



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 29 October 2019

Session 5



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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
28th Meeting 2019, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Rachael Hamilton (Etrick, Roxburgh and Berwickshire) (Con)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Katriona Carmichael (Scottish Government)
Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)
Hugh Dignon (Scottish Government)
Leia Fitzgerald (Scottish Government)
Don McGillivray (Scottish Government)
Andrew Voas (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 29 October 2019

[The Convener opened the meeting at 09:46]

Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill: Stage 1

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's 28th meeting in 2019. I remind everyone to switch off their mobile phones or put them on silent as they may affect the broadcasting system.

Under agenda item 1, we will hear from Scottish Government officials on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. I am delighted to welcome Leia Fitzgerald, wildlife management team leader, wildlife management and biodiversity unit; Grant McLarty, solicitor, animal health and welfare branch, directorate for legal services; Hazel Reilly, solicitor, forestry, natural resources and climate change, directorate for legal services; and Andrew Voas, veterinary head of animal welfare, animal welfare branch. Thank you for coming in. Will one of you set out the context for the reforms that are proposed in the bill and provide an overview of the scale of the challenge relating to animal welfare offences?

Andrew Voas (Scottish Government): On animal welfare offences, we include information in the financial memorandum about convictions over the past 10 years. During that time, there have been 773 convictions for animal cruelty or animal fighting offences, with 41 custodial sentences and 147 community sentences; the remaining convictions resulted in fines.

We should bear it in mind that convictions are not necessarily a direct measure of offending behaviour, but they give an indication of it. To give the issue perspective, with 41 custodial sentences over 10 years, you could say that, on average, every year there are four very serious animal cruelty or animal fighting offences that have resulted in custodial sentences. Obviously, those offences have raised a lot of public concern because of their very serious nature. There have been sickening examples of sadistic or depraved behaviour. Unfortunately, we have seen cases involving animals such as dogs being tied to a tree, covered in petrol and set on fire. There have

been more recent cases involving puppy farming or animal fighting that have been truly appalling. Such offences are relatively rare, but they create a lot of understandable public concern.

On the overall direction of travel, we are concerned about some new developments, such as in the puppy trade. That has gone on for a while, but we are aware that it is a serious problem and that organised crime groups are involved in importing animals.

The Convener: Do you think that such things have escalated because the penalties have been too low?

Andrew Voas: I would not necessarily say that there is a direct cause-and-effect relationship, but that is possibly true. We have heard reports that, because of the penalties involved, organised crime groups might consider things such as illegal puppy dealing or puppy importing to be relatively low risk compared with other criminal activities, such as dealing in drugs or firearms. That view has certainly been expressed.

The Convener: Okay. The bill is about penalties, not new offences. Is that correct?

Andrew Voas: Yes, that is correct. The bill is focused on increasing penalties for existing offences, introducing fixed-penalty notices and looking at powers for enforcement authorities relating to taking animals into possession. It is about penalties and powers; it is not about creating any new offences or any new areas of responsibility.

The Convener: Powers will also be given to people who recover animals. Currently, animals have to be kept for the duration of any court proceedings. There is a change there.

Andrew Voas: Yes. The powers in the Animal Health and Welfare (Scotland) Act 2006 allow enforcement authorities to take animals into possession if they are suffering or are likely to suffer. Currently, a court order is required to allow those animals to be moved out of their possession. The bill proposes a new procedure that will remove the need for that court order, so the procedure should be more straightforward and swifter.

The Convener: So animals could be rehomed or sold on.

Andrew Voas: Yes. They could be more swiftly rehomed or sold on.

Finlay Carson (Galloway and West Dumfries) (Con): On the fines for puppy trafficking, you mentioned puppy trafficking not being regarded as being in the same group as drug dealing, for example. However, a litter of puppies could be worth £10,000, £15,000 or £20,000. I know that

we are looking at potentially unlimited fines, but what are the maximum fines that have been imposed until now? Is it likely that the fines that are imposed as a result of the bill will be substantially greater?

Andrew Voas: The fines that are imposed will, of course, be a matter for the courts. The bill's purpose is to give the courts the flexibility and additional powers that, in some cases, they have asked for to deal with the most serious offences. Currently, a potential fine for unnecessary suffering is £10,000. That will be changed to an unlimited fine for the worst cases of animal cruelty. [Interruption.] I am sorry: the figure is £20,000. I have been corrected.

The Convener: I am sorry, but would you say that again?

Andrew Voas: The existing maximum available fine for section 19 offences is £20,000.

The Convener: That could become unlimited.

Andrew Voas: It would become unlimited.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): An issue arose there. I presume that the Proceeds of Crime Act 2002 would enable the state to recover the profits that large dealers made.

Andrew Voas: Yes. The Proceeds of Crime Act 2002 certainly applies, and it has been used.

Stewart Stevenson: That is fine. I simply wanted to put that on the record. Thank you.

My interest is in how fixed-penalty notices work. It might be useful to hear from Grant McLarty—I am not sure; it is up to you guys—about whether the acceptance of a fixed-penalty notice creates a criminal record. What would happen to the person? That is a general question about fixed-penalty notices. Are there any differences in that regard with the fixed-penalty notices that are proposed in the bill?

Andrew Voas: Let me deal with that question in general terms; Grant McLarty can give more information if necessary. The bill is intended to create the powers to enable fixed-penalty regimes of different types to be introduced in future regulations. At this stage, we are not getting into detail about exactly which FPN regime will be appropriate in individual circumstances. The bill asks for powers that are sufficiently flexible to allow us to introduce in future regulations FPN regimes of different types for different circumstances.

Stewart Stevenson: We are talking about fixed penalties for minor and technical offences. I can sort of understand “technical”, but what might “minor” mean in this context? You might need to give the committee an example.

Andrew Voas: It will be a requirement that FPN regimes apply only to offences that have a maximum penalty of up to six months' imprisonment and a fine at level 5 on the standard scale, which is currently £5,000. They will certainly not apply to offences for which there are higher penalties.

In practical terms, we see the need for FPN regimes in relation to, for example, offences that do not necessarily involve harm to individual animals, in the context of our attempts to improve overall compliance with legislation to benefit animal health and welfare more widely. For example, we are planning to introduce legislation to require licensing of animal sanctuaries and rehoming centres and to modernise licensing for dog breeding and pet sales, and there might be paperwork offences, such as not applying for a licence or not holding one, which would not necessarily involve an animal being harmed. It is important that overall compliance with the regulations is achieved.

Stewart Stevenson: I understand that, up to now, fixed-penalty notices have, in essence, been levied on individuals. The example that you gave suggests that it might be possible to levy an FPN on a corporate entity. Some animal sanctuaries are all about an individual, but many of the larger ones are corporate entities and charities. Is it envisaged that fixed-penalty notices will be levied on such bodies?

Andrew Voas: As I said, at this point we are interested in getting the powers to introduce appropriate FPN regimes in future. In future, we will be able to consider the detailed, technical questions of how FPN regimes will operate and on whom penalties could be levied. I think that, in principle, FPNs could be levied on corporate bodies and legal persons as well as on individuals.

Stewart Stevenson: The consultation on animal health is still open, but you have brought forward proposals in that regard. I accept that proposals will be implemented via secondary legislation, but the approach seems slightly unusual. Are you anticipating the results of the consultation? Will you use the results to amend the bill at stage 2?

Andrew Voas: This is partly about the timing of the consultation on animal health. There have been initial discussions with local authorities, primarily about the principle of fixed-penalty notices for animal health offences, and there is a clear desire to introduce FPN regimes for animal health offences, and a need to have the ability to do so. That is why there is provision for animal health FPNs in the bill.

