OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 24 October 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 24 October 2017

CONTENTS

DELEGATED POWERS AND LAW REFORM COMMITTEE
28th Meeting 2017, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

Alison Harris (Central Scotland) (Con)
*Monica Lennon (Central Scotland) (Lab)
*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)
Gerald Byrne (Scottish Government)
Luke McBratney (Scottish Government)
Isobel Mercer (RSPB Scotland)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)
Daphne Vlastari (Scottish Environment LINK)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 24 October 2017

[The Convener opened the meeting at 10:05]

Interests

The Convener (Graham Simpson): I welcome everyone to the 28th meeting in 2017 of the Delegated Powers and Law Reform Committee. I have received apologies from Alison Harris, so I welcome her substitute, Bill Bowman. I also welcome to the meeting Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe, and his officials.

Our first item is a declaration of interests. In accordance with section 3 of the code of conduct, I invite Bill Bowman to declare any interests that are relevant to the remit of the committee.

Bill Bowman (North East Scotland) (Con): I have nothing to add to what is in my entry in the register of interests.

Decision on Taking Business in Private

10:06

The Convener: Our second agenda item is to make a decision on whether to take business in private. It is proposed that the committee take items 8, 9 and 10 in private. Those items are the delegated powers provisions in the Social Security (Scotland) Bill, the contents of the committee's report to the Education and Skills Committee on the delegated powers in the Children and Young People (Information Sharing) (Scotland) Bill and consideration of the evidence that we will hear from the minister, Scottish Environment Link, and RSPB Scotland on the European Union (Withdrawal) Bill.

Does the committee agree to take those items in private?

Members *indicated agreement.*

European Union (Withdrawal) Bill

10:07

The Convener: Our next item is evidence on the European Union (Withdrawal) Bill. Do you wish to make any opening remarks, minister?

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): Thank you for the invitation to be here today. I will be brief because I know that members have a number of questions. I would like to emphasise one important point. We are very keen to differentiate between the technicalities of leaving the EU, which require that the European Union (Withdrawal) Bill be enacted at Westminster, and the policy of leaving the EU, with which we profoundly disagree. In so far as today's questions will focus on the bill, we are trying to find a modus vivendi with Westminster in order that we can take the issue forward. That has been difficult, and it remains so.

The joint ministerial committee (European Union negotiations) meeting, which was held last Monday in London, made some progress on the frameworks that are covered in clause 11 of the bill. I am happy to speak about that, if the committee has questions on it.

I have made that distinction because it would not be a good use of our time to get involved in the second issue at this stage, given that the committee is focused on the first issue—the technicalities in getting the legislation right.

The Convener: Thank you, minister. You are right to say that the committee is concerned with the technicalities rather than the policy. Can you outline your general concerns about the bill?

Michael Russell: My concerns lie in two areas, although there are many other concerns and several things in the bill to which many of us would take exception. So far, there are more than 300 amendments to the bill at Westminster.

We have been working very closely with the Welsh Government: early on, the Scottish and Welsh Governments decided that there are two principal areas of concern. Those concerns arose after we had not been shown the bill while it was being drafted, as would be normal for a bill that requires a legislative consent motion. Usually there is a process between officials who discuss a bill to ensure that it is in a form to which legislative consent can be given. That process did not take place, so when we were finally shown the bill—at the beginning of July, with the bill due to be published in mid-July—we expressed concern about two issues. As a result, I met David Davis the following week, but neither we nor the Welsh Government could persuade the United Kingdom Government to make changes to the bill, at that stage.

The first of the two issues is clause 11, which will transfer to Westminster, rather than to the devolved Parliaments, the powers that exist in the EU that are to do with devolved areas—a list of 111 items. That is unacceptable as far as we are concerned, and there is, across a range of political parties, broad agreement that it is unacceptable. That is an on-going issue.

The second issue is to do with so-called Henry VIII powers. We have concerns about the breadth and exercise of those powers—which we will, undoubtedly, come on to—but there is a specific issue with the powers that are given to the Scottish ministers. Those powers are different from the powers that are given to the United Kingdom ministers, which include the ability to change Scottish legislation without consultation of the Scottish Parliament or the Scottish Government. That would be unacceptable to us.

Those are the two principal areas of concern. We can also talk about a variety of other issues that we find difficult, but in our approach to the matter, we decided—very unusually—to propose with the Welsh Government joint amendments that focus on the areas that are of most concern. It is the only time that we have ever proposed joint amendments to a Westminster bill. Members of the UK Parliament from the Labour Party, the Liberals, the Scottish National Party, Plaid Cymru and the Green Party have lodged amendments on other matters, as have some Tory MPs, but the amendments that we have focused on are those that we have developed jointly with the Welsh Government, and which have been tabled in the House of Commons with the support of all the Opposition parties.

The Convener: I want to ask you about last week's meeting between the UK Government and the devolved Administrations and the statement that came out of it about common frameworks. I found it to be quite positive that such a statement was issued. You were a party to that, so I take it that you accept that common frameworks are needed.

Michael Russell: I have accepted since we published "Scotland's Place in Europe" last December that some common frameworks are needed. Frameworks are not the issue. The issues are who decides on what subjects such frameworks are required for, how those frameworks are governed and how decisions are made as a result of those frameworks. Both sides agree that there are some things for which we will not need frameworks, and that there are some things for which it is likely that we will need frameworks of some sort, but those cannot be

imposed and must involve an element of co-decision making. If we are dealing with matters that are devolved to the Scottish Parliament, the Scottish Parliament will not give them up. It could choose to share decision making on those matters, but the UK Government would also have to decide to do that. That is the issue.

Last week's meeting was positive in that we managed to agree on the principles that would guide our decision making. We are now moving on to look at exemplars in a number of areas including agriculture, the legal area—

Gerald Byrne (Scottish Government): Justice and home affairs.

Michael Russell: In addition, the Welsh Government—which does not deal with justice and home affairs to as great an extent as we do—has asked that something be done on food labelling. We will look at those exemplars to see whether we can agree a governance structure. We have made a small step forward and we are genuinely trying to make progress. However, I stress again that we cannot lodge a legislative consent motion at the present time because we cannot consent to the bill—clause 11, in particular—as it is drafted.

The Convener: The statement that was issued following last week's talks says:

"Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent".

What does the phrase "not normally" mean?

Michael Russell: As far as we are concerned, it means that the competence of the devolved institutions will not be adjusted without our consent. If I am correct, the word "normally" was used in the Scotland Act 2016 in relation to the Sewel convention. The expectation then was that it would be a binding commitment by Westminster. Rather unfortunately—I do not want to be too unkind about this—the Advocate General made much of the word "normally" during the Supreme Court hearings, arguing that it has no meaning whatever. In my view, that was foolish—I have made that view clear in other circles, too—because it undermined confidence in a relationship that should have an element of trust in it. However, if one party puts words into an agreement and then turns around and says, "Yah boo. They don't mean anything," that diminishes that trust.

As far as I am concerned, the agreement that we reached last week—and which the Welsh also reached last week—means that there will be no change in the devolved settlement without the consent of the devolved Administrations. Should that not be the case, we will go back to where we have been, which would mean that there would be inability to communicate on these matters. I take it, however, that we have an agreement that we are going to behave properly, respectfully and trustfully to each other, and that we will move forward to try to find a way to get a solution.

The Convener: That is helpful. I hope that that is the case.

We have some set questions, which we will work our way through.

The bill confers wide powers on United Kingdom and devolved Administration ministers to correct retained European Union law. In your view, are those powers clearly expressed?

Michael Russell: The powers are expressed in terms that are understandable; whether they require further refinement is an issue to be discussed. For example, one could ask whether the powers are necessary. No power should be broader than it needs to be. We need to ensure that the powers cannot be used to enable ministers to make significant policy changes, for example. That is not the intention of the bill. The intention of the bill is to ensure that the changes that are necessary—or "appropriate", in the terms of the bill; one could discuss the difference between the two words—

The Convener: We will.

Michael Russell: We want to ensure that the bill is used to do the things that require to be done. There is no doubt that this exercise is unique—by which I mean that it has never been done before—and is huge in scale. As a result of that, we will have to do things that have not been done before. However, we need to be cautious that we are not using the opportunity to do things that should not be done. I refer the committee to how the bill has been drafted. Some people would interpret the bill as being drafted in such a way that it can be used as a back door to reducing the powers of the devolved Administrations. That is not what it should be used for, so we would object to that element, at its very heart.

The Convener: Do you think that that is the case?

Michael Russell: I think that that is how the bill looks. I have had an assurance from the First Secretary of State and Minister for the Cabinet Office that that is not the case, but that is how the bill looks. I hope that we can come to an agreement that will remove the parts of the bill that give that impression. That is also the position of the Welsh, who have taken as strong a line as we have that such a reduction in the powers of the devolved Administrations will not be allowed.

The Convener: As you said earlier, there is cross-party support for that view: every party has agreed on that point.

Michael Russell: Absolutely. I am happy to say that the parties have been meeting here in Parliament, as you know. The Conservatives were at the last meeting; I am glad that they are involved.

The Convener: The committee has heard from witnesses that there are problems with the breadth of the powers and, in particular, with the wide reach of the term "deficiencies". At the same time, we recognise that deficiencies must arise from the UK's withdrawal from the EU in order to fall within the scope of the correcting power. How do you think that the powers could be improved?

Michael Russell: There are a number of ways in which the powers could be improved. I want to make clear the fact that we have focused our attention on two deficiencies in the bill that we require to be remedied before we can give legislative consent. There is a broader range of views on deficiencies that Westminster MPs are also bringing forward to amend the bill. For example, the definition of "deficiencies" is unlimited but—as you know—illustrations are given in clause 7(2), and those examples demonstrate the range of ways in which law will be inoperable as a consequence of leaving the EU. In those circumstances, an illustration is given of what the problem is and there is application of a solution to the problem. However, there are parts of the bill in which that does not happen, and no examples are given at all. Those parts are harder to interpret.

On a general point, we do not object to the work having to be done. We do not want it to be done—I make that policy point—but we do not object to its having to be done. We just want it to be done in the best and most efficient way possible without unintended, or intended, adverse consequences.

The Convener: I will ask you my final question for now, because you have mentioned the issue. Would you support calls to make the powers available only where "necessary" to correct deficiencies in retained EU law rather than where that is considered to be "appropriate"? We have taken evidence on the matter.

Michael Russell: I know. "Appropriate" is often used, including in our own legislation, so its meaning is easier to understand. No powers in any bill—particularly this bill—should be capable of being used to make significant policy changes, so I suppose that the word "necessary" is narrower and perhaps more appropriate, in that sense.

I am not unsympathetic to the suggestion. I will not take a firm view at this stage, but I can say that if we are trying to ensure that the provisions in the bill are not abused—accidentally or deliberately—the word "necessary" might be a better word.

The Convener: Both words could allow for some flexibility.

Michael Russell: Yes. The word "necessary" is probably narrower and therefore allows a degree of confidence to be gained in how the powers might be used.

Stuart McMillan (Greenock and Inverclyde) (SNP): Do you think that the sunset clauses that apply to the powers in the bill are the right ones, or should the powers lapse earlier—for example, on exit day?

Michael Russell: I have no firm view on sunset clauses in respect of most of the bill. They will be for amendment and discussion at Westminster. Where I think that a sunset clause would not create a difference—this has been raised, of course—is in the case of clause 11 of the bill. The Law Society of Scotland is among the bodies that are suggesting the possibility of a sunset clause for the powers that will be transferred by clause 11. It seems that such a clause would not cure the problem. If the problem is—as I have defined it this morning—about who makes the decisions and how those decisions are made, the fact that the decisions would stop being made by the wrong people and in the wrong way after a period of time would not get to the root of the matter, which is to make sure that that does not happen at all. I am not unsympathetic to limiting powers, but I do not think that doing so would make much difference in this case.

As for the other sunset powers, that will be for others to discuss.

Stuart McMillan: Should constitutional statutes such as the Scotland Act 1998 be amendable or repealable through regulations that will be made under the bill?

Michael Russell: No. There should be a further restriction of the powers in clauses 7, 8 and 9 because the ability to amend Northern Ireland devolution statutes is explicitly referred to in the bill, so that it is not possible to amend them. I can see why it is the case, but I do not think that it is right that there will be no power to amend Northern Ireland devolution statutes while power to amend Welsh and Scottish statutes would remain. We have made that concern absolutely clear.

Stuart McMillan: You have mentioned clause 11 on a few occasions this morning. It provides for the process by order in council to allow amendment of retained EU law, where that is otherwise restricted at the point of exit from the EU. The process is similar to that which is already provided for in section 30 of the Scotland Act 1998

to make modifications to schedules 4 and 5 of that legislation. Orders in council under clause 11 will be subject to affirmative procedure and to joint scrutiny by the Westminster and Scottish Parliaments. Is procedure by order in council appropriate?

Michael Russell: No—because I do not agree with clause 11. It is a chicken-and-egg situation, if I can put it that way.

Clause 11 is unacceptable—we do not want it in the bill and we cannot give consent to the bill while it remains. That is absolutely clear. It is modelled on section 30 of the Scotland Act 1998, which provides for adjustment of reserved matters, but this is not an adjustment of reserved matters. It is a clear point of principle that, at the time of withdrawal from the EU, the powers should come to the Scottish Parliament. That is consistent with the political arguments that were made at the time, when the leave campaign made much of the fact that such powers would come directly to Scotland. Clause 11 not only breaks that political promise, but there is also something quite wrong about it. It confuses the process of devolution. That is the core problem.

Devolution is built upon the simple foundation that matters that are not reserved are devolved. That was a founding principle and it has worked very well. Clause 11 clouds that—in fact, it contradicts it. Some matters would become both reserved and devolved. It is not a good and workable way forward and it is wrong constitutionally. The bill should not have been drafted in that way, and we want the provision to be removed. Our position is common with that of Wales, and it is the position across the political parties in Scotland. I hope that it will prevail. There is no harm in people saying, "Look, we didn't get this right—we're going to take this out and do something different." That is exactly what we want to happen.

Stuart McMillan: Further to that, I note that the Delegated Powers and Regulatory Reform Committee at the House of Lords has taken a similar position regarding clause 11.

Michael Russell: It is very hard to find anybody who supports clause 11 other than, I have to say, the current UK Government. I have not heard the argument being put that it is the right thing to do, and all the examinations of it have indicated that it should not be in the bill. Given the consensus that exists on the matter—including the consensus across this Parliament, which the convener has pointed out—I think that there is an overwhelming case for clause 11 to be removed and for the bill to proceed in a more sensible way.

Stuart McMillan: What alternative process do you suggest should be considered in order for that to happen?

Michael Russell: Where we are at the moment in the discussions suggests that, with the removal of clause 11, there would be a range of ways in which co-operation could take place on frameworks. Some of those already exist; there is already legislative co-operation, including memoranda of understanding and joint working.

Some matters might require a legislative underpinning that would replicate the current Council of Ministers structure—it might be required in agriculture, for example. We are very keen to discuss how that would work so that there is co-decision making—I go back to those words again. Where there is a legislative underpinning, there needs to be a co-decision making process, and we can envisage that very clearly.

The Welsh Government published a paper in June, I think, that looked at possible structures. We think that it is a helpful contribution. It is not necessarily the final word; there are lots of models. We are trying to scope that with the UK Government and the Welsh Government through the JMC process in order to make sure that we understand how they would work, and to build trust and confidence that they will work. If we can do that, we can get an agreement.

Stuart McMillan: Thank you.

Bill Bowman: Good morning. I will move on to questions on devolved authorities' powers, which we might have touched on already. The committee has noted that the Scottish ministers have no power under the bill to modify retained direct EU legislation. It has been suggested in evidence that it would give rise to legal uncertainty if four sets of Governments in the UK were able to modify direct EU legislation—for example, that would make it difficult to identify what retained EU law was, with a potentially detrimental effect on the continuity that the bill aims to provide. What is your response?

