robson from the University of Strathclyde, and there is plenty of case law in relation to the Rent Acts down the years and what can and cannot constitute tied accommodation. I am not hugely concerned about that point. I do not know whether anyone else wants to comment.

Gavin Mowat: A lawyer can understand the definition of tied accommodation, but I am not sure that communities have the same breadth of understanding. As we have heard, there might be experts in some communities but, by and large, I am not sure that it will be adequately understood across the board. That said, however, I am not sure that that is the main issue that we want to bring up.

From our point of view, the purpose of the regulations is to deliver sustainability. We understand that the Government is trying to fix the problem where tied accommodation is included in abandoned and neglected land. However, if we take tied accommodation as a part of a business rather than the whole of it, and we include that in a right to buy, we must consider the possible implications for the sustainability of the wider business. That needs to be considered in the regulations.

Dr MacLeod: As has been mentioned, community capacity is an issue. We know that it will vary between communities, but in the vast majority of community buyouts that are undertaken, there is a tapping of community capacity. In most instances, communities take control of the land and other assets as a means of delivering the housing, jobs and services that will ensure that those communities are sustainable in practice. That bottom-up element is important.

On tied accommodation, we quite often see that communities that have taken over assets and tracts of land have enabled businesses to come in through that new ownership model. Under community ownership, there is an important continuity, as opposed to a disjuncture.

Jon Hollingdale: The regulations and rules were more or less cut and pasted across from part 3A of the Land Reform (Scotland) Act 2003, on the community right to buy abandoned, neglected or detrimental land. In the discussions when the bill that became that act was going through the Parliament, there was initially an idea that all tenancies would be excluded, but it was pointed out quite clearly that, if that was done, huge areas of Scotland would be ruled out from eligibility.

The important point on that, on tied accommodation and on the broader points that Gavin Mowat made is that everything would be subject to the sustainable development test. I suspect that a community that came forward and simply wanted to buy or acquire some houses that were tied accommodation with no other purpose would struggle to make a sustainable development case to the Scottish ministers. The test has to be included because, if the community wants to buy the whole estate, it will want to take the tied accommodation or other forms of tenancies with it.

The question has to be framed within the broader sustainable development test, and we need to consider why the community body seeks to acquire the housing that is under one of those forms of tenancy and the other bits of land that it wants to acquire, rather than just looking at the housing, because it would be really unlikely that ministers would ever approve such an application.

Annie McKee: Speaking as a non-lawyer, I suppose that I am a bit nervous about tied accommodation, because it possibly reinforces power relations that are quite traditional, which we may want to move away from. I would encourage the Government to include in the guidance document consideration of how employment and housing opportunities can be provided in parallel so that, if someone is offered a job, they are also—hopefully—offered a tenancy that is discrete from the job. We need more homes, especially in rural communities.

Finlay Carson: Jon Hollingdale suggested that much of the content of the regulations has been lifted and dropped from previous legislation. Are there any provisions in the regulations that are different from the other community rights to buy? If so, are there good reasons to include them?

Jon Hollingdale: There are additional provisions that do not appear in part 2 of the 2003 act, but most of the provisions in parts 3A and 5 of that act appear pretty much word for word. I am

looking at Malcolm Combe, who will tell me if I have got that wrong

Malcolm Combe: They appear word for word. An omission that was made when the part 3A regulations were put in place was that there was no mention of tenancy at will, which is a particular type of tenancy that exists in some geographical locations in Scotland, although it is not common. That was possibly an oversight. Otherwise, they just track what is in the 2018 regulations.

The Convener: We will move on with some questions from Mark Ruskell.

Mark Ruskell: I turn to the exclusions in the regulations. There are the section 4 exclusions in relation to an individual's residence and its curtilage, which reminds me of the Ann Gloag case around access and the 2003 act. There is also an exemption for land that is ancillary to the person's residence, and there are various exemptions on the keeping of pets, recreational and leisure activities, the growing of food and so on. What are your thoughts on those exclusions? Are they appropriately drawn? Do you see any issues regarding things that are not included? Are the exclusions drawn too broadly or too narrowly?

