



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Environment, Climate Change and Land Reform Committee

**Tuesday 13 March 2018**

**Session 5**



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Pàrlamaid na h-Alba

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**Tuesday 13 March 2018**

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**ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE**

**9<sup>th</sup> Meeting 2018, Session 5**

**CONVENER**

\*Graeme Dey (Angus South) (SNP)

**DEPUTY CONVENER**

\*John Scott (Ayr) (Con)

**COMMITTEE MEMBERS**

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

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Jackie Baillie (Dumbarton) (Lab)  
Tom Cattanach (Fochabers Estate)  
Gemma Cooper (National Farmers Union Scotland)  
Simon Dryden (Marine Scotland)  
Hew Hunter (Whitehills Estate)  
Jim Inness (Glenlivet Estate)  
Keith Main (Marine Scotland)  
Luke McBratney (Scottish Government)  
Stuart Middlemas (Marine Scotland Science)  
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)  
Brian Shaw (Applegirth Estate)  
Kate Thomson-McDermott (Scottish Government)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**LOCATION**

The Robert Burns Room (CR1)



## Scottish Parliament

### Environment, Climate Change and Land Reform Committee

*Tuesday 13 March 2018*

*[The Convener opened the meeting at 09:31]*

### Decision on Taking Business in Private

**The Convener (Graeme Dey):** Good morning and welcome to the 9th meeting of 2018 of the Environment, Climate Change and Land Reform Committee. Before we deal with the first item on the agenda, I remind everyone present to switch off mobile phones and other electronic devices because they may affect the broadcasting system.

The first item on the agenda is for the committee to decide whether to take in private items 5 and 6. Do members agree to do that?

**Members** *indicated agreement.*

## Subordinate Legislation

### Conservation of Salmon (Scotland) Amendment Regulations 2018 (SSI 2018/37)

09:31

**The Convener (Graeme Dey):** Agenda item 2 is evidence on the Conservation of Salmon (Scotland) Amendment Regulations 2018 (SSI 2018/37) from officials who have been involved in the regulations' construction. I welcome from Marine Scotland Simon Dryden, who is the policy team leader of salmon and recreational fisheries; Keith Main, who is the policy manager for salmon and recreational fisheries; and Stuart Middlemas, who is an ecologist in the freshwater fisheries laboratory of Marine Scotland's science division. We will also, in the next wee while, be welcoming Jackie Baillie MSP, who will join the committee for this item.

Gentlemen, we will move straight on to the regulations. Can you explain the methodology that you used to arrive at your position? Do you believe that it would stand up to peer review? Indeed, has it been reviewed independently?

**Stuart Middlemas (Marine Scotland Science):** In brief, there are lots of details; it is quite a complex modelling process.

Essentially, we take the catches that have been provided for each river and use them to work out how many salmon are coming back. We then convert the number of salmon into a number of eggs and compare that to the egg target for the river. If the number is above the egg target, exploitation or killing is allowed, but if the number is below the target, the river becomes a catch-and-release river. That is a standard process that is used internationally and has been peer reviewed in a number of places. Essentially the same method is used in Norway and Ireland. The general process has been peer reviewed and our work will stand up to peer review.

We used Scotland-specific information rather than taking information from, say, Norway and applying it to Scotland. That bit has not been peer-reviewed, but it has been subjected to a large amount of scrutiny through consultation discussions and preconsultation with Fisheries Management Scotland, local biologists, local trusts and so on. We have considered—we will continue to do so—having it peer reviewed in scientific literature, but that takes time and we must balance going through that process with making the changes that, through our consultation and various discussions, have been suggested.

**The Convener:** I hear what you are saying, but would not some system of peer review get you to a position in which you might be subjected to less criticism about the methodology than you have had?

**Stuart Middlemas:** Indeed. The issue is partly down to the speed at which we have to get things in place and, as I have said, is about striking the balance between making changes that have been suggested by other people and updating the methodology, on the one hand, and taking the time to pause, on the other. Peer review is not a quick process, but we are actively looking at it and seeing how we can do it.

**John Scott (Ayr) (Con):** On peer review, at a meeting in October 2017, Marine Scotland was asked by the Loch Lomond Angling Improvement Association whether it would stand by the current methodology and whether you would put your name to a scientific paper on the calculation method and data that had been used. Apparently, you replied that you would not.

**Stuart Middlemas:** I do not recollect saying that.

**John Scott:** That certainly makes things awkward, because among other things I have here a letter that I received from Gareth Bourhill of the Loch Lomond Angling Improvement Association, which is dated 4 March.

In addition, do I understand, from what you said earlier, that you use a completely different methodology—a Scottish solution—which is based on catch, rather than on eggs or the young fish that are available to measure?

**Stuart Middlemas:** We do not count the young fish that are available to measure but—

**John Scott:** Is not that accepted practice?

**Stuart Middlemas:** No. The accepted practice is to use adults, as is done in Ireland, England and Wales, and Norway, so we are using international best practice. It is the data that we use that is specific to Scotland. In using catches to figure out numbers of salmon that are coming back to a river, we do not use the information that is used in Norway because that information is specific to Norway. We use the best available information for Scotland. However, the general method is used internationally.

As I said, I do not recollect saying that I would not put my name to the method. We are looking at having it peer reviewed, so of course I will put my name to it. We are not hiding from our use of the method. We are here at the committee meeting, and we have gone out to speak to people, including the Loch Lomond Angling Improvement Association, local trusts, biologists, boards and so on.

**Simon Dryden (Marine Scotland):** Perhaps I can give another example of the balance between going for peer review and developing the model. The current egg target that we use is a national one. To give the committee a little bit of detail, that means that the model currently requires an egg target of between 1.1 and 9.8 eggs per 1m<sup>2</sup> of the wetted area. We have had constructive feedback from local biologists to say that not all rivers in Scotland are the same, so that range does not apply to all rivers.

We have said that we will look at that, so this year we aspire to getting a more refined target for the model. We will look at the data to see whether it suggests that we can do so. We might find, for example, that on the east coast the range could be larger than that on the west coast. If that is the case, that would reduce the egg requirement on the west-coast rivers. We are taking that range, doing 10,000 iterations and choosing a figure from the range. If we make the target smaller, that is better; if we can do that, local biologists would agree with us that we have improved the model again. However, it will take a substantial amount of time and research to make sure that we do it properly.

**John Scott:** Is it fair to say that that is a work in progress?

**Simon Dryden:** Absolutely; it is very much a work in progress. Every year, we have improved on the 2016 model. There have been calls saying that if we are improving it, we should not have any grades until we are happy that we have the best possible model.

The answer is that we do not think that doing nothing is an option. All the evidence that we have suggests that the number of adult salmon returning to Scottish rivers is reducing dramatically. The catch numbers tell us that, as does the anecdotal evidence from this year. We believe that we need to offer protection and to take a balanced approach in the interests of today's anglers and anglers in the future. If we allow today's anglers to kill too many salmon, there might not be any salmon for future anglers in some rivers.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** If my question can be answered relatively briefly, the answer will be useful; if it is a long answer, it will probably not be.

Representing the constituency that I represent, I am used to the regime around conservation in the oceans and am aware that, even after 100 years, the International Council for the Exploration of the Sea continues to refine its processes in that regard. Is there a quick and pithy way of saying how similar the process that ICES and the contributing nations use is to what you are doing in

our salmon rivers, in terms of the scientific approach?

**Stuart Middlemas:** The processes are very similar. Some of the ideas that we use have come from the ICES working group on salmon, and our approach has been discussed with international colleagues.

**Kate Forbes (Skye, Lochaber and Badenoch) (SNP):** How do you take gaps in data and information into account when classifying rivers?

**Stuart Middlemas:** There are lots of data gaps. We do not have perfect information for each river, so we have to use the best information that is available to us. In many cases, we use all-Scotland average information. With regard to the conversion from catches to numbers of fish, we have that specifically for a set number of rivers. Where we do not have that information, we either use an all-Scotland average or use information about the effect of geographic relationships throughout Scotland, if we can find it. That is how we—and other countries—fill in such missing information.

**Simon Dryden:** Particularly in relation to the River Endrick, we are aware that we have missing catch data—specifically, rod-catch data. The model does not add in additional salmon catches to try to take account of catches that have not been reported. We think that any such estimate would be too subjective and that it would be too risky to design a method to make such an estimate.

In the case of the River Endrick, we liaise with the Loch Lomond Fisheries Trust and we have identified that we do not have data for just over 11km of river that has fishing on it—that takes into account both banks. We equate that to about 21 per cent of the assessed river area. If we were to uplift the catches by 21 per cent to give a pro-rata figure—which we do not think would give us a sound basis—that would uplift catches by 24, which would not have made the River Endrick a grade 2 river.

**The Convener:** As you have raised that particular issue, we will explore it now. Claudia Beamish has a question.

**Claudia Beamish (South Scotland) (Lab):** The constituency MSP, Jackie Baillie, has passed on to me some correspondence between her and the Loch Lomond Angling Improvement Association. In that correspondence, the group highlights issues in a slightly different way from Simon Dryden. It says that the data is being collected from a 16km stretch of the river, despite the river being 46km long, that the club has rights only to that 16km stretch, and that it considers fish counters to be the only way to accurately define the numbers. It does not consider that any

improvement has been made to the way in which the data has been captured. I appreciate that it is a very complex issue. Can you comment more generally on the fact that, according to the Scottish Government—if I have this right—there are only six fish counters, which will be increased to eight counters.

**Simon Dryden:** It might be easier for us to follow up in writing the explanation for the differences from the river length. When we do an assessment, we take into account the wetted area, which is the area in the catchment in which salmon can reside. One might call that the assessment area. That is not the full river length, in the case of the Endrick. There might also be differences when we say that it is not simply about the river length and it might be more appropriate to count left and right banks.

09:45

We sat down with the Loch Lomond Fisheries Trust for a substantial amount of time and the trust mapped out the river for us. We are fairly confident that we do not have catch data for 21 per cent of the river.

**Claudia Beamish:** Are you saying that you have catch data for 21 per cent of the river?

**Simon Dryden:** No—there is 21 per cent of the river for which we do not have catch data.

**Claudia Beamish:** I am sorry: my mistake.

**Simon Dryden:** Fish counters decrease uncertainty in data. It would be helpful to have more fish counters. However, there is a balance to be struck. For example, this year, the Scottish Environment Protection Agency is spending about £7 million on removing barriers from rivers, which helps migration of salmon, so we are reluctant to build a barrier, even if it were to have a fish pass counter in it, because that would be counterintuitive. We need to look for places where a barrier cannot be removed and a fish pass counter can be put in. It is a challenging and expensive process. It is not just about the cost of putting the counter in place: they require a lot of ongoing maintenance and analysis.

We found an opportunity to put a fish counter on the River Ettrick this year and we provided some funding for that. That salmon counter should go live in the next few weeks.

**Claudia Beamish:** Is not that something that volunteers would be only too keen to help with? That would help your costs. Could citizen science be involved?

**Simon Dryden:** We hope so; we hope to exploit such opportunities.

**The Convener:** Given that Jackie Baillie has been name checked, I invite her to declare any interests in relation to the instrument, and then to ask her questions.

**Jackie Baillie (Dumbarton) (Lab):** Thank you convener, and I apologise for being late. I was held up in traffic. The only interest that I will declare—it is not a registrable interest—is that Loch Lomond Angling Improvement Association is based in my constituency.

It is a matter of regret that this is not the first time that we have been in this situation. The predecessor committee, of which the convener was a member, considered the issue way back in 2016. Some of the discussion at that time was about the lack of an evidence base for regulations. I regret that we seem to be in a similar position today.

What discussions have the officials had with Loch Lomond Angling Improvement Association and when?

**Simon Dryden:** We opened discussions in October, specifically on the assessment. In that period, we have had extensive dialogue with the association via email, on the phone and in meetings to try to explain how the models work. I note that in correspondence received from them there is concern expressed that we did not use the same wetted area for the assessment as we did in 2016. We have used the same wetted area: we have not changed it. We took on board the suggestions that were made at that time and have remained consistent in our approach.

**Jackie Baillie:** Knowing that there were difficulties with a lack of evidence for that particular stretch of water, why did you wait 18 months—just a few months before you intended to introduce new regulations—before engaging with the association?

**Simon Dryden:** That was partly due to a change in personnel. I am not excusing what Marine Scotland has done, but my team has changed completely. I was unaware of the missing data issue until it was escalated again and highlighted to me in October last year.

**Jackie Baillie:** I point out with the greatest respect that Stuart Middlemas was there; I see him in the *Official Report* of the meeting, in March 2016.

**Stuart Middlemas:** We have been in contact with various people to try to get catch data. I do not deal with that—although that is no excuse. The issue of catch data has been taken forward to some extent, but obviously not successfully.

**Jackie Baillie:** There is an acknowledgement that the data is clearly incomplete and that you

have made assumptions based on a fraction of the River Endrick. Is that correct?

**Simon Dryden:** Since the issue was highlighted in October 2017, we have had meetings with the Loch Lomond Fisheries Trust during which we asked whether it would identify all the proprietors. The sensitive issue here, which we fully respect and understand, is that the Loch Lomond Angling Improvement Association and the trust do not feel able to give us the contact details of the owners, despite us asking for that information. We understand that, because making a return is a statutory requirement, that is difficult.

The trust has provided us with some information, which has allowed us to establish that we are missing 21 per cent of the data. The trust says to us, anecdotally, that the catches in that area were negligible. I accept that we do not have data on returns.