The purpose of the consultation is really to go into a bit more detail about what sort of FPN

regimes would be appropriate for animal health. As local authorities will be involved in administering such regimes, a lot of the arguments and considerations in that regard are probably similar to the ones about FPN regimes for animal welfare. That is why we thought that it was justifiable to include in the bill a general provision, which could be refined after the results of the consultation are known. The consultation will close on 23 December and we hope that an analysis of the results will be available early next year.

The Convener: A bill such as this one is about preventing cruelty or harm to animals. That is what we want to achieve. Has there been any analysis of how crimes of the type that you mentioned have reduced as a result of penalties like those that are envisaged in the bill? For example, have you looked at other countries that have done something similar? What reduction do you anticipate?

10:00

Andrew Voas: We are increasing the penalties to give the courts the powers to deal with the most serious offences in an appropriate way. The bill is about giving the courts extra powers to deal with offences appropriately.

The Convener: But it should be a deterrent as well.

Andrew Voas: We have looked at the situation in other countries. There are quite complicated arguments about deterrence. We have to balance the seriousness of the penalty with the probability of someone being detected or apprehended. Deterrence may work better with crimes that have more consideration and pre-planning. For example, there may be greater deterrence with crimes such as animal fighting, which might require a fair degree of preparation and planning, than with crimes in which somebody acts violently and abusively towards an animal on the spur of the moment.

Primarily, we see the bill as giving the courts the powers to award appropriate sentences that reflect the seriousness of the crimes that are committed.

Mark Ruskell (Mid Scotland and Fife) (Green): Alongside fixed-penalty notices and custodial sentences, are there other approaches that can work to re-educate people effectively? I am thinking about awareness courses or sanctions such as banning people from keeping animals. Do you have evidence on the effectiveness of those measures and are they covered by the bill in some way?

Andrew Voas: It should be remembered that various options are available to enforcement authorities before they reach the point of referring

a case to the procurator fiscal. Enforcement authorities give a lot of general advice and issue warnings, and some issue care notices under the 2006 act. When a case is put to the procurator fiscal, the fiscal also has non-court options such as warning letters or fiscal fines.

I see the attraction of awareness courses and that sort of thing for convicted offenders, but we have to remember that the number of convictions is relatively small and that, to provide that sort of awareness course, we would need somebody to operate it. Currently, community payback orders require local authorities to set up training or awareness courses so that people who have committed offences can be sent on them. If we were to do something like that—

Mark Ruskell: Can you envisage a community payback order being applied to, for example, a gamekeeper who is convicted of a wildlife crime? What would be a suitable community payback order for such a person?

Andrew Voas: We have considered that in general terms, but we have to be aware of the practicalities. That approach would require suitable courses to be set up and operated so that convicted people could be sent on them.

Mark Ruskell: The bill does not extend the powers of the Scottish Society for the Prevention of Cruelty to Animals in relation to wildlife crime. There is a mismatch between the Scottish SPCA's current powers in relation to domestic animals and its ability to detect and help to bring people to prosecution for wildlife crimes. Why does the bill not extend the Scottish SPCA's powers? The organisation is a uniformed service that does effective work with domestic animals. What is holding us back from extending its powers to include wildlife crime?

Andrew Voas: As I understand it, the issue was addressed in a letter to the committee in May 2017, which explained that, with wildlife crime, it was considered more appropriate for police constables to use the full range of powers and facilities that the police have available. That led to an increase in the number of wildlife crime officers. It was decided to go down that route back in May 2017. I know that the issue has been raised with the committee recently. As far as we know, the Scottish SPCA made an offer, which was considered, and the reasons why that offer was not taken up fully were explained in the letter in May 2017.

Mark Ruskell: That letter to the committee outlined a range of actions, one of which was the establishment of special constables on a trial basis to deal with wildlife crime in the Monadhliath area. Why can we not see the evidence and outcomes from that trial to allow us to know whether

supplementing the work of wildlife crime officers is a more effective route to tackling wildlife crime than the Scottish SPCA? I am left without knowing the outcome of the process and whether it was effective.

Leia Fitzgerald (Scottish Government): Along with the police and the Cairngorms authorities, we are carrying out an assessment of the effectiveness of that pilot. We are actively working on that, but it is at an early stage. We are happy to provide the committee with more details, once the assessment has been advanced.

Mark Ruskell: Will that come under our scrutiny of the bill?

Leia Fitzgerald: I do not have timescales, but we will look into that, and I hope that we can get back to you with an indication of when we will complete the assessment process.

The Convener: We would be grateful if you could write to give us an indication of that.

Claudia Beamish (South Scotland) (Lab): Having been on the previous committee during the previous session of Parliament when the idea of extending the Scottish SPCA's powers to wildlife crime was raised, I find it puzzling that it is not thought appropriate for the Scottish SPCA to be able to offer additional support to the prosecution of wildlife crime. I do not understand that decision, given that Police Scotland is up against it in terms of resources. I appreciate that there is a pilot in the Cairngorms—we are interested in that—but it would be helpful for the committee to understand the reasons why it is not thought appropriate to extend the Scottish SPCA's powers. If not now, perhaps you could give us that information in writing. The process has gone on for a long time.

The Convener: We can ask the cabinet secretary the reasons behind that.

Claudia Beamish: Yes, but it might inform developments if the bill team could let us know that—if that is appropriate.

Leia Fitzgerald: We can certainly provide more information in writing, if that would be helpful. As Andrew Voas said, this matter was looked at at the time, since when Police Scotland has increased the number of wildlife crime officers so that there is now one in every division. There is extensive training so that people in Police Scotland more widely are trained. The situation—

Claudia Beamish: With respect, from evidence that I have heard and from going out with people who are on the ground, I know that in South Scotland, the police—with the best will in the world—sometimes take a considerable amount of time to respond. Incidents happen in remote areas, where evidence can be damaged by the weather and must not be touched, and other such

issues come up. I still do not understand why that extra support is not possible, when the police are up against it. I am highlighting the issue now.

Angus MacDonald (Falkirk East) (SNP): Continuing the fixed-penalty notices theme, when do you envisage the Government bringing forward regulations on FPNs? Are they likely to be affirmative, and who will manage the use of FPNs?

Andrew Voas: We do not have any immediate plans for individual FPN regimes but, as I mentioned, the licensing legislation that is being introduced might be where we seek to introduce the first FPN regimes relating to animal welfare.

The regulations will certainly be affirmative, as is the case for all regulations that are made under the 2006 act, and they will come before Parliament. They will probably come to this committee or possibly, in the case of animal health or farm animal-related regulations, the Rural Economy and Connectivity Committee. There will obviously be a requirement for due consultation before those regulations are put forward.

Primarily, it will be local authorities that will administer the FPN regimes, and they will be responsible for the licensing work that we mentioned. A lot of the animal welfare enforcement is done by local authorities. Depending on the exact situation and the purpose of the FPN regime that is developed, other bodies such as the Animal and Plant Health Agency or Food Standards Scotland may be involved.

Angus MacDonald: Do you envisage any capacity issues for local authorities? We always get that feedback from them.

Andrew Voas: We are interested in introducing regulations that will assist local authorities. We know that local authorities are keen on the idea of FPNs in other areas, and we have been discussing with local authorities what future FPN regimes might look like for animal health and welfare enforcement. Generally, local authorities are welcoming of that. Although, inevitably, it is possible that there will be an additional task, there is the opportunity to recover some of the costs of enforcement through the FPN regime. However, those are all details that will be developed in due course when we bring forward the regulations.

Finlay Carson: To tidy up on fixed-penalty notices and other sanctions, is there a possibility in the bill to use the income that is generated from fixed-penalty notices to assist in promoting good animal welfare more widely? If not, are there significant barriers that prevent that possibility?

Andrew Voas: As I mentioned, the basic purpose of the bill is to provide the overall power to introduce FPN regimes of different types and for

slightly different purposes in future welfare or health legislation. The focus of the bill is on providing the suitably flexible power that will allow us to do that. As those future FPN regulations are introduced, we can consider exactly how the income should be channelled, who it should go to and what purposes it could be used for. In principle, there is nothing that would necessarily prevent income from being used for particular purposes. However, that is not really the purpose of the bill.