Dr MacLeod: I can see why the categories of exclusions have been included in regulation 4. We made the point in our submission to the Scottish Government consultation—others probably made the point, too—that we can see why the exclusions are there, but we need to be mindful of the need to ensure that there is no sharp practice, to use a non-legal term, in how they are interpreted. For example, is someone putting their pet sheep Dolly on to three different fields as a way of precluding an opportunity for a community to focus on a piece of land that it argues would contribute to its sustainable development?

We need to be mindful of how the categories of excluded land will be interpreted in practice. I imagine that the guidance and other documentation will be really important, as is the case in relation to the other community rights to buy, with regard to what the possibilities, or the lack of them, will be.

Hamish Trench: Our general view is that the exclusions seem entirely reasonable and understandable. Of course, there could be misuse, but we just need to be alert to that. I would be nervous about tightening the exclusions, because the other side of the coin is that the right to buy needs to be sufficiently applicable. It is important to ensure that the regulations will be usable in all sorts of different circumstances around Scotland. Given the criteria and the public interest test, there will be an ability to step in and spot any sharp practice or deliberate misuse. They seem to be pretty well framed, as far as we can tell.

Jon Hollingdale: It will be down to Scottish ministers to exercise their judgment on whether the exclusions are reasonable in any particular case. For example, a householder who has a private water supply that is drawn from several hundred metres away could conceivably have their own hydro scheme, and they could claim that the catchment of that is supplying the electricity to their house. I would not be keen on that being used as a reason to exclude several hundred or thousand acres from a community bid. However, Scottish ministers will have to tackle such things and make decisions as and when cases come forward. It would be very difficult to fix a rule in the regulations.

12:15

Malcolm Combe: Eight things are listed that will exclude land from eligibility for buying. The seventh item in regulation 4(b) is:

"access to the individual's home, if the land is owned by the same person that owns that home."

Where someone has a servitude of access to their home, a change in the ownership of the burdened area of land will not affect their access rights. As such, there is no need to exclude that from the operation of the right to buy. A couple of the other items in the list—those on the use of land for drainage and the storage of vehicles—also reflect rights that can be represented in Scots law by servitude rights. I made that point in the submission that I provided alongside Alisdair MacPherson and Donna McKenzie-Skene.

The tail of the seventh item in regulation 4(b), which states

"if the land is owned by the same person that owns that home",

could also be applied to the third item, on drainage, and the second item, on the storage of vehicles. It is possible for those rights to exist in relation to land that is owned by someone else, rather than the homeowner. Arguably, we should have made that point back in 2018, because it would have applied equally to the regulations in relation to abandoned, neglected and detrimental land. I apologise for being two years late in that regard. Nonetheless, it is worth at least logging that now. I will be happy to speak further to that if the committee wants any clarification.

Diarmid Hearns: We observe that the exclusions are narrowly drawn. There are exclusions for individuals, which we support, and for Government land, but there is nothing in the middle in relation to other forms of ownership. Speaking from a charitable perspective, I note that we own assets for public benefit, but local community groups might own assets for public benefit, too. That is not covered, and the question

of who has the greater public interest has been left to the judgment of Scottish ministers.

In our case, we have the added burden of inalienability. Some parts of our ownership would be declared inalienable, which limits our ability to sell them. It goes to a parliamentary test. It seems that a big band of other types of public ownership have been left out and it is being left to Scottish ministers to make judgments.

The Convener: Finlay Carson has a question on that, so I will bring him in.

Finlay Carson: I want to consider the implications of the exclusion of land that is owned by the Government, the Crown and local authorities. We see many examples where decisions by local authorities are seen as not having been taken in the interests of communities that are directly affected. How will that work in practice? Is it a major exclusion that needs to be looked at? In relation to the Crown Estate, there has been a suggestion that communities should have the right to control foreshores and so on. What are the implications of those exclusions?

Jon Hollingdale: Scottish public authorities such as local authorities, Scottish Forestry and Scottish Natural Heritage are covered by the asset transfer provisions. As such, in most cases, communities will be much more likely to go through that process.

I suspect that the big omission is land in Scotland that is owned by UK bodies such as the Ministry of Defence and Network Rail. As they are not covered by the asset transfer provisions, that route is not available to communities, and now there is not this route. The Ministry of Defence is an odd one, because there have been a number of cases where communities have successfully used the right under part 2 of the 2003 act to buy land from Ministry of Defence estates. As such, I am not entirely clear why it is excluded.

Sandra Holmes: There are anomalies in the regulations when we compare and contrast them with the previous community rights to buy. I am not clear why land or assets that belong to UK ministers are excluded, and I cannot see any reference to that in the crofting community right to buy. Asset transfer is different, because it is to do with Scottish public authorities.

Land falls to the Crown if, for example, a company or an asset of a company has been dissolved and the company has not divested itself of its assets. If somebody died intestate, their assets will fall to the Crown. My understanding is that that is in the primary legislation, so it is perhaps beyond being changed at this stage. Bona vacantia and ultimus haeres are excluded, so the approach is consistent with part 3A of the 2003 act. However, as far as I can see, part 3A and part 2 of the 2003 act, which is about the community right to buy, do not exclude assets that belong to UK ministers.

Dr MacLeod: I reiterate and support Sandra Holmes's point about not seeing the rationale for the exclusion of that type of land. Mr Carson mentioned foreshore rights. There are lots of examples involving that type of land where such rights would be helpful to communities.

There is a right to ask for the community asset transfer process to happen. However, the Scottish Land Commission research, which Annie McKee mentioned, clearly says that a lot of public authorities have quite a long way to go on the cultural position with regard to where, in whose hands and for whose benefit they see assets sitting, and we need to tackle that.

Finlay Carson: I have a daft-laddie question that Jon Hollingdale might be able to answer. Military defence land has been touched on; there are also UK properties that are now redundant, such as Driver and Vehicle Licensing Agency properties and vehicle testing facilities. Is there a right to buy south of the border that does not apply to Scotland? Can communities there apply to take over those properties, whereas that is not covered in Scotland because there is different legislation here?

Jon Hollingdale: I am not an expert on the issue, and I am even less of an expert on legislation south of the border, but I do not think that there are any formal mechanisms for that.

Malcolm Combe: I am pretty sure that there are not. The nearest legislation to that is the Localism Act 2011, which gives communities a right to bid for six months. However, even that right to bid is just that: the landowner does not need to accept the bid. That allows them six months to get their show in order but not—not to torture the vehicle analogy too much—necessarily even on the road at the end of the day.

The Convener: Does Mark Ruskell want to come back in?

Mark Ruskell: No. My issue has been covered.

Claudia Beamish: I have a brief supplementary question about the exclusions. I think that I am correct in saying that, in its submission, Scottish Land & Estates highlighted concerns about local development plans in relation to part 5 of the Land Reform Act 2016. Do you have any comments to make on that?

Gavin Mowat: I think that it has been mentioned that the new planning act has a new purpose, which includes sustainable development and the public interest. In essence, if any local development plan allocation is made, it should be in the public interest and sustainable development

should have been looked at. The initial thought was that, if something is in the local development plan, it is likely to already be in the public interest and the interests of sustainable development, so it perhaps will not meet one of the five tests for the regulations. We therefore thought that it might be better to include such things.

Claudia Beamish: Are there any other comments?

Dr MacLeod: I read that particular submission and the submission from the Scottish Property Federation with considerable interest. Community Land Scotland does not think that that is an appropriate approach to take, not least because, with the Planning (Scotland) Act 2019 and national performance framework 4, we have a policy agenda on rural repopulation and we have issues to do with local place plans and which organisations might be involved in shaping, developing and managing those plans. Local communities and community bodies could well be part of that process, so it would be detrimental to the sustainability of areas to follow that policy through.

On other exemptions, I think that it has been suggested that protected areas might also be exempt. I am not entirely clear about what protected areas are in this context, but, if we are talking about whether designations are environmental or otherwise or about local development plans, for example, that would be inconsistent with the applicability of any of the other community rights to buy that we already have.

Let us take national scenic areas as one example of that. Great swathes of Scotland's rural land would be cut out from being eligible for this particular community right to buy. For the same reason, making second or empty homes ineligible flies in the face of rural sustainability and the need to get access to affordable homes and put empty homes back into the community.

The Convener: There could be a fundamental disagreement among the community about what a local authority, for example, wanted to do with its land. In my constituency, there is a fundamental disagreement about the local authority's objectives for an area of land, which is based on environmental issues. There is a tension there that has not been addressed.

Dr MacLeod: That takes us back to the point about the public interest, because that is a public interest argument.

Annie McKee: Understanding the public interest is very difficult for people who volunteer in rural communities, and having to address that with the local authority could be quite a challenge. There needs to be more discussion about what sustainable development is at a local level and what is in the public interest. There needs to be a national conversation about that within the context of planning reform.

Hamish Trench: The Scottish Land Commission would not support the extension of exclusions to include such examples of development allocations or designated sites. That is partly because doing so would exclude very significant areas of land in Scotland, but it is fundamentally because that would be to prejudge the public interest. It would, in essence, undermine the point of the right to buy, which is precisely to look at and to weigh up the public interest in the specific local circumstances.

The Convener: We will move on to questions from Claudia Beamish.

Claudia Beamish: Thank you, convener.

The Convener: Actually, I will stop you there, because I have completely ignored Gavin Mowat and Jon Hollingdale, who wanted to come in on that last point.

Gavin Mowat: I take on board all the points that have been made. We wanted to emphasise the sustainable development angle particularly in cases in which an individual or a community cannot do something with a piece of land because it has been designated that sustainable development should be taken into consideration. Perhaps not every community has the capacity to understand that. I am quite happy for such issues to be defined more clearly in guidance rather than included as extra exclusions.

Jon Hollingdale: I presume that, when a case is brought to the Scottish ministers, allocation in local development plans will be one of the factors in their judging the public interest. There is a clear principle in part 2 of the Land Reform (Scotland) Act 2016, on the community right to buy, that communities cannot try to buy assets to frustrate development and prevent things from happening. However, in this case, it is more likely that communities would want to buy the asset in order to fulfil the allocation in the local development plan.

I have recently been working with a community that wants to create affordable housing. The local authority has said that the community has a site right next to its village that has been allocated for that but the landowner has no interest in developing that site for that purpose, so the community is stuck in limbo. The local authority has said, "Here is the land," but the community cannot access it.

It is more likely that communities will want to buy an asset in order to deliver what is in their local development plan rather than to frustrate it.

The Convener: We will go back to Claudia Beamish, with my apologies.

Claudia Beamish: I would like to focus our minds on the types of area that are specified for the definition of a community. I shudder slightly when I recall the Land Reform (Scotland) Act 2016, but that was passed some time ago and I hope that things have shaped up well. However, we will hear the panel's views.

For the public record, I will set out the definition of the types of area by which a community may be defined—I am sure everyone in the room will know the definition. The definition includes

"an electoral ward, ... the area of a community council, ... a postcode area, ... a postcode district, ... a postcode sector, ... an island, ... a locality"

or settlement

"delineated on the maps included in the Population Estimates for Settlements and Localities in Scotland, Mid-2016".

Do the provisions adequately cover all possible eventualities and situations in relation to communities that might want to use them? Is it possible that certain communities might be excluded? Are the provisions in keeping with other community rights to buy? If they differ, is there a good reason for their doing so? Of course, the communities of interest issue was raised previously, and there are other issues that the panel might want to highlight and comment on.

12:30

The Convener: Annie McKee, I saw you nodding your head as Claudia Beamish was speaking about the definition of a community. Do you want to respond?

Annie McKee: How to define a community is an interesting part of social science. I do not know whether I have anything to add to the list—I would turn to the more legal heads in the room for that. I am really interested in whether the guidance could consider how communities might be able to work together. If they cross boundaries, for instance, or if they are part of a landscape, there may be an opportunity to overcome capacity limitations by forming visions for their place together.

Sandra Holmes: The legislation has been broadened. When it was first implemented, the definition of a community was quite narrow. That has been added to, which benefits communities, because most people tend to know what their natural community is.

I am not aware of any significant limitations in the current drafting of the definition, which has just been outlined, but there is some confusion for communities when new legislation comes in on top of existing legislation. I think that Jon Hollingdale pointed out that communities are having to redraft their constitutions to accommodate the new legislation.

We are coming to the end of the suite of rights to buy, and there are templates available to help communities, so I do not see the drafting of the legislation as a barrier. I think that it is pretty workable. I work with communities frequently, and most of them tend to use postcodes, but they have other options as well.

Jon Hollingdale: I understand that the definition is lifted from part 3A of the 2003 act, so it is the same set of rules. I think that the primary legislation allows communities to define themselves not just in terms of one electoral ward or one postcode sector but by parts and combinations.

My only query is why the definition is fixed at the localities and settlements of 2016. I appreciate that that is what is in the part 3A rules, but I think that National Records of Scotland updates its localities and settlements information every four years. If we are trying to future proof the regulations, we must recognise that, 10 years down the line, that localities and settlements information will be two or three iterations out of date.

I am not quite clear why that has been done. There is probably a good legal reason that I do not understand, but fixing the definition in 2016 seems strange.

Malcolm Combe: I flew a bit of a kite in my consultation response by proposing a slightly new-fangled way of defining a community by imagining an area of land that has been somehow fragmented or subdivided.

Let us imagine that a 100-acre site was split up 25 years ago and 40 acres were sold off, then someone from one area of the land wanted to reacquire the split-off area in order to consolidate what was fragmented back into the site as a whole. There would have been some historical co-management of that resource when the whole site was still together, and that person would be able to check the site's history through Registers of Scotland. There could be a sunset rule with a cut-off after a certain number of years—maybe 100 years, or 20 years if it was thought that a shorter period would be appropriate. That could be another way to show what a community is, and the community right to buy would have a particular role to play in a shared overcoming of certain barriers to sustainable development if the land was previously part of the same ownership unit.

That proposal is not based on anything other than my having a stab in the dark as to whether it might be an issue. Committee members can look

at my consultation response to get a bit more detail.

Diarmid Hearns: It is in line with the general tenor of other rights to buy, but it comes from quite a rural perspective on what land reform is about. From a conservation perspective, a lot of these assets are very expensive and it takes quite an aggregation of interests to make something happen. Thinking about sport, recreation, religion and culture, we might require a city-scale—or even a regional-scale—community of interest to take on an asset. I think that the scale of the community of interest and how it gets represented is a missing piece of the jigsaw in land reform generally.

The Convener: We are rapidly running out of time, but Annie Wells has a couple of questions to put to you.

Annie Wells: Thank you for coming to give evidence. I have taken my first step into this subject today, and it has been truly fascinating.

I have a couple of questions on restrictions on dealings while an application is pending, which would apply to

"any transfer of the ownership of the land that is subject to an application"

and

"any action taken with a view to a transfer of land".

Do the provisions adequately cover all possible eventualities and situations in relation to the restriction of activities? Is it possible that the restrictions might impact on a landowner's ability to undertake certain actions in relation to their land?

Jon Hollingdale: As I mentioned earlier, we expect—and always advise—community bodies to go through the part 2 prohibition process first, so they have an existing prohibition on transfer that closely matches what is in the regulations even before they get to the beginning of the part 5 process.

The rules that are there are probably fine. I suspect that, in almost all cases, the new rules will only duplicate what was there before to ensure that the landowner, if they are minded to avoid the part 5 rules, does not try to make the transfer of asset before the part 5 restriction on transfer comes into force. That happens only when the application is made to the Scottish ministers or when the thing goes up on the register, whereas the landowner sees the community body coming from a long way away, because it has to write more than six months in advance, hold a ballot and so on.

The part 2 prohibition comes into effect to prevent transfer beforehand and just carries forward as long as the community keeps its part 2 registration active.

Malcolm Combe: I have a quick point and acknowledge the role of my former colleague Donna McKenzie Skene in forming it. It is an insolvency law point. The proposed exceptions include vesting of the land as a result of sequestration and bankruptcy, but they do not cover trust deeds for creditors, because there is no vesting in that situation. I query whether that is deliberate. For those who like insolvency law, there is a bit more detail in our written submission. It is something to consider.

The Convener: I have a daft-lassie question: what is vesting?

Malcolm Combe: It is when the right goes across to the person who deals with the insolvency process. The point is that, if you set up a trust deed for creditors, you would not get the same vesting process as with a formal insolvency situation under the new bankruptcy legislation or any other insolvency process that was mandated in statute. It might not be very relevant in many situations—I am talking to a point that my former colleague Donna McKenzie Skene knows far more about than I do—but it is possible that there would be a slight gap.

Annie Wells: That has answered my question.

The Convener: I thank everyone for their time this morning. It has been an interesting session that has flagged up a few things that we might want to look into.

12:38

Meeting continued in private until 12:55.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

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

The Scottish Parliament
Pàrlamaid na h-Alba