Michael Russell: I have two responses. First, the concept of retained EU law is a pretty strange one, given the way in which the bill applies, because it is bound to atrophy. It is bound to die away and, as it does so, it will sometimes be difficult to read the runes of it to find out what is and is not there. The approach is not how we would have gone about this, but we are where we are.

Secondly, devolution is predicated on subsidiarity—on identifying where the right place is for decisions to be made. The fact that decisions may differ in each place is not a reason not to devolve them. Unless we reject devolution in its entirety, we will have variation and a pattern of

provision, and there is no reason why that should not be the case—it can be well dealt with.

If there are to be frameworks, they can deal with areas in which some certainty is required because there is a European equivalent—we can use agriculture as an example. However, there is also diversity in agricultural provision because of the diversity in how things are delivered. You will note, for example, that less favoured area payments exist in Scotland but not in the vast majority of England, so there are differences in how things are done. That does not change how agriculture is understood in these islands, and people can practise their business.

Having difference is not necessarily a problem, particularly if there is co-ordination, and we have always agreed on co-ordination, through a variety of mechanisms. I indicated to the convener just a few moments ago what those mechanisms are. We can go from the loosest type of co-ordination, which is simply a recognition of difference, perhaps with a memorandum of understanding, through to legislative co-ordination under agreed structures. That is all possible based on the current approach to devolution, and particularly if it is underpinned by a simple principle on what is reserved and what is devolved. The problem with the bill is that it confuses that principle.

10:30

Bill Bowman: So we need the co-ordination to make that work.

Michael Russell: Where we need co-ordination, we should have it, but we do not need it everywhere. There are already many areas where it does not take place. Damian Green has used the example of a jam manufacturer in Dundee wanting to sell his jam in Newcastle. Nothing in the bill helps or hinders that. The reality is that, in the present situation, there would be no difficulty in that jam manufacturer selling whatever he wants in Newcastle. The UK Government is going to make it more difficult for the jam manufacturer to sell jam in Nantes rather than Newcastle, but that is another matter.

Bill Bowman: I recently bought Mackays marmalade in Faro, so perhaps—

Michael Russell: Well, I just hope that you can continue to do so after 2019. I am sure that it is a staple product.

Bill Bowman: I am always happy to mention Dundee, anyway.

To move on to a shorter question, are there powers that are available to UK ministers under the bill that you think should be available to the Scottish ministers?

Michael Russell: That is an interesting question. One of the core issues is that powers are available to UK ministers to change law in Scotland without reference to the Scottish Parliament. We cannot agree to that, and we have to ensure that those powers are equalised.

We might discuss in more detail later the need for an appropriate mechanism to ensure that, if such powers are to be exercised by the Scottish ministers, they are subject to appropriate scrutiny and control by the Scottish Parliament. My officials are talking to parliamentary officials to try to find a way in which we can do that. As I think you know, I indicated in the statement that I gave to the Scottish Parliament on 20 September that I am entirely happy for such a mechanism to be found. I indicated that in evidence to the Finance and Constitution Committee, and we are putting forward constructive ideas about what the powers should be. That is paralleled by views at Westminster on the powers for UK ministers. The powers require a degree more scrutiny than the bill provides for.

Bill Bowman: I believe that there is no procedure that allows the Scottish ministers to make regulations urgently, although such a procedure is available to UK ministers.

Michael Russell: We would probably require to have to hand evidence that such powers are required. The emergency procedures might be necessary at Westminster, but we do not know that yet, as no illustrations have been given. If it is proved to us that they are necessary at Westminster, maybe such an amendment should be made to the bill, but we do not really know that at present.

Bill Bowman: Do you suggest that the Scottish ministers should have that power?

Michael Russell: I am not in a position to suggest that, because we do not know precisely what the powers are or how they will be exercised. However, if it was to be proved to us by Westminster ministers and through the usual official channels that there was a likelihood of using them and a necessity to use them, it would be appropriate for the Scottish ministers to be able to exercise such powers in Scotland, in the way that UK ministers would exercise them in the rest of the UK.

Stuart McMillan: A few moments ago, you mentioned co-decision making. The bill provides a choice of three routes to be taken in exercising the powers of correction: regulations made by UK ministers acting alone, regulations made by the devolved authorities acting alone and regulations made jointly by UK ministers and the devolved authorities. What factors will determine the choice of route that is to be taken?

Michael Russell: That is intriguing, and we will know that only in the light of the issues that arise. However, we have been clear that it is inappropriate for instruments to be made in relation to devolved Scottish legislation without the involvement of the Scottish Government and Parliament. That is the principle that we would apply, so we think that the route of instruments being made by UK ministers without any consultation should not be followed.

Two routes then remain: co-decision making and individual decision making. On co-decision making, we presently have involvement in joint legislative or administrative action in some areas, and we would apply that as required. We do not have a means of giving legislative consent to secondary legislation, but am I right in saying that that exists in Wales?

Gerald Byrne: I would need to check that, minister.

Michael Russell: This is therefore an ex cathedra pronouncement without support from officials, which is dangerous. I think that there is a mechanism in Wales that allows the giving of legislative consent to secondary legislation, because the Welsh Parliament has dealt more with secondary legislation than with primary legislation until now. We do not have such a procedure, so maybe we will require to develop one to look at secondary legislation that is being altered by joint decision making.

As for our decision making, it is clear that decisions that are made should be scrutinised. The issue on which I just responded to Mr Bowman is how we would scrutinise them and what type of scrutiny we would develop, which might perhaps be stronger than the scrutiny that is applied at Westminster. We will work with the Scottish Parliament on those issues, which we will want to get right. Section 57(1) of the Scotland Act 1998 allows EU obligations to be implemented in devolved areas. That is an example of how we might work.

The Convener: I am sorry, Stuart—Bill Bowman appears to be itching to come back in on that.

Bill Bowman: I am sorry—my hand is up because the sunshine that is coming from behind the minister is blinding me.

Michael Russell: I thought that it was the clarity of my argument that was making you look away, but there we are.

Bill Bowman: There we go.

Michael Russell: I am rarely accused of dazzling people—thank you for that.

Stuart McMillan: Minister, you said that the Scottish Government would be prepared to work with the Scottish Parliament. How would the Government propose to account to the Parliament for positions that it chose to take—particularly for choosing whether to give consent if the UK Government were to make provision in areas of devolved competence?

Michael Russell: That goes back to developing appropriate methods of scrutiny in the Parliament that are acceptable to it. I am sure that this committee will have a significant role in developing and implementing those methods. We are having those discussions and bringing forward ideas and I am keen that we do that.

There are lots of possibilities; I will touch on one or two. There could be pre-laying, flexible use of existing processes, new scrutiny procedures and modifications of committee structures and sitting times. All of those are possible ways to create opportunities for increased scrutiny; they and other things are being put on the table in discussions. Discussions between Government and parliamentary officials are the appropriate place to come up with recommendations that both sides can support and take through Government and parliamentary processes. That seems to be the right way to operate.

Luke McBratney (Scottish Government): The minister mentioned section 57 of the Scotland Act 1998, which is an existing example of the UK Government being able to implement EU obligations in devolved areas. That is done only at an administrative level, after bilateral consultation and with the formal agreement of the Scottish ministers. Scottish Government guidance on the use of that section requires that, when giving consent to the implementation of an obligation through section 57, the relevant portfolio minister should write to the convener of the Scottish Parliament committee that deals with the subject matter and to the convener of the Culture, Tourism, Europe and External Relations Committee.

That is the mechanism by which ministers are held accountable for their decisions to agree to the use of section 57. I expect that that is the sort of mechanism that is being discussed between Government and parliamentary officials to cover the similar issue that is raised by the proposal in the Scottish and Welsh Governments' amendments to the bill that would require devolved ministers' consent before the UK Government can make regulations in devolved areas.

Stuart McMillan: Thank you—that is helpful.

The Convener: Will you explain for the record, and for our army of viewers, what section 57 is?

Luke McBratney: Sure. On devolution, most existing powers of the UK ministers to make

provision in devolved areas were lost—they were transferred to the Scottish ministers. Section 57 preserves the ability of UK ministers to implement EU obligations, even in devolved areas. That is because an EU obligation would apply in the same way or very similarly between Scotland and England—between reserved and devolved matters.

The 1998 act provides no parliamentary procedure for the use of section 57 in the Scottish Parliament. However, as I explained, the procedure in practice is to write to both the subject matter committee convener and to the Culture, Tourism, Europe and External Relations Committee convener. That reporting mechanism is used to hold ministers accountable to the Parliament for the use of that power.

The Convener: Mr Russell, you just talked about parliamentary scrutiny, which the committee takes extremely seriously. You suggested that we might need to come up with new procedures. Have you or the Scottish Government given any thought to how Parliament might be enabled to decide between using the negative or the affirmative procedure for regulations under the bill?

Michael Russell: Practically, on what is coming down the line, we are not yet entirely clear about the scale of the instruments that will be required or the divide between those that are best decided on a UK-wide basis and those that are best decided on by the Scottish Parliament. I therefore do not think that we will put anything in place at this stage that is too rigid or too elaborate; we have to have more information first. We do not want to tie ourselves to a decision until we see what is coming. However, we can look at the question issue by issue and decide what will work for us.

Under schedule 7 to the bill, the affirmative procedure is dictated in certain circumstances—if the instrument

"establishes a public authority ... provides for any function of an EU entity or public authority in a member State to be exercisable instead by a public authority in the United Kingdom ... provides for any function of an EU entity or public authority in a member State of making"

a legislative instrument

"to be exercisable instead by a public authority in the United Kingdom ... imposes ... a fee ... creates, or widens the scope of, a criminal offence, or ... creates or amends a power to legislate."

Those criteria in schedule 7 set out how the decision should be made, and anything else should be subject to the negative procedure.

We do not quite know the bulk of the work that will come through that can be judged against those criteria. Once we know that, we will be in a clearer position. Given the development of the scrutiny procedures that we are talking about, we might want to apply further criteria—after agreement with the Scottish Parliament—that allow us to make such decisions.

That is where we are. As things develop over the next few months, we will be in a clearer position.

The Convener: For the record, the two procedures—affirmative and negative—allow for different levels of scrutiny by MSPs. It is in the Government's gift to decide which procedure to use.

Michael Russell: It is in our gift as defined by the legislation, if the bill is passed. Of course, I am just assuming that the bill will be passed at Westminster. If it is passed, it will make the position clear. We might apply other qualifications that would widen—not narrow—the definitions. It is clear already what some of those will be; there may be more.

The Convener: The House of Lords has suggested that a sifting committee could be set up to make such decisions. Would you be open to that idea here?

Michael Russell: Sifting and pre-laying arrangements are one of the issues that we are discussing. Gerald Byrne might want to say a word or two about that.

Gerald Byrne: That sort of idea has very much been included in our discussions with our opposite numbers from the Scottish Parliament, the clerks to the committee and others, with the aim of finding a pragmatic balance between the statutory requirements and the procedures that will give Parliament enough confidence that it is able to scrutinise the instruments that it wants to in sufficient detail, given the potential volume that might be generated.

With the clerks, we are trying to develop a range of proposals—including the idea that the House of Lords has discussed—that will give this Parliament confidence that there is sufficient opportunity in exercising its scrutiny function to see what the Government is doing. As I said, we are doing that while recognising the potential volume and the need for the efficient use of Parliament's resources and the Government's resources to make the necessary preparations.

The Convener: If such a committee was established, it could create a mountain of work for MSPs.

10:45

Gerald Byrne: Getting the right balance, as we laid out in the legislative consent memorandum, by having procedures that are pragmatic but which

recognise the need for proper scrutiny, is what the clerks and others will be searching for, as well as getting the necessary level of trust between the institutions. That is about the range of proposals that we will want to produce with our opposite numbers.

Michael Russell: No matter what happens, there will be a mountain of work. That will not be avoidable.

The Convener: We are aware of that, but we want the right degree of parliamentary scrutiny, so that ministers are not accused of a—shall we say—power grab.

Michael Russell: Indeed. I have to say that we have no such desire, because we did not want to be in this position to start with.

The Convener: Quite.

Monica Lennon (Central Scotland) (Lab): The committee has heard from stakeholders about the need for early engagement on consultative drafts of regulations to be made under the bill; and the importance of stakeholders and, of course, the Parliament having opportunities to propose amendments to draft legislation has been emphasised to us. Minister, you have already put on record the fact that you are open minded about scrutiny. Is there scope for strengthened scrutiny in some areas along the lines of the super-affirmative procedure?

Michael Russell: I am open to any suggestions and the discussions that are taking place between officials on both sides will be helpful. The one thing that I would be cautious about is that there will be a timescale that has to be met, so if we have super-affirmative procedures, which take longer, we may find ourselves in difficulty; but I am certainly not in any sense against having wider involvement in the process by stakeholders. One of the virtues of this Parliament is the ability to bring in people to give evidence and information that can allow informed pre-legislative decisions to be made. We are at our best when that happens, so let us try to make it happen, but if we tie ourselves too much to lengthy procedures, we could lose what makes the bill necessary—the fact that it has to be done in a shortish period of time—and find ourselves in a difficult position at the back end.

Monica Lennon: If you are not in favour of the super-affirmative procedure, how do you intend to address some of the concerns?

Michael Russell: That will come from the discussions that are taking place. We must bear in mind the necessity of ensuring stakeholder and informed involvement in the decisions that are being made. I do not usually charge Gerald Byrne with doing things in the middle of a meeting, but I am sure that, in his discussions with the Parliament, he will ensure that those points are borne in mind.

Gerald Byrne: Stakeholder engagement in the preparation of instruments is a wider question, and we would want to ensure that the Parliament is able to engage with stakeholders on the drafting of instruments just as much as the Government does when looking at the available options. As the minister says, one of the issues that we will be considering in bringing forward proposals with our clerking colleagues to conveners and ministers is balancing the need to satisfy the Parliament's scrutiny requirements with the need for progress, recognising, as the minister has pointed out, the volume of work in relation to formal procedures.

The Convener: When do you think we might see the proposals?

Gerald Byrne: I believe that the officials are meeting again on Friday. We are clear about the need to make early progress.

Monica Lennon: Thank you. I look forward to getting updates on that.

I am sure that you agree that the quality of supporting information on instruments will be crucial to effective and efficient scrutiny, minister. What information do you expect to provide in support of instruments?

Michael Russell: We already have a good system in Scotland and we provide additional information with every instrument. I am absolutely open to seeing whether more information is required, such as—this is only an example—a statement of appropriateness or necessity that says briefly why the instrument is being laid. That might be helpful for everyone to have to ensure, at least, an initial check that what is being done is for the right reasons. I am open to that; it would be part of the discussion about how things are done and what is needed.

Monica Lennon: That kind of statement would be very helpful. Are you able to give a commitment that such information will be provided at the point of laying an instrument before the Parliament?

Michael Russell: I would have thought so, but it is difficult to speculate before an instrument is laid. The information comes in a package; there is the instrument and an additional explanatory note, and the statement, which might or might not be necessary, would come with that. We could also use the statement as a checklist to ensure that we know what is in and why.

Monica Lennon: We had a couple of ideas from listening to stakeholders. The information could include an explanation of existing EU law, the reasons for and the effect of the proposed

change, and a summary of the consultation that has been carried out. Are you open to that?

Michael Russell: We should make sure that people have as much information as we can give them within the timescale that is needed. The idea of a statement of appropriateness or necessity is that it could contain all of that information, so that we know why the instrument is there and what it is trying to correct. If other people are or should have been involved, it should say so. However, we will have piles of paper as it is, so I would like any statement to be as brief and concise as possible.

David Torrance (Kirkcaldy) (SNP): On the sheer scale of the project, what information can you give the committee about the work that the Scottish Government is undertaking to prepare for the anticipated volume of secondary legislation that will be required in relation to the UK's departure from the EU?

Michael Russell: I am working closely with the Minister for Parliamentary Business to make sure that we have an integrated legislative programme. Despite the mountains of work that will come, we will ensure that the mountains are not too scary. We are getting that all together and officials in each Scottish Government portfolio are working to identify the secondary legislation that we will need to consider over the next 18 months.

We need better information sharing from the UK Government. I say that regularly, because we do not have enough information sharing from the UK Government and better information sharing would help us. Some of this will depend on what process is adopted at Westminster and what Westminster does, but we are working on it.

David Torrance: How will the Scottish Government work with the Parliament and the committees that are tasked with scrutiny of the legislation to keep them informed?

Michael Russell: I indicated to Monica Lennon my thoughts about some of the documentation. We want to let Parliament know as soon as possible what the anticipated volume is and break it down. I know that the Minister for Parliamentary Business is due to give evidence to the committee later in the year, and I hope that he will be in a position to let you know about that then, because we are working on it presently. I am quite happy to make a commitment to keep you informed as that develops.

David Torrance: The committee has heard from witnesses about the importance of UK and Scottish ministers and their respective officials working together to handle the secondary legislation project, given the potential for overlap, in particular, and the sequencing issues involved. Is there a cross-administration steering group? If so, will the Scottish Government provide a commitment to keep the Parliament updated on the progress and decisions of that steering group?

Michael Russell: We already have the JMC, which is essentially what you are talking about, and the JMC structure is meant to cope with that.

The JMC structure consists of a plenary of the Prime Minister and the First Ministers, plus other ministers as required. The JMC on Europe—JMC(E)—is a sideshoot of that which deals with the upcoming European Council. Every time there is a European Council, the JMC on Europe is meant to meet two or three weeks beforehand to look at the agenda; it is a sort of clearing house. The new part, which was established last year, is the JMC(EN), which is the JMC on European Union negotiations. It is the one that met last week and had not met for eight months. Underpinning it all is the JMC(O), which is the officials' group. It has lots of different strands to it and officials meet to talk about matters.

Considerable work is being done but, until we get agreement on the bill and, in particular, clause 11, we will not be in a position to take a lot of things forward. We do not agree with the way in which things are going and we cannot agree to set up frameworks until we have an agreement on what those frameworks will be like. There has been a slight hiatus, but discussion is going on about the detail of the bill and that will continue. Officials will bring that information to ministers—I presume to UK ministers, as well as to Scottish ministers—and we will react accordingly.

When we know things, we will let the committee know. We have no interest in hoarding information because we recognise that the burden will fall on committees. That is where we will go.

The Convener: I guess that the upshot is that we want to get to a point at which the Scottish Parliament and the National Assembly for Wales can agree the legislative consent motions so that everyone can agree to the bill. How confident are you that we will get there?

Michael Russell: I do not know. There is a clear route to that, which is for the UK Government to remove clause 11 from the European Union (Withdrawal) Bill and accept the amendments that we have proposed with the Welsh Government. In those circumstances, we can get there. If that does not happen, we will not lodge a legislative consent motion. That is where we are.

We are talking. John Swinney and I have met Damian Green and David Mundell twice. I have spoken on the phone separately to Damian Green and to David Davis. There has been a meeting of the JMC(EN) and we are promised another one before Christmas.

The bill is moving more slowly than had been anticipated. It is not now due into the Commons until after the November recess—the Commons is off for a week in November—so 13 November is the earliest date that it will go in. It will be very tight to get it through before Christmas, which was the UK Government's stated intention. However, we have time to resolve the matter because we do not have to lodge a legislative consent motion until the last amending stage of the bill, which is the final stage in the House of Lords. We thought that that would be in January but it is now likely to be later. It could be in February, so we have until then to resolve the matter. If we get it resolved, we can lodge that legislative consent motion; if we do not, we cannot.

The Convener: Obviously, there are a lot of amendments. I have not seen them but you probably have. I presume that some of them deal with the points that you have made.

Michael Russell: Let me define clearly what we are talking about. We are interested in the Welsh and Scottish Governments' joint amendments. If they, or equivalents to them, are agreed to, we will lodge the legislative consent motion. That is clear. There are lots and lots of other amendments on a range of matters—a charter of fundamental rights, for example—with which I profoundly agree and which I would be delighted to see passed, but we have been clear in our scope: we are focused on the Welsh and Scottish amendments.

The Convener: Just out of interest, who submits your amendments and the Welsh ones?

Michael Russell: They have been tabled by a group of MPs representing Labour, the SNP, Plaid Cymru, the Liberals and the Greens, so it is a cross-party activity. I was pleased that when Keir Starmer identified the six key issues in the bill at the weekend, one of those was about the devolved Parliaments and their rights. The amendments have the backing of the parliamentary parties that I talked about.

The Convener: You will be aware, because of a statement that was made last week, that the House of Lords has set up a committee of parliamentarians from the four nations—including me—who, in essence, are saying that we want to get to the point of being able to agree the LCM.

Michael Russell: I am pleased that that is the case and if people who have influence with the current UK Government can bring that influence to bear, that is all the better.

The Convener: As members have no more questions, I thank you very much for your time.

We will suspend briefly to allow for a change in witnesses.

10:59

Meeting suspended.

11:01

On resuming—

The Convener: The session with our next panel was arranged at short notice, so I thank the witnesses for attending. We have before us Daphne Vlastari, advocacy manager, Scottish Environment LINK, and Isobel Mercer, policy officer, RSPB Scotland. Welcome to you both. I ask you to begin by giving us your general thoughts on the bill.

Isobel Mercer (RSPB Scotland): First, we thank the committee for inviting us to give evidence. It is important to say that RSPB Scotland and other members of Scottish Environment LINK all approach the issue from an environmental outcomes perspective, so we are primarily interested in ensuring that all the protections that are currently provided to the natural environment by EU legislation and institutions will remain, that all that legislation will be brought over and that there will be no gaps in the protections that are provided to the environment.

In looking at the bill, we have focused on three principal points. One is to ensure that environmental principles are brought over alongside the entire body of EU environmental acquis. EU environmental law is underpinned by a number of key principles of international environmental law, such as the precautionary principle, the polluter-pays principle and the principle of sustainable development, which play a key role in how EU environmental law is interpreted in the court system and in how EU environmental legislation is developed.

All EU legislation is developed on the basis of those principles but, although they are outlined in the EU treaties, they are not spelled out in any of the directives, and they are not articulated in domestic law. At present, the bill does not make clear whether those principles will be brought over. That is one of the key issues that we are interested in.

Daphne Vlastari (Scottish Environment LINK): Thanks for having us. Isobel Mercer outlined clearly some of our concerns about the bill. We see the necessity of it, but there are gaps that need to be addressed. The need to convert EU law into domestic law is important. Retained EU law, as it will be called, needs to have the status of primary legislation.

The issue of principles is also important. I am talking about international environmental governance principles that are enshrined in things

such as climate change treaties, the Rio declaration and the sustainable development goals. The fact that those principles are in the legal text of the EU treaties has enabled EU law to be based on them. As we leave the EU, we will lose those principles, which have formed the bedrock of all environmental and consumer health legislation. That is an important issue to look into in the context of the bill.

Another aspect is that we have identified an important governance gap in relation to our exit from the EU. In the previous evidence session, reference was made to different bodies and duties. The EU bodies currently perform a variety of roles: they gather and monitor data, supported by the national agencies, and there is recourse to the European Commission and the European Court of Justice if we find that EU law is not being implemented. That has provided useful leverage in ensuring that all Governments implement EU law in the best possible way to deliver the environmental outcomes that we are looking for. Of course, the same applies across the EU acquis. We would seek to have a discussion across the UK about what bodies were needed to preserve those functions as we move forward.

Another aspect, which was highlighted in the previous evidence session, concerns scrutiny and stakeholder engagement. As we move forward, different statutory instruments will need to be looked at, and frameworks will be considered for potential UK implementation. We would like a clear mandate for transparency in scrutiny through the involvement of Parliament and substantive stakeholder engagement.

We highlight the fact that the joint communiqué, which was mentioned in the previous evidence session, makes no reference to stakeholder engagement. Unless there is a public and transparent dialogue, we will not get the best legislative outcomes.

The Convener: I am looking through the communiqué now—you are absolutely right to say that there is no reference to stakeholder engagement.

Daphne Vlastari: I would hope so; otherwise, my reading skills are not so good.

Stuart McMillan: The final paragraph of RSPB Scotland's submission highlights the issues, which you touched on a few moments ago, of oversight and a lack of clarity in the bill about the status of retained EU law. You suggested that EU law should be transferred into primary legislation. How many pieces of primary legislation do you estimate that would involve?

Daphne Vlastari: We estimate that approximately 80 per cent of current environmental laws are EU laws. Some are already part of Scottish statutes in order to conform with directives, and others are in regulations.

A communication from Michael Gove to the relevant committee at Westminster provided information about statutory instruments and the amount of work that would need to be done. We have not collated such evidence, but I am happy to forward you that letter, although I assume that you already have it. We would be looking at a substantive amount of statutory instruments.

Stuart McMillan: I am sympathetic to your suggestion about protection for environmental laws. However, one bill is going through the parliamentary process, and it is expected that another 13 bills will come through after that. This Parliament will have to deal with potentially about 300 pieces of secondary legislation. You suggest that environmental protection should be in primary rather than secondary legislation, which I imagine would be over and above what is being discussed.

Daphne Vlastari: I will clarify—perhaps I was unclear. We seek to ensure that the retained EU law that is part of our domestic system is given the status of primary legislation so that it cannot be changed by secondary legislation in the future. For example, if we decided that we needed to make changes to environmental protection, that would mean that we had to go through the full parliamentary procedure rather than amending the provisions without any scrutiny. We are not seeking to pass all pieces of EU law by primary legislation, but rather to grant them the status of primary legislation and the securities that come with that.

Stuart McMillan: How many pieces of legislation would you expect that to be?

Daphne Vlastari: We do not have a firm number. As you probably know well, the majority of environmental law—about 80 per cent—comes from the EU. There is a complex matrix of directives, regulations and other decisions, so it is a bit hard to give a number. As I said, the estimate is that approximately 80 per cent of our legal texts on the environment come from the EU.

Isobel Mercer: I emphasise that the key point is that we are interested in safeguarding those pieces of legislation and making sure that any future Government cannot make changes through secondary legislation that could have far-reaching implications for the environment.

Stuart McMillan: Would you accept an interim position whereby we first transposed the legislation and then had a period—for discussion's sake, it could be five years—during which anything that had been transposed into secondary legislation went into primary legislation?

Daphne Vlastari: We would need to get legal clarity on the possibilities. The bill aims to bring over all EU law. If the bill includes clauses that mean that we can amend the content of that retained EU law with limited scrutiny, we will be opening ourselves up to a lot of potential changes—intentional and unintentional. Our point is that, to meet the bill's goal, which is to keep the current environmental protections, we need to give retained EU law the status of primary legislation. As we understand it, we do not have to pass legislation to give it that status, although perhaps we can get legal clarity on the possibilities.

Stuart McMillan: I stress that I am genuinely sympathetic to your suggestions, but I am conscious of the work that goes through the committee and the scope of what is ahead of us not just here but UK wide.

Daphne Vlastari: We can perhaps come back to the committee on that point to clarify the implications of the request, including those for the workload. We can get back to you with a more precise response.

Stuart McMillan: That would be helpful—thank you.

The Convener: Do you fear that, in the process, some of the environmental laws that you cherish could be lost?

Isobel Mercer: All sectors are worried that there will be gaps in the regulations that are brought over. As we have laid out, our main concern is to ensure that the entire body of EU environmental legislation, including the underpinning principles, is brought over because, were it not to be brought over in its entirety, there could be far-reaching consequences for the environment, as has just been indicated.

That is why we feel that the issues to do with scrutiny and stakeholder engagement are particularly key. One issue that we are concerned about concerns technical and non-technical changes. There is no good definition of what would constitute a technical change and we need much more clarity on the changes that are to be made. For instance, in the explanatory notes to the bill, one illustrative example of a technical change is the removal of a reporting requirement. It is suggested that, rather than being transferred to a UK public authority or body, that reporting requirement could be removed altogether. If it was a requirement to report on and monitor the status of some aspect of the environment, such as air quality or trends in species populations and habitats, that would go far beyond what we would consider to be a technical change. The bill suggests that such changes would go through without what we would consider to be an appropriate level of parliamentary scrutiny and stakeholder engagement.

11:15

Daphne Vlastari: We have mentioned policies and pieces of legislation, and the aspect to highlight is that recent data suggests that an overwhelming majority of the UK population does not want those EU laws to be lost in any way. In fact, there was great support from citizens across the UK for the regulatory fitness and performance programme check of the EU birds and habitats directives that was only recently closed at the EU level.

Apart from the text of the legislation—the directives and regulations—we are also concerned about the loss of functions that EU bodies carry out. Monitoring—collecting the data and comparing that—is one aspect, which is rather mundane and technical but important for measuring the process, and the other aspect is the implementation and enforcement of EU legislation. Through Mr Gove, the UK Government has accepted that there is such a governance gap—as it has now been called—and we are looking to develop different solutions for that. The legal system in the UK and Scotland does not allow for the functions of the Commission and the ECJ to be replicated in quite the same way, so we will be looking for potential solutions, whether that involves giving existing bodies new functions or creating new bodies.

The Convener: What sort of bodies at the EU level are you talking about that would have to be replicated here?

Daphne Vlastari: The ECJ is the guardian of EU laws; it ensures that there has been proper implementation and enforces that at the member state level. That means that, when those in civil society, businesses or citizens feel that some piece of EU legislation has not been adequately implemented, they have recourse to the European Commission to address that. Through bilateral discussions with different public bodies of the member state concerned, the Commission seeks to understand whether there is actually an issue.

If that approach is taken towards the entire process, that means involving the ECJ. We are concerned about who will be the guardian of retained EU law. Our concern is that parliamentary scrutiny processes and the existing space that is provided by the UK and Scottish legal systems do not quite replicate the functions of the Commission and the ECJ.

The Convener: Practically, what does that mean?

Daphne Vlastari: The environmental sector is looking at different options. We are doing that with colleagues across the UK—it is not a Scotland-only exercise. There is a variety of potential solutions, and we are not looking for a silver bullet. Different functions will perhaps go to different bodies. However, I think that we are potentially looking at an environmental commissioner or ombudsman to help with issues of access to justice and at environmental courts, which would mean that we could address issues in a more affordable way with the relevant expertise. That would be in addition to the current parliamentary scrutiny and accountability mechanisms.

The Convener: Would the commissioner and courts exist at the UK level or at the Scottish level?

Daphne Vlastari: To take a step back, Scottish Environment LINK and other environmental non-governmental organisations have been calling for environmental courts in Scotland for quite some time, so there is scope for them to be at the Scottish level. However, whether the final constellation involves UK bodies or bodies at a devolved level will depend on how the bill progresses and how the different competences are set. We would like all Governments, regardless of level, to be held accountable in the same way and on an equal footing.

Isobel Mercer: To build a bit on Daphne Vlastari's point that Scottish Environment LINK members have been calling for environmental courts for a long time, it is worth mentioning that the governance issues already exist to some extent with our current domestic arrangements.

For instance, there are gaps in access to environmental justice; the Scottish Government consulted on that subject last year. It is worth flagging up the existing issues, which will be exacerbated by the loss of EU institutions and oversight mechanisms.

As Daphne Vlastari outlined, there will be instances in which, through the Scottish judicial and parliamentary systems, the gaps that we have mentioned could be filled. However, in other instances, the loss of EU oversight and accountability mechanisms could cause a larger problem, which might necessitate a UK-type governance arrangement.

The Convener: We have heard from witnesses, including both of you, that there are problems with the breadth of the powers in the bill—particularly the wide reach of the term "deficiencies". Can you explain in what way the powers are too wide? How could they be improved? Do you consider that the reference in the withdrawal bill to what is considered "appropriate" means that the powers are too broadly drawn? You will recall the evidence in that regard that was given earlier.

Isobel Mercer: As you said, quite a few of these points have already been made, but I reiterate the three main concerns of RSPB Scotland and Scottish Environment LINK with regard to the scope of the powers. They relate to the definition of what constitutes technical or non-technical change; the fact that the definition of "deficiencies" is not appropriately limited and is currently extremely broad; and the fact that the bill leaves open the opportunity to make changes

"as the Minister considers appropriate",

which we are quite concerned about.

