



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 1 May 2018

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 1 May 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
14th Meeting 2018, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Donald Cameron (Highlands and Islands) (Con)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
Gil Paterson (Clydebank and Milngavie) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Amy Hill (ClientEarth)
Richard Leslie (UK Environmental Law Association)
Professor Gavin MacLeod Little (University of Stirling)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 1 May 2018

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning and welcome to the 14th meeting in 2018 of the Environment, Climate Change and Land Reform Committee. We have received apologies from our colleague Gil Paterson. Before we move to the first item on the agenda, I remind everyone present to switch off mobile phones and other electronic devices, as they might affect the broadcasting system.

The first item on the agenda is for the committee to consider whether to take items 4, 5, 6 and 7 in private. Do members agree to do so?

Members *indicated agreement.*

EU Environmental and Animal Welfare Principles Inquiry

09:33

The Convener: The second item on our agenda this morning is to take evidence on the European Union environmental and animal welfare principles. We are joined by Amy Hill of ClientEarth; Richard Leslie, in his role as co-convener of the Scottish branch of the UK Environmental Law Association; and Professor Gavin MacLeod Little, who is a professor of environmental and public law at the University of Stirling. We were to have been joined by a representative of the Law Society of Scotland, but the witness is unable to attend, due to unforeseen circumstances. Ladies and gentlemen, we will just move to questions and I will kick off.

Can each of you, in turn, tell me what you believe would be the effect of relying on the inclusion of environmental principles in international law post-Brexit, and how they could be enforced?

Professor Gavin MacLeod Little (University of Stirling): I will start. I should say first that the paper that I submitted was co-authored by Dr Annalisa Savaresi, who unfortunately could not be here today. She is an international law expert. I am a domestic governance specialist, so I have a working knowledge of international aspects but do not claim to have expertise in that regard.

If we imagine ourselves in the Brexit situation, the simple answer would be that Scotland and the Scottish Government and ministers would continue to be subject to international law obligations that include the environmental principles. That would be the case for treaty law—there are a number of treaties that involve different principles—and international customary law.

Richard Leslie (UK Environmental Law Association): I think that the principles will remain after Brexit unless they are repealed. At some future stage, we might go back into Europe, so there might be an opportunity for us to retain the principles. However, beyond that, I have no other comment.

Amy Hill (ClientEarth): One of the issues with the principles sitting solely in international law is the ease with which citizens and civil society can hold decision makers accountable for them. To echo what others have said, ClientEarth is concerned about there still being a place for the principles in domestic law so that they continue to be more accessible and applicable in the domestic context, rather than in a state-to-state context.

John Scott (Ayr) (Con): Good morning. Following on from the convener's question, what are the advantages and disadvantages of placing environmental principles on a statutory footing, and is that necessary to ensure that they continue to influence Scottish environmental policy and Scots law?

Professor MacLeod Little: Clearly, one advantage is that we have been subject to the environmental principles via European Union law for some decades. If we imagine ourselves in a Brexit in which that is no longer the case, that would be a significant change that could impact adversely on the certainty and clarity that attaches to how we make environmental law and policy. We should therefore not lose sight of the fact that we have been, and are at the moment, subject to the environmental principles through EU law. As we embark on Brexit, we need to think clearly about how we ensure continuity in that.

John Scott: Will there be continuity with other parts of international law that have similar environmental principles?

Professor MacLeod Little: There will not be continuity to the same extent. The environmental principles are not, of course, just EU principles; they are principles that are common to any developed system of environmental governance and law.

However, the EU has developed the principles to a very high degree compared to other jurisdictions and other legal structures, and we are currently part of that. We need to be alive to the possibility that Brexit is suddenly going to take us from being, without necessarily thinking too much about it, subject to a developed idea of what environmental principles are, to being not subject to that. That is a potential issue in terms of ensuring continuity, certainty and clarity in how we approach environmental governance.

John Scott: Do other witnesses want to comment?

Richard Leslie: Some of the principles are already enshrined in many of our statutes. For example, we have the concept of the polluter pays in the contaminated land regime; we find out who caused the pollution and they have to pay for the clean-up. We use the precautionary principle in that we have to have environmental impact assessments for big developments. Those principles already sit behind, or are enshrined in, our legislation and we already use them.

Amy Hill: I agree—they are general concepts. Although they are not magic bullets and are not the only important things in environmental law, they provide a benchmark and have been used by EU policy makers, decision makers and courts, by Scottish policy makers and decision makers, and

even by Scottish courts—although less frequently. They provide something extra as a benchmark and an overarching set of goals that drive us in a certain direction.

The Treaty on the Functioning of the European Union sets out the EU principles in article 191.2, which also says that EU policy will

“aim at a high level of protection”

for the environment.

Professor Eloise Scotford has written on the issue. She sees the principles as working together as a unit and as a coherent list. We often see them being used together in EU environmental directives—for example, the water framework directive references the prevention principle, the polluter pays principle and the principle of remedial environmental damage at source—and as a group to develop an approach to controlling environmental damage and protecting the environment.

The principles' general nature means that they can apply in a nuanced way in different circumstances, which can be seen as an advantage, in that Government can provide policy direction in a particular context for how it sees, for example, the precautionary principle applying to chemicals. However, we still have the overall benchmarking and agreed principles that guide environmental law.

John Scott: I am concerned because the Law Society of Scotland has some reservations about that. Professor Little, did you co-author the written submission from the Law Society?

Professor MacLeod Little: No.

John Scott: You did not. Forgive me—I misunderstood. The Law Society said:

“A ‘principle’ may be incapable of being legally enforced due to lack of certainty as to how it applies in a particular situation and how it interacts with more specific provisions of substantive law. Directly enacting principles in legislation is generally not an effective way of law-making unless their subsidiary role is made clear and there is no instance of principles being relied upon in place of sufficiently precise legal rules being developed.”

It goes on. There is huge scepticism throughout the Law Society's evidence. Do you share that scepticism?

Professor MacLeod Little: No, I do not share that scepticism. As has just been said, the environmental principles provide an important big-picture narrative and an overarching set of ideas on how to approach what is often a very complex and fragmented regulatory area. Having them on a statutory footing or in the EU treaties, as they currently are, ensures that they are not overlooked in policy making, implementation, decision taking

and the exercise of discretion, which can also guide statutory interpretation.

I take the Law Society's point on what is quite a narrow issue. If the environmental principles are put into statute, the extent to which they have legal effect would depend on how that was done. For example, if there is statutory provision including the environmental principles that explicitly states that the courts may and shall use the principles in statutory interpretation, or that the principles may be viewed as a standard for decision takers, the court should take cognisance of that. Clearly, in that context, they can be quite significant and muscular elements.

09:45

John Scott: It is a great shame that the gentleman from the Law Society of Scotland cannot be with us. The Law Society submission specifically says:

"We do not consider that there will be a need to expressly incorporate principles into the statute book."

Richard Leslie: I think that what the Law Society is trying to say is that it does not want a specific statute in which the principles are enshrined in Scots law. It would prefer to have the principles put in specific areas of law. We have already mentioned the water framework directive principle that the polluter pays, which we have in our water legislation. If someone is going to discharge into water they have to obtain consent and they have to pay.

I think that the Law Society's view is that application of principles should be done case by case, and that we should take cognisance of the principles. The UK Environmental Law Association, which I represent, wants to have the principles as general binding guidelines, just as we have a national planning framework. Legislators would have to take the principles into account, but the principles themselves would not be in statute.

John Scott: So, they are not two irreconcilable positions. Thank you.

Finlay Carson (Galloway and West Dumfries) (Con): I have a quick question. I cannot miss the opportunity to ask it when I have three experts in front of me. Polluters must pay. If, prior to local authority reorganisation, a district council had polluted and that council was then incorporated into a larger regional council, could the original council still be held responsible as the polluter?

Amy Hill: That is an excellent example of how the principles feel intuitively very easy, but sometimes things can be complex.

I cannot speak to the specific Scottish legal situation in terms of the analysis, but the polluter pays principle—which can run into problems in

respect of identifying the polluter—has its limits. There might be a sound policy reason why we might not always want the polluter to pay. If a Government was trying to encourage an insurance regime around movement of a particularly hazardous substance, for example, it would want to make sure that insurance was available to companies so that if there was a spill, it could be sure that no environmental damage would be left unremediated because a company was in liquidation or did not have assets.

It is possible to conceive of a situation in which a Government might wish to cap liability, which would mean that there might not be strict application of the polluter pays principle, but might encourage insurers to provide insurance for a particular thing.

There will always be intricacies in applying the principles to particular contexts, but that is where Government decisions would be helpful—for example, having a policy guidance document accompanying a list of the principles. Government and Parliament can turn their minds to those issues to give more detailed direction in terms of how the principles would apply in particular instances. However, the polluter pays principle would also be used alongside remediation at source and so on, to guide the approach to a contaminated-land issue.

Richard Leslie: Would not it be the case that we would have to look at the appropriate local government legislation to see what environmental obligations and responsibilities had been taken on by the new authority, just as there would be other obligations and responsibilities in terms of social care and so on? I would have thought that any liabilities that a previous authority had would be passed on to the new authority, depending on the council area that they were in. We would have to look at the legislation, but if landfill was incorrectly disposed of, for example, my guess would be that the new authority would take on that liability and would have to deal with remediation under the polluter pays principle, unless it was possible to find somebody else who was responsible.

Under that principle, if the polluter cannot be traced, it often falls to the landowner to remediate. If the land was owned by the new local authority, I am afraid that the cost would have to be borne by that landowner, if the pollution was causing harm. We would have to look at the pollution and see. If it was just sitting there doing nothing—for example, if it was encased in a landfill site and was not escaping—it may be that nothing would need to be done.

The Convener: Before I let Mark Ruskell in, I want to go back to something that Amy Hill said. Amy, I hear what you say about the application of the principles, but would there not be a clear

deterrent effect to having the principles very much enshrined? Is it not likely that, for someone who was considering polluting because they were playing fast and loose with the environment, the knowledge that they would be pursued because of the existence of the principles would have a behavioural effect?

Amy Hill: Absolutely. Sorry—perhaps I was unclear earlier. That is one of the strengths of the polluter-pays principle and one of the reasons why it was developed—to deter as well as to ensure that there is remediation. That would have a deterrent effect, and the strength of the principles also lies in how they flow into more detailed legal rules. We can see how the polluter-pays principle flows into the detailed legal rules in the contaminated land regime.

Mark Ruskell (Mid Scotland and Fife) (Green): What are your thoughts on how the principles have now been incorporated into the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill? We had quite a few discussions about the nature of the principles and whether they should be seen as general principles to be enshrined in the legislation or be there as guiding principles to inform future legislation. I think that we perhaps ended up more on the guiding principles side of things, perhaps taking into account some of the concerns that the Law Society of Scotland has expressed in its written submission. What are your thoughts on where we ended up with that?

Professor MacLeod Little: I assume that the legislation had to be put together extremely quickly, given the circumstances. In many ways, it is very solid, given that it states the principles. I think—this is my own view—that it is better not to be too prescriptive or specific about what they are. They should just be referred to in the terms that they are referred to, which is in some respects similar to the provision in the Treaty on the Functioning of the European Union. There is benefit in that.

One observation that could be made is that the legislation is very much targeted to Scottish ministers; it is not an attempt to establish a more general duty that could apply to other public authorities. It also clearly links the Scottish Parliament's ideas of what the environmental principles are with the European Union provision. That is important because, as I said a few minutes ago, we have been part of the EU regime for decades, so we are contiguous with that regime both in cultural terms and in terms of our approach to what the law is and how it should be implemented and used in the environmental context.

I think that sticking quite close to the EU provision is the right thing to do. I do not think that

we should be thinking in terms of trying to develop a specifically Scottish or UK-based view on what the principles might mean.

Richard Leslie: I would favour the guidelines scenario as well.

The Convener: Stewart Stevenson wants to come in briefly.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I just want to make a contribution in the light of Finlay Carson's question. It took me a moment to find the legislation that Richard Leslie mentioned. Section 15(2) of the Local Government etc (Scotland) Act 1994 refers to

"the transfer of all rights, liabilities and obligations of an existing local authority on 1st April 1996 to such new authority or authorities".

In other words, they continued to exist across the reorganisation, and they are now merely with different bodies. I thought that, to avoid that running away from us, it would be useful to get it on the record.

The Convener: Thank you for that witness evidence, Mr Stevenson. Does Amy Hill want to come back in?

Amy Hill: Only to say that I agree with Professor MacLeod Little. ClientEarth has campaigned for the inclusion of the environmental principles in the European Union (Withdrawal) Bill at Westminster, and it was very pleased and encouraged to see them in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. ClientEarth hopes that the principles will be applicable to all public authorities rather than just Government ministers. We also agree that simply listing them in statute and then perhaps following up with a more detailed policy document that sits alongside that would be better than including a rigid definition in statute.

John Scott: My questions have been answered to some extent, but what are the alternative options to putting the principles into Scots law? You have talked about grouping them in guidance and having them sitting behind the law. Have I understood that correctly?

Amy Hill: Yes.

Richard Leslie: Our public authorities have a number of other environmental duties, so there could be a clash if we enshrined the principles in Scots law. I will read out some of the other duties. Public authorities have an obligation to look after the natural heritage and biodiversity under the Nature Conservation (Scotland) Act 2004; they have climate change targets and sustainability obligations under the Climate Change (Scotland) Act 2009; and there are the requirements of the habitats directive. Therefore, they already have a

number of obligations and, if we introduced new ones, there could be conflict between the two. We have seen that with wind farms. At the macro level, we have renewable energy; at the micro level, the site may not be good. There may be an opportunity for the Scottish Parliament to look at which obligations should get priority or whether there are too many obligations on public authorities and they should be streamlined. Perhaps that is for another day.

John Scott: Well, no—it is for another question. A colleague will come on to the hierarchy of competing demands and principles in a moment. My final question is this: what would be the consequence of having different approaches, priorities and competing principles across the United Kingdom?

Professor MacLeod Little: In areas that are clearly devolved, whether to have principles in legislation should be a matter for the Scottish Parliament, irrespective of the position that we understand will be taken south of the border, where there will be no statutory provision for them. I suppose that difficulties could arise in crossover areas in which there is a shared interest.

John Scott: In the cross-border marine and moorland environments.

Professor MacLeod Little: Indeed.

John Scott: But you think that there has not been an opportunity for overarching frameworks. I appreciate that they are not yet resolved, but you think that that should be a matter for Scotland and that, as we say in Scotland, the deil take the hindmost as far as others in other parts of the United Kingdom are concerned.

Professor MacLeod Little: If Scotland chooses to have a particular position whereby it seeks to put the environmental principles into statutory form because that is felt to be in the Scottish public interest and it is within a devolved area, the Scottish Parliament should do that. However, issues might arise from that.

10:00

Richard Leslie: We understand that, in England, the Department for Environment, Food and Rural Affairs proposes an independent statutory body to champion and uphold environmental standards. We wonder whether Scotland should either appoint its own body to look at environmental standards or explore with the UK and the other devolved Administrations ways of enabling joined-up environmental oversight.

When we are trading with other nations, there will be occasions when we have to have joined-up thinking, for example in the context of animal

welfare. We may not simply be able to go our own way if there is a UK imposition—although our law might be different, because there are opportunities for us to have our own environmental law.

We want to ensure that the principles that are already established in Scotland are not watered down by the other jurisdictions. That is the non-regression policy. We do not want our environmental policies to be weaker or watered down simply because we are going to trade with the United States or Brazil, for example, as opposed to the European Union. We have to be careful about that, so it would be useful to have a body that could champion environmental standards and say, “That is a backward step.”

Amy Hill: ClientEarth is keen for there to be some sort of co-designed, co-owned UK-wide framework, if at all possible, which would obviously respect the devolved settlements. A model that we are considering, which might provide a framework, is the marine policy statement, which I understand is co-designed and co-owned. I understand that there is a mechanism whereby a devolved Administration can drop away if, at some point, it does not wish to continue to work jointly on the marine policy statement, which leaves the statement applying in the remaining jurisdictions. There would be advantages to a UK-wide framework of some sort.

The Convener: But why, when in theory such an approach runs the risk of lowering standards?

Amy Hill: Mainly because there are joined-up approaches to, for example, the marine environment and national climate change targets. Obviously, some environmental issues are more localised, and if the approach resulted in a lowering of standards, it would not be preferable, but—

The Convener: How do we safeguard against that?

Amy Hill: Maybe that is a matter of political will, if people are working across borders. Governments could be allowed to go above and beyond a baseline standard in their own jurisdictions—with no limit upwards.

John Scott: Will you develop that theme? I wanted to ask about the possibility of having a minimum standard—a baseline—which others could go beyond and improve on if they wanted to do so. Is that a tenable position, if Scotland wants different or better standards? Can there be an overarching framework, with an enhanced position in Scotland if that is what we want?

Amy Hill: I think that such a position would be tenable. There is frequently such an approach in areas of EU law. Member states are allowed to improve on the baseline but it is not acceptable to

go the other way, as a general principle. We could have an agreed UK-wide baseline, on which Scotland could improve.

Richard Leslie: We already take such an approach. Under the Climate Change (Scotland) Act 2009, we have far tougher targets in Scotland than the UK has. We could take the same approach.

John Scott: We would be developing an existing principle.

Donald Cameron (Highlands and Islands) (Con): I refer to my entry in the register of members' interests: I am a practising advocate.

My questions relate to those of the convener and deputy convener and are about Brexit and international obligations. The most obvious example of an international obligation is the Aarhus convention, which is the United Nations document that enshrines important principles such as access to information, public participation in decision making and access to justice. After Brexit, the convention will persist.

I suppose that I am asking the panel to look into the future. Do you see Brexit as an opportunity for us to raise standards, or is it more realistic to think that we will see a lowering of standards? What do you think will happen?

Richard Leslie: It will be a question of political will, ultimately. We have debated whether we should have environmental courts, but there has not been either the appetite or the funding for them. As Scotland is a fairly small jurisdiction, my concern is whether we would have the manpower to deal with that or whether we should follow the lead of the rest of the UK. However, the Aarhus convention would continue beyond that point and would be developed by our courts rather than by our politicians, although the politicians would have an opportunity to do something about it.

Donald Cameron: On the question that has just been asked, there is a healthy debate on access to justice, on whether Scots law allows that principle and the extent to which it is being realised. If there were to be a divergence between the devolved Administrations, could you see, for example, Scotland allowing greater access to justice in environmental cases than other forums in the UK?

Professor MacLeod Little: Potentially, yes. I agree entirely that it is ultimately a matter of political will and of resource. The question also touches on a subject that I know has been raised before the committee in the past, which is that, after Brexit, we may find ourselves in a situation in which environmental issues will be far more politicised at local level. There may be very much more in the way of, for example, lobbying activity

directed at the Scottish Parliament and the Scottish Government, which could also be quite a profound influence on such a dynamic.

The Convener: I will probably betray my lack of legal understanding in asking this question, but I will do so anyway. The issue is all about what applying the principles would look like in future. Quite recently, the committee concluded that there was little evidence of the precautionary principle having been deployed in relation to aquaculture expansion. I recognise that there will be contrary views on that, but how do we get to a future set-up that ensures that Government and its agencies do not and cannot ignore such principles and must pay heed to them? What would be the best set-up to get us into such a position in future?

Amy Hill: ClientEarth proposes having the principles listed in statute, with accompanying policy guidance, and having clear duties on public authorities to have regard to them—or possibly to act in accordance with the policy statement.

However, a lot of the success of statutory duties also comes down to political will. An example that I have recently come across is an act from 1992 that relates to fisheries, which has only one or two sections and says that all authorities that make fisheries management decisions should do so while taking wildlife conservation into account. That approach has not been particularly influential or effective. However, there are other examples, such as the counterterrorism prevent duty, in which similar statutory wording is taken very seriously. Therefore a lot of the approach is about building up political will and developing practices such as routinely picking up the principles document, having a flick through it and considering it.

Professor MacLeod Little: I will add to that by saying that a statute that sets out the principles and makes them applicable to, say, public authorities could also have a regular reporting requirement. There could also be provision for information on specific decisions that have been arrived at by authorities to be provided—for example, to the Parliament.

Therefore there is a range of things that could be done to channel decision takers down a particular line. For example, if we are thinking about the precautionary principle, we could say that they should, as a matter of course, consider precautionary issues. Of course, depending on the situation, it might be that they would consider the precautionary principle and decide that precautionary action was not appropriate in that case, which would not be unreasonable at all. The important thing is that there would be a requirement to report on it and, if necessary, to provide reasons, not only to this Parliament but publicly. It should be transparently done.

The Convener: That is very interesting.

Richard Leslie: When it comes to aquaculture, you may want to look at the consenting regime to see whether changes can be made to it to take into account the precautionary principle, because there is a question mark as to what the longer-term effects will be.

Richard Lyle (Uddingston and Bellshill) (SNP): Some people have strayed into the area of my question, so I will rephrase it slightly.

It has been suggested that further consideration should be given to whether additional principles should be included in Scots law. Colin Reid, professor of environmental law at the University of Dundee, proposed that a non-regression principle should be introduced, stating that

“any changes in law or policy should maintain or increase the level of environmental protection, and not allow any deterioration”

of it. Do panel members think that other principles, such as the non-regression principle, should be incorporated into Scots law ahead of Brexit?

Professor MacLeod Little: It certainly could be, and I can see that there are strong arguments for doing so. I think that the value of including a principle of that sort would primarily be that it would serve as a baseline for decision takers, and it could usefully be reported on by decision takers. It is one of the criteria for decision takers that sits well with the other principles.

I know that later we will discuss the hierarchy of principