



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 21 November 2017

Session 5



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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

29th Meeting 2017, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Donald Cameron (Highlands and Islands) (Con)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Kate Forbes (Skye, Lochaber and Badenoch) (SNP)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)
*David Stewart (Highlands and Islands) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)
Andrew Taylor (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 21 November 2017

[The Convener opened the meeting at 10:00]

Interests

The Convener (Graeme Dey): Welcome to the 29th meeting of 2017 of the Environment, Climate Change and Land Reform Committee. I remind everyone present to switch off mobile phones and other electronic devices as they may affect the broadcasting system.

I welcome Stewart Stevenson to his first meeting as a member of the Environment, Climate Change and Land Reform Committee, and I invite him to declare any interests that are relevant to the work of the committee.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Thank you for the welcome, convener. I have no relevant interests to declare.

The Convener: I thank Emma Harper for her contribution to the committee's work over the past 18 months. We wish her well in her new role on the Health and Sport Committee.

Decision on Taking Business in Private

10:00

The Convener: The next item on the agenda is a decision on whether to take items 3, 4 and 5 in private. Do members agree to do so?

Members indicated agreement.

The Convener: Thank you. We will resume the meeting in public to hear evidence on the Pollution Prevention and Control (Scotland) Amendment Regulations 2017, but not before 10.50.

10:01

Meeting continued in private.

10:50

Meeting continued in public.

Subordinate Legislation

Pollution Prevention and Control (Scotland) Amendment Regulations 2017 [Draft]

The Convener: I welcome everyone to the public part of the meeting. The next item of business is evidence on the draft Pollution Prevention and Control (Scotland) Amendment Regulations 2017. I welcome Roseanna Cunningham, who is the Cabinet Secretary for Environment, Climate Change and Land Reform, and Andrew Taylor, who is the air quality policy manager at the Scottish Government. I refer members to the papers and invite them to ask questions.

Claudia Beamish (South Scotland) (Lab): Good morning, cabinet secretary. I understand from our notes that Scottish ministers are able to make the Scottish statutory instrument more robust in relation to air quality problems. Is that something that might be considered? For emitters between 1MW and 5MW, the 2029 date suggests a very long lead-in time, although I appreciate that emitters will have to change or adapt their technology. Can you comment on that?

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): I cannot, really. The instruments are very technical and are designed to transpose a European directive. They do not apply to huge numbers of generators in Scotland—we estimate that there will be about 2,000 by 2030. The dates for compliance are United Kingdom-wide—they are not our dates, if you see what I mean. The 2029 date applies to plants between 1MW and 5MW. We are fitting into a UK-wide framework; we have introduced the SSI for the moment, but there will be changes next year. We are watching what is happening with the English equivalent regulations that have been brought in, because they are already being changed. There did not seem to be much point in our acting if we were immediately going to have to change the regulations.

Claudia Beamish: I should have referred to where I found the information about the ability of Scottish ministers to make the instrument more robust. It was in the Scottish Government explanatory note, which says, on regulation 17:

“The amendments require that when preparing an air quality plan, the Scottish Ministers must consider whether to include measures imposing lower emission limit values for MCPs than those set out in the Medium Combustion

Plant Directive, if that would make an improvement to air quality.”

We heard evidence and concerns in committee last week about background air quality. I wanted to highlight that for you, cabinet secretary. I apologise for not having given the detail when I first asked the question.

Roseanna Cunningham: As I suggested, we regard the amendments as fairly technical changes. The intention is to capture generators that are not currently captured, to ensure that we are not being left behind. That will have environmental benefits and will help the UK to meet more stringent targets, but from our perspective it is not a huge change. Currently, we do not have equivalent generators in Scotland, so one of the things that we have to look out for is that we do not leave open a loophole that would allow them to come in. That is why we will make more changes in 2018. We have approached the transposition as a fairly technical exercise.

The Convener: I think that Claudia Beamish has highlighted a wider issue, so it would be helpful if you could write to the committee on those wider points when it is appropriate to do so.

Roseanna Cunningham: Andrew Taylor might want to add something, but as I said, our perspective is that the process involves technical transposition rather than any wider aspect. There are issues that I have questions about, including diesel generators and the concern that we might see an increase in their number, which we do not want, for obvious reasons. At the moment, diesel generators are not a big problem in Scotland. Therefore, from the perspective of where we are just now, although the regulations are part of the broad spectrum of air pollution regulations, there is not a major issue.

Andrew Taylor (Scottish Government): The regulations allow for tighter emissions limits to be applied. Under the regulations, all medium combustion plants will have to have an operating permit from the Scottish Environment Protection Agency, and it might well be the case that SEPA will decide in some circumstances that a permit justifies the imposition of tighter air quality standards. That will be considered case by case.

The Convener: Claudia—do you want to follow up on that?

Claudia Beamish: No. I simply wanted to highlight the issue because of the committee’s serious concerns about air pollution.

Stewart Stevenson: I have a question that is probably for Andrew Taylor, rather than for the cabinet secretary.

On the 1MW to 5MW plants that were mentioned earlier, is not it the case that a large

proportion of such facilities will be standby generators for hospitals, computer centres and so on, and will be used pretty infrequently and therefore have an extremely long life, which means that it would be disproportionately bad news to replace them early in their life cycle? That might help to justify some of the dates that are associated with the smaller generators that are used very little.

Andrew Taylor: Yes. Compliance costs will fall disproportionately on smaller operators, which is one of the reasons for the long lead-in time. There are a number of flexibilities in the directive that we have, for the most part, employed in the regulations. One is that plants that operate for fewer than 500 hours per year on a five-year rolling average will be exempt from the requirements, because applying emissions-limit values to those cases would not be proportionate, given the limited emissions reductions that could be achieved and the associated costs on smaller operators.

Roseanna Cunningham: I have an indication in my papers that small businesses that operate plants at the lower end of the requirements, between 1MW and 5MW, would end up with annual compliance and administrative costs of between 0 per cent and 2 per cent of gross operating surpluses. There are costs involved in this, and one of the reasons for the long lead-in time for total compliance is to help to balance out that cost.

As I indicated, we are trying to keep within our UK-wide framework on this. For technical reasons, we are going at a slightly different time, but the idea is that next year we will all be in line, across the UK.

The Convener: As I said, in due course, you could update the committee on the more general aspects of the issue.

John Scott (Ayr) (Con): The impact assessment estimates annual costs of £3.8 million. My question was going to be about the industry view of those costs and additional cost burdens, with a particular emphasis on the views of small businesses, but I think that you have just answered that.

Roseanna Cunningham: Yes, I have. There is a total annual cost of £3.8 million for 2030, which includes compliance administration and monitoring. That will, of course, be offset by the benefits, although those will not necessarily accrue to individual businesses. That is where the broader issue arises, given that the benefits will be environmental and health benefits, including a reduction in emissions. I suspect that that is one of the reasons why there is a fairly long lead-in time for total compliance.

The Convener: As no other members have questions, we move to item 7, which is consideration of motion S5M-08384.

Motion moved,

That the Environment, Climate Change and Land Reform Committee recommends that the Pollution Prevention and Control (Scotland) Amendment Regulations 2017 [draft] be approved.—[Roseanna Cunningham]

Motion agreed to.

The Convener: I ask the committee to delegate to me the task of signing off on the subordinate legislation report. Are members agreed?

Members indicated agreement.

The Convener: I thank the cabinet secretary and her official for their attendance. We will have a brief suspension to allow for a change of officials.

11:01

Meeting suspended.

11:02

On resuming—

Wild Animals in Travelling Circuses (Scotland) Bill: Stage 2

The Convener: Agenda item 8 is consideration of the Wild Animals in Travelling Circuses (Scotland) Bill at stage 2. I again welcome the Cabinet Secretary for Environment, Climate Change and Land Reform. I also welcome her officials from the Scottish Government, who are Andrew Voas, veterinary head of animal welfare and bill team leader; Beverley Williams, bill team manager with the animal welfare team; Angela Lawson, solicitor with the legal directorate; and David McLeish, parliamentary counsel. Members should note that officials are not allowed to speak on the record in these proceedings.

As this is the committee's first stage 2 bill consideration in the current session of Parliament, members might welcome my laying out the process on the record, with apologies to those who have been through this before.

Everyone should have with them a copy of the bill as introduced; the marshalled list of amendments, which sets out the amendments in the order in which they will be disposed of; and the groupings. There will be one debate for each of the four groups of amendments. I will call the member who lodged the first amendment in the group to speak to and move that amendment and to speak to all the other amendments in the group. I will then call any other members who have lodged amendments in that group to speak to their amendments and to any other amendments in the group but I will not, at that time, ask them to move their amendments.

Members who have not lodged amendments in the group should indicate to me or the clerk if they wish to speak. If the cabinet secretary has not already spoken on the group, I will invite her to contribute to the debate before we move to the winding-up speech. At times, I may allow a little more flexibility for members to come back on points of clarity that have arisen in the debate.

I will conclude the debate on each group by inviting the member who moved the first amendment in the group to wind up. Following the debate on the group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If the member wishes to press it, I will put the question on the amendment. If the member wishes to withdraw it, I will check whether any other member objects. If any member objects, the amendment is not withdrawn and the committee must immediately move to vote on it.

If any member does not wish to move their amendment when it is called, they should say, "Not moved", and they should do so audibly. Any other member present may move such an amendment. However, if no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting on any division is by a show of hands. It is important that members keep their hands clearly raised until the clerks have recorded the vote.

The committee is also required to indicate formally that it has considered and agreed to each section of the bill, and I will therefore put a question on each section at the appropriate point.

I hope that that is all clear to everybody.

Richard Lyle (Uddingston and Bellshill) (SNP): Convener, before we move on, can I refer members to my entry in the register of interests? I am the convener of the cross-party group on the Scottish Showmen's Guild and an honorary member of the Scottish Showmen's Guild.

The Convener: It was remiss of me not to give you that opportunity. Does any other member have interests to declare?

John Scott: I should declare an interest as an honorary member of the British Veterinary Association.

Mark Ruskell (Mid Scotland and Fife) (Green): I should also declare an interest as an honorary member of the BVA.

Section 1—Wild animals in travelling circuses: offence

The Convener: Amendment 4, in the name of David Stewart, is in a group on its own.

David Stewart (Highlands and Islands) (Lab): The bill's long title states that it is

"An Act of the Scottish Parliament to make it an offence to use wild animals in travelling circuses",

and the explanatory notes refer to

"The offence of using a wild animal in a travelling circus".

However, OneKind notes that section 1(1) as drafted does not refer to using a wild animal in a travelling circus, but rather to someone who

"causes or permits a wild animal to be used".

It might be argued that using a wild animal is included in causing or permitting a wild animal to be used, but it would be helpful to make that much clearer in the bill. If we do not do so, it is conceivable that a sole operator who trains and performs with his animals could argue that he is not causing or permitting use, as no other person is involved. Amendment 4 would add useful clarity

and is consistent with the drafting of other measures such as the UK Government's draft wild animals in circuses bill, published by the Department for Environment, Food and Rural Affairs in 2013, and the new Irish regulations prohibiting the use of wild animals in circuses, which will come into force on 1 January 2018 and which state:

"A person shall not use, or cause or permit another person to use, a wild animal in a circus."

Amendment 4 is reasonable and uncontroversial.

I move amendment 4.

John Scott: I support what Mr Stewart has said. It is a reasonable amendment, which we should consider.

Roseanna Cunningham: I thank David Stewart for lodging his amendment, the effect of which would be to make it clearer that a circus operator who uses a wild animal in a travelling circus is guilty of the offence. The provision in section 1 as introduced would have covered that scenario, since circus operators directly using a wild animal are in effect causing its use. However, the amendment removes any doubt and, therefore, we are prepared to support it.

David Stewart: I appreciate the support of members and the cabinet secretary.

Amendment 4 agreed to.

The Convener: Amendment 5, in the name of the cabinet secretary, is grouped with amendments 6 and 7.

Roseanna Cunningham: I will outline the thinking behind amendments 5 to 7. The committee's stage 1 report raised concerns regarding the effectiveness of section 1 in introducing a ban on the use of wild animals in travelling circuses in Scotland. In particular, the committee noted that the use of the word "purpose" in section 1(2) could be interpreted to mean that, if a wild animal was transported with no intended use in mind but was subsequently used in a travelling circus, no offence would have been committed.

I thank the committee for its close scrutiny of section 1. The intended effect of the section is a ban on the use of wild animals in travelling circuses. The purpose, intention or manner of transport of the travelling circus in transporting a wild animal should not be the focus of the offence. We certainly want to avoid any loophole that would mean, for example, that a circus could claim that a wild animal is a pet and so was not transported specifically for the purpose of use. We also do not wish to inadvertently capture within the offence the movement of wild animals that does not mirror the

movement of the travelling circus—for example, movement for veterinary treatment.

My officials have considered the drafting further, and I have lodged amendments to section 1 to address the issues that were raised. The amendments remove the reliance of the offence on the intention or purpose of the transportation by removing the requirement to establish intent. They adjust the wording to refer to an animal that is transported to a place where it is used, which establishes a factual situation that may be verified more easily. The amendments also adjust the wording to tie the offence to a particular rather than generic travelling circus by providing that the offence may be committed

“in relation to a travelling circus”,

and making further changes so that references to “a travelling circus” become references to “the travelling circus”.

The amendments mirror the new drafting that is proposed for the definition of travelling circus in Scottish Government amendment 8, which we presume will be agreed to, so that the offence is committed only if the wild animal is transported

“whether regularly or irregularly, from one place to another”.

The changes fully address the committee’s concerns about the effect of the offence.

I move amendment 5.

Stewart Stevenson: Can the cabinet secretary confirm that, in changing the wording from “a travelling circus” to “the travelling circus”—from a generality to specificity—that does not introduce a danger in relation to someone who transports in one context for use in another context and that we would not disconnect the transport from the circus in a way that defeated our objectives?

Roseanna Cunningham: That is not our view. The amendments were drafted to try to ensure that we do not capture the wrong things or exclude other things. The new drafting tightens up the bill and ensures that parallel transportation does not get caught in a situation in which we are talking about a travelling circus. It should be remembered that this is about committing offences. The clarity makes the issue a lot more straightforward in considering any offence.

The Convener: As no other member wishes to contribute, does the cabinet secretary wish to wind up?

Roseanna Cunningham: There is not anything extra that I need to add. I simply reiterate that the amendments are to tighten up the bill so that the nature of the offence becomes even clearer.

Amendment 5 agreed to.

Amendments 6 and 7 moved—[Roseanna Cunningham]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Meaning of wild animal

The Convener: Amendment 1, in the name of John Scott, is grouped with amendments 14 to 16, 2, 17, 18, 3, 20 and 12.

11:15

John Scott: Amendments 1 and 2 seek to create a list of wild animals that are not to be used in travelling circuses. Amendment 1 details where lists of such wild animals might be found and seeks to place such information in the bill. Amendment 2 would allow ministers to specify by regulation a species or kind of animal that is to be regarded as included in or excluded from such a list. The negative procedure would be the process for doing that. Amendment 3 is consequential to amendments 1 and 2.

All my amendments respond to the view that was expressed in the committee report and during the stage 1 debate that a list of wild animals that might perform in travelling circuses should be placed in the bill. The amendments would usefully enhance the clarity of the bill, but they can also be regarded as probing amendments. I welcome the fact that the cabinet secretary has lodged amendment 12 in response to my amendments and Mark Ruskell’s amendments 14 to 18.

I note Mark Ruskell’s intention to create a list of domestic animals. That seeks to achieve the same objective as my list but approaches the end point from a different direction. I believe that Mr Ruskell’s list, even at a cursory glance, has some omissions, most notably that of reindeer, which were much discussed by the committee and which are much in service at this time of year. Perhaps Mr Ruskell’s list highlights the point that has been made regarding the difficulty of providing exhaustive lists in the bill.

On the cabinet secretary’s amendment 12, I welcome the Government’s further consideration of the need for greater clarity and I look forward to the cabinet secretary’s explanation of what additional clarity the amendment will provide. I note the use of “may” in subsections (1) and (3) of the proposed new section introduced by the amendment. I wonder whether “may” should be substituted with “will” in order to take matters forward.

I look forward to hearing members’ comments.

I move amendment 1.

Mark Ruskell: We have a definition of domestication in the bill. However, at the end of

stage 1, we came to the conclusion that there were problems with it: that it was interpretable in different ways, particularly with regard to wild animals that have come from captive breeding stock and have been tamed over a number of generations. The definition creates a loophole in the bill that could result in certain wild birds, reptiles and small mammals being used in circuses, even though they are wild species.

The question in this grouping is about how to close that loophole. I appreciate John Scott's amendments. I was initially on the same page as John in wanting to define "wild animal" and create a negative list. However, there are problems with that, and the definition that John Scott has provided results in significant omissions including that of raccoon dogs, which I gather are increasingly used in performances and circuses.

The cabinet secretary's amendment 12 is welcome on one level, but it does not effectively deal with the issue in the bill. The approach is to put in a regulation-making power that can be used at the Government's discretion when a particular problem arises. However, we have time now, during the passage of the bill, to get a much clearer definition. Whether that is a list that includes or does not include reindeer, raccoon dogs or whatever, let us bottom that out now, rather than leave it to the courts to decide or for future regulation to be required at a later date as a result of a legal action.

In essence, I am presenting the committee with two options, both of which would provide the clarity of a list of domestic animals. That would be a positive and much shorter list of domestic animals that could be used in circuses, which would be introduced before section 1 comes into force.

The first option, which is set out in amendments 14 and 20, is to provide a list and a way of updating that list over time. The list has been drawn up on the basis of the culture of how animals are used in circuses in this country, and is also based on other countries' lists. It acknowledges that some animals have a long history of use and breeding and are fundamentally altered from the wild type. The second option is to create a power to introduce a list. I would go a little further than the cabinet secretary and would suggest that that needs to happen before section 1 is implemented.

We need that clarity. Whether there is a list in the bill, which is approved at this point, or a list that must be generated before section 1 comes into force, that clarity is important.

Roseanna Cunningham: I will come to amendment 12 after I have spoken to the other

amendments in the group. That would make more logical sense.

This debate is about the committee's concerns regarding clarity in the definition of a "wild animal". I understand the committee's recommendations about including a list. I understand the motivation and why people would think that a good thing. However, that kind of definition in legislation often becomes incredibly problematic, which is why it does not happen in general terms.

I thank the committee for its consideration of the issue, and I will deal with the amendments, starting with those in the name of John Scott. His idea is to refer to existing lists of wild animals under the habitats directive and the Dangerous Wild Animals Act 1976 to help define the kinds of animals that are and are not considered wild. He is taking a similar approach to mine in proposing, in addition, to provide a power for the Scottish ministers to specify whether a species or a kind of animal is wild or not. However, I rather fear that the approach that has been taken in John Scott's three amendments would render the bill ineffective without extensive secondary legislation. In its current form, the approach would automatically exclude any wild animals that are not considered dangerous wild animals or animals of particular conservation importance in Europe. In particular, it would exclude foxes and raccoons, which are currently used in one particular circus. It would also exclude other animals that might conceivably be used, including woolly lemurs, tamarins, guanacos, vicuñas, night monkeys, squirrel monkeys and all the other different kinds of monkeys that are and can become popular in circuses.

Secondary legislation listing a wide range of animals would indeed be required immediately the act came into effect, but it would be difficult to provide and keep up to date. It would have to be exhaustive, and it is difficult to see how it could be an exhaustive list. It would have to include not just wild animals but the hybrids that a travelling circus might possibly use. It would create constant problems, as we would constantly have to monitor the animals used.

Mark Ruskell's amendments lie on the other side of the coin. Mark Ruskell is trying to list the domesticated animals that can be used, as opposed to the wild animals that cannot be used. Listing domestic animals may seem simpler than listing wild animals, but that would still require debate on and updates to legislation, should the status of certain animals in the British islands change—not least as the offence would be triggered with the use of any animal that was not listed.

Many of the animals listed in amendment 20 are clearly commonly domesticated animals, and there

is little need to list them, as such animals will already be exempt from the ban under section 2(2) of the bill. However, some of the animals included in the list in amendment 20 are not commonly domesticated. They are what we would consider to be wild: for example, Pallas's cats, sand cats and the Scottish wildcat.

Furthermore, many commonly domestic animals are missing from the list in amendment 20, including llamas and alpacas, which are examples of changing culture around animals. I guess that, 20 or 30 years ago, we would not have regarded llamas and alpacas as commonly domesticated in the UK, but most of us recognise that they are now. Also missing are various small animals commonly kept as pets.

If the list is not absolutely accurate, some travelling circus operators could conceivably be prosecuted for using a kind of animal that is indeed commonly domesticated in the British islands, while others might legally use what are in reality wild animals.

In a sense, it comes back to the issue of lists. I stand by my previous advice that a list of animals by species, subspecies and hybrids would not be practical because it would be difficult to ensure that it was exhaustive and anything not on the list would remain legal to use, which would provide a way for travelling circuses to keep using wild animals by constantly adjusting the kind of animal that they use. There would also be a requirement for frequent updates to the list, with each update no doubt causing significant debate among stakeholders. Listing domestic animals that are not to be covered by the ban would simply give rise to the same problems, because it would be difficult to ensure that the list was exhaustive, any wild animals inadvertently captured by the list would remain legal to use and circus operators who used clearly commonly domesticated animals that were not caught by the list would then be open to prosecution.

To summarise my views on amendments 1 to 3, I see no advantage in restricting the tried and tested meaning of "wild animal" in the bill by referring to lists in other legislation, such as the habitats directive or the Dangerous Wild Animals Act 1976. In regard to amendments 14 to 18, and 20, I consider that the risks to law-abiding travelling circus operators would be too great if a list of domestic animals was adopted. Ensuring that any such list was comprehensive and up to date would be critical and difficult, with potentially serious consequences if that was not achieved.

Those examples illustrate clearly the dangers of trying to construct a list of animals that are or are not wild for the purposes of the bill and underline why the definitions in the bill provide what we consider to be the correct approach.

I move on to amendment 12. I understand the committee's concerns regarding the need for clarity on this matter and I fully accept that there might be occasional cases of genuine doubt as to whether a type of animal is of a kind that is commonly domesticated in the British islands or is wild, since where a type of animal sits in those two categories is not fixed but can change over time, as I have indicated with the obvious examples of alpacas and llamas. I have therefore lodged amendment 12, which would provide the Scottish ministers with a power to make regulations to include or exclude specific kinds of animals as wild animals for the purpose of the legislation. As I stated at the stage 1 debate, the regulations would be subject to the affirmative procedure, which is consistent with the procedure that is used for other animal welfare secondary legislation and would allow full consideration of any future regulation by the committee.

We would use the power in cases of genuine doubt. That approach would have the advantage of retaining the tried and tested definition of "wild animal" that is currently used in the Animal Health and Welfare (Scotland) Act 2006, the equivalent Zoo Licensing Act 1981 in England and the more recent Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012, thereby keeping consistency. However, the approach would go further by allowing the Scottish ministers to exclude or include specific kinds of animals as wild animals in a targeted manner to remove any doubt in particular cases where there was uncertainty. I think that amendment 12 addresses the committee's concerns about definitions, without bringing in the difficulties that would arise with the alternative approaches that have been proposed. I therefore respectfully ask John Scott and Mark Ruskell not to move or press their amendments and ask the committee to agree to amendment 12.

Stewart Stevenson: I have come to this matter quite late, but I have had an intensive weekend of study on it. The cabinet secretary has slightly pre-empted me in that I have identified that I have llamas 3 miles from my home and there are vicuñas and alpacas 10 miles from where I live. Those species are not covered in any lists and I think that they now might be regarded as commonly domesticated in the British islands.

There is perhaps a bigger issue with regard to feral animals. For example, the dingo, which is now regarded as a wild dog in Australia, is in fact descended from and genetically linked to the dogs that are still here in the UK. One could have an interesting debate as to whether a dingo imported into the UK was commonly domesticated, because genetically it might be a very close cousin. I just give that as an example.

There are also examples such as the wild horses on Exmoor, which could be brought to Scotland—although they are semi-domesticated in some ways, I think—and there are colonies of wild goats and sheep, and cats that go feral. There is a range of ambiguities.

11:30

Roseanna Cunningham: And, indeed, there are wallabies.

Stewart Stevenson: The cabinet secretary says wallabies—my experience is comprehensive, but not total. I have not yet met any wallabies.

One could even consider rabbits, which are actually domestic animals that were introduced by the Romans 2,000 years ago but are now regarded as wild animals. There are ambiguities associated with the production of lists—which, of their very nature, cannot be comprehensive in their coverage—but, more fundamentally, they create loopholes and enable circuses to exploit omissions from the lists.

I support what the cabinet secretary has said and the approach that she has taken, while understanding and sympathising with the underlying motivation of John Scott and Mark Ruskell. In particular, amendment 20 is a safety net for that which we cannot currently know and may only discover in the future.

Richard Lyle: I agree with the comments that Stewart Stevenson just made, and also with what the cabinet secretary said. I can see where Mark Ruskell and John Scott are coming from, but I think that a list would set the whole thing back. Remember that we have 32 councils that will have to make the legislation work, and 32 different council officers who may have differing views. I am reminded that there are some domesticated camels and also wild camels. We could go through every species and say which are wild and which are domesticated and, before we know it, the list will be endless and it will need to be reviewed. We will also have circus owners who will sit with a list and say, “Oh—I can have a circus with that animal because it ain’t on the list.” As far as I am concerned, a list is wrong and I will not be supporting any of those amendments.

Claudia Beamish: I find this issue quite complicated, if I am open about it. Lists often have their dangers and, although I was keen to support the possibility of a list of wild animals, as set out in John Scott’s amendment, in order to provide strong clarification, in view of what the cabinet secretary said I now have concerns about that and will not be supporting John Scott’s position.

I have had concerns right the way through about supporting an alternative list for domestic animals,

which would further complicate matters. Although I understand the sentiment behind Mark Ruskell’s amendments, and it is very important that we are as clear as possible, I am not clear myself that those amendments would clarify what is or is not a domestic animal, so I will not be supporting his amendments at this stage either.

It may well be necessary to revisit the idea of lists, although not in the bill because of the difficulty of changing them. However, I would not rule out consideration of the idea at stage 3 after further clarification. At this stage I am keen to support amendment 12, which leads to further clarity.

Mark Ruskell: I listened carefully to what the cabinet secretary said. I would like clarification over amendment 12, because it enables ministers to make a regulation about a kind of animal that is regarded as wild and a kind of animal that is not. Does that, in effect, draw up a list of those animals that are wild and those that are commonly domesticated? If it does, there still has to be consideration of where to draw the line—when it is acceptable to have an animal performing in a circus, based on the three ethical considerations that are at the heart of this bill.

I want to briefly go back to the issue of frequent updating of lists or consideration. It is the nature of domestication that it happens over multiple generations; indeed, the cabinet secretary mentioned the changing use of alpacas and llamas. Given that that has occurred over at least a human generation—in other words, 30 years or so—the updating of any kind of list yearly, whether under amendment 12 or under the other amendments in the group, simply would not happen. Domestication happens over a very long period of time, as does the culture of how we use animals, so I do not believe that this issue needs to be revisited all the time. That said, I seek some clarification from the cabinet secretary on how the Scottish Government might bring in regulations and where one draws the line in a list of species.

Roseanna Cunningham: I think that there is a slight misunderstanding here. Most of us will agree on pretty much all the animals that are domesticated and all those that are wild; what we are talking about is the small number of animals where there might be real dubiety or an animal that no one has heard of or met before or which is not normally used here in these circumstances. As a result, we might have a slightly ambiguous situation in which there is real doubt as to whether an animal is domesticated or wild.

The expectation, therefore, is that the regulations would come into play only if we were confronted with that real doubt. They would not come into play if a lion, say, or a dog was being used, as one is clearly wild and the other clearly

domesticated. They would apply only in the situation that I highlighted. I made a joking comment about wallabies earlier, but there actually are wallabies in Scotland; they got free and have now colonised a small part of the Loch Lomond and the Trossachs national park. I do not know whether wallabies have been domesticated by now in Australia, but you can understand how we might get confronted from time to time by that kind of anomaly—in other words, an animal that we had not previously thought of as being an animal that lives in Scotland. It is those anomalies that we would look to the regulations to deal with, not the widely understood categories of domesticated and wild. The vast majority of the animals that John Scott and Mark Ruskell have listed are clearly what they are defined as, but you can see straight away that the minute you listed specific animals, the people at this table and in this room would be highlighting examples of animals that had been left off those lists. If we can bring up such examples, you can bet your boots that everyone else will be able to as well.

We are using the common understanding of wild and domesticated animals. Mark Ruskell is quite right to point out that the regulations would not be used every six months or every year; they would be used only when a very particular anomaly arose and when there was real doubt as to whether a particular animal fell into a particular category. It would involve consideration of that particular animal, about which we would get evidence and information.

Stewart Stevenson: It strikes me that paragraph (a) of subsection (2) of the proposed new section in amendment 12 makes it very clear that the generality of the phrase “commonly domesticated” and other parts of section 2 is in no way undermined or replaced by any list that might be created in secondary legislation. That is perhaps the most important part of amendment 12: it protects the generality, even though at some point in the future it might produce what I suspect will be quite a short list. It complements but does not replace the generality.

The Convener: It is worth nothing that the amendments lodged by John Scott and Mark Ruskell are constructive and well intentioned in what they set out to achieve but, as we have heard, they immediately throw up difficulties. I think that that reflects the committee’s wisdom in handing the matter back to the Scottish Government in its stage 1 report and asking it to reflect on the issue of lists, although I know that some members have kindly attempted to assist in that process. On that basis and having reflected on the matter, I cannot support the amendments lodged by Mr Scott and Mr Ruskell, although I stress again that I think they were offered in a constructive spirit.

John Scott: I thank the cabinet secretary for her explanation of the apparent weaknesses of my three amendments, which I think has convinced me of the dangers of seeking to create lists. Indeed, she named species that I was certainly not aware of. My intention was to include, not exclude, animals and definitions. Moreover, I would not wish to foist the burden of frequent updates through subordinate legislation on future generations of parliamentarians.

I welcome the fact that the cabinet secretary has lodged amendment 12 and that it will be subject to affirmative procedure. I believe that the probing amendments that Mark Ruskell and I have lodged have served their purpose of encouraging the Government to refine its approach, and I welcome the cabinet secretary’s explanation of how amendment 12 will work.

Although I share some of Mark Ruskell’s remaining concerns, I will, with the committee’s permission, seek to withdraw amendment 1, given that the view of the committee is, I believe, to support amendment 12 instead.

Amendment 1, by agreement, withdrawn.

Amendments 14 to 16, 2, 17, 18 and 3 not moved.

Section 2 agreed to.

Before schedule 1

Amendment 20 not moved.

Section 3—Meaning of other key terms

The Convener: Amendment 19, in the name of David Stewart, is grouped with amendments 8 to 11 and 13.

David Stewart: Although OneKind initially took the view that the Scottish courts would be well able to interpret the word “circus” in any proceedings under the new legislation, it accepts the point made at stage 1 that it is not particularly practical for enforcement agencies to have to wait for a judicial definition when addressing possible breaches of the legislation. Cases in court are the tip of the enforcement iceberg, and the local authority needs to be able to act quickly and work with clear and comprehensive legislation at all times. Understanding of the word “circus” was complicated by discussions that the committee had at stage 1—and which are set out in detail in section 3 of the committee’s stage 1 report—and I therefore believe it essential to have a clear definition on the face of the bill. Amendment 19 reflects the previous discussion, covers the necessary elements and will aid interpretation of the legislation at all stages from consideration of enforcement through to the court process.

I move amendment 19.

11:45

Roseanna Cunningham: The bill's definition of "travelling circus" has been the subject of some conversation and deliberation. The committee considered that the term "place to place" could inadvertently capture wild animal use in a static circus that relocates. Part of the concern raised by the committee regarding what constitutes a travelling circus related to parallel concerns about the bill's lack of a definition of the word "circus".

I will speak to amendments 8 to 11, dealing with the wider definition of a travelling circus first, and then come back to amendments 13 and 19, dealing with the more complex topic of defining the word "circus".

Amendments 8 to 11 in my name amend section 3 in relation to travelling circuses to clearly target the ban on travelling circuses, so that static circuses and any other enterprises that are not considered to be travelling circuses are not caught by the ban.

I thank the committee for its close scrutiny of section 3 and for raising members' concerns. The amendments address the committee's concerns that the phrase "from place to place" could inadvertently capture enterprises that are not travelling circuses by replacing it with the phrase "from one place to another".

The amendments provide more clarity on the type of travel that is necessary to make a circus a travelling circus under the bill by describing travel as being

"regularly or irregularly, from one place to another"

for the purposes of providing entertainment. They also specifically mention a relocated static circus as an example of what would not be included in the definition of a travelling circus. The changes go a significant way towards addressing the committee's concerns about the definition of a travelling circus.

I move on to the topic of defining the word "circus" and will outline why I recommend that the committee supports Graeme Dey's amendment 13 and why I cannot recommend that it supports David Stewart's amendment 19. The committee's stage 1 report recommended that the Scottish Government should include a definition of a circus in the bill. The committee's view was that such a definition is crucial to the correct targeting of the ban and that, without it, the legislation would be difficult to enforce. That view came through strongly in the stage 1 debate.

I understand the concerns about the targeting of the bill and the intention is to ensure that the ban

on the use of wild animals is effectively focused on travelling circuses. However, a specific definition in the bill such as that which would be provided by amendment 19 would be frozen. I remain concerned that such an approach would risk the unintended consequence of capturing or excluding certain enterprises precisely because of its rigidity.

A narrow definition would provide travelling circuses with a clear blueprint for how to avoid the ban by making adjustments to their shows, rather than by stopping using wild animals. That could inadvertently provide travelling circuses with a continuing opportunity to bring wild animal acts to Scotland and use them in performances or displays. Conversely, a wide definition could capture the use of wild animals in many sectors that it is not intended to ban.

I therefore thank David Stewart for lodging his amendment 19, but I am concerned that the wide definition that he proposes would ban the use of wild animals in a much broader range of activity than just travelling circuses. It could capture wild animal use in many sectors where it is not intended for the ban to have any effect. For example, filming, bird of prey exhibitions and festive reindeer could be said to involve animals

"performing tricks or manoeuvres"

or

"being displayed or exhibited".

However, I recognise that the committee and some stakeholders remain concerned by the issue and I also acknowledge that there might be occasions when enforcement authorities will need to consider carefully whether a particular enterprise is a travelling circus and should be included under the ban. I expect the guidance that we will issue to local authorities will assist with making such decisions, but amendment 13, which we will deal with later, provides powers to address such concerns conclusively in cases of doubt, and we would provide a power to make regulations to include or exclude

"a particular type of undertaking, act, entertainment or similar thing"

within the meaning of travelling circuses

"for the purposes of this Act."

Convener, I appreciate that you will be coming back to amendment 13.

The Convener: Can you do it now?

Roseanna Cunningham: Okay. The regulations will be subject to the affirmative procedure, consistent with the procedure used for other animal welfare secondary legislation, to allow the committee to fully consider individual cases. Again, that power would be used only in the case of genuine doubt.

Amendment 13 does that while avoiding the significant challenges that would accompany a requirement for a complete list of all the types of undertakings, acts, entertainments or other similar things that are to be included or excluded from the definition of travelling circus. Any such list is unlikely ever to be comprehensive, and it is highly likely that some types of enterprise would be omitted. Amendment 13 also avoids the overly wide net that would be provided by the definition in amendment 19. The adoption of amendment 13 would mean that, in the majority of cases, the bill would rely on the commonly understood meaning of circus and on section 3 to define a travelling circus, which we believe is a strategy that is already working well for other legislation. However, in cases of genuine doubt about a particular kind of enterprise, we would have the power to come back and revisit it.

Amendment 13 is the more effective way of addressing the committee's concerns and I am grateful to the committee for its work in considering the issue and to Mr Dey for lodging the amendment.

I need to add one small but important note about amendment 19, which is that we have doubts about its legislative competence. I feel that I ought to draw that to the committee's notice. We feel that it is outwith legislative competence and may put the whole bill in jeopardy. I can expand on that if you want me to at this point.

The Convener: I see heads nodding. That would be useful.

Roseanna Cunningham: The definition in David Stewart's amendment 19 widens the type of activity that is caught by the offence to include any peripatetic or travelling animal display activity. That could include, as I indicated before, festive reindeer displays or birds of prey displays. The Scottish Government position is that there is insufficient evidence of moral opprobrium or welfare concerns associated with all travelling animal display activities such as to justify a complete ban on the use of wild animals in such ventures. Without evidence of a legitimate justification for such a ban, there could be a risk of acting incompatibly with rights under the European convention on human rights or European Union law.

The Convener: I will speak to my amendment 13. In our stage 1 report, the committee raised concerns about the bill's lack of a definition of a circus and how that could impact on what might or might not be viewed as a travelling circus. In responding to the stage 1 report, the cabinet secretary indicated a willingness to consider any amendment aimed at bringing clarity, provided that it did not have unintended or unwanted consequences. Amendment 13, complemented by

clarifying guidance, will get us as far as we can reasonably go towards addressing the committee's concerns, while not creating wriggle room to allow either activities that should be captured by the scope of the bill to escape it, or acts or entertainments that were never intended to be captured by the bill to be caught by it. I hope that the amendment addresses the unanimous concerns expressed by the committee.

In essence, amendment 13 would give ministers a power to introduce regulations either to define an activity that was contending that it was not a travelling circus, when it was indeed intended to be subject to the bill, or to define an activity that was never intended to be captured but which might become the subject of efforts to contend that it was. I am thinking of such things as reindeer visiting shopping centres or wild bird shows. The amendment calls for such regulations to be introduced under the affirmative procedure, which would afford this committee, or any relevant successor committee, the opportunity to properly interrogate them. Clearly, we would wish that there was never a need for those powers to be exercised, but if amendment 13 is accepted and if the accompanying guidance is as clear as possible, we can get where we need to go.

Stewart Stevenson: I have no particular difficulty with what David Stewart intends with amendment 19, which addresses recommendation 8 in the committee's report, but the wording blows the whole thing wide open. The amendment says:

"in relation to which animals are kept or introduced wholly or mainly for the purpose of—"

How would I get around that provision? I would simply get my animals by leasing them from a zoo for no more than 182 days per year. Therefore they would be in the zoo for 183 days per year and so would be mainly zoo animals and only subsidiarily circus animals.

Secondly, there is the wording "kept or introduced". I am not quite sure what "introduced" means in this context, but as for "kept", if the animals are normally kept by another enterprise that is not the circus, such as a commercial zoo—and there are commercial zoos—then again, the whole thing would escape.

I am sure that further examination could find other ways in which the particular words that are used can be got around; that is an issue that the member might consider further. Because of the quite straightforward ways that we can see someone getting around the particular words that we have before us, I think that it would be extremely unwise for us to accept and agree this amendment.

Donald Cameron (Highlands and Islands (Con): I have two points, the first of which is on

legislative competence. I am interested to know what provisions of European Union law or the ECHR the cabinet secretary has in mind when she says that amendment 19 is “outwith legislative competence”.

My second question is also in relation to David Stewart’s proposed amendment 19. I take on board what the cabinet secretary said about various issues with the wording of the amendment, and I therefore find it difficult to support, but the principle of defining the word “circus” is worthy of further consideration. This bill goes to great trouble in section 3 to define not just “travelling circus” but the phrase “circus operator”. The “circus operator”, we are told, means

“the owner of the circus”,

and we are then told that it is

“any person ... with overall responsibility for the operation of the circus”.

Does the cabinet secretary think that it is sustainable to pass legislation regarding wild animals in travelling circuses without defining the very word “circus”?

The Convener: We will come back to that point. I want to let Kate Forbes come in.

Kate Forbes (Skye, Lochaber and Badenoch) (SNP): It is a very brief comment. I understand the intention of David Stewart’s amendment. My main concern is that it would mean that the legislation went beyond its intention. One of the main concerns raised during the course of evidence was that the legislation would capture, for example, travelling reindeer. However, I see the temptation to define “circus”.

The Convener: Do any other members wish to speak?

Mark Ruskell: Amendment 13 is a constructive amendment to lodge, but perhaps it falls into the same trap as amendment 12, which we have already debated, on the definition a wild versus a domestic animal.

The cabinet secretary says that there may well be situations where there is genuine doubt with regard to the definition of a wild animal or of a travelling circus. Amendment 13 seems to be drafted in a very similar way to amendment 12 in that it relies upon the generality of a definition that is already in the bill—a generality that this committee has already had concerns is not tight enough.

I have the same lingering concerns that we just had in the previous debate. In a way, amendment 13 pushes the issue into the future. It says that if there is a legal challenge over a definition, we will come back and regulate it at that point. I would expect the definitions of a wild animal and a

travelling circus to come back at some point, possibly through the courts, and possibly then through further regulation by this committee.

I do not know whether that is the most appropriate way to deal with the concerns. If there are tighter, more accurate, relevant definitions of both terms that could be included in the bill, why not do so now and enable them to be changed over time, if evidence arises that they need to change?

12:00

The Convener: If no other member wants to comment, I will bring in the cabinet secretary again, to answer questions.

Roseanna Cunningham: I do not want to be drawn into the broader discussion about definitions in legislation. The issue is not specific to this bill; in the context of almost any legislation we hear arguments being played out about definitions and the likelihood of challenges.

We accept that, in future, there might from time to time be a determination to try to challenge the bill, but the bill is no different from any other legislation in that regard. I cannot think of any legislation in relation to which there is no hypothetical possibility of challenge in future. The fact of that being a possibility is not a reason for going into the kind of contortions that would be necessary—I think that committee members can already see what kind of contortions we get into when we try to make definitions in legislation work in practice.

I am content that where we are at the moment does not freeze a definition of circus, the common understanding of which might change over time, as happens in many cases, any more than our current approach freezes the definitions of a wild animal and a domesticated animal. There is a need to future-proof legislation, and that is what we are doing. I am not saying that what we do here will absolutely guarantee that there will never be a challenge—one can never say that—but we are trying to ensure that we capture the right things in the right way.

That takes me back to the very start. Members need to remember that the legislation is predicated on not welfare but ethical grounds, so we need to make our arguments on ethical grounds, and in future the legislation will be looked at on ethical grounds. If it were welfare legislation, it would look and sound rather different.

On Donald Cameron’s point, I indicated that we had doubts about legislative competence—I do not know whether David Stewart has had conversations about that. Under EU law, there is the freedom to provide services; members should

remember that we are interfering with businesses, so we must have regard to that and to ECHR article 1, protocol 1, on the right to property. We have concerns, which can be overcome by making the arguments—and that takes me back to the point about reminding ourselves that the basis for the bill is ethics and not welfare. [*Interruption.*]

I am being reminded that clear guidance to local authorities is to be provided on the back of the bill. The guidance will come to the committee, I presume, so the committee will be able to consider whether it is sufficient before it goes out to local authorities.

David Stewart: The objective of amendment 19 was to improve the bill. At stage 1 we heard criticisms about the vagueness of the definition. I was particularly concerned—as I think were other members—to ensure that we did not just wait for a definition to come through a court process and various test cases and that advice and guidance would immediately be given to the 32 local authorities.

However, I understand the points that other members and the cabinet secretary made. On that basis, I will not press amendment 19.

Amendment 19, by agreement, withdrawn.

Amendments 8 to 11 moved—[Roseanna Cunningham]—and agreed to.

Section 3, as amended, agreed to.

After section 3

Amendment 12 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Cameron, Donald (Highlands and Islands) (Con)
Carson, Finlay (Galloway and West Dumfries) (Con)
Dey, Graeme (Angus South) (SNP)
Forbes, Kate (Skye, Lochaber and Badenoch) (SNP)
Lyle, Richard (Uddingston and Bellshill) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)

Abstentions

Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 10, Against 0, Abstentions 1.

Amendment 12 agreed to.

Amendment 13 moved—[Graeme Dey].

The Convener: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Cameron, Donald (Highlands and Islands) (Con)
Carson, Finlay (Galloway and West Dumfries) (Con)
Dey, Graeme (Angus South) (SNP)
Forbes, Kate (Skye, Lochaber and Badenoch) (SNP)
Lyle, Richard (Uddingston and Bellshill) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)

Abstentions

Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 10, Against 0, Abstentions 1.

Amendment 13 agreed to.

Sections 4 and 5 agreed to.

Schedules 1 and 2 agreed to.

Sections 6 to 8 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

At our next meeting, which is on 28 November, the committee expects to take evidence ahead of the Scottish Government's draft budget for 2018-19.

Meeting closed at 12:07.

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