The UK Government has given reassurances that the bill will make only what it considers to be technical amendments to ensure that the law continues to operate on exit day. However, the three issues that I have outlined essentially leave open the possibility that those powers could be exercised in a way that could create substantive policy change.

As we have outlined, we believe that any non-technical changes—what we might consider to be substantive policy decisions—should be made only by primary legislation. In order for those to be identified, some sort of sift-and-scrutinise mechanism for statutory instruments might be put in place—as was suggested earlier—to identify whether a change is technical or non-technical. Changes of the latter type could be given increased scrutiny.

The Convener: We have some questions on devolved authorities' powers. Perhaps Bill Bowman has a question on that area.

Bill Bowman: Actually, I wonder if I could ask the witnesses a different question. Are you saying that the current EU law that will be transferred over to UK law—I presume that we are speaking not about Scotland but about general UK law—cannot operate without scrutiny or without having European bodies in place?

Daphne Vlastari: We are saying that, for the law to operate on the same level as it currently does, we need to replicate the mechanisms of enforcement and monitoring that are currently exercised at an EU level through EU bodies. Simply copying and pasting the text, if you like—

Bill Bowman: In effect, it will exist as it does at present, will it not?

Daphne Vlastari: Its operation relies on a lot of EU bodies carrying out functions. That is why there is a clause in the withdrawal bill on assigning functions that are currently exercised by EU bodies to new or existing bodies. That hints at that the fact that there is a bit of a governance gap.

Isobel Mercer: That power also allows the UK Government to abolish or remove those functions entirely. We would be quite concerned if it was proposed that some of those functions should be removed.

It might help if I give an example of the type of functions that we are talking about. A current high-profile issue in the media is air pollution and air quality regulations. ClientEarth has twice taken legal action against the UK Government through the EU institutions in order to ensure that the UK Government meets its commitments under EU legislation.

At one end of the scale are enforcement and compliance and at the other end are things such as monitoring and reporting. If we are talking about enforcement and compliance, it concerns us that there will be a gap in the extent to which the executive can be held to account on its commitments. That is because we will lose, for example, the mechanism of the Commission that allows citizens and organisations in the EU to lodge complaints. A mechanism, or forum, does not really exist in Scotland or in the UK as a whole to which individuals or non-governmental organisations such as RSPB Scotland can bring a complaint that the executive is not upholding its environmental commitments.

Bill Bowman: I thought that it was the UK courts that took the Government to task on air quality.

Isobel Mercer: It was done through the UK courts but using the European legal system.

Bill Bowman: You say that you want to replicate that—I think that Daphne Vlastari said that she would put in place exactly the same procedures.

Daphne Vlastari: We are looking to ensure that we retain the functions that are useful and have helped us to improve our environment. There is also the issue of public safety, given that the functions apply to a wide variety of sectoral legislation. We will look at how we can replicate some of the functions. We are not saying, "Bring everything back to the UK."

Bill Bowman: Sorry—I thought that that was what you said.

Daphne Vlastari: We would like to see how the functions can be replicated at the domestic level, whether existing agencies such as the Scottish Environment Protection Agency and Scottish Natural Heritage could take on some of the responsibilities that are carried out at the moment by EU bodies, and whether other bodies would be needed to carry out other functions. What we are doing now is highlighting that there is an important governance gap—a gap that has been acknowledged by the UK Government. We need to look at the potential solutions to ensure that we will have a functioning statute book as of the date of exit.

The Convener: Who would like to ask the panel about devolved authorities' powers?

David Torrance: Could I come in on the point about scrutiny? In your evidence, you have called for a robust scrutiny system and for more engagement with stakeholders. Do you consider that there is scope for strengthening scrutiny in some areas along the lines of a super-affirmative process, by which I mean that there would be a consultation period on a draft order before the order is laid before Parliament and that the order would be subject to approval?

Daphne Vlastari: That would be one of the options. As you will appreciate, we would be looking to maximise the potential for stakeholder engagement, which would mean maximising the ability of any committee to look into instruments that have been laid before the Parliament. There should be an opportunity to engage with stakeholders and ask them questions, and for stakeholders to provide evidence, just as we have done today.

Equally, committees should be able to call on ministers to provide evidence. Another possibility is that a committee that has looked at any relevant documents should be able to make recommendations to ministers, and that those recommendations should be taken into account. Those are some of the things that we would like to see.

Stuart McMillan: The committee notes that Scottish ministers have no power under the bill to modify retained direct EU legislation. It has been suggested in evidence that it would give rise to legal uncertainty if four sets of Governments in the UK were able to modify retained direct EU legislation. For example, that would make it very difficult to identify what retained EU law was, with a potentially detrimental effect on the continuity that the bill aims to provide for. What is your response to that argument?

The power in part 1 of schedule 2 enables Scottish ministers to make changes to retained EU law that is EU-derived domestic law. Are there restrictions on ministers' ability to revisit those changes and make further changes?

Daphne Vlastari: That is quite a long question, so I might ask you to repeat parts of it. Generally, our starting point is that we are going through a unique process—it has never been attempted before—and we are identifying issues as they come up.

However, we want the devolution agreement to be fully respected and any policies that come forward to be jointly developed and agreed. We think that that is very important for ensuring good environmental outcomes. We feel that when Governments have a stake and are invested in a policy process, the policy is all the more likely to be successful and well implemented in the future—that is really where we are coming from. I hope that that was helpful.

11:30

Stuart McMillan: That goes back to what we heard from the minister regarding the clause 11 discussion and the amendments that have been tabled at the House of Commons. I assume that you are lobbying the relevant MPs and the UK Government on this area as well.

Isobel Mercer: Yes. The RSPB, Scottish Environment LINK and the other environment links in the UK are all part of the greener UK coalition of environmental NGOs, and it is through that organisation that we have been doing most of our engagement with MPs. We have been calling for any common frameworks on environmental matters to be jointly developed and agreed by all four countries, because we feel that that is likely to lead to the most beneficial environmental outcomes, as Daphne Vlastari outlined. Legislation is more likely to run smoothly if it has been jointly agreed and negotiated rather than imposed.

Stuart McMillan: Under the bill, are there any powers available to UK ministers that you think should also be available to the Scottish ministers?

Isobel Mercer: We do not feel that the bill provides enough clarity about where Scottish ministers and the Scottish Parliament are expected to play a role and where they will be expected to create statutory instruments. As you outlined, there are issues around certain types of retained EU law such as EU regulations and whether Scottish ministers will be expected to create statutory instruments to amend the deficiencies in that retained EU law. More generally, we are calling for greater clarity on where Scottish ministers and the Scottish Parliament are expected to play a role. Then—again going back to our headline points—any delegated powers under the bill will need to be subject to an appropriate level of scrutiny.

Stuart McMillan: There is no procedure that allows Scottish ministers to make regulations urgently—we heard about that from the minister—although such a procedure is available to UK ministers. Do you think that that could cause problems for ensuring continuity of environmental law? If so, what would you like to happen?

Daphne Vlastari: If the minister was unable to provide a concrete answer earlier, it is unfair to expect us to provide one. I do not think that that has come up as an issue. Our general concern is to do with the level of scrutiny and stakeholder engagement that we want to see for statutory instruments. We have identified one specific aspect, which links back to the governance gap. In clause 7(5), the bill gives ministers powers to assign functions that are currently exercised by EU bodies, but there is no obligation for them to do that. Isobel Mercer mentioned the need for such an obligation. We also need the equivalent powers to be conferred on Scottish ministers so that that can be done at the Scottish level. That is one quite specific but important point to be taken forward.

Stuart McMillan: Are there other areas of the governance gap that you would like to highlight?

Daphne Vlastari: We are not able to provide any solution, but it is quite important to take into account the open-ended and far-reaching nature of the delegated powers that are conferred in the bill. We are particularly worried about some of the powers that would enable ministers to make changes to the withdrawal bill itself. There needs to be some level of confidence in and certainty about the clauses and about the status of EU retained law going forward.

The other aspect that we are not entirely clear about at the moment relates to the references to the UK and Scottish ministers acting jointly. We want to see a bit more certainty about how that process would actually be delivered and what role, if any, the Scottish Parliament would have, going back again to those really basic principles of decision making and how that would work in terms of transparency and stakeholder engagement.

We mentioned UK frameworks. There are provisions in the withdrawal bill for re-devolving, if you like, some of the powers at the Scottish level. However, there is no real clarity on how the process will be taken forward and on how the various Governments, Administrations and Parliaments will be involved. To move forward as constructively as possible, we need that process to be laid out more clearly.

Stuart McMillan: You mentioned a joint approach, and we have discussed whether Scottish ministers or UK ministers would take decisions, or whether there would be a joint approach. What factors should determine which of those routes should be chosen?

Daphne Vlastari: I am not sure that we have a concrete solution. The withdrawal bill contains some specific provisions about how certain aspects could be carried forward. We want to ensure that environmental protections and the

legislation that supports them are taken forward, and that, looking to future legislation, the Scottish Government is in the best possible position to deliver on all the ambitious targets on biodiversity loss, resource efficiency and climate change to which it has committed.

Monica Lennon: Sticking with the issue of scrutiny, we all know that the Parliament will have a big job to do, and it will be important to prioritise our work. Do you have any suggestions for what the Parliament should focus on? Do you have a view on the idea of a sifting committee, which we raised with the minister earlier?

Isobel Mercer: We were very pleased to hear from the minister that the Scottish Government is considering that suggestion. Greener UK, RSPB Scotland and Scottish Environment LINK have all suggested as an option a time-limited parliamentary committee that would sift through statutory instruments, as Daphne Vlastari said; ask either stakeholders or the minister to provide further evidence on an instrument; and recommend substantive changes to an instrument if that was felt to be necessary. We definitely support that idea.

Daphne Vlastari: Yes, I agree with that. I have nothing further to add.

Monica Lennon: I am interested in a point that Daphne Vlastari made. You said that for some years Scottish Environment LINK has been calling for an environmental court to be established in Scotland. Given the importance of what you have set out today, what could the Scottish Government do in the short term to place a focus on environmental protection and on some of the associated issues that you have raised? You have suggested an environmental commissioner and an environmental court, but are there things that the Government could do now?

Daphne Vlastari: Yes. The fact that there is a bit of a closed door on environmental courts—even though it is not 100 per cent closed—does not help the conversation to move forward. We would like an open debate about how the governance gap can be addressed. A lot of work is being done in the First Minister's standing council on Europe—perhaps the topic could be taken forward in the council's environmental sub-group.

In addition, the Scottish Parliament and some of its committees could perhaps look into the possibilities for, and the positives and negatives of, different solutions. We are working with some academics to try to suss these things out.

Another aspect that it would be quite important for the Government to take forward—although I appreciate what the minister said about focusing on the Scottish and Welsh amendments—concerns principles. The Scottish Government has traditionally made a lot of use of environmental principles such as the precautionary principle and the polluter pays principle, which we mentioned earlier. It would be only fitting for the Scottish Government to support the maintenance of those principles at the UK level and definitely at the Scottish level, and to make that a key argument in its position.

Monica Lennon: Is the Scottish Government doing that strongly enough at present?

Daphne Vlastari: Stronger would be better. However, we heard from the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, that there will be no turning the clock back on environmental protections, which is very important, and that the Scottish Government will want to continue to look at what the EU is doing on environmental protection in law and relate that to Scotland where it is applicable and where it makes sense. The Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, has made similar commitments. That is a fantastic starting point, but we are now getting to the point in the negotiations at which we need to start fleshing out what those commitments to environmental protection and consumer health actually mean in concrete—almost legislative—terms. That will be important as we move forward.

The Convener: As no other members wish to ask questions, I thank you very much for your time this morning. I suspend the meeting briefly.

11:40

Meeting suspended.

11:44

On resuming—

Instruments subject to Affirmative Procedure

The Convener: No points have been raised by our legal advisers on the following four instruments.

Telecommunications Restriction Orders (Custodial Institutions) (Scotland) Regulations 2017 [Draft]

Budget (Scotland) Act 2017 Amendment Regulations 2017 [Draft]

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

Fishing Vessels and Fish Farming (Miscellaneous Revocations) (Scotland) Scheme 2017 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Common Agricultural Policy (Direct Payments etc) (Scotland) Amendment (No 2) Regulations 2017 (SSI 2017/317)

11:45

The Convener: The regulations amend the Common Agricultural Policy (Direct Payments etc) (Scotland) Regulations 2015 (SSI 2015/58). The amendments make provision to extend the deadline for relevant applications under the voluntary coupled support scheme for ovine animals.

The regulations were laid before the Parliament on 28 September 2017 and came into force on 9 October 2017. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. As regards its interest in the Scottish Government's decision to proceed in this manner, the committee may wish to find the failure to comply with section 28(2) to be acceptable in the circumstances. The reasons for the breach are outlined by the Scottish Government's agriculture and rural economy directorate in its letter to the Presiding Officer dated 28 September 2017.

Does the committee agree to draw the regulations to the attention of the Parliament under reporting ground (j) as the instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

Public and Private Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/321)

The Convener: The regulations correct errors in two earlier instruments: the Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281) and the Water Intended for Human Consumption (Private Supplies) (Scotland) Regulations 2017 (SSI 2017/282). The current regulations fulfil an undertaking given by the Scottish Government to correct errors in those instruments at the earliest opportunity.

The regulations were laid before the Parliament on 3 October 2017 and come into force on 26 October 2017. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject

to the negative procedure and the coming into force of that instrument, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The committee may wish to find the failure to comply with section 28(2) to be acceptable in the circumstances. The Scottish Government's energy and climate change directorate has outlined the reasons for the breach in its letter to the Presiding Officer dated 3 October 2017.

Does the committee agree to draw the regulations to the attention of the Parliament under reporting ground (j) because the instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following four instruments.

Sea Fishing (Miscellaneous Revocations) (Scotland) Regulations 2017 (SSI 2017/323)

Sea Fishing (Miscellaneous Revocations) (Scotland) Order 2017 (SSI 2017/324)

Prohibition of Fishing with Multiple Trawls (Scotland) Order 2017 (SSI 2017/325)

Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 (SSI 2017/329)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:49

The Convener: Under item 6, no points have been raised by our legal advisers on the following three instruments.

Pollution Prevention and Control (Designation of Medium Combustion Plant Directive) (Scotland) Order 2017 (SSI 2017/322)

Housing (Scotland) Act 2014 (Commencement No 7, Amendment and Saving Provision) Order 2017 (SSI 2017/330 (C 24))

Act of Sederunt (Civil Legal Aid Rules Amendment) 2017 (SSI 2017/332)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Child Poverty (Scotland) Bill: After Stage 2

11:49

The Convener: The next item of business is consideration of the revised delegated powers memorandum to the Child Poverty (Scotland) Bill. We have a paper before us that considers the delegated powers that are contained in the bill following amendments that were made at stage 2.

One existing delegated power has been amended in line with the committee's recommendation in its stage 1 report. As a result, the power to make regulations that change the base date for the absolute poverty target in section 3 is now subject to the affirmative procedure. That is a higher level of scrutiny than the negative procedure that was included in the bill at introduction.

Two new delegated powers have been added as part of the new schedule to the bill. The paper before us suggests that the scrutiny procedure for the power to make regulations in paragraph 3(2)(c) of the schedule to the bill, on access to information, should be subject to the affirmative procedure rather than the negative procedure as currently provided.

Does the committee agree to welcome the fact that the Scottish Government has amended section 3 of the bill in line with the recommendation in the committee's stage 1 report?

Members *indicated agreement.*

The Convener: Does the committee agree to report to the Social Security Committee along the lines that are detailed in the paper?

Members *indicated agreement.*

The Convener: In particular, is the committee content to recommend that the power to make regulations in paragraph 3(2)(c) of the schedule to the bill be amended to be subject to the affirmative procedure rather than the negative procedure?

Members *indicated agreement.*

The Convener: I move the meeting into private.

11:51

Meeting continued in private until 12:58.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

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

The Scottish Parliament
Pàrlamaid na h-Alba