Last Friday, the Scottish Government announced a new wild fisheries governance fund. That gives the opportunity for both those bodies and other proprietors to make a bid to establish a district salmon fishery board with a grant of up to £50,000.

There would be a number of benefits from so doing. One is that the process of establishing a board would involve the sheriff making up a roll of all the proprietors in the district. That is a potential way for us to move forward. I will be in contact with both bodies, now that the situation has changed and funding is available to help should they wish to move to a board, to revisit that idea with them.

**Jackie Baillie:** That sounds very positive, but the difficulty that I have is that that would happen after you want the regulations passed. Surely a Government that prides itself on evidence-based policy making would gather the evidence first.

As probably a final question—the convener is nodding at me—what are the consequences of making the Endrick a category 3 river? Have you thought them through? The Loch Lomond Angling Association spends a considerable amount of money employing bailiffs and engaging in conservation projects. If its membership drops—which it will if the river becomes a category 3 river—those things will go. Surely that is not the consequence that we all want to see. I therefore ask whether we should wait for the evidence before moving ahead on that river system.

**Simon Dryden:** We are aware of the risks of having a river at grade 3, particularly with regard to angling numbers. However, our 2016 data does not suggest—

**Jackie Baillie:** It is incomplete data.



**Simon Dryden:** When we look at the catches in the rivers that were grade 3 in 2016 and compare them with catches in grade 2 and grade 1 rivers, we do not find that the catches dropped disproportionately. If you expect that, once a river is designated grade 3, anglers will stop using it and move elsewhere, you might expect the catches in those rivers to fall quite considerably, but they have not fallen more than the catches in grade 1 or 2 rivers. If the salmon were being displaced, you might have thought that the catch in the grade 1 or 2 rivers would go up. In 2016, which was its last year, the catch on the River Endrick was 113 salmon. That was when it was a grade 3 river, yet that catch is higher than the three preceding years when it did not have a grade. If, in 2016, when we made it a grade 3 river, the Loch Lomond Angling Improvement Association lost members, as it predicts it will do this year, we might have expected catches to go down, but they did not. They went up and they were only two below the five-year average of 115.

My final point is that we count the catch upstream of fish counters and we have not seen a reduction or a different relationship between the fish going through the counters and the catch. If there was less effort, you would expect the catch rate—the proportion of salmon caught—above the counters to be reduced, and we have not seen that.

**Jackie Baillie:** Mr Dryden, you quite properly pointed to a reduction in membership of the Loch Lomond association. The reduction this time would be significant. I asked you specifically about the impact on local bailiff and conservation projects and I am not sure that you answered that. I would be interested in your view, because that would be a consequence that nobody wants to see, particularly on the basis of data that is incomplete because not all proprietors have been identified and not all the catch has been identified. That does not add up to evidence-based policy making in my book.

**Simon Dryden:** We have a balance to strike. If we changed the grades of rivers and killing went on, that could jeopardise the stock for future anglers and mean that some rivers could become moribund. We just announced on Friday an additional £500,000 of funding for the wild sector to help with research and activities to address the 12 high-level pressures on salmon stocks that we have identified. We are putting a lot more funding into the sector this financial year, which will include activity that will happen in the Loch Lomond catchment area.

**Claudia Beamish:** I have a question and whoever feels that they can answer should do so. What would the implications be if—I stress the word “if”—there were a motion to annul the

Scottish statutory instrument? I understand that the current 2016 regulations are not time limited, but primary legislation might be required to review an update every two years. Could you clarify that? If there are concerns of the nature that are being highlighted and if there were a move to annul, what would happen? Obviously, it is a European Union directive and it is a protected species. The committee has serious concerns about that and we want to get it right.

**Keith Main (Marine Scotland):** Under the current regulations, if a motion to annul were carried, we would revert to the previous year's regulations, which are the 2016 amendment regulations. You are quite right that they are not time limited and they would continue to apply for the 2018 fishing season, which would have implications for a large number of rivers. For reasons that I understand, we are concentrating today on the Loch Lomond system and Endrick Water, but there are a large number of rivers that will be grade 3 this year. That was part of the public consultation that we did in September and October, and we had a lot of representations about that. The grade change was not entirely a surprise to a lot of the fishing community, because the stocks and catches of salmon have been on a downward trend for quite a while. Therefore, in the entirety of the regulations that are currently being considered by the committee, this is the right way to go.

We model the salmon on the basis of a five-year average; arithmetically, we lost the figure for 2011, which was a good, healthy year for salmon catches, and brought in the figure for 2016 which, if I remember rightly, was something like 63 per cent of the 2011 figure. There could be wide implications; a lot of rivers that would be grade 3 this year might stay at grade 2, for example, and that would allow killing of salmon. Whether that is restricted or by local arrangement, there would be management arrangements in place.

10:00

As to whether primary legislation would be required, I am not sure whether that is the case. The primary legislation and the regulations at its base require an annual review of the position for the 17 special areas of conservation around the country, and we will continue to review them year on year. There is not a requirement to make annual regulations. I believe that, when the first regulations came into place, the cabinet secretary said that there would be an annual review and, as a result, this is the third set of regulations coming forward.

In England, the Government went to a public consultation last week on similar conservation measures for the 42 principal salmon rivers in

England. Those would be 10-year byelaws with a five-year review. Under the terms of the consultation, if the byelaws came into place, many of the rivers in England would go to mandatory catch and release—the equivalent of our grade 3—for a 10-year period, with very little scope for review.

As Simon Dryden and Stuart Middlemas have said, we are continuing to develop and improve our model year on year. There are hard years, and this is going to be a hard year for quite a number of river systems. We understand that, but we will continue to review the situation and to invest in improving wild fisheries, and I hope that we will see some improvements. As part of our annual review process, we will bring forward regulations again. We have already started this year to think about the regulations for 2019.

**Finlay Carson (Galloway and West Dumfries) (Con):** On the back of Jackie Baillie's question, I voice my concern that when you designate a river as grade 3, that sends a big message out that people should not fish it, so fishing effort is reduced. It is quite clear that there is less fishing effort on grade 3 rivers. Given the choice between grades 1, 2 and 3, I would certainly pick a grade 1 river, not necessarily because I would want to kill fish, but because I would want to go to a river that is healthy and where I would have more chance of catching fish.

Will the £500,000 go any way towards mitigating the reduction in income from investment by angling societies and organisations that are looking after the health of rivers?

**Simon Dryden:** We have not finalised how we will spend the £500,000 in this financial year, but we are liaising with Fisheries Management Scotland on giving seed funding to a scheme that would seek to increase angling participation, in particular among young people. When we first introduced the regulations in 2016, we gave £100,000 to FishPal to help angling clubs. That funding is still being utilised. The scheme will run through until June, and FishPal hopes to extend it voluntarily with clubs. I have heard in conversations that I have had with angling clubs that that has had a positive impact. Clubs have taken advice on increasing participation; they have created Facebook pages and so on, and they seem to have increased the number of visiting anglers that they get.

**Finlay Carson:** Have you done any consultation on the effectiveness of FishPal? My understanding is that FishPal did a lot of that work anyway, and all that happened was that the Scottish Government offset some of its costs but did not actually add to what was already out there.

**Keith Main:** FishPal has built on its existing model and continues to develop it. The Government's investment of £100,000 over two years has helped it to extend its offering, to modernise it a little and to go out to clubs and river systems that have not previously engaged with FishPal, and which—as Simon Dryden said—have perhaps not had the social media or public-facing presence that FishPal can offer.

Over the two years so far, FishPal has brought on more than 80 clubs and it is talking to another 40 or so to bring them on. Each club can tailor its presence, but FishPal gives them a better and more obvious internet presence. It offers online booking for people who want to fish and it gives day-by-day, almost hour-by-hour, information on conditions in the water and the number of catches. FishPal has built on an existing model and it has brought on clubs that have not had to pay the initial registration fee, which I think was £250. For the duration of the project, FishPal has not been charging commission on bookings that are made through it, and so on. The offer has been there for two years and quite a number of clubs have taken it up.

**Claudia Beamish:** What is the level of concern about regrading river systems in relation to systems that have not been highlighted so far? In 2016, it was highlighted to our predecessor committee that there would be more granularity and localness in development of the science. Could the panel comment on that in the context of concerns, and how the two things interface with each other?

**Simon Dryden:** I will let Keith Main respond first.

**Keith Main:** On levels of concern, we are this year—as we have done in previous years—carrying out a consultation: there is a statutory requirement for a minimum 28-day public consultation. It depends how far we go back, but around this time last year, our scientific colleagues were gathering all the data from the previous year, doing the science, doing the 10,000 iteration run on the model, and coming up with the proposed classifications.

We went to public consultation on that in September and got more than 190 responses. I have to say that more than 50 per cent of them were with regard to the Loch Lomond Angling Improvement Association. However, 32 river systems got back to us. In some cases, we had one letter on behalf of the district salmon fishery board; in others, we had a number of letters that ranged from fairly small concerns, such as Finlay Carson mentioned about a river being graded as grade 3 for the first time, to very detailed scientific concerns.

This is the third year that we have consulted: I think that some of the concerns are more detailed—although I am fairly new to the team—than concerns about the previous two lots of regulations. My predecessors spent a lot of time going around Scotland to clubs and discussing in detail the things that we need to improve. As we have said, we are developing the model as we go.

We have responded to some of the concerns, but we have not been able to respond to all of them. For example, I think that seven systems that were going to be grade 2 this year will be grade 1 instead because we have responded to concerns about uncertainties about how the fish use loch systems.

Stuart Middlemas might be able to respond on granularity.

**Stuart Middlemas:** In the first year, regulations applied at district level and so could involve a number of rivers. We undertook to move to river level. There has been a large process involving consultation of fisheries so that we could get river-level statistics, which we have done for the past two years. That is one of the main changes—we have increased granularity in that respect.

The other main change is that we have gone out and consulted on distribution of salmon in a number of areas. We have had over 3,000 changes to the distribution information that we had, which we have taken on board and fed into the models.

There was previously a lot of discussion about our not being able to take into account angling conditions. The models that we have produced take into account the flow in the river; for example, in particularly dry conditions there is less chance of catching fish. We account for poor conditions as best we can in the model.

**Claudia Beamish:** Will you briefly explain a little more about that and, more generally, how effort from anglers has been taken into account? The Nith and Annan groups have highlighted to me that they have concerns that the number of anglers is down and that some clubs, particularly on grade 3 rivers, have reduced numbers. That seems to contradict the information that the panel gave to the committee earlier.

**Stuart Middlemas:** The conditions that we account for are that if there is not much water it is harder to catch fish. No one is sure why, but it could be that the salmon are not moving.

**Claudia Beamish:** I understand that. I have not been clear in my question.

**Stuart Middlemas:** I thought that there were two parts to the question.

**Claudia Beamish:** It is about the effort, if there is not so much fishing going on.

**Stuart Middlemas:** No one regularly collects information on effort, so we cannot put that into any modelling. However, we accept that it is an issue.

We have tried to collect information on effort, but it has proved to be difficult to do. We are aware that a number of groups are trying to collect information on effort and we are speaking to them. The Galloway Fisheries Trust has received some funding to assess effort and we are discussing with it what can feasibly be collected. Where there is an angling club, effort is different from where there is a private beat. The discussions about what can be done are part of a process to figure out how we can use information in the future.

We do not feel able to say that people must collect that information so that we can use it the following year. As a first step, we asked when people had filled in their catch returns, and that they let us know whether they had fished that month.

**Claudia Beamish:** Would that skew the results? That matter has been raised with me by fishermen on the Solway.

**Stuart Middlemas:** It would skew the results, but we do not have a handle on how. We need to collect information on effort so that we can go from anecdotal information to something that we can use. We asked the simple question whether people had fished that month, so that we could tell whether a zero catch return was from people fishing but not catching. About 70 per cent of people ticked the box. There are difficulties in getting the information, but we are working with people including the Galloway Fisheries Trust to do that.

**Simon Dryden:** We accept that there are inherent uncertainties in any biological model. Effort—how much time is spent fishing and how well it is done—produces a lot of uncertainties. We want to spend a considerable amount of the extra funding on looking at what anglers have called for, which is a complementary juvenile assessment model. That will involve selecting appropriate sample points in rivers, doing electrofishing surveys and counting the numbers of small juveniles. We have the funding and system in place to do that across Scotland this year and to build a model to predict the densities of juvenile fish that should be in rivers, if they are healthy.

**Claudia Beamish:** Is there a methodology for that yet?

**Simon Dryden:** There is a methodology for how we do the electrofishing surveys and where we do them, but we have not finalised the modelling to

predict densities. That is ongoing; we hope to produce a report in 2019 with the first outputs. We would then have two models, both with uncertainties. We would have an adult and a juvenile model and could compare the results.

**The Convener:** We need to move on. I will allow two brief supplementaries.

**Richard Lyle (Uddingston and Bellshill) (SNP):** This is not an exact science. Are you saying that if we do not do this, the anglers of the future will not have any fish to catch?

**Simon Dryden:** I am saying that that is a significant risk.

**Richard Lyle:** Briefly, you said that when a river's designation is lowered, the catch goes up.

**Simon Dryden:** The catch went up on the River Endrick. I said that the catches in 2016 were higher than in the three previous years. The good news was that all the fish were released, whereas in the previous years some of the caught fish were taken.

**Richard Lyle:** Are we doing this for conservation?

**Simon Dryden:** We are absolutely doing this for conservation.

**Richard Lyle:** Thank you.

10:15

**The Convener:** Not all of the released fish survive.

**Simon Dryden:** That is right. We may start some research this year to look more closely at the mortalities among rod-caught fish that were released. At the moment, the model assumes that 10 per cent of the released fish will die. That is based on historical research, but we want to check whether that figure remains valid, is too high, or is too low. We take a precautionary approach at the moment.

**Jackie Baillie:** Do you acknowledge that all rivers are different and, therefore, that we cannot generalise? That is why evidence is important in deciding what to do, and there is a lack of evidence, certainly on the Lomond system.

I will ask a question that I asked in March 2016. Have you done an equality impact assessment and, if so, will you provide it to the committee? I ask that question because 30 per cent, if not 40 per cent, of the Loch Lomond Angling Improvement Association members have protected characteristics.

**Keith Main:** I would have to go and look at that. I know that you asked about that before, and I think that the cabinet secretary gave an assurance

that an equality impact assessment had been done. I am not sure when that happened, but I will check and write to the committee.

**Jackie Baillie:** I saw no evidence that it had been done, so if it has been done this time that would be welcome.

**The Convener:** Perhaps you could write to the committee about that before next week's meeting and, as far as you can, provide information on the scale and nature of the concerns that were expressed about the 32 rivers to which you referred. It would be useful for members to have that information.

**Stewart Stevenson:** I am one of the ineffective fishermen who contribute to effort, but not to catching. Fifty years ago, my brother and I were water bailiffs for 40km of the Tay. That was not for rod fishing, but for commercial netting, essentially, which is a wee bit different.

In my constituency, where there is offshore fishing, the approach to conservation has been that people need to prove that there are enough fish before they are allowed to go and catch them. For about five years, the fishermen have suffered significant constraints on catching, particularly of cod, but now one might almost say that we have a superabundance of cod.

Should the decision on moving the grading of a fishery from grade 2 to grade 3 be made on the precautionary principle, whereby a river is highly rated only if it can be proved that it will be sustainable to allow fish to be taken from that river and killed? The discussion so far seems to have been the other way around—it has had to be proved that there is a need for the river to go down in categorisation.

For white fish offshore, proof is required in the other direction—it has to be proved that there are fish to catch before the grading is moved up to catchable status. Which approach is being taken, particularly when a change of grading from 2 to 3 is being considered? That is perhaps the critical change.

**Simon Dryden:** Our approach is based on whether we feel that there are sufficient fish to catch. We say that a fishery will be a grade 2 only if we judge that the average over a five-year period will be a 60 per cent or more chance—

**Stewart Stevenson:** May I stop you for a second? You said that a more than 60 per cent chance gets the grading up to 2.

**Simon Dryden:** Yes. Checking to my right, I see that Stuart Middlemas agrees. More than 60 per cent gets the grading up to 2. The model asks what the chance is of reaching the requirement in each of five years and then takes the mean of that statistic—the percentage given—over the five

years. Therefore, for a grade 2 river, we believe that the chance of the egg requirement being met is 60 per cent or more; for a grade 1 river, the chance is 80 per cent or more.

**Stewart Stevenson:** But my fundamental point is that the burden of proof is that there will be sufficient fish to catch before a river is moved from grade 3 up to grade 2 or grade 1. If there is an absence of data, we must not authorise the catching of fish from that river, given the overall picture in Scotland. In 1968, when I was a water bailiff, we were worried about declining stocks, so that is a continuing and long-running issue.

**Simon Dryden:** That would be our view, of course. We are saying that if we have got it wrong for the River Endrick, to come back to that river, we are being more cautious than we need to be, and the stock should recover more quickly and we will move to grade 2. If, as policy makers, we were less cautious and, in fact, were being cavalier, we would be jeopardising the populations for future anglers and we would be scared that too many salmon were being killed.

**Stewart Stevenson:** Internationally, is it the same in other jurisdictions that might be similar? Ireland, England and Wales have been referred to. Do they sanction catching only when the evidence is present and available to say that there is sufficient fish to catch?

**Simon Dryden:** As my colleague said, England is moving to that position. They are consulting now on a 10-year byelaw that will say that for all bar 10 of their 42 salmon rivers, there will be mandatory catch and release for 10 years, which will be reviewed after five years.

**The Convener:** Donald Findlay. I am sorry, I meant Donald Cameron—my apologies. *[Laughter.]*

**Donald Cameron (Highlands and Islands) (Con):** I will take that comparison.

**The Convener:** It was a legal comparison.

**Donald Cameron:** I refer to my entry in the register of members' interests regarding fishing. Am I right in thinking that you are working on the current model in relation to getting more local variable habitats involved?

**Stuart Middlemas:** Yes, that is right. We are working, particularly for the egg requirements, on coming up with something other than an all-Scotland number, which is the only information that we have just now. We are trying to produce something that will give us regional targets so that we can see how they vary between rivers.

**Donald Cameron:** That will not affect the 2018 gradings, but it will play into the 2019 gradings. Given that, is there a danger that the 2019

gradings might be more accurate than the 2018 gradings?

**Stuart Middlemas:** We hope that every time we make changes, after discussion with stakeholders and getting ideas and more data, the gradings will become more accurate. At the moment, we use the best available information and science that we have. Information can always be improved, as can science. If we get more counters, for example, that gives us more information. We hope that bringing in complementary approaches, such as the model for juveniles that Simon Dryden mentioned, will improve the information.

**Donald Cameron:** Given the quite startling move in grade 3 changes from 2017 to 2018—I think that the number of rivers that changed from grade 2 to grade 3 almost, but not quite, doubled—there will be a lot of concerned stakeholders in the general fishing sector. Can you explain what the appeals process might be for those stakeholders?

**Keith Main:** There is not a formal appeals process as such—there is no statutory appeal. The engagement, if you like, is first and foremost the 28-day consultation period in the autumn, to which I referred, as well as our on-going discussions with individual clubs, district salmon fishery boards and trusts and with various groups, such as the salmon liaison group—or the local biologist liaison group—that we have in place as part of developing the model. Last May, when the initial results started to come out for the set of regulations that are being considered, the salmon liaison group had accepted and was happier with the model, which has now been developed for this set of regulations.

As I said, 32 river groupings responded to the consultation, many of which expressed concerns. That is 32 out of 171 river systems that we consulted on. We will certainly write to the committee and summarise the issues that were raised. As with any consultation that the Government undertakes, we were saying, "These are our proposals—let us have your representations." We will consider the responses. We have read every one of them and we have reported to the cabinet secretary, but the decision involves balancing the weight of the objections or representations with our proposals, if you like.

**Donald Cameron:** I may be corrected by Jackie Baillie, but I think that I am right in saying that, in 2016, the Loch Lomond Angling Improvement Association had an objection upheld. What happens in that scenario?

**Keith Main:** That is a matter of language. We listened to the feedback that we were given and reacted. There was no appeal or anything that was upheld. Using that association's feedback, we

established that we could change the wetted area. The wetted area for the catchment area was reduced, which obviously meant that there was a lower egg requirement—we are talking about eggs per square metre. We were given more information and we listened and said that the information was valid and that we would take it on board. As I said, we have kept the same basis for the current grading. The association was concerned that we have changed it, but we have not.

**The Convener:** I know the answer to this question, but I want to tease out the issue on the record. As you say, you base your decisions on the best available science. Given that there is no formal process, I guess that it is therefore almost impossible for an appeal to be successful unless those who are complaining about your decision can produce alternative science to challenge it. Therefore, for all that people have voiced opposition to your decisions, I suspect that not a single change has been made as a result.

**Simon Dryden:** As Keith Main said, we have made seven changes in grading in this consultation period.

**The Convener:** Okay—sorry.

**Simon Dryden:** In essence, however, I support what you are saying. Those seven changes were a change in policy decision. We assess the populations and take into account loch areas, where they are on a river, as well as the river area. In a situation in which, when we include lochs, we would grade a river as a grade 2 but, taking the river only, it would be a grade 1, our policy approach used to be to make it a grade 2. However, we now accept that, in that situation, we will choose the river-only grading.

**The Convener:** Have there been any instances in which you have graded a river as a grade 3 and you have had objections and changed it to a grade 2 as a result?

**Simon Dryden:** No. So far, we have not had additional evidence, such as scientific evidence or more catch data, to say that the catches have changed. If we had been able to acquire more catch data from the River Endrick in the period from October until we laid the regulations, we would have taken that into account. We made strenuous attempts from October to identify the owners and get the data for the 21 per cent that we are missing.

**Keith Main:** There have been one or two other changes historically. For example, the change to the Loch Lomond wetted area was a result of dialogue, and there have been other changes as a result of such dialogue. For example, in the new regulations, there are changes to the outflow points for two rivers. The outflow point is

effectively the limit of the river, upstream of which we count the fish catches. Those changes are made in response to representations that we had last year, and we gave an exceptional commitment to talk to those involved in the three rivers. In two of the three cases, we were able to respond and we accepted that the outflow points should change. Although that is not the headline grading of the river as such, it will make a difference to the catches and to who will be able to fish in those rivers this year.

10:30

**Stuart Middlemas:** Although it did not happen this year, in previous years the Nith was consolidated at grade 3. The stakeholders came back to us and said that certain catch returns had not been put in, so we went through our records, accepted those figures, and the catches went up; the grade went up from a 3 to a 2, so it has happened previously, even if it has not happened in the past year.

**Claudia Beamish:** Now it has gone to grade 1.

**Stuart Middlemas:** Yes, I think that that is right.

**Claudia Beamish:** What was the basis for that change? Was it because of the increase from 60 to 80 per cent?

**Stuart Middlemas:** Yes. That is what happened previously.

**Richard Lyle:** Am I correct in saying that, according to the grading for 2018, 48 rivers have fallen one level, 12 rivers have fallen two levels, and five rivers have been raised by one level, including—I am pleased to say—the Clyde, which has gone from grade 2 to grade 1?

**Keith Main:** That is correct.

**Mark Ruskell (Mid Scotland and Fife) (Green):** I was a bit alarmed earlier when I heard that there were 11km of the Endrick for which you were unable to get data because you did not know who the riparian owners were. Can you identify which bit of the Endrick that is? Is it the Jackie Baillie bit or is it further up?

**Jackie Baillie:** It might even be the Roseanna Cunningham bit.

**Richard Lyle:** Or the Donald Findlay bit.

**Simon Dryden:** I am sorry, but I do not have the details with me. I would need to write to the committee to give you the precise areas of the river that were covered by those 11km.

**Mark Ruskell:** I find it quite remarkable that you do not know who the owners are. If you are talking about the Fintry area above Bogside farm, the vast majority of that area is owned by the Forestry Commission. I am concerned that you do not know

who the owners are and that you are unable to contact them and establish proper data as a result of that.

I will leave that there, but I have a further question on the EU habitats directive. Do the concerns around the habitats directive apply to all the grade 3 rivers, or just to the rivers identified as special areas of conservation?

**Simon Dryden:** It is just the 17 rivers that are identified as special areas of conservation.

**Mark Ruskell:** Okay—so it does not apply to the wider rivers.

**Simon Dryden:** No, it does not.

**Mark Ruskell:** What is your understanding about the sufficiency of the actions that were taken in 2016 as mitigation in relation to the EU habitats directive, to avoid infraction proceedings?

**Keith Main:** Stuart Middlemas may correct me on this, but my understanding is that formal infraction proceedings had not started but the Commission had indicated that it would begin infraction proceedings, and that we were conscious of that at the time. Off the top of my head, I am not entirely familiar with the exact stages, but the process had begun. That is one of the reasons that led us to introduce this set of conservation regulations and other regulations on annual close times and such things; there is a raft of measures, of which these regulations are part. As a result of our doing that work and introducing the model and the first set of regulations, the infraction proceedings did not go ahead, and there is no current outstanding infraction threat.

**Mark Ruskell:** That threat has been withdrawn.

**Keith Main:** Yes.

**Finlay Carson:** It appears that a framework needs to be brought in fairly rapidly, but the Scottish Government appears to have kicked the wild fisheries bill into the long grass. Can you give us any indication of when legislation relating to wild fisheries will be brought forward?

**Simon Dryden:** The situation has not changed since the cabinet secretary's answer to the committee, which I can repeat. She said:

"There will be a place for the wild fisheries bill in the current parliamentary session, but I do not want to preempt a future programme for government. It was never intended to be a year 1 bill, so it is not imminent. I would have expected it to be introduced in around year 3, potentially. A lot of the legislative programme is subject to Brexit consequentials, which we are looking at carefully."—*[Official Report, Environment, Climate Change and Land Reform Committee, 31 October 2017; c 3.]*

**The Convener:** There is a final, final question from John Scott.

**John Scott:** What use will the moneys of £700,000 that were announced on Friday be put to? We are pushed for time, so the answer needs to be in one sentence.

**Simon Dryden:** Of that sum, £200,000 is for a wild fisheries governance fund to help boards to voluntarily merge or to help form new boards. The use for the other £500,000 is yet to be finalised, but a substantial proportion will be for a new national juvenile sampling strategy across 27 regions of Scotland so that we sample juveniles all around Scotland.

**John Scott:** Does that suggest that the current system is inadequate, given that it needs £500,000 to be spent on it?

**Simon Dryden:** We will not be spending £500,000 on the system, but we accept that there are inherent uncertainties in any biological model. If we can introduce a juvenile assessment model to sit alongside an adult model, we can reduce those uncertainties.

**The Convener:** Claudia Beamish has a final, final question.

**Claudia Beamish:** It is a quick question. I do not know whether you are able to comment because I understand that it is a legal case at the moment, but perhaps you could say whether there are any other cases. The Annan common good fund is seeking compensation for the loss of money from the local fisheries to support that very good cause; I hope that it has been in dialogue with Marine Scotland about that. Can you comment on that? If there is any other compensation, will that relate to the fund that was announced on Friday?

**Simon Dryden:** It will not relate to the fund that was announced on Friday. From April, we will move into the third of three years of compensation being paid to coastal netmen. We have not paid any compensation to netmen or the boards of angling clubs within estuaries or rivers.

**Claudia Beamish:** That relates to half-netters, does it not?

**Simon Dryden:** It means that we have not offered any compensation to half-netters.

**Claudia Beamish:** Thank you. I just wanted that on the record.

**The Convener:** Gentlemen, I thank you for your time. There are a number of items on which you have undertaken to write to the committee. Please do so as quickly as possible and certainly in advance of this time next week.

10:38

*Meeting suspended.*

10:41

*On resuming—*

## Scottish Crown Estate Bill: Stage 1

**The Convener:** Welcome back. The third item on the agenda is to take evidence on the Scottish Crown Estate Bill at stage 1, with a particular focus on the agricultural assets of Crown Estate Scotland (Interim Management). I welcome Gemma Cooper from the National Farmers Union Scotland, Tom Cattnach from Fochabers estate, Hew Hunter from Whitehills estate, Jim Inness from Glenlivet estate and Brian Shaw from Applegirth estate.

We are already well behind schedule, so I ask members to ask short, sharp questions. If witnesses do not feel the need to respond to a particular question and feel that it has been well enough answered, they do not need to respond. If we proceed on that basis, we will get through this meeting in an appropriate fashion.

I will start with an obvious question. From the evidence that we have had, it strikes me that, although there will always be individual issues, in a general sense there is a degree of contentment with the Crown estate, and with Crown Estate Scotland (Interim Management), in terms of its relationship with tenant farming set-ups. Is that a fair assessment?

**Brian Shaw (Applegirth Estate):** Yes. We have come from a position, with the old Crown Estate, where we did not have any communication or say at all. Now we have established a working group and we are getting on very well with Crown Estate Scotland (Interim Management). We like it. There are issues, of course.

**The Convener:** As ever. Jim Inness, do you wish to concur with that?

**Jim Inness (Glenlivet Estate):** I agree with it. We represent the Crown Estate's four estates in Scotland—Applegirth, Whitehills, Glenlivet and Fochabers. We are the community of farmers. Our working group has come on by leaps and bounds, and we would like it to be advantageous for both sides, going forward.

**Claudia Beamish:** Good morning, panel. Can I tease out some of the opportunities that are presented by the rural estate? Some of us visited tenanted farms and areas in the previous parliamentary session. We saw interesting models of things such as best practice in managing tenants and encouraging young farmers and young entrants, which is very important. We also saw interesting examples of innovation and

management of the environmental wellbeing of the land. Do you see there being any other positive and possible opportunities?

**Gemma Cooper (National Farmers Union Scotland):** I can answer that. The Crown Estate provides a unique opportunity for best practice in that, although it is mainly composed of secure agricultural tenants, there will be pieces of land that come back to it. It would be very positive if it had policies that were more in favour of getting young entrants into farming, perhaps by providing something akin to the starter farm units that the Forestry Commission offers. I think that the Crown Estate has a unique role to play in that and it is a really important opportunity, because at the moment, generally, opportunities are very limited.

10:45

**Jim Inness:** I would say that we are quite fortunate to be on the Crown estate. Its management would like to see the wellbeing of the estate and the tenants within it, which is a healthy approach. Other landlords may be less scrupulous and less accommodating, so we have an opportunity to show best practice to the other landlords out there.

There is a possible case for a subsidised rent for new entrants to farming, to give them a start. It is in our submission. On the wider issue of rent reviews and sustainability for farmers in the tenanted sector, due account has to be taken of the social infrastructure of where you farm. It is not all about revenue. We have to keep the fabric of these communities intact. If we keep the community intact and the farming intact, the whole thing looks after itself. It is not all about revenue all the time. We have to be careful of how we manage rent reviews going forward.

**The Convener:** One of the things that I have picked up in dealings with the tenant farmers on the Crown estate is a possible concern about the factoring arrangements. There is not an embedded factor on an estate or even an embedded factor for the whole of the Crown estate that tenants can go to. Very often, it is a local land agent or a locally based land agent, who is available for one or two days a week. Does this bill present an opportunity to change that approach and would you welcome such a change?

**Hew Hunter (Whitehills Estate):** We have asked a number of times—would Bell's Brae have its own factor? The response was always that the Crown Estate relied on Savills to give it more experience and more staff. I think that we would be quite keen to have an in-house factor.

**Brian Shaw:** We have a junior factor who comes round but he only works two days a week. There is a problem with tenants not being able to



converse well. We are only just picking up on emails, but if you want something done, you have to do the paperwork and get it logged. The general tenant will meet up with the guy who comes round and they will agree on something, but then it will be forgotten about. Both sides need to set up a situation where they are quite clear about what they want and whether it can be done.

**The Convener:** Is it a generally held view that an in-house factor would be a step forward?

**Jim Inness:** I think that it is normally the case. At the Fochabers estate, we have a specific factor from Savills, and it is the same for the Glenlivet estate. That works, but I think that the fact that we have this tenants working group up and running is like having a halfway house. We have a meeting with the Crown Estate twice a year and we are starting to involve the factors as well.

We are intermediaries between them, so there is more accountability creeping in all the time. Accountability is expanding, which has to be good. We have meetings with our own tenants on each estate maybe twice yearly—just as and when necessary. Up to now, those meetings have been pretty well attended—probably 90 per cent of tenants have attended. Their feedback is that this is good and they have never seen this before. So far, it is all positive.

**Claudia Beamish:** Do the panel members have any brief comments on investment and whether there is a disparity in investment between different tenanted farms and different areas of the Crown estate? Jim Inness said that it is not all about revenue and I understand his point, but is there any concern that there are showcase areas and then other areas that might lose out a bit?

**Brian Shaw:** We could not possibly comment on that.

**Jim Inness:** I farm on the Crown estate in Glenlivet but I also farm down in Dufftown, which is a different type of ownership altogether. It is chalk and cheese with the different landlords. The Crown Estate in the past was the bee's knees with regard to investment in farms. Obviously, with the way that costs have crept up for buildings, for example, there is not the same money going about but the Crown Estate is still focused on keeping the farms alive and kicking and replacing buildings as and when needed. It is still an on-going situation. It works out.

However, it is not all about money. The farm has to be viable for the future and the buildings need to be up to scratch. The financial plan is pretty good reading. The plan is to grow the portfolio by £2 million in 2018-19. The net revenue would be about £1 million. That is all good but, although the rural estate is worth £96-odd million in capital, the revenue from it is not very clever. That is farming,

but it is a key area of the Crown Estate portfolio and it needs to be looked after.

**Brian Shaw:** We have an issue, particularly in Applegirth, which has been taken over. My family has been there since before the Crown Estate took over. No proper maintenance is ever done. Investment is now left to the tenants, by and large. The Crown Estate does not invest in dairies, for example. However, we are considering maintenance.

An audit must be done. Last night, I got an email from Andy Wells who said that one would be done. If the Crown Estate does not know its liabilities, it cannot do a budget. There are so many underlying issues that need to be addressed that have happened over the years. It is not the current lot's fault—although it is their problem now—but has come from what happened before. Therefore, an audit must be done.

As tenants, we have the opportunity for an amnesty, whereas we are putting forward our tenant investments. Alongside that, I believe—I think that we all do—that the landlord should understand what his problems are, because he needs to lay aside money to fix the lead pipes and the fallen-down sheds.

**The Convener:** So, to answer Claudia Beamish's question, there is an inconsistency of approach to investment across the four estates.

**Gemma Cooper:** I agree. In general, the tenants are proud to be Crown Estate tenants. That is refreshing in agricultural tenancies. There probably is a disparity between what happens now and what has happened previously. Brian Shaw mentioned the Applegirth estate in Dumfries and Galloway.

Part of the issue is transparency. There has not been much transparency until now, and it is good to see that theme in the bill. The tenants do not have a lot of input into decisions or understanding of how they are made, so a bit more information might help them to feel confident about investment in future.

**Alex Rowley (Mid Scotland and Fife) (Lab):** I was going to come in later but, because Claudia Beamish touched on the question, I will ask it now. I am really interested in an audit. I assume that the Crown Estate has not done one. Any large organisation—a local authority, for example—would know the condition of its buildings and other assets. Are we saying that the Crown Estate does not?

**Brian Shaw:** Absolutely. Only when a tenant comes and says that they have a problem because the roof is falling in is it put into the budget. There are many underlying problems about which tenants are honestly frightened to go

to the Crown Estate. There are some houses that need a lot of work. However, an audit is not difficult.

A crazy thing that the Crown Estate has done recently is a drive-by audit. I do not understand it. It is perhaps something technical. The factor phoned me up and told me, "I am driving past your farm very slowly. If you wonder what I am doing, I am doing a drive-by audit." I said, "You're a kerb crawler." I do not know how he can value my farm or whatever part of it they are interested in. The snow was on the ground as well.

**Alex Rowley:** Can I follow that up? One of the questions that I was going to ask was about the benefits from the Crown Estate in terms of investment. Is there cross-investment to target areas of greatest need? If the Crown Estate does not know the condition of its properties, I assume that that is a serious issue.

**Jim Inness:** I think that Brian Shaw down in Applegirth has been disadvantaged for long enough. Up in our neck of the woods, in Fochabers and Glenlivet—we could say that Glenlivet is the showpiece—we have been looked after quite well. The agents come round and look at things, and letters have been sent to me over the past six months when there have been issues, such as with the budget, repairs and so on. I reckon that the Crown Estate has sharpened up its act already.

I would not be too worried just yet, but Brian Shaw is quite right that we need to see where you guys are at with regard to the finances of the rural estate and how much needs to be spent in order to correct things. In all fairness, Applegirth probably needs more money spent on it than Fochabers or Glenlivet. I had experience of the other landlord and it is like chalk and cheese, but we need to keep the momentum going.

The Crown Estate should be an example of best practice as regards landlords, input and all the rest of it. If you put the money in, you will get delivery. If the farm is healthy—the portfolio of the buildings and all the rest of it—the whole community is healthy. It all filters back to the environment round about. If you look after the farmers, the whole thing falls into place and is kept intact.

**Hew Hunter:** I am on Whitehill estate, which was bought as an investment—the Crown Estate has had a lot of money from it. We had opencast coal mining, but Scottish Coal went bust when it was being put back, so the interim committee has had to pick up the pieces in re-establishing some of my farm. However, there is a quarry elsewhere on the estate and the Crown Estate has been able to sell land for housing behind Rosewell, not far from here.

There are only three or four of us farmers left on the estate, and we are out of the way of the rest of them. We are being managed from Dumfries now, so our situation is a wee bit like Brian Shaw's in that agents are not coming up to Whitehill as much to see what needs to be done and what have you.

**Jim Inness:** Our working group has regular meetings with the managing agents, Andy Wells and company. That has got to be a good thing, because we can tease out the negative aspects within the portfolio of the rural estate and try to get some more action on that.

**Richard Lyle:** Among its assets, Crown Estate Scotland is responsible for managing 37,000 hectares of rural land, which includes agricultural tenancies, residential properties and so on. In your opinion, what are the wider benefits for rural Scotland of Crown Estate Scotland continuing to hold on to and manage those assets effectively?

**Jim Inness:** As I said before, for a rural estate it is self-explanatory. If you manage the assets, it pays dividends right down the line in social infrastructures, environmental balance and the whole thing.

**Richard Lyle:** What about employment?

**Jim Inness:** It pays dividends in employment as well; the whole thing is related to a degree. Post-Brexit it could be negative. It is all relevant. That is a tricky question for the future, given that Brexit is a hidden area—we do not know what will happen with it.

**Richard Lyle:** I do not think that anybody knows.

**Jim Inness:** No.

**Gemma Cooper:** There are huge benefits to retaining the Crown estate as it is. These guys have been really clear from day 1 that they are proud to be tenants and think that the estate is a showcase. It could be a showcase for Scotland if it is done right and the positives are built on.

As for the agricultural tenants, the estate has a huge number of the secure tenancies that are left in Scotland, and those tenancies provide opportunities and long-term security. I also point out that, with regard to wider food security for Scotland, these guys are a massive part of the economics of these rural areas, and in anything that goes forward, the emphasis must be on giving them stability, particularly with the future of subsidy support, Brexit and so on.

In summary, then, the estate seems to have been functioning quite well in general, and I have seen no hugely compelling case for splitting it up.

11:00

**Richard Lyle:** It was said that you have meetings twice a year, but should you not be having a meeting every month or four times a year to fix the problems that Mr Shaw mentioned earlier?

**Jim Inness:** We could, but I should point out that, at one point, there were no meetings at all—

**Richard Lyle:** I know that.

**Jim Inness:** Then there was one per annum, and now there are two.

**Richard Lyle:** Push for more.

**Jim Inness:** You could push for more—

**Richard Lyle:** No—you push for more.

**Jim Inness:** Aye.

**The Convener:** Brian, you seem to be in agreement.

**Brian Shaw:** That is right. Certain things are coming up. In his email, Andy Wells said that, after our suggestion, the Crown Estate was now going to do this audit—or so we believe—and that it would get in touch with us once it had been organised. That is not the way to go about this. We need to help the Crown Estate organise it to ensure that the job is done correctly and that this is not some top-down thing. We are now part of this infrastructure; in fact, we are buried in the churchyard, so we want to be part of the decision making.