Finlay Carson: Is there potential for the increased use of powers to ban people from keeping animals—whether domestically or for commercial farming—or to require offenders to undertake training to allow them to keep animals in the future?

Andrew Voas: The 2006 act already contains the power for courts to give disqualification orders when an offender is convicted. Those disqualification orders can prevent people from keeping, working with or—basically—having anything to do with animals. When people are convicted of an offence, the courts already have a range of powers. We do not anticipate that changing as a result of the bill, as those powers already exist.

Finlay Carson: I will move on to the issue of animals that are taken into possession to protect their welfare. Over the past 13 years, court orders have been used only 40 times to allow local authorities to take animals away for their welfare, either to be rehomed or to be destroyed. The Government said:

“it has not been possible to produce a reliable figure for the total number of animals”.

Why is that the case? Should it raise concerns, particularly given that the bill would allow animals to be taken into care without the requirement of a court order?

Andrew Voas: To correct Finlay Carson slightly, the enforcement authorities have the power, through the 2006 act, to take animals into possession. The court order comes in when they need to deal with the animals after they have been taken into possession.

We asked all 32 local authorities in Scotland for as much information as they could provide on the times when they had taken animals into possession and then sought court orders. However, it should be remembered that we were asking them to give information covering the past 12 years and that there was no formal requirement to record information in any particular format, so local authorities had dealt with it in a variety of ways. Some of the information will be in case files that are several years old. We got a lot of useful information from several local authorities, but we

could not honestly say that we had a complete picture, which is why we said that we could not provide reliable information overall. We should also bear in mind that cases can involve varying numbers of animals; there could be one or two animals or, in the case of farm animals, several hundred. There is wide variation in the numbers of animals that have been taken into possession and in the outcomes for animals in terms of court orders and being sold on or rehomed.

Finlay Carson: Are there specific provisions in the bill for councils to recover the cost of caring for commercial animals that have been seized, or do the provisions address more general issues?

10:15

Andrew Voas: Do you mean in relation to the arrangements for taking animals into possession?

Finlay Carson: Yes.

Andrew Voas: The existing arrangements for cost recovery allow local authorities to recover their costs from the proceeds of animal sales and from the animal owner. There are often practical difficulties in doing so, particularly if large numbers of animals are in their possession for a long time. The purpose of the new process is to allow councils to make proper arrangements for animals more quickly, which would minimise the cost—that is really what it is about.

We are doing this to improve animal welfare and avoid suffering by animals that have been taken into possession by allowing proper arrangements to be made reasonably swiftly. We are thinking primarily of commercial situations involving dog breeders or farm livestock, which are probably the most problematic situations, or potentially the animal hoarder scenario, in which somebody has acquired a large number of animals that need to be dealt with properly.

The provisions will allow animals in those situations that have been taken into possession to be dealt with swiftly and efficiently to benefit their welfare. I hope that they will also allow a smoother process, so that local enforcement authorities can use the powers in the 2006 act—which were a major improvement at the time, allowing animals to be taken into possession to prevent future suffering—effectively, as was originally anticipated.

Finlay Carson: Where is such a decision taken? For example, if a member of the public reports what they see as a potential animal welfare issue, at what level is the decision taken to seize puppies or dairy cows, for example, and process them quickly? In the case of puppies, it may be that they should be rehomed within six weeks. Where does the burden of that decision

fall? Once there are been a court case, is compensation considered if no prosecution is delivered?

Andrew Voas: Currently, enforcement regarding puppies and companion animals is largely done by the Scottish SPCA, which takes the animals into possession to protect their welfare. It has that power under the existing 2006 act provisions if it considers that the animals are suffering or are likely to suffer in future and it can get a vet to certify that.

Local authorities tend to take on cases involving farm animals. They reach a point when they decide that the appropriate way to deal with a case is to take possession of the animals; they usually take them away from the farm to be cared for somewhere else. The decision to take animals away is up to the enforcement authority, which will be the local authority or the Scottish SPCA.

You asked about compensation. Under the current arrangements, animals—it is usually farm animals—can be sold on and the proceeds will belong to their owner. The enforcement authority can deduct reasonable expenses from the value. Because we are seeking a swifter resolution under the new arrangements, the owner can be compensated, with the important proviso that the compensation can be deferred if there is a related on-going criminal case. Ultimately, a court will be able to order that compensation is not paid to the owner, if it thinks that that is appropriate after due process and a conviction—that is an important safeguard.

The Convener: We move on to questions about attacks on service animals.

Angus MacDonald: I want to look at the Scottish Finn's law provisions of the bill. The Scottish Government has told the committee that attacks on service animals are more likely to be prosecuted as malicious mischief or vandalism than they are to be prosecuted under the Animal Health and Welfare (Scotland) Act 2006, which the bill will amend in order to strengthen the provisions in respect of such attacks. Why is that? Why are the amendments to the 2006 act considered to be needed?

Andrew Voas: How offences are dealt with are primarily matters for the police and the Crown Office and Procurator Fiscal Service. We have discussed the issue with the police. My understanding is that, in the past, some attacks have been dealt with as part of wider public order offences, such as breach of the peace, and assaults on police officers. In those situations, the police and COPFS have considered the overall pattern of behaviour when deciding what the appropriate offence has been.

The change that we are trying to introduce—it is known as Finn's law, as you said—is to make it easier for offences that involve causing unnecessary suffering to police animals to be prosecuted under the 2006 act. That would require courts to disregard whether an action was committed for the purpose of defending the offender, another person or another animal. Currently, courts are required to have regard to that in deciding whether suffering was unnecessary. When we make the changes, courts will be required to disregard the fact that an action was committed to defend a person or a property in relation to attacks on service animals—that is police dogs or police horses. That should make it easier for such attacks to be successfully prosecuted under the 2006 act.

The proposal recognises the fact that service animals should be regarded as sentient and capable of suffering in their own right, rather than as police property or something that can be vandalised. That is the principle behind the provision.

Mark Ruskell: We are talking about service animals. Will there be a wider applicability to Finn's law? What if, for example, someone beat a racing greyhound at a track and, in their defence, said, "I was trying to ensure that this greyhound wasn't going to attack another animal or damage the property of another person"? I am trying to get it clear in my mind why the provision applies to service animals but not to other working animals.

Andrew Voas: It is for practical purposes. We have to remember that police service animals are put in positions in which they are trying to apprehend individuals or maybe control the movement of crowds. They are particularly vulnerable to incidents in which someone attacks them and, potentially, argues that they did so to defend other individuals. Those are the circumstances in which the possibility of talking about the use of self-defence in relation to police dogs and horses might arise.

Mark Ruskell: Do you not see racing greyhounds as being in a similar position? They can be in a very vulnerable position and can be attacked by handlers.

Andrew Voas: It would be harder for a handler to say that they were beating a greyhound in order to defend themselves, because a greyhound is obviously not being used to control the handler or in a way that poses the handler any danger. The provision is really about the practicalities of how the arguments about whether the action was committed in self-defence would arise.

The Convener: We move on to the Poustie review recommendations.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): The Poustie review recommendations were broadly accepted by the Government at the time of its publication. I am interested in the impact statements.

The Government, after conversations with COPFS and Police Scotland, accepted that the current system works, and that, where the conservation, ecological and animal welfare impact statements are requested, they work well.

It is therefore considered unnecessary to legislate further. Was it the reassurance from Police Scotland and the Crown Office and Procurator Fiscal Service that led the Government not to accept the Poustie review recommendations in that regard?

Leia Fitzgerald: We spoke to stakeholders, who confirmed that they use statements where they feel that that is necessary and helpful. They already have the power to do that, so there is no need to put the matter on a statutory basis. That would be legislating just for the sake of it, because those statements are already being used. There are circumstances in which an impact statement might not be required or helpful, so we do not want to create an unnecessary burden to produce a statement if it is decided that one is not required in a specific case.

Rachael Hamilton: Are you saying that the statements are not requested as a matter of course?

Leia Fitzgerald: A decision is made in individual cases as to whether an impact statement is required. That is how the process works at the moment. Stakeholders feel that it is working well and that they have sufficient ability to use the statements when needed.

Rachael Hamilton: Poustie also recommended that forfeiture penalties should be extended and made consistent across wildlife legislation. What forfeiture and other alternative penalties were considered as part of the background to the bill and why were those alternatives dismissed?

Leia Fitzgerald: Forfeiture penalties are already available under existing legislation, including the proceeds of crime legislation. We are considering the possibility of introducing fixed-penalty notices as an alternative form of penalty. We have already had discussions with stakeholders on that and we intend to consult on it. That is one of the alternative provisions that we are considering.

Rachael Hamilton: Sorry, but can you repeat that last bit?

Leia Fitzgerald: In terms of alternative provisions, we are looking at fixed-penalty notices, as have been looked at for animal welfare and health offences.

Rachael Hamilton: Just to be clear, why were the alternatives that were recommended dismissed?

Leia Fitzgerald: Fixed-penalty notices are one of the alternatives that we are looking at.

Rachael Hamilton: My next question is about firearms legislation, which is reserved to the United Kingdom Government. What discussions is the Scottish Government having with the UK Government with regard to the recommendation that there should be a power to withdraw shotgun certificates in wildlife crime cases? What plans do you know of to amend the existing UK legislation?

Leia Fitzgerald: I am not aware of any such plans at the moment. We have spoken to our justice colleagues, who lead on firearms legislation. The Scottish Government would like amendments in a number of areas relating to firearms, and not just wildlife crime. Justice colleagues have regular discussions with the Home Office about that. As far as we are aware, the Home Office has no plans to introduce new legislation, but we will certainly continue to have those discussions with justice colleagues and, if an opportunity presents itself, we will consider that.

Rachael Hamilton: Mark Ruskell touched on a preventative strategy for wildlife crime. The Poustie review recommended that empathy training be given. Do you have any comment on awareness courses, which might be a bit like rehabilitation courses for people who have committed speeding or other driving offences? Those could be brought in as part of a preventative strategy for wildlife crimes.

Leia Fitzgerald: There are powers already, but no specific courses of that kind are being run or developed in Scotland. If the court was to make that provision, there would need to be a suitable course. However, as Andrew Voas said, thankfully, the number of cases is quite low. There are practicalities about having suitably qualified people to deliver the courses and having sufficient numbers of people on them. We have not ruled that out, but there is no obvious course available at the moment that we could use. If such a course were to be developed by stakeholders or others, we would certainly look at it to see whether it was appropriate.

10:30

The Convener: Mark Ruskell has some questions on vicarious liability.

Mark Ruskell: I understand that only two vicarious liability restrictions have been put in place in the past seven years. There are questions about whether the current extent of the use of

vicarious liability is effective in tackling wildlife crime. What representations have you had on the topic in relation to the bill? What consideration have you given to extending vicarious liability in the bill?

Leia Fitzgerald: We have not had any specific recommendations about extending vicarious liability. We know from speaking to the police and the prosecution service that it is something that they will always consider and, if they deem it appropriate and there is sufficient evidence, they will seek to bring charges.

In his review of the Protection of Wild Mammals (Scotland) Act 2002, Lord Bonyon recommended introducing vicarious liability for offences relating to hunting with dogs. We are looking at that and, when we introduce proposed legislation on fox hunting, we will consider whether it would be appropriate to implement that recommendation.

Mark Ruskell: Okay, but you have no plans to extend vicarious liability in the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill.

Leia Fitzgerald: The bill is about increasing the penalties for existing wildlife offences; it does not seek to create any new wildlife offences.

Claudia Beamish: I seek clarification whether, when it is alleged that a crime has been committed but no one has been directly prosecuted for it, it would still be possible for there to be a vicarious liability prosecution. Would court action be considered even in the absence of the perpetrator being convicted? It would be helpful to have that clarified, because there is concern about that issue, which, to a degree, relates to the bill.

Leia Fitzgerald: In order for a charge of vicarious liability to be brought, it is not necessary for somebody to have been convicted of the underlying offence. Often, a charge of vicarious liability will be brought when somebody has been convicted of the underlying offence, but it can still be considered if someone has not been convicted. However, the Crown would have to be content that there was sufficient evidence that it could bring such a charge.

The Convener: Claudia, would you like to ask your questions about evidence gathering?

Claudia Beamish: Yes—I want to turn to wildlife crime investigations and video surveillance. Given the nature of wildlife crime—it has already been highlighted that it is committed in remote areas, that the weather can affect the gathering of evidence and that evidence can be removed—the likelihood of perpetrators being apprehended is clearly an important factor in the context of the bill, as is the deterrent effect of sentencing. How will the bill impact the ability of

authorities to investigate and gather evidence of serious wildlife crime?

Leia Fitzgerald: One of the things that the bill is doing is increasing the time limit for prosecutions to be brought. We have spoken to the police, the Crown and stakeholders, and they have all said that there have been cases that they have not been able to pursue because of the time limit, for the reasons that you alluded to. In addition, quite a lot of complex forensic testing sometimes needs to be undertaken. Stakeholders feel that the proposed increase in the time limit will be helpful, because it will give them more time to investigate. As I said, the police, the Crown and stakeholders were all able to give examples of cases that had fallen under the time bar, whereas if the time bar had been longer, they might very well have been able to bring a charge.

Claudia Beamish: That was helpful.

As you will know, the committee has heard previously that video surveillance could be important in gathering evidence and thereby enabling the prosecution of wildlife crime. However, there has been some debate about the admissibility of such evidence in court. Will the bill shift the debate in this area? Do you think that it is more likely that evidence that is gathered through video surveillance will be admissible as a result of wildlife crime being treated as serious crime?

Leia Fitzgerald: The increase in the penalties will mean that there will be opportunities for police-sanctioned surveillance, providing that it is considered that that would be appropriate and all the requirements for carrying out that surveillance are undertaken. That will help in that regard.

On the issue of evidence that has been gathered from third parties, the bill seeks to make no changes to the processes or procedures under which wildlife crime is investigated or prosecuted. At the moment, the rules governing the admissibility of evidence are not specific to wildlife crime, the use of closed-circuit television or video evidence. The Crown is able to consider such evidence and it will do so. However, it has to make decisions on a case-by-case basis about whether a piece of evidence is admissible. There will be various reasons that are considered in that regard, some of which will be legal reasons.

Claudia Beamish: That is helpful. Particularly with regard to third parties, has article 1 protocol 1 of the European convention on human rights, which concerns private property, been considered in relation to future developments? I am thinking about the issue in view of where we started with regard to the remoteness issue and the importance of recognising that wildlife crime is now being said to be a serious crime.

Leia Fitzgerald: It is not being looked at in relation to the bill, as the bill is concerned with the penalties rather than those wider areas. As I said, a decision would have to be made about whether video evidence could be used—that will continue to be the case. There have been cases where it has been deemed to be admissible.

The Convener: Just to clarify, am I correct in thinking that the legal issues around the use of video evidence relate to any crime and are not specific to wildlife crime? That is, there is a threshold that has to be met in order for the police to embark on any kind of video surveillance of a situation. Is that correct?

Leia Fitzgerald: There are rules governing when police surveillance can be used and there are, obviously, operational decisions that Police Scotland has to make. There are rules governing the admissibility of any kind of evidence. In May 2017, Sarah Shaw wrote to the committee with information that covered all the rules around what the Crown takes into consideration when determining whether evidence is admissible.

Finlay Carson: The bill includes the ability to increase sentences and make unlimited fines. Will that increase the possibility of video evidence being used in a case?

Leia Fitzgerald: No. The police have certain criteria under which they can authorise surveillance. Increasing the maximum penalties that are available for some of the crimes might make them fall under some of the categories in those criteria, but there would still be case-by-case decisions for the police to make about whether, based on all the criteria, it would be appropriate to authorise surveillance.

There will be no impact on the use of video evidence from third parties. It will still be for the Crown to determine whether that can be used, under the current rules and regulations.

Finlay Carson: But, potentially, the police will have more scope to consider using video evidence, because the limits involve whether something is a serious crime, a crime that might result in a sentence of three years or more and so on.

Leia Fitzgerald: Yes.

The Convener: I will conclude the questioning by asking about the Werritty review. It was expected to report in the summer, but it did not. Do you have any idea when it might report?

Leia Fitzgerald: The review was delayed for reasons that were outwith the control of the review group. It is an independent review. We do not have a definite date, but we have been advised that the group hopes to present a report to Government shortly.

The Convener: Thank you very much. I thank everyone for their time this morning.

10:40

Meeting suspended.

11:01

On resuming—

European Union Exit (Environment)

The Convener: Item 2 is an opportunity for the committee to hear about European Union exit and the environment from the Cabinet Secretary for Environment, Climate Change and Land Reform and her officials. I am delighted to welcome the cabinet secretary, Roseanna Cunningham, and her officials. Katriona Carmichael is deputy director for future environment division, Clare Hamilton is deputy director for climate change, Don McGillivray is deputy director for environmental quality and circular economy division, and Lisa McGuinness is head of compliance at Marine Scotland. Thank you all for coming.

Cabinet secretary, I understand that you want to make brief opening remarks.

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): Thank you, convener.

Today is interesting timing for this discussion. Notwithstanding where we are in the process, I continue to be deeply concerned about the negative impacts of EU exit, whenever it happens and whatever the terms. I am particularly troubled by the on-going threat of a no-deal exit. I understand that, as of today, the potential no-deal exit date shifts from Thursday this week to the end of January—I think that it will be 31 January; nobody is quite sure.

There has been extensive preparation to protect environment, climate change and land reform interests from the damaging effects of a no-deal Brexit. The Government will continue to prepare for that possibility unless and until it is fully ruled out. We must continue to do so, notwithstanding changing dates.

As the committee knows, on 8 October the Government published, “Scottish Government Overview of ‘No Deal’ Preparations”. I wrote to the committee last week to set out more detail on the actions that have been taken across the portfolio to prepare for no deal, including actions to ensure a functioning statute book. The reality is that it will simply not be possible to mitigate all the impacts of leaving the EU without a deal.

Three aspects of more general Brexit impacts across the portfolio should attract the committee’s attention. First, the revised withdrawal agreement and political declaration that the Prime Minister has agreed to are still live, and together they raise significant concerns, because the revised texts

contain no legally binding commitments on environmental protection or climate change. The language in the revised political declaration about the need to “uphold ... common high standards” is unclear and has no legal force.

Because of the Prime Minister’s stated intention of potentially diverging, in the future, from EU laws and regulations that deliver environmental, product and labour standards, the issue continues to be a major concern.

The UK Government’s apparent intention to move away from alignment with EU standards could also seriously undermine the development of long-term common frameworks. The Scottish Government will not agree to any measures that would disadvantage Scotland or place environmental standards at risk, or to any that do not reflect the clear desire of the people of Scotland and the Scottish Parliament.

Secondly, I am concerned about the pace of final development of the UK Environment Bill and the lack of time that we were given for proper detailed consideration of its provisions. Before that bill was published, the Scottish Government was not consulted or even made aware of the climate governance role that is to be given to the proposed office for environmental protection, to replace the role of the European Commission. I have told my UK counterparts that we must work together in a spirit of true collaboration to develop the meaningful joint decision-making processes that might be required, as long as they respect the devolution settlement and help us to achieve our respective net zero targets.

Thirdly, effective and appropriate governance to monitor and enforce environmental standards in Scotland is vital. Our consultation has confirmed that key gaps will exist once we lose the European Commission’s scrutiny of Government performance, so we are currently finalising our proposals for long-term governance arrangements on the basis of that analysis. However, gaps would be immediate in the event of a no-deal exit from the EU.

I intend to appoint an interim advisory panel that will operate if a no-deal exit is confirmed. That panel will provide advice on maintenance of environmental standards and implementation of environmental law in Scotland. Because of his considerable skills, I have invited former Scottish Public Services Ombudsman Jim Martin to chair the panel, and to put in place an interim approach that will follow as closely as possible the Commission’s approach.

I hope that the committee recognises the huge amount of work that has already been carried out by the Scottish Government, and its on-going work to ensure that our environmental laws and

regulatory systems are robust in the event of exit from the EU.

I would be happy to discuss any of those issues further with the committee.

The Convener: You have said that the Scottish Government has done a lot of work to prepare for a no-deal Brexit.

Roseanna Cunningham: Yes.

The Convener: Obviously, work is taking place across the Government and Parliament. How much has that work cost in your portfolio? Where is the money for it coming from?

Roseanna Cunningham: The cost is considerable, and much of it must be met from our own budget. Obviously, we have made bids for funding and will continue to do so.

There are significant costs in several areas. A no-deal exit would have a disproportionate impact on Marine Scotland's compliance functions, so funding has been awarded accordingly. The Treasury has, at least, now acknowledged that that is a significant issue, and it has provided long-overdue funding to help to mitigate some of the impacts—although it has done so at an incredibly late stage in the day. It has agreed to release £5 million for compliance assets, which will not prevent all the entirely avoidable damage, but is, at least, a significant subvention.

Our clear expectation is that the Treasury will continue to honour the promise on other significant costs that are incurred by the Scottish Government in relation to Brexit. That covers the overall issue of funding for Brexit costs.

Marine Scotland is now, as a matter of considerable urgency, committing the funding that it has been given at this late stage to further enhance existing marine compliance assets. We would not have been able to have the additional assets in place before the end of this week because of the very late confirmation of the funding. Obviously no deal is now not on the table, but we cannot stop preparing for outcomes that might yet happen.

Marine Scotland has borne the lion's share of costs. There has been spend by the environment and forestry directorate and by various public bodies and the main research providers. I have a detailed year-by-year breakdown: I do not know how much detail you want me to go into.

The Convener: An overview is fine.

Roseanna Cunningham: We have been spending on Brexit. For example, £4.4 million was spent by the environment and forestry directorate and sponsored public bodies in 2017-18 and 2018-19, primarily on staff costs. I can give you a

more detailed breakdown in a letter, if the committee would like that.

The Convener: We would welcome that detail. I will pick up on a point in your opening statement about the Environment Bill. The policy statement that accompanies that United Kingdom Bill states:

"There has been extensive and continued collaboration with the Scottish and Welsh Governments and the Northern Ireland Civil Service. This has enabled us to bring forward ... measures that we expect to see adopted outside of England".

That contradicts what you have just said. Are you saying that such collaboration has not taken place?

Roseanna Cunningham: I have read that statement; it is categorically untrue.

The Convener: Has there been no collaboration or discussion?

Roseanna Cunningham: There has been none. There has not even been notification, let alone collaboration.

The Convener: Right.

Roseanna Cunningham: To be clear, I point out that we have known about the proposed office for environmental protection since the UK Government began consulting on the bill, when both Scotland and Wales refused to be part of it. The notion that that office was going to be extended to have oversight of climate change activity came out of the blue when the bill was published. I could be mischievous and point out that if a Government is to have oversight of climate change activity, given that Scotland's ambition on climate change is considerably in advance of that for the UK as a whole, it should perhaps be the case that the Scottish Government oversees what is happening at Westminster. However, I find the UK Government's position astonishing.

The Convener: That is of particular concern, given that quite a lot of the targets in the Climate Change (Emissions Reduction Targets) (Scotland) Bill that we recently passed are dependent on what happens at UK level. That is correct, is it not?

Roseanna Cunningham: Yes.

Stewart Stevenson: The panel might not be in a position to comment on this, but another part of the European Union (Withdrawal Agreement) Bill that causes me great concern is the overarching power of the proposed independent monitoring authority that schedule 2 will create, the membership of which Scottish ministers will have no right to determine. Has that relevance for the committee's interests? It will clearly have relevance for the interests of the Scottish

Parliament as a whole. The authority's focus seems to be on human rights, but it seems that it will cross over into environmental matters and might, in fact, sit over the proposed office for environmental protection on leaving the EU. What can you say on that?

Roseanna Cunningham: Those are among the issues on which we have continued to try to get clarity, and are among the reasons why we are at this stage unable to agree to a legislative consent motion. We have advised the Presiding Officer that we cannot do that until we get more clarity from the UK Government. I suspect that, in the few days before the Environment Bill was published, there was a rushed attempt by colleagues south of the border to get something out the door. I am not sure that they are clear about some of what is in the bill and what is intended. We need to do a lot of work on that, if we have the opportunity to do so; we could be in a completely different position by the end of today.

Stewart Stevenson: That leads to my second question. I have just seen on the wire that all the parties at Westminster now support the proposal for a general election in early December, which implies that the Environment Bill will fall. In that light, what would we in Scotland lose through the bill not being progressed at Westminster? Notwithstanding our concerns about some aspects, I imagine that we would also lose some positive things that would have been of benefit.

11:15

Roseanna Cunningham: In fairness, I say that a considerable amount of work has been done, and that we were in agreement on things such as producer responsibility. Perhaps that is a conversation for another meeting.

We had negotiated with the UK Government some such provisions over a long period, and would have been happy with an LCM on those. The levering in of additional provisions has created the problem, rather than the pre-existing agreed areas on which we had hoped to use the passing of the UK Environment Bill to allow us to have legislation on things that would have been difficult for us to legislate on, given the pressure on our parliamentary legislative timetable.

There has been a bit of a loss in that respect. Stewart Stevenson is right to raise the matter; however, given the current circumstances of the bill, I cannot, in all conscience, simply sign it off. Of course, if the bill falls because an election is called, this all goes back to square 1.

Mark Ruskell: The picture is changing minute by minute; I am getting confused.

Roseanna Cunningham: Forgive me; I do not know any more than you do about that.

The Convener: We will try to keep you up to date.

Mark Ruskell: We need to keep an eye on Twitter.

Is there any more clarity around how the proposed office for environmental protection will link with devolved functions? We have heard about the example of offshore wind farms and whether the proposed OEP could have a role in determining consent processes for them. I am searching for real examples in which the proposed OEP would straddle a mixture of devolved and reserved matters, or will come in on them.

Roseanna Cunningham: That is one of the areas on which we have been unable to get clarity. Our perspective is that the proposed OEP should have no role in respect of devolved issues. We have never had clarity on what the UK Government thinks are the issues on which the proposed OEP might intervene; that is something that we have been unable to establish. The addition of climate change came as a complete surprise to us because we had been having conversations about the proposed OEP.

As I understand it, the proposed OEP will, in effect, be a desk that receives things then passes them to the relevant departments—it will be a conduit for complaints and issues. It is an interim proposal. Perhaps Katriona Carmichael has more information.

Katriona Carmichael (Scottish Government): That is my understanding of the UK Government's proposal for the interim arrangement.

Roseanna Cunningham: The committee should understand that the UK Government is proposing an interim arrangement, although the bill is about the longer term. It is not clear what the proposed OEP will look like and what the bill is intended to cover. Scotland and Wales have said clearly from the outset that we are not happy for the legislation to extend to devolved policy areas. As members heard in my opening remarks, we have therefore developed a proposal for an interim position while we develop the long-term scenario. The scenario is so fluid that I have been having conversations about setting up a fix for a no-deal Brexit, and for things that might not be necessary if no deal does not happen, but will be necessary if there is no deal, which we might not know until the last possible minute. It is like an "Alice in Wonderland" scenario.

I want to record that I am extremely grateful to Jim Martin for agreeing to take on the task in the hugely uncertain space that we are all in just now.

My intention is that our interim measure would look much more like a proper set-up. It would not be just a desk, but would mirror what the European Commission currently does. We cannot make it bigger than that, but it will, at least, do that.

The Convener: I am sorry to interrupt. You are putting in place all these governance procedures and processes and, potentially, bodies. Are you concerned that there might be some compulsion from the UK Government that interferes with that or supersedes it?

Roseanna Cunningham: I cannot say whether that will be the case because, at the moment, there is so little available for us to understand. When the UK Government consulted on this aspect of the Environment Bill, it did so on the basis that we—by which I mean Scotland and Wales—were out of those provisions for devolved policy. The UK Government has always kept the odd overarching statement that there will be some reserved policy matters, but we have never been able to establish what it thinks those will be. That has always been an issue, and we continue to press the UK Government on it. I suppose that one could argue that the bill progressing through Parliament might at least have given some ability to find out what that was all about.

I have to say that, at the moment, I do not think that the UK Government intends to do that, except for the addition of the climate change oversight. We were all taken aback by that, and I do not understand what that will look like. I am trying to be as expansive as possible, given the situation that we are currently in.

The Convener: I appreciate that.

Claudia Beamish: Cabinet secretary, it is helpful that you highlighted the reassuring point about the advisory panel and recognising the Commission's position. Can you say anything about the monitoring and enforcement arrangements? As I understand it, in the consultation in Scotland, positive arguments were made for having environmental monitoring and enforcement arrangements here. If those arrangements go ahead, how would they be independent of Government?

Roseanna Cunningham: Again, I will separate out a no-deal exit from an exit with a deal, because those are two different scenarios.

Claudia Beamish: Of course. I was talking about the long term.

Roseanna Cunningham: For a no-deal exit, as well as the panel, we would expect the existing organisations in Scotland that carry out monitoring and enforcement to continue to do that. Obviously, there is a conversation to be had about longer-

term governance in that regard, and we will bring forward ideas on that as soon as is reasonable, although the committee is undoubtedly aware that there is little chance of legislating before 2021. Therefore, the interim scenario that may come into play may subsist for a couple of years.

The other thing about the interim scenario is that we couch it in terms of no deal and deal, but it kind of depends on the deal whether we continue to have the interim scenario for longer. We are in a very uncertain period.

Claudia Beamish: Convener, do you want me to ask about environmental principles now?

The Convener: I will come to Rachael Hamilton first and then I will come back to you.

Rachael Hamilton: I want to go back to a previous point. Cabinet secretary, am I correct in thinking that you are considering ways in which the devolved Administrations can work together to produce environmental principles?

Roseanna Cunningham: I am not clear what you mean. We all agree on the environmental principles that we adhere to. I do not think that there is a difference anywhere in the UK—there is prima facie agreement about the environmental principles.

Rachael Hamilton: Okay. It is just that there was something in the papers that said that there was an agreement to consider

“ways in which the four UK administrations can work to provide for coherent sets of principles.”

Roseanna Cunningham: That may be a shorthand that the media has used, because the four environmental principles that everybody knows about are agreed by those round the table. There is some discussion of additional principles, which some members of the committee will want to have a conversation about, but the four that apply are those that we anticipate putting into the continuity bill, when it is introduced.

There is no disagreement on those principles, although there may be one on another matter. Let us assume that Northern Ireland has a minister and that there are four ministers around a table discussing coherence of approach. The issue arises with the presumption by one of those ministers that they somehow have the directing role, when they do not when it comes to any devolved matter. The issue concerns that, rather than the principles themselves.

Rachael Hamilton: Thanks.

Claudia Beamish: As you will recall, cabinet secretary, Mark Ruskell and I lodged amendments to the previous continuity bill—that seems a long time ago—on the four guiding principles and we were reassured, as were many people in Scotland,

that they were included. However, I understand that there is another possible principle on integration, and that human rights principles could be added. You have already highlighted that there will be more to consider. I know that the four principles are there, and that is reassuring, but there may be more to consider.

Roseanna Cunningham: I need to say that I am not in charge of the continuity bill, so that question is slightly off centre for me. We have agreed the four principles, and there would be no debate about that unless we felt that the continuity bill had to be brought forward in time and introduced earlier. That may raise an issue because of timetables for parliamentary drafting. I am therefore wary about getting drawn into too much detail about what might or might not be a debate at the time of the introduction of the continuity bill, which, at the moment, is due to be in spring 2020 and is intended to legislate for the four environmental principles. However, as we know, it is not just a week that is not a long time in politics—a day is now a long time in politics.

The Convener: You have said on quite a few occasions that the Scottish Government intends to keep pace with EU standards, yet the language from the UK Government has changed in that area.

Roseanna Cunningham: Very much so.

The Convener: What is your response to that, and what will the impact be?

Roseanna Cunningham: It does not change my intention. It makes it even more important that we retain full control over what is already devolved, because we will be able to do that only if we are in the driving seat on policy. There are tricky issues on keeping pace, because doing so means that we also have to be plugged into the discussions, debates and conversations, and the development of changing thinking. That will be a challenge for us, and we are looking at ways in which we can continue to do that, even on the other side of Brexit, and ensure that there are mechanisms by which we can continue to stay plugged in. For example, we very much hope that the Scottish Environment Protection Agency will continue to be locked into the pan-European gathering of environmental protection agencies.

We will need to keep a very close eye on the continuation of such connections so that we have the information that will allow us to keep pace with developments. It is our intention to do so, but that is why I am so resistant to anything that would give away power in this area.

The changing language that you have referred to, particularly in recent weeks as the political declaration and withdrawal agreement have come back, is a worry for us, because it appears that—

perhaps not today, tomorrow or next week, but at some point—there will be an attempt to diverge from the EU standards to which we have become accustomed. The Government and I need to protect our environmental policy from that as much as possible.

11:30

Finlay Carson: Given the Government's position that, regardless of how the UK leaves the EU, it will maintain or exceed the existing environmental standards, and your assurance that your civil servants are prioritising preparations for a no-deal exit from Europe, how advanced are your interim plans as regards governance?

Roseanna Cunningham: I have indicated that I have already had conversations with Jim Martin, who has agreed to chair the panel.

Finlay Carson: What are the timescales for that? The present scenario is one that you will have been looking at from day 1. Since people voted to leave the EU, the Government's position has always been that it would keep pace with environmental standards and prioritise preparations for a no-deal exit. Why have we come so far down the road before getting some idea of what the interim arrangements would be?

Roseanna Cunningham: With the greatest respect, we were not discussing a no-deal exit right from the get-go in 2016. At that point, everything was about getting a deal. A no-deal exit has become a live issue this year, and it was this year that we began to consider that we needed to do something that would allow us to address the interim scenario. We had to make a decision about what that would look like; there has been a bit of to and fro about that. We then had to make a decision about who, in the circumstances, would be the best person to anchor that process. That is the context in which the discussions with Jim Martin have taken place.

As I indicated in an earlier answer, we intend the situation to mirror the existing situation for cases that are currently before the European Commission. At the moment, there are six live cases from this country. The scenario that we are talking about is not similar to a court sitting on a daily basis; it is not like that. We will simply have to proceed with the panel in the knowledge that a no-deal exit is still a possibility.

It is an extremely difficult set of circumstances. I am having a conversation with somebody who is very experienced and who knows that the panel might not happen, but who has nevertheless agreed to take it on. He is having to get up to speed with the current cases. We have yet to make a decision about what would happen with those. If we were to go off a cliff as part of a no-

deal exit, every one of those cases would suddenly be finished. We would need to make a decision about whether we would uplift some of those and bring them into the new scenario. Depending on what stage they were at, they could fall away. All of that must be thought about beforehand.

It is an odd discussion to be having, because the panel might or might not be needed, but we are continuing to have it.

Finlay Carson: I am suggesting that there is no uncertainty about a no-deal exit—a no-deal exit is a no-deal exit. Therefore, you have some certainty: if we have a no-deal exit, you know what the parameters are within which you will have to work.

Roseanna Cunningham: Yes.

Finlay Carson: That is why I am surprised that, given that it is likely that the Scottish Government will not support any deal that is arrived at and that you expect to have to prioritise a no-deal exit, we do not have more certainty about what things would look like after a no-deal exit. That scenario is less uncertain, because we know what a no-deal exit would look like.

Roseanna Cunningham: Are you asking me why I did not tell the committee what I am telling it today a year ago? Is that what you are asking me?

Finlay Carson: No. I am suggesting that the lowest common denominator—the worst scenario—is a no-deal exit. I am surprised, given that we could have been leaving the EU on 31 October without a deal, that you do not have a better idea of what interim arrangements might be put in place.

Roseanna Cunningham: Okay. There is a lot to do. We have a huge amount to do across the board in this whole area. Officials have had to focus on certain things at the expense of other things. I suppose that, in theory, I could have had the interim panel ready to go six months ago, but we are talking about six cases. That process did not have the same necessity as some of the other things that we have had to do. This is all about managing what we do and do not do and how we do it. We have not stopped doing some things, but we have had to slow them down in order for other things to take place.

There will not be a no-deal exit on Thursday. There is a new date at the end of January, and there might or might not be an exit then. You have to understand that money will get spent on that, too. If we get to a position in which the panel wants or needs to take up cases, it needs to think about what its approach will be in those circumstances. People are, on their time, already engaged in doing that.

This is all a balancing judgment about what is absolutely needed and when it is needed. Some of the choices are not easy to make.

Mark Ruskell: I will ask about the UK Government's replacement for the registration, evaluation, authorisation and restriction of chemicals—REACH—regulation. Numerous tranches of regulations and amendments to regulations have come to the committee. The UK Government seems to have made limited concessions—it will be involving more expert advice and stakeholders in the decision-making process. Are you content with where we have got to? Will the changes lead to improvements? Where is Scotland's voice represented in the regulatory structure? In effect, the Health and Safety Executive will still run the regulatory framework for the whole of the UK, and I am a little unclear about how we will input into it. Where is the voice of the Scottish Parliament and the Scottish Government the regulations?

Roseanna Cunningham: Broadly speaking, we are probably in the best place we thought we could be, but I will not say that the situation is perfect. There are on-going conversations about a common framework; those have not been finalised, but they are moving on. This is one of the areas where engaged conversation is taking place.

This is about maintaining the highest possible standards and protections for public health and the environment and, crucially, for business, to make sure that it has consistency and continuity. Chemicals are one of those things that most people do not really think about, but they underpin an enormous amount of our industry and they are incredibly important for the functioning of our economy.

I intend to make a case for the UK retaining membership of the European Chemicals Agency—I have a strong view about that—and participating in all the relevant regulatory regimes. Also, the UK Environment Bill would remove powers previously available to the Scottish ministers, so that is an area that we want to work on.

If I think about the areas that most directly affect my portfolio and are most directly impacted by Brexit—chemicals, waste, water and the EU emissions trading system—chemicals are possibly the area that is in the best place in terms of the agreements that have been reached. However, the situation is not ideal. I agree that there is still a slight nervousness about the information technology system that has been set up, and people will not be convinced until the button is pressed and it works. However, that is more to do with IT systems than it is to do with this issue.

Don McGillivray looks like he is itching to come in on this issue.

Don McGillivray (Scottish Government): No, I was simply nodding along to what you were saying, cabinet secretary.

Roseanna Cunningham: That is always a helpful sign.

Don McGillivray: I think that you have covered the points that I would make.

Mark Ruskell: You spoke earlier about going beyond the four environmental principles. When we debated the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, the Scottish Government made a commitment to progress animal sentience issues. That is not covered in the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. Where does that principle fit in? Will it come back in as part of the continuity bill? Can legislation be updated in other ways?

Roseanna Cunningham: Animal sentience is not one of the four principles of the continuity bill that we have been speaking about. I am not conscious of where it is, so I will undertake to get back to the committee about it.

The Convener: With regard to EU exit, we often ask you about your discussions with the UK Government on the shared prosperity fund and replacement funding for EU funding streams. Can you give us an update on whether the discussions have moved on in clarity or detail?

Roseanna Cunningham: I still have no idea what the shared prosperity fund is intended for and how it will be operated, so I continue to have the same concern, as does my colleague Fergus Ewing. There is no doubt about that.

The loss of EU funding would obviously pose a huge risk to environmental objectives through a direct financial impact and a longer-term reputational impact. There are already signs that our research would be adversely impacted; people are being told that, in effect, a UK element in a research proposal will not work, because most proposals span a number of other countries—that is a big issue. We have considerable concerns about that issue and the continued lack of information and clarity, and it is not just my portfolio that is affected.

I have a breakdown of current EU funding—would the committee like to see something more detailed?

The Convener: We would be happy to take the breakdown. We have a fair idea—

Roseanna Cunningham: You are probably all aware of it.

The Convener: Yes.

Roseanna Cunningham: The short answer about whether we are any clearer about replacement funding is no.

Claudia Beamish: It has been highlighted to the committee that big and significant long-term projects have been supported by the EU. For example, the Shiant Islands, which I have visited, got EU LIFE fund money. I fully expect that the cabinet secretary has already done so, but is it possible to highlight again to the UK Government that the loss of such long-term funding in our biodiversity crisis would be of real concern to Scotland?

Roseanna Cunningham: We raise the issue at every interministerial meeting between the Department for Environment, Food and Rural Affairs and the devolved Administrations. The devolved Administrations are all in the same position and we raise it at some point of the agenda at every single meeting—the meetings take place almost monthly.

I am bound to say—although I may be speaking out of turn—that I am not entirely certain that most UK ministers know either. I am not sure that their refusal to tell us is because they are keeping it a secret. I am not clear that they themselves have much more detail than we have.

Finlay Carson: If there is to be a shared prosperity fund, it is obviously really important that it is designed in such a way that Scotland can maximise it. When is the Scottish Government's consultation, which is headed by Professor David Bell, likely to report back? I know that it will be in the new year. Ultimately, it is important that it is brought forward quickly, so that it could potentially fit with the prosperity fund.

Roseanna Cunningham: The consultation is not being instructed through my portfolio. I will ask Katriona Carmichael whether she is aware of the answer.

Katriona Carmichael: We will be able to confirm that.

Roseanna Cunningham: We will confirm the reporting date, but the consultation is not instructed through my portfolio, so I am not certain when it will be.

The Convener: My colleagues do not have any final questions, and we have run out of time. I thank the officials who have accompanied the cabinet secretary. The meeting is suspended briefly to allow officials to change over for the next part of the agenda.

11:44

Meeting suspended.

11:45

On resuming—

Subordinate Legislation

Conservation (Natural Habitats, &c) (Miscellaneous Amendments) (Scotland) Regulations 2019 [Draft]

The Convener: The third item on our agenda is evidence on the draft Conservation (Natural Habitats, &c) (Miscellaneous Amendments) (Scotland) Regulations 2019. I am delighted to welcome back Roseanna Cunningham, the Cabinet Secretary for Environment, Climate Change and Land Reform, who is joined by Hugh Dignon, head of the wildlife management and biodiversity unit of the Scottish Government. Good morning.

Members will recall that we considered the regulations on 24 September and reported on 27 September. The instrument was subsequently withdrawn and relaid. The committee also wrote to the Minister for Rural Affairs and the Natural Environment, querying two matters in relation to the instrument, and we have had a response on those. The committee's letter and the Scottish Government's response to the queries is available at annex B of the relevant committee paper.

The Delegated Powers and Law Reform Committee considered the regulations this morning and had no comments to make. Do any colleagues have any comments?

Mark Ruskell: I have a brief comment about enforcement on the back of the letter that Mr Dignon sent to the committee. The regulations are very welcome and extend the provisions on how we tackle invasive species. However, I notice that the letter says that there has been only one enforcement agreement on giant hogweed in Scotland and that no control orders have been put in place. The suggestion is that a letter from Scottish Natural Heritage is often good enough to get some action from landowners. However, it is plain that that does not seem to be the case on the ground.

How do we improve enforcement? It is fine to create a long list of invasive species that we do not want to see coming into Scotland—there is also the pressure of climate change and other issues—but if we are not carrying out any enforcement, except through an occasional letter from SNH to a landowner that will get ignored, what is the point?

Roseanna Cunningham: Hugh Dignon will deal with that question.

Hugh Dignon (Scottish Government): The question is very relevant to much of the invasive

alien species policy in Scotland, but it is not dealt with directly by the regulations, as it is covered by the Wildlife and Countryside Act 1981. The point that SNH is making is that most approaches to clearing non-native species, whether that is Himalayan balsam or giant hogweed, are best conducted on a large scale—typically a river-catchment scale. SNH's policy is to use the enforcement mechanism where a landowner does not want to co-operate and so renders useless the activities of the other landowners.

SNH is saying that it usually finds that people are willing to co-operate and that schemes go ahead. There are plenty of schemes throughout the country to remove invasive species from river catchments. Where someone indicates that they are not prepared to co-operate with their neighbours, a letter pointing out that the enforcement powers are available to SNH usually has the effect of persuading that person that it would be best to work with their neighbours to remove the species in question.

Mark Ruskell: You say that that is usually the case, but when we first looked at this issue, committee members raised numerous examples of places where action is not happening at all. A letter from SNH does not really do it. In your response to the committee, you said that no control orders have been issued, which means that none of this is being enforced and there is just a bit of coercion to try to get landowners to do the right thing. That may happen in most cases, but it is not happening in all cases.

Hugh Dignon: SNH has not made me aware of any situation where it has tried to co-ordinate a wider approach to controlling an invasive species that been frustrated by an individual landowner and where there has been an opportunity to impose a control agreement and that has not been done. As far as I am concerned, where SNH seeks a wider collaborative approach, it usually gets co-operation from the landowners concerned.

Mark Ruskell: I could send SNH a list—I am sure that other members have lists, too.

Stewart Stevenson: I want to follow up on that and ask whether Hugh Dignon is aware that Aberdeenshire Council—which is not led by my political colleagues, even though I am saying good things about it—is taking action following the discovery of giant hogweed. Is that typical of what is happening across Scotland? Are local councils simply getting on and doing it, so it never really comes to the attention of the enforcement system at all? The example of which I am aware is exactly such a situation—the council is simply getting on with it.

The Convener: As there are no more questions, I will move on to the next agenda item

and invite the cabinet secretary to move the motion.

11:52

Meeting continued in private until 12:50.

Motion moved,

That the Environment, Climate Change and Land Reform Committee recommends that the Conservation (Natural Habitats, &c) (Miscellaneous Amendments) (Scotland) Regulations 2019 [draft] be approved.—
[Roseanna Cunningham]

Motion agreed to.

The Convener: I thank the cabinet secretary and Hugh Dignon for their presence this morning.

That concludes the committee's business in public today. At the next meeting, on 5 November, the committee will hear from the UK Committee on Climate Change on the Scottish climate change adaptation programme. The committee will also take evidence on Scottish Water's investment plan.

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