**Jim Inness:** I agree with Brian Shaw. The Smith commission recommended the devolution of more assets down the line; we have made it quite clear that we want the estates to be managed from a national perspective, but now that we are involved in this process, we seem to be this halfway house between the board and the managing agents. The Government seems to have bought into this; it is delivering, to a degree, what the Smith commission suggested, and I think that that should be built on—and indeed expanded—as time goes on.

As for Richard Lyle's suggestion of four meetings per annum, it is the same thing as our having meetings with our fellow tenants: you do not have meetings just for the sake of having meetings. The easiest way of ensuring good attendance is to wait until priorities come to the fore and there is something to discuss, such as consultations; indeed, I see that a new one on pilot schemes came out yesterday. That is why you have a meeting.

**Richard Lyle:** Yes, but given you are already in the door, you should be pushing for more. That is my point.

**Jim Inness:** I agree, but we should not have meetings for meetings' sake. There needs to be something of substance to talk about.

**The Convener:** The door has been opened to another subject, which Finlay Carson will ask about.

**Finlay Carson:** Jim Inness mentioned the possibility of the bill empowering communities to manage their rural assets more. What is the panel's view on devolving more of that management to local authorities, other public authorities or community organisations? Could Brian Shaw down in Applegirth, say, form a community group to seek to manage assets, given the issues with factoring in the past?

**Brian Shaw:** To be quite honest, managing my own business is enough of a job. At the level that we are talking about, it is fine; we can get some cohesion with the tenants. However, all that we want to do is help the thing to run smoothly. We do not want to take over, because it works pretty darn good as it is.

**Jim Inness:** Can I come in again? You can shut me up if you want to. [*Laughter.*] We do not really want things to be devolved down to councils, because Moray Council, for example, has a big enough job running its own show. As you know, it is in deep trouble financially. I should perhaps not say that, but it has already been picked up on.

The estates that we represent form a big portfolio; you need expertise to manage them, and in my opinion, that expertise lies in Bell's Brae. Those people have been doing the work for years, and I do not think that we should diverge from the original format in the slightest.

It is the same with community involvement. Do communities have the money or the expertise to dip their toe in the water? There might be certain avenues—bike trails or whatever—that they could go down, but we in the rural farming sector see it as a no-no.

**The Convener:** What about the interaction with the wider community around estates? It is not just about the agricultural tenancies. At Tomintoul, there is the village, and other things are going on. How can there be better and wider engagement with local communities in the context of Crown Estate tenants and tenancies?

**Brian Shaw:** We have created some walks and trails. There was subsidy to help to put them in place. One of the benefits of the approach is that we can regulate where the community comes, rather than have people walking everywhere, willy-nilly. We have made interesting walks along a riverbank and the like. We have nothing to do with the fishings—they are all owned and let out by different people.

I will meet RSPB tomorrow, to do work to try to save the tree sparrow or the house sparrow. People want to talk to us, and we respond.

**Jim Inness:** Over the past 10-plus years, the Crown Estate has been instrumental in putting in bike trails and walks, especially in Glenlivet—it is way ahead of the game on all that; other estates do not do it. There is community involvement in that. We had a meeting with the community association; I think it was around December last year—no, it was further back, because it was in Richard Lochhead's time. The farmers had their say, and then the community association came in, and everyone was singing from the same hymn sheet. It was all on a par.

**John Scott:** I declare an interest: I am a member of NFU Scotland, although I am not a tenant farmer.

NFU Scotland said in paragraph 9 of its submission:

"The group is not in favour of too much local community or local authority involvement and believes that the estate is best served by retention of the national management structure where possible."

Is that the panel's view? Do you think that the structure should remain as it is, with, of course, the enhancement of the stronger community links that you have talked about? Does that encapsulate your position?

**Hew Hunter:** We have said that we want the estate to stay together.

At Whitehills, the community has been given an old steading to develop and use. The Bell's Brae team will have to get better at publicising what the Crown Estate does with communities. A lot of things are not seen. We have trails in some of the woods, and they need to be better publicised.

**Finlay Carson:** Are people ruling out the opportunity for a group of tenants to come together to form a community group, which could provide factoring services to tenants in Applegirth, for example?

**Brian Shaw:** That is the next step, I guess. We have a group in Applegirth, which meets and deals with things.

The farmers are farmers, and they do not want to get too spread out; they want to concentrate on what they are doing, but if there is some way in which we could help, let us hear about it.

**Kate Forbes:** I want to ask about the farm sales framework and how decisions are made about the sale and reletting of farms on the estates. The bill requires the Crown Estate to "maintain and enhance value" of the estate and the return from it. My understanding is that, at the moment, unless there is a clear justification for an alternative, a

unit will always be relet for agricultural use—I understand that the same goes for sales.

Does the panel have any thoughts on whether the new requirements in the bill will have an impact on the farm sales framework, as it stands?

**Jim Inness:** Why not ask Tom Cattnach to comment on that? He is being very quiet here. He might give you an opinion.

**Tom Cattnach (Fochabers Estate):** My opinion is that it should be left the way it is just now. There will be circumstances in which they want to sell a farm, and I think it works well the way it is just now. If you block that, you will shut that off, and it will not be able to happen once the bill has gone through. I would prefer that we were left with the status quo.

**Kate Forbes:** What about reletting and sales for agriculture?

**Tom Cattnach:** That can happen as long as the money is reinvested in something else. A farm should not be sold only for the money to be frittered away; perhaps it could be used to provide a higher income for the Crown Estate.

**The Convener:** What about the reletting of farms that become available? Should there be a presumption in favour of reletting units to existing Crown Estate farmers, whether or not units are broken up? That could help to strengthen the tenancies that are already there. I accept the point about new entrants, but should that approach be taken as opposed to letting units to people who might be farming already, outwith the Crown Estate? Does anybody have views on that?

**Gemma Cooper:** You would probably expect me to say yes, but we have discussed that and people are quite keen that it does not always happen like that. The Crown Estate recently let a farm on one of the northern estates, and the tenants there are keen that what they call empire building does not happen. They see anything that becomes vacant as a potential opportunity for the younger guys to come in. I do not think that it is the sort of thing that we can have an inflexible policy on.

To go back to Kate Forbes's question about the framework in the bill, it has become apparent during discussions that we are talking about a massive estate and a hugely diverse portfolio with stuff coming in and stuff going out, and the ability to maintain that is crucial to its long-term survival.

**The Convener:** Can I push you on the question? It would be good to get clarity. Given what you have said, is there a preference for a unit that becomes available to be let to the next generation—for example, to new entrants who are already involved in the Crown Estate? They could be the sons or daughters of existing farmers who

want to branch out themselves. Do you still want it to be done on a wider basis?

**Gemma Cooper:** There are probably pros and cons to that approach. Given that the majority of the tenancies are 1991 act secure tenancies, those individuals will likely inherit or be able to have farms assigned to them anyway, so we have to question whether that is the right route.

**The Convener:** That would happen eventually.

**Gemma Cooper:** Yes.

**Jim Inness:** In the past 10 years or so, the Forestry Commission has created starter farms. A lot of starter farms have 10-year leases, and at some point they come to an end. The Crown Estate could be a role model in creating opportunities for guys moving up the ladder. By the same token, as has been suggested, we have farmers' sons branching out with their own structure and taking on farms, and that has to be a good thing. There needs to be a system for people to climb rungs on the ladder, because guys who go through the 10-year leases need that. If no farms are available, they will be dead and buried because they cannot get anywhere.

As regards rental revenue, Kate Forbes mentioned growing the revenue in the estate, but due account also has to be taken of the sustainability of farms. Empire building is a non-starter for me. On the revenue side and the rents that are achieved, it is not all about maximum revenue. As we have seen in the past, people all too often go for big bucks, and three years down the line the tenant pleads poverty and says, "This isn't working. I need a rent review and a rent reduction to make it viable."

As regards new farms coming on to the scene for let, there has to be a rigorous forward plan of, say, five years, and there has to be financial accountability so that the rent that is offered can be sustained and we do not have the situation of people pleading poverty in three years' time. It has to be sustainable. However, that does not necessarily grow the estate as regards revenue. You cannot have it both ways.

**The Convener:** Okay. Thank you for that.

11:15

**Mark Ruskell:** We took evidence from the Government's bill team a couple of weeks ago on the proportion of net revenue that can be retained by asset managers and reinvested back into estates. The figure of 9 per cent was mentioned, which seems to be an historic figure that is based on Treasury rules. I probably know the answer to this already, but is 9 per cent enough? How does a variation of that figure affect the motivation of managers?

**Brian Shaw:** I guess that, if the audit is done, we will know. The part of the world that I come from will need more than that initially and for a few years to come. Three or four farms have already been sold off, and that seems to be where revenue is coming from to afford the keeping up of the estate. If that is to be, it is to be. I do not have a clue about the 9 per cent, but it needs to be enough to do what is needed to keep it tenable.

**Jim Inness:** There is a cross-subsidising element to the management of the portfolio, as some parts of the estate might not be doing as well as others. If the capital fund is grown and if the 9 per cent is too high, there would not be enough money left to divert or to cross-subsidise to maintain the estate portfolio.

To come back on one specific point, farm sales are needed at the moment to provide revenue to keep everything mobile and moving forward. However, we do not agree with selling farms from the central part of our rural estate, because it might start off with one farm being sold, but then two are sold, and that leads to fragmentation creeping in, which is not a good idea. Farm sales have to be analysed in full; perhaps one corner could be sold off so that the estate is not fragmented. By the same token, there should be consultation with groups such as ours before any sales or purchases are made. Perhaps I am being a bit self-important with regard to the group, but it is all to do with accountability and making the right decisions for the benefit of the whole portfolio.

**The Convener:** To go back to something that Brian Shaw mentioned a second ago, I think that you would all accept that what you as tenant farmers might deem to be necessary by way of repair and restoration work, the Crown Estate might hold a different view on. How do you envisage compromise and mediation working in practice to come to an agreed position? Inevitably, there will be differences of opinion.

**Brian Shaw:** Let us start by getting all the houses up to a reasonable standard. At the minute, agricultural laws do not require farmhouses to be up to the lettable standard. It is heading in that direction, but some houses out there are really not very good.

As far as maintenance and bringing them up to standard is concerned, that will be quite obvious. What has been stopping or retarding that is the fact that there has not been enough money in the budget. This budget is derisory and we do not know where it comes from; I think that it is just the same as last year. Some tenants say, "Oh yes, we'll do that," but the onus has to come back to us to tell the bosses what the situation is so that they can afford to put right the estate in a timely manner.

**Jim Inness:** That is why a repair and investment audit is totally relevant at this juncture, so that we can see where we are financially and for the future.

**Gemma Cooper:** To build on what Jim Inness said, the Crown Estate calls it an audit, but I call it a record of condition. This is a chance to start afresh, and carrying out records of condition of all the holdings would be really useful. It could be followed by an agreed schedule of works, which would tie in with the estate budgets.

With regard to wider industry codes, a lot of work is being done by the tenant farming commissioner, which is about behaviour, and I think that that underpins discussions already. I do not see that as necessarily being a source of conflict—it can be just a discussion—but the tenants need information that they do not have currently to be able to be involved in the process.

**Mark Ruskell:** To go back to the points about the audit and how it might function, will it look at the condition of existing assets or at their economic potential? If there is a farmhouse or an abandoned building on a farm that could be used for bed and breakfast but a substantial investment would be needed to achieve that, would an audit pick that up, or would it merely look at whether the building is falling down and can be retained as it is, abandoned?

**Brian Shaw:** Yes, it certainly would pick that up. The picture would be painted and then a decision about what would have to happen would be taken. Sometimes, a building is made redundant and then a bit is maybe knocked off the rent. I have had a building renewed. The problem is that there are leases. That is the problem that the Crown Estate and all landlords and tenants have—there is a lease that has to be adhered to. If a building that someone is paying rent for is falling down, it should be replaced. Whether it is replaced in its traditional form is a moot point.

In the cases that I have been involved in, buildings have become worn out. I have pointed out to the landlord that I am paying rent on them but they are no good to me, and they have put up something substantial. They have done good. However, quite a few tenants are not able to push that enough. If there were a review, as Gemma Cooper says, we would all start from a level base and then people who are, sadly, behind at the moment would get up to speed.

**Jim Inness:** Houses might be not derelict but not being used. You make the point that diversification is an avenue for the tenant and it can be co-funded by the Crown as landlord. That is food for thought going forward but, at the moment, what happens if the house has never been used and is in a sad old state? What

happens if it is in a prime location and a decent spot? The landlord will take the opportunity to sell that site or house and grow the revenue, or the capital budget. There are two ways of looking at it.

As regards bed and breakfasts and stuff like that, Glenlivet might be overdone already as regards holiday accommodation, but in other areas that could be a useful secondary income. Any of those avenues will be useful post-Brexit if subsidies are going to decline.

**Donald Cameron:** I refer to my farming interest, which is in the register of interests.

How should tenant farmers be represented and involved in the decision-making processes of the Crown Estate in this new environment? How would you like to be involved? Do you want the status quo? Do you want more consultation with you as tenant farmers? Do you want a voice in a management structure? What is the best way?

**Tom Cattanach:** The forum that we have, with two tenants from each estate, is essential going forward, because we can speak with tenants and take forward what they say either to the interim board or direct to Government, if needed. If everybody is in a circle round the table at Bell's Brae and speaking, we have got to come to good decisions.

**Jim Inness:** The fact that we are here today giving evidence shows how far we have come. On the question of how we would like things to go forward, we are the farming community that ticks the Smith commission box, and we would like to see our group's involvement in decision making expand.

**Donald Cameron:** The convener touched on this, and it is an interesting scenario. If there was a dispute between a tenant farmer and the Crown Estate as landlord, would that kind of system nip it in the bud? Would it help mediate when there are problems?

**Brian Shaw:** Absolutely.

**John Scott:** In light of the above, what are your views on the bill? For example, are additional safeguards or commitments needed in some areas? Many of the witnesses said that you quite like the status quo. You have all said that it is a privilege to be tenants of the Crown Estate, so you are already examples of good practice, but how do you see possible improvements being made?

**Brian Shaw:** You mention safeguards in the bill. We are moving in that direction. The bill provides a big improvement for us. We see nothing lacking in the bill that we are looking for. We believe that we are heading in the right direction. We are not propelling the ship; we hope to steer it.

**The Convener:** We will finish on that optimistic note. I thank the witnesses for their time. It has been a useful and constructive meeting.

11:25

*Meeting suspended.*

11:32

*On resuming—*

## **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill**

**The Convener:** Item 4 is to take evidence on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. I welcome Michael Russell, Minister for UK Negotiations on Scotland's Place in Europe, and his officials Kate Thomson-McDermott, Luke McBratney and Helena Janssen. Good morning, everyone. Mark Ruskell will kick us off with questions.

**Mark Ruskell:** Good morning to the minister and his officials. I want to pick up where the Finance and Constitution Committee left off last week in its scrutiny of where environmental principles and animal sentience principles sit in relation to the continuity bill. Professor Page expressed the view to the committee last week that, in the continuity bill as it stands, those European Union principles would not

"be covered by the idea of the general principles of EU law."—[*Official Report, Finance and Constitution Committee*, 7 March 2018; c 30.]

Could you give us your reflections on Professor Page's evidence on that and say what your ambitions are now in relation to taking forward those principles into law?

**The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell):** That gets us very quickly to the heart of the issue around environmental principles in the bill. If you will forgive me, convener, I will just tease this out a bit. I have written to the committee in response to its question, but it is important that we are sure that we know what we are talking about, particularly because we will consider later today proposed amendments to the bill—one from Mr Ruskell, one from Claudia Beamish and, I think, some from Tavish Scott. There are therefore proposed amendments to the bill to deal with the issues that we are discussing.

We should try to put to one side the issue of animal sentience, not because I do not believe that it is necessary but because it is well covered in Scots law. Indeed, the first legislation on it was in 1912 with the Protection of Animals (Scotland) Act 1912, which was passed when Asquith was Prime Minister and McKinnon Wood was the Secretary of State for Scotland. That legislation prevented actions to

"infuriate, or terrify any animal ...or cause any unnecessary suffering".

Animal sentience is understood and is not in question here at all. There has continued to be legislation on that issue, including legislation in 2006. That legislation exists. Keen as I am on European matters, I know that not every principle derives from European law. There are principles that exist in the law in Scotland.

The question is what the bill will do and what other things need to be done to protect environmental principles. It is important that we look at that carefully. The bill will take into our law regulations and laws that have come from Europe over the past 46 years, which we have been a part of making. Those laws and regulations will come into our law. Any law or regulation that respects or is based on the general principles or the guiding principles—it is important to recognise those two things; there are general principles that allow action by individuals and guiding principles that have led to the creation of the law and which underpin it—will automatically continue to apply, because it will have been taken back into our law. The bill says that that will all be there and be ours and will continue to affect us. Therefore, if we are moderately content with the situation presently—things can always be improved—we should be moderately content with the situation that will exist after Brexit day. That is presuming that Brexit happens; I make that point, because I still do not think that Brexit is an inevitability—we should always make that point.

What will happen beyond that date? There are three issues to address, the first of which is what the bill can do about that. The answer to that is nothing. The bill is not about changing policy after exit date; it is about ensuring that what we have now will continue to be part of what we will go forward with.

We could look at what will happen in two different ways, both of which are useful to us. The first way is to say that the keeping-pace power in section 13 of the bill, which has been subject to a great deal of discussion and many amendments—I will speak to amendments later today to ensure that the scrutiny of that is stepped up and the way in which it operates is sharper; I believe that those amendments are useful and informative and will help to make the bill better—is important. The keeping-pace power in itself will allow us to continue to do things that are underpinned by the guiding principles and observe the general principles.

An example of where the keeping-pace powers become useful to us is in aquaculture—I know that that is not the committee's direct responsibility. The list of fish diseases that require action by the Scottish Government will change; it changes from time to time as new diseases are identified or become prevalent. Those are automatic changes

within European legislation. Unless we have a keeping-pace power, we would have to go through a lot of primary hoops in order to put changes in place. The keeping-pace power allows us to do that, and that guides where we are.

The final question is whether there is more that we could do. I entirely agree with the view on that of the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham. She wrote to the committee on 31 January. In section 2 of her letter, she talked about on-going consideration of how best to achieve the aim of ensuring that we meet not just the letter of environmental law but its spirit—that is precisely the point that has been made.

Are there things that we should still do in the bill to allow that to happen? It is quite clear that we cannot change or improve European law. We could keep pace with European law, but we should also consider whether other legislative routes will arise over the next year and a half to two years that we could use prior to Brexit to do things. We should now discuss and consult on that. As we move from stage 2 to stage 3 of the bill, I will consider whether we can make a commitment in legislation to ensure that that matter is considered in terms of future legislation.

I am sorry for the lengthy explanation, but it is a very detailed area. I entirely concur with the view that we want to ensure that we are doing those things. This is not the bill in which we should do them. There are things in the bill that will allow them to happen and go on happening. We should recognise those and, as legislation and regulation develop in this field, we should look for ways to ensure that they are consulted on and made more firm. That is where I think that we should be.

**Mark Ruskell:** Thank you for that lengthy response. I hear what you say, particularly about animal sentience, but in your letter to the committee you acknowledge that the principles in our current provisions on animal sentience need to be further strengthened. In fact, I understand that there is currently a negotiation between the Scottish Government and the Westminster Government in relation to the UK animal welfare (sentencing and recognition of sentience) draft bill. It is clear that we have not completely addressed the issue of our respect for animal sentience and the welfare provisions that arise from that. The draft bill is being considered by the Environment, Food and Rural Affairs Committee at Westminster, which has deemed that its provisions on animal welfare and sentience are insufficient. No obvious or easy solutions to the issue of enshrining animal sentience in our legislation appear on the horizon in the immediate future, so I am still at a loss to understand why the Scottish Government would not want to enshrine that principle in the continuity



bill, rather than relying on a bill that is being tested to destruction in Westminster and found wanting.

**Michael Russell:** This bill cannot do what you wish it to do—it cannot change the existing law. It can take into our law those things that already exist, but it cannot change those things. That is not the purpose of the bill. If we were to write the bill in that way, it would be a different bill.

I do not share the member's gloomy view of what can and cannot be done. The Cabinet Secretary for the Environment, Climate Change and Land Reform is in active discussion with the UK Government about the ways in which this Parliament might be persuaded to give legislative consent to the UK bill, were that bill to improve. There are things that can be done, there are members of Parliament at Westminster who wish the situation to improve, and this committee can certainly say that it wishes things to improve in that way.

I am not indicating that I am content; I am indicating that animal sentience is a principle not only in European law but in Scots law. However, I am also indicating the ways in which we can and cannot do things in the continuity bill and the ways in which we can take the issue forward through a variety of other actions.

**Claudia Beamish:** It is often said that 80 per cent of our laws in Scotland that relate to the environment come from the EU. I am sorry if that is not completely accurate, but that is the figure that is bandied around. You referred to other legislative routes to make legislation on the environment more secure. Which routes were you referring to? Will that be put on the face of the bill?

**Michael Russell:** There are many routes that this committee and the cabinet secretary can and will take in the next 18 months. As I have indicated, some of those involve new legislation here and at Westminster. For example, issues of environmental governance are being examined. If that leads to legislation, as it may well do, that is legislation in which such things could be enshrined.

I am not in any sense against clarifying and moving the issue forward; rather, I am indicating what the continuity bill does and does not do, and trying to ensure that that is acknowledged. What the continuity bill does is important, which is to ensure that all the things that presently exist are enshrined in Scots law. There is a keeping-pace power, too, relating to certain areas that will be for the decision of the committee and the recommendation of the Scottish ministers. There will also be opportunities to take the issue raised by the member forward in other legislation, and that is the right thing to do. It cannot be taken forward in the continuity bill because, frankly, we

cannot change European law in the bill. That is not what the legislation sets out to do and it is not something that we have the power to do.

I know that the continuity bill has been criticised by some members because they believe that it would take powers that the Scottish Parliament does not have. I consider that the bill takes forward those powers in an entirely legitimate fashion, but I would not want to open the door by doing so in a way that could not be done.

11:45

**Kate Thomson-McDermott (Scottish Government):** Mr Russell's focus is on the continuity bill. From a policy perspective, our work to ensure that we can carry forward environmental legislation post-Brexit is a process of looking at all the powers and functions in current law and figuring out where the deficiencies will be. Through that work—there is a lot of it—we will identify where the problems will be and what changes we need to make to ensure that the legislation keeps functioning. We have talked to the committee before about that issue.

As part of the process, we will need to think about how we could use the potential powers under the continuity bill—or the UK withdrawal bill, depending on where we end up—to fix deficiencies and to keep pace. However, there might be wider issues that need to be looked at that would require more than using deficiency powers. If there are areas in which we need to make more substantive policy changes and it would not be appropriate to use deficiency powers, we might need to consider introducing further primary Brexit-related legislation. That is exactly the UK Government's position on animal sentience. It recognises that that issue is about more than just retaining EU law; it is about changing policy, so it needs to think about different primary legislative vehicles in which to do that.

The UK Government has committed to consult on environmental governance. We are waiting for initial advice from the round table on environment and climate change, and we will consider whether we need to do something similar if a need to do things that might require primary legislation comes out of that work.

There are a range of different areas where we might be required to consider the use of primary legislation—that is all part of the process; those are on-going considerations—and we are considering environmental principles and governance and fixing deficiencies together as a package when thinking about what would be most appropriate in that regard.

**The Convener:** How advanced is that work?

**Kate Thomson-McDermott:** We are still working through identifying all the deficiencies. There is a remarkable amount of work and we are making a lot of progress, but there is still a lot more to do.

**Michael Russell:** I stress the timetable for the recognition of deficiencies. Assuming that there is a transition period—I make that assumption without there being absolute clarity that there will be one—we will probably have a period between now and December 2020 in which all that work must be done. Therefore, we have almost three years to get through that work. There are estimates of how much work is required—there will certainly be hundreds of items to deal with. The bill contains the powers that it has and it is urgent because we need to get into that position. The UK withdrawal bill is trying to do the same thing, and it has not been passed yet either. The UK Government will have—by some magnitude—a greater number of changes to bring about.

**Claudia Beamish:** If what the minister and Kate Thomson-McDermott have described happens, will that involve a Scottish Government amendment at stage 3 to the continuity bill to clarify that? I still want to understand whether that will be the case.

**Michael Russell:** Yes, I am more than prepared to consider such an amendment. We would have to work out what it said and what it was committed to do, but that would be the right way to make a commitment, for example, to the process in which consultation or consideration of how the principles are brought into Scots law would be possible. The continuity bill cannot do that, because it cannot change European law.

**Claudia Beamish:** My substantive question still remains, which is probably because I just do not get it. It is because of that, actually—[*Laughter*]—so I hope that the minister does.

**Michael Russell:** I am really keen to help you to get it. You and I have worked together in the past on issues like this. I respect your position on the issue, and you know that my position on environmental law and what we need to do is exactly the same. I am trying to find a way in which we can take forward the matter. Regrettably, how we do that is not in the continuity bill, but I am indicating a range of ways in which we can take it forward. I am trying to find something that we can put in the bill that will meet the points that you and Mr Ruskell are making and the points on which Tavish Scott has lodged amendments, so that we are content that the issue is moving forward, although you may not be content that that cannot be done in the continuity bill.

**Claudia Beamish:** I do not get why the issue cannot be dealt with in the bill. I ask the question because, as a non-lawyer—

**Michael Russell:** As, indeed, am I.

**Claudia Beamish:** —and an environmentalist, I think and hope that it perhaps can be dealt with in the bill. I will make, I think, three points.

It is possible to refer to the charter of fundamental rights in the bill, and the minister's letter to the committee yesterday highlighted—and I am sure that all committee members would agree—

“environmental protection as a core human right”.

I think that it would be possible to put something about environmental protection in the principles of the bill. I am aware that the Scottish Government sometimes shies away from putting principles in bills, because they can end up as a list and bills can become complex. However, I still do not understand, if environmental protection and the precautionary principle specifically, but other issues as well, are enshrined in EU law and the EU courts, why we cannot put those principles in the bill. If you think that we cannot do that, why can we not put the principles into the policy memorandum or the explanatory notes, and what status would they have? I know that that was rather a long question.

**Michael Russell:** I will attempt to answer the question, then I will ask Luke McBratney to correct my homework. He will come in and add more.

The charter of fundamental rights is already codified. It already exists as a thing that we can take and say, “That's it, and we are putting it in there.” The charter contains only one of those underlying principles, which I am pretty sure is—I have lost my bit of paper—the precautionary principle. There are three other principles that we would want to consider in that list: prevention, rectifying pollution at source, and the polluter pays principle. The precautionary principle is already codified and in the general principles, so that is set. The other three principles are not set at the present moment, so what do we do with them?

There is a distinction between a principle that has a distinct character—the one that is in the charter—and the other three that are set out in the EU treaties. Those three surround, underpin and influence the making of laws, but they are not recognised in the same way. If the bill was to recognise those principles in the same way, we would move forward the issue in a way that we cannot do—we cannot make European law. All that we can do in the bill is take what exists and bring that into Scots law—that is the process of Brexit. We cannot break new ground on the matter.

**Claudia Beamish:** With respect, the principles are in treaties. What is the status of treaties?

**Michael Russell:** They are not general principles. General principles are in a different category from guiding principles. We would be trying to create a situation that we cannot create. I am sorry that the matter is so technical; I wish it was a lot easier. It would be a lot easier if I could say, “Yes, we can do it”, but we cannot. I have given you my explanation; I think that it is a reasonably good one.

We could expand the explanatory notes to put in the guiding principles, but I am trying to find something more than that that could go in the bill. That is why I am suggesting an amendment of some sort that commits to a process to ensure that the issue is not forgotten or put to one side, but becomes part of the process of legislation as new legislation comes in.

**Claudia Beamish:** What is the status of the explanatory notes?

**Michael Russell:** They explain what the bill is about. They can be taken into account in legal circumstances, but they are not the same as having something in the bill. That is why I am trying to find something to go in the bill. I am not shying away from the issue. I am trying to find the right thing, not the wrong thing, to go in the bill to be enacted. Luke McBratney will now underpin, in some way, what I have said.

**The Convener:** Marks out of 10 for Mr Russell, Luke?

**Luke McBratney (Scottish Government):** Ten out of 10 always, convener.

I cannot promise that my explanation will be any less technical than the minister’s. It is important to understand what the bill means by “continuity of law”. Both the “continuity” and the “law” parts are quite important.

In terms of continuity, the bill aims to replicate exactly what is in EU law at present and how it will operate afterwards. That is as imprecise an exercise as the exercise of asking what EU law is at present. The Government is quite frank that a necessary part of that exercise is that, when there are uncertainties or ambiguities in existing law that would require to be resolved by the courts, they will be part of what is carried forward. That is the continuity part.

However, we are interested in continuity of law. In sections 2 to 5, the bill carries forward everything in EU law that we consider has legal effect. That includes the general principles, because they can act as an aid to interpretation of existing EU law, and they can be relied upon in challenges to public authorities acting within the

scope of EU law and even challenges to EU law itself. Those are the general principles.

The guiding principles are in a slightly different category, as the minister explained. They are more in the way of an instruction to policy makers to take certain things into account. In and of themselves, they do not have freestanding legal effect, so they would require some adaptation if they were to be converted into retained EU law after exit. As the minister has explained, that is not quite what the bill is about.

The bill is interested in continuity and keeping things the same, and law, which is things that have legal effect. In that respect, it is important to note that the provisions in the continuity bill about the general principles are slightly different from those that are in the withdrawal bill, which would retain those general principles only for a single purpose, which would be as an aid to the interpretation of EU law. The Scottish Government’s position is that much greater continuity should be provided. Section 5 of the continuity bill provides that, wherever there is an existing right of challenge based on one of the general principles before exit, that right is continued after exit.

In the ways that the continuity bill differs from the withdrawal bill, greater continuity and effectiveness are provided for the general principles. However, they are only provided for the general principles, which are the principles that currently have legal effect.

**Kate Forbes:** I could probably join the dots in your previous answers to get an answer to this question, but I will ask it to get a direct answer. If the environmental principles were to be included in the continuity bill, what impact would that have on non-environmental areas?

**Michael Russell:** Kate? [*Laughter.*] My officials are much better dot-joiners than I am.

**Kate Thomson-McDermott:** I want to clarify that when we carry over the general principles, we will carry over the precautionary principle, which the European Court of Justice has identified as one of the general principles, and that is different from what is set out in the charter. As Luke McBratney has said, that will be a continuity and it will not be a change, because it is already part of our law.

The other principles are mainly set out in article 191, which asks that the EU considers them when developing EU policy. The question then is, when we are outwith the EU—if we are outwith the EU—what would we want the obligation to be on the Government and Parliament to think about how we inform future policy development? That is a change. The current requirement is on the EU to consider those principles in developing

environmental policy. That is not all EU policy and it is not a direct obligation on member states or on any public authority within member states. That is the current set-up.

The answer to your question is that we do not know, and that is what we have to consider. That is why we need to go through the process of thinking about what this means, exactly what outcome we want to achieve, and make sure that we have consulted on and discussed that before we make any changes.

12:00

**Michael Russell:** To be blunt, this illustrates the extraordinary and, in my view, utterly wasteful complexity of the Brexit process. The conversation that we have been having for the past 25 minutes is just a small part of those conversations in which I find myself immersed daily. That is why I continue to argue that this is a ridiculous process.

That being the case, we still have to prepare ourselves for it. I stress that the bill is an essential backstop in our preparation that freezes things and creates a situation so that there is no cliff edge. It does not develop policy. In small areas, it deviates from the UK bill, because we think that there are things that need to be done in that regard, such as listening to the Parliament on issues of scrutiny and other matters. However, the bill does not implement new things.

If Brexit takes place, bills that do that will need to come along and Scotland will need to protect itself. The best way to do so, outside the EU, is undoubtedly by being in the single market and the customs union. There are issues to be addressed in that respect but, if that happens, there will need to be new legislation of a variety of types, including secondary legislation that corrects deficiencies and primary legislation to chart new courses. In my view, those courses will not be as good as those that we have at present, but that is where we are.

**Donald Cameron:** In a way, my question has already been answered, as you touch on it in your letter, but I want to ask about section 13 and the keeping-pace power. Is it your forecast that what might be called environmental principles could be embedded by using section 13?

**Michael Russell:** That is an interesting point. I will treat it as a positive point for a positive debate, rather than anything else. The effect of the guiding principles would be seen if the relevant cabinet secretary—we are dealing with environmental issues here, but the point would of course apply to other issues—chose to use the keeping-pace powers in a particular area. The effect of the guiding principles would be seen because the policy on the items through which we were

keeping pace would have been developed with respect to those guiding principles, as Kate Thomson-McDermott indicated.

As I have said, we would want to take a clearer and much more up-front view of how to take forward the guiding principles as principles per se, by consulting on them and by finding primary legislation with which to include them. However, their effect would be seen in the use of the powers under section 13, with the approval of the Parliament.

**Donald Cameron:** I am hypothesising. If the EU took a more stringent view of, say, the polluter pays principle and that then changed and became much stricter in practice, would it be the keeping-pace power that allowed the Scottish Government to replicate that?

**Michael Russell:** No. That would be replicated only in so far as it dealt with a specific set of circumstances, and where the cabinet secretary came to the Parliament and this committee and said, “We would like to keep pace with that power in these circumstances.” We should remember that it is not an unlimited power, so it will not last forever. There would be the effect of that principle and the outcome of it, which would be consciously chosen by the Government of the day and approved by the Parliament. In those circumstances, that would not be taking forward the principle itself; that would be for the Parliament to decide, once it had decided how to take care of those principles within law.

**Stewart Stevenson:** Do the guiding principles already influence Scots law and policy because of what they say rather than because they come from the EU?

**Michael Russell:** That is a deeply philosophical question. I suspect that the answer is yes, but I would probably like to consult somebody on the issues of jurisprudence before I answered it. However, taking the wider issue of the development of jurisprudence and the way in which decisions of the European Court of Justice affect courts in Scotland, the answer is probably yes. Mr Stevenson is sitting next to an advocate, who is better placed to answer those questions than I am.

**Stewart Stevenson:** I have tried, minister.

**Michael Russell:** Indeed.

**Mark Ruskell:** You talked about making a conscious choice to apply guiding principles when considering new keeping-pace legislation. Does that imply that there is a conscious choice not to apply guiding principles, in which case, what would your judgment be on that? Are there opportunities to choose not to apply the

precautionary principle or polluter pays principle, or not to respect animal sentience?

**Michael Russell:** I do not think that there is an opportunity not to apply the precautionary principle, because it is enshrined in the charter and would come as part of that. The other principles have influenced the law that has been made, which is coming into our law, and therefore would affect future judgments.

I think that one would also want to say—and I want to be clear about this—that there would be political choices to be made. My political choice would be to ensure that the principles not only continue but grow in influence. There are some people in the UK—though not in the Scottish Parliament, I hope—who I think would take a very different view. We have heard people giving their views on environmental law that they would like to get rid of.

There will be political choices to be made. That is one of the many, many reasons why I think that we should remain in the EU, so that we are part of a progressive movement on such issues and do not run the risk of being part of a regressive movement on them. My view is that there are some things that we can say with certainty that we will maintain and some on which we will have to make choices.

**Mark Ruskell:** But why allow a political choice about guiding principles in relation to keeping-pace provisions?

**Michael Russell:** Because that is the situation in which we find ourselves. Brexit is a situation not of our choosing, and, in my view, Brexit is an attempt to diminish all sorts of rights and privileges that we have at present, which is why it should be resisted.

I cannot give you a guarantee of any sort, but I can say that this Government wants to and will do its best to ensure that things move forward. That is why I indicated that we are trying to find a way to include in the bill the key issues that we can move forward. However, we cannot do things that do not have standing or status or that do not exist, because if we did, we would be ultra vires, in a variety of ways.

We are trying to do what you suggest that we do, but it is fraught with difficulty, because the Brexit process is fraught with difficulty, and we cannot look to this Parliament to find every solution. The people of Scotland clearly voted against Brexit, but unfortunately they are currently being dragged out of Europe against their will, and that is the political reality.

**Mark Ruskell:** With due respect, if we were to legislate now with a bill that did not incorporate the polluter pays principle and the precautionary

principle, we would be in a difficult situation. We would be acting against the Lisbon treaty—

**Michael Russell:** I want to be absolutely clear. We are not doing that—

**Mark Ruskell:** So how do we enshrine the guiding principles in relation to keeping-pace provisions?

**Michael Russell:** I really want to be absolutely clear. What you described is not what we are doing. With the greatest of respect, that is a misrepresentation—no doubt an unwitting one—of what we are doing. We are taking the legislation that contains those things and has been drawn up in that way and we are bringing it back into Scots law. That is what we are trying to do. That is what the bill does, and that is what we will do.

Also, where guiding principles are identified we are making sure that they are in and can be acted on, because they have been the basis of decision making and there is a case for doing so. There are three items that are not in that position, which we need to include in primary legislation and would like to find a way to do so. The cabinet secretary and I have indicated that. However, we cannot do that in this bill, because that is not what this bill is about. We would run the risk of putting the bill in a dangerous position. We are not saying that we are not going to do it; we are saying that we want to do it and are trying to find a way to do it. However, it cannot be done in some of the ways that are suggested, because that is impossible in this bill. I want to make that absolutely clear.

**John Scott:** How do you see section 13 working in relation to the issues that are in the remit of this committee? Can you provide examples?

**Michael Russell:** I have indicated one or two areas where that would be helpful to the committee, but let me tease out some examples that I have already used.

Under the Aquatic Animal Health (Scotland) Regulations 2009, with which you are no doubt intimately familiar—I know you well, Mr Scott, and I know that such detail never escapes you—whenever the EU adds a new fish disease to its list of identifiable diseases, we exercise a power under section 2(2) of the European Communities Act 1972 to add those diseases to our own regulatory regime. That is the sensible thing to do; indeed, during my time as environment minister, I dealt with outbreaks of fish disease and I know that you need to act very quickly and resolutely. That is the power in that respect, but we could lose it unless we are able to take a keeping-pace action. That would mean a minister or the cabinet secretary coming to the committee and explaining why this was necessary, and a scrutiny process taking place. The keeping-pace power would allow

us to continue to do that, which is something that is very important to us.

Another example that you will be even more familiar with is that of invasive species. The list of such species is automatically updated, depending on the identification that takes place in the European Union. You will be familiar with this with regard to animal health, but such issues might arise in the east and then spread to the west, and in those circumstances, you will want to be able to take action without necessarily going through the hoops of primary legislation. The keeping-pace power is therefore important in clear, practical areas. Mr Cameron has asked me a question on this already, but I do not envisage that power being used in major areas where you would want to introduce primary legislation. In areas where there is a sensible solution to be found, it should be found.

**The Convener:** Would such a process be subject to the standard affirmative procedure?

**Michael Russell:** That issue will require to be teased out in the debates that will take place over the day. As we heard from a range of individuals last week, there is a clear demand in the chamber for the issue to be examined very closely and for ways of scrutinising it more closely to be found. I am listening to and open to such demands, and that is a decision with regard to the bill that will eventually come about.

**The Convener:** Do you have any further questions, Mr Scott?

**John Scott:** I thank the minister for reminding me that I should have declared an interest as a farmer when he cited animal diseases as coming within my knowledge sphere.

Having very helpfully provided a list of examples that fall within the committee's remit, I ask the minister to elaborate on the implications, in his view, for the environment of not having a keeping-pace provision?

**Michael Russell:** They are exactly as I have indicated. It would be burdensome, and it would mean that the speed of action that is often required in such circumstances would not be there.

Another matter that has concerned me very greatly over the past few weeks is how we would play these issues within a UK framework. If we were to have frameworks, which is something that I am entirely in favour of, they would be able to take advantage of a keeping-pace power that existed across the islands in order to put such things in place. Moreover, the governance of those frameworks might also benefit from the ability to access such a power. I am in favour of such work taking place. If a framework existed but the

keeping-pace power did not, we would find ourselves with a much more cumbersome and less fleet-of-foot process. As we know, in animal health and, indeed, in aquaculture, speed is of the essence.

**John Scott:** You are, of course, much closer to the discussions that I am. Is the UK Government considering a keeping-pace proposal or not? I am sure that you have made these points to it.

**Michael Russell:** We were disappointed to find that the proposal did not exist in the withdrawal bill, and we think that that was a major opportunity lost. There appears to be an ideological objection to it.

Frameworks would give the opportunity at least to discuss the matter again. If one part of these islands had the power—and I note that it also exists in the Welsh bill, so Wales would have it, too—that might be an example to England that it is a power that it should seek to have. However, we would certainly want to exercise it.

We recognise the need for frameworks to exist in, for example, areas of animal health, and we are quite willing to be part of them. The only difference of opinion is over such frameworks being agreed by this Parliament, which is what we still intend to happen.

12:15

**Finlay Carson:** Does the inclusion of the keeping-pace provision in the continuity bill while no such clause exists in the withdrawal bill not increase the potential for Scotland to have different environmental regulations? You mentioned invasive species. I think that we are more interested in what may travel north to south or south to north than in what may travel east to west. Is it potentially divisive and not particularly sensible, both technically and politically, to have differences and move at different paces?

**Michael Russell:** Devolution has already brought changes, which this Parliament has been quite comfortable with. Examples include in relation to genetically modified crops, air quality targets, food waste targets and the water framework directive. Changes exist. The nature of devolution is that decisions are made by the various parts of these islands under the principle of subsidiarity—and that is the right thing to happen. I would argue that we should trade up rather than trade down, and therefore the examples that I have given are good examples to look at.

On the potential for animal disease, I absolutely agree that, if we look at a variety of animal diseases—bluetongue is an example—we would want to make sure that north-south and east-west

are covered. I do not make decisions for the UK, but my view is that the power should exist within the withdrawal bill, because it is a sensible power to have. Therefore, when I had the opportunity to put it in the continuity bill, I put it in there. That is what the Welsh have done, too. I think that it recognises the reality of devolution, and we all learn from one another. I would like to see the power exist.

I do not think that it is divisive to have the highest standards and to want to continue to observe the highest standards. Rather than being divisive, it is perhaps an exemplar of what should take place.

**The Convener:** We will move on. It appears that section 5(1) of the Scottish bill seeks to achieve the same outcome as paragraph 2 of schedule 1 to the UK bill, albeit that it uses a different approach. Why is the Scottish Government taking that different approach? What practical difference, if any, does it make?

**Michael Russell:** I am sure that Luke McBratney will wish to respond.

**Luke McBratney:** I return to some of the things that I said earlier. The continuity bill expresses this in different ways. The UK Government's approach is explicitly to preserve the general principles as part of domestic law after withdrawal only to the extent that they are an aid to interpretation. In contrast, as I discussed, the Scottish Government's approach is to provide that the general principles have the same legal effect and attract the same legal status after withdrawal as they did before it, for the reasons that I gave earlier. It is not a status that can be described with enormous precision, but the effect of the continuity bill is that that status is continued after exit day.

**The Convener:** And that is the difference.

**Luke McBratney:** Yes.

**The Convener:** Okay. Thank you for clarifying that.

**Richard Lyle:** Good afternoon, minister. I, for one, get what you are saying. This is all about continuity. Basically, if anyone cannot get that, I do not know where they are going.

I turn to how the general principles that are inherent in retained EU law are given effect. I am sure that Luke McBratney will be able to answer this question. If the ordinary person in the street asked you, could you explain to them why the Scottish Government has chosen to retain rights of action and the power for courts to quash law and decisions based on incompatibility with the general principles of EU law, under section 5(2)?

**Michael Russell:** Apart from the fact that we are nice people, I am sure that Luke McBratney will want to answer that.

**Luke McBratney:** The Scottish Government's position across the bill has been that, with a number of the policy differences that Mr Russell alluded to earlier, we have decided to provide for greater continuity. For example, on the European charter of fundamental rights, it was an explicit decision by the UK Government not to retain that—to limit its effect after withdrawal. We have chosen a more maximalist approach.

The same reasoning lay behind the decision to retain rights of action based on the general principles. As the minister indicated, the situation is going to be confusing enough without attempting to tinker with what exists at the same time as doing the already complex job of trying to convert it into domestic law.

**Richard Lyle:** Can you explain how section 5(2) sits with section 7(1), which removes the ability to challenge the validity of EU law from which devolved retained EU law derives?

**Luke McBratney:** I will repeat a number of points that I have made already. At present, the domestic courts do not have the ability to strike down European law on the ground of validity. There would require to be some adaptation of the principles and procedures at the point of exit if we were to provide for that. That is why section 7 has a power that enables us to customise the domestic courts' ability to strike down retained EU law after exit. Section 5(5) makes it clear that the retention of rights of action under section 5 is subject to section 7 and to any provision made under section 7. However, section 5 preserves a much wider range of rights of action than the simple ability to challenge retained EU law on the ground of validity. For example, the retention of the general principles under section 5 would allow a challenge to administrative action by a public authority on the ground that it did not comply with one of the general principles. That is unaffected by section 7.

**Michael Russell:** We also have to recognise that part of the context is that there is an antipathy to the European Court of Justice and its rulings within the motivation for Brexit—an antipathy that is largely not shared in Scotland. There is a very effective Scottish judge on the ECJ and the court itself is not seen as inimical to Scottish interests. Indeed, there is a wide range of areas in which we have been greatly helped by the existence of the ECJ. There is therefore a context to the policy making that we profoundly disagree with. We want to make sure that we do not continue the expression of that antipathy in ways that are unhelpful to the ordinary citizen.

**Richard Lyle:** Thank you.

**Kate Forbes:** I have a brief question followed by a slightly longer one.

Thank you, minister, for responding to our letter so quickly. The issue that I am going to raise was not covered in the response, so, for the record, will you confirm that the principles in the charter of fundamental rights can be modified by the powers in section 11 as part of the domestication process, in so far as that would be necessary to deal with a deficiency or to make the law work properly?

**Luke McBratney:** The short answer is yes. The charter will form part of retained devolved law after withdrawal and will therefore be subject to the powers that can operate on retained devolved law. I should emphasise that that is not being done in anticipation of any concrete plan by the Scottish Government to change the charter of fundamental rights or any of its provisions. The extent to which the charter is currently entrenched and not modifiable is a product of the fact that it belongs to a supranational institution over which we do not have influence. It is a necessary effect of domesticating instruments such as the charter instruments or the corpus of retained EU law that they will become subject to the powers of this Parliament.

**Kate Forbes:** That pre-empts my longer question, which is about the circumstances under which you would envisage modification of the charter.

**Luke McBratney:** We envisage none at present. The incorporation of the charter is specifically limited by section 5(1) so that it has effect just as it has effect immediately before exit day in EU law and as it relates to anything under sections 2, 3 or 4, which are the three principal sections that domesticate the law. The effect of the charter after exit day will therefore be limited to the subject matter of the continuity bill.

**The Convener:** Okay. Thank you. I have another question for clarification, for the record. It appears that both the withdrawal bill and the continuity bill will allow, but not require, courts to take account of decisions of the ECJ post-exit. Why is the Scottish bill drafted differently from the UK bill in that respect? What practical difference will be achieved?

**Luke McBratney:** The provision that is made for interpretation of retained devolved EU law under the continuity bill is, in practice, very similar to that which is made under the withdrawal bill. The Scottish Government does not think that it would be appropriate to include in the bill a higher or more stringent test that would require the courts—on grounds that are unspecified—to apply law in more strict circumstances or in particular circumstances.

As I have said, there is inherent imprecision in the exercise. Mr Russell mentioned the Scottish judge who is on the general court of the European Court of Justice; Judge Forrester gave a speech recently that is on the Scottish Council of Law Reporting website, if members wish to see it. He described the current state of EU law as

“a vast tangle of ... wires”

and said that all that we can do is try to transfer them from one place to another. For that reason, we think that the best way of retaining courts' existing ability to bring precision to where there is imprecision is to empower the courts, as will be done under section 10, to take ECJ decisions into account where they consider that to be appropriate, but not to do so when they do not. The Scottish Government does not consider that there would be much value in going further than that.

**The Convener:** Essentially, the provisions in the two bills will achieve the same purpose.

**Luke McBratney:** They will achieve broadly the same purpose. There is one difference between section 10's interpretation provisions and the corresponding interpretation provisions in the withdrawal bill, which is that we will by default continue to apply the interpretative obligations under section 10 to retained EU law as it is developed under the bill. Under the withdrawal bill, when law is modified, by default the interpretative obligation will fall away. We have chosen to change the default rule, but both rules can be disapplied.

**The Convener:** Thank you for that.

**John Scott:** In the particular rather than the general, how will the incorporation of the general principles of EU law impact on the policy areas that are covered by the committee's remit?

**Michael Russell:** Member states are already bound by the general principles of EU law, which influences how they interpret and apply the laws. Under the continuity bill that we are trying to enact—we do not overclaim for the bill, because it cannot change policy—the general principles will be retained for all purposes and incorporated into our law. In the end, there will be no practical difference in how the principles impact on the policy areas that are covered by the committee; they will simply form part of Scots law, rather than being EU law.

That means that acts of Scottish ministers and public authorities, for example, could still—perish the thought—be struck down if we do not apply the general principles that would be incorporated. The responsibilities to observe the law remain unchanged, but that law will change from being EU law to being law that is folded into our law.



That is the process that we are engaged in: we are saying that there should not be a cliff edge.

The easiest way to understand the situation is thus: if we do not do what we are doing, and we and the UK Government just sit on our hands, we will get to whatever date it will be when everything finally changes, and there will be no law. There would be a cliff edge and we would not know. We have to fix that situation.

The problem of deficiencies will arise if the conversion does not work properly and something has to be changed. For example, in agricultural policy, referring to the common agricultural policy and the Council of Ministers will not work because such provision will not exist. The issue is how we adapt to that. There will be a standstill or freeze in our law, and a moving in of EU law, rather than anything else.

There is also the issue of changes that we would like to make and in what way. Some of the changes will be forced upon us because of deficiencies and incompatibilities, and others will be changes to principles when we want to do something in a stronger or more effective way. We want to make sure that we will do that. That is the process on which Roseanna Cunningham will want to engage with the committee.

**John Scott:** The deficiencies and incompatibilities are for another day. You are saying that there will be no effective change to the policy areas that are covered by this committee, and that divergence will follow.

**Michael Russell:** We start off with that position because that is where we were. John Scott will be aware that there will be a price to pay, either in our exports or in our principles and standards, if there is regulatory divergence. Regulatory divergence is also the issue that affects the Northern Ireland border, which becomes complex and worrying.

**The Convener:** Mark Ruskell has the final question.

**Mark Ruskell:** The bill does not deal with governance, and you have already touched on the reasons why. What will be the process for filling that governance gap? At the moment, there could be a cliff edge if we do not have adequate monitoring, scrutiny and enforcement powers.

12:30

**Michael Russell:** Roseanna Cunningham has written to the committee on the issue, and has made it clear that there is an urgent need for an approach to be developed. She has sought initial advice from the round table on environment and climate change. Coincidentally, she and I are to appear before the committee next week, which will give her the opportunity to discuss environmental

principles and governance following Brexit—in the event that it takes place. She is fully sighted on the issue, is taking advice on it and wants to discuss it with the committee, and she will, after consultation, I am sure, put forward solutions— suggestions for which will come from the committee and elsewhere. That will have to be tackled within the next couple of years, so that something can be put in place post-exit.

**Mark Ruskell:** Is there a risk that there will be a gap?

**Michael Russell:** There should not and must not be a gap, and that is what Roseanna Cunningham is working towards. The current set of circumstances is not of our making, but we must respond to them. Nobody wishes there to be a gap. Just as the continuity bill will make sure that there is no legislative cliff edge, Roseanna Cunningham will—after listening to this committee—want to put in place arrangements that will mean that there is no governance cliff edge.

**Mark Ruskell:** Will there be clarity on day 1, or even before then, on what the roles and functions of institutions will be with regard to monitoring and sanctions?

**Michael Russell:** Clarity will be required on those matters, but I do not want to stray into Roseanna Cunningham's areas of responsibility. I am clear what my responsibilities are. She has the responsibility for dealing with that issue. As I said, she and I will appear before the committee next week when, in our respective roles, we will be able to answer such questions.

**The Convener:** Thank you for your time this morning. The session has been helpful in clarifying a number of questions for the committee.

At its next meeting on 20 March, the committee will consider the Conservation of Salmon (Scotland) Amendment Regulations 2018 and will take evidence from the Cabinet Secretary for Environment, Climate Change and Land Reform and—as we have just heard—the Minister for UK Negotiations on Scotland's Place in Europe, on the environmental implications for Scotland of the UK leaving the EU.

12:32

*Meeting continued in private until 13:00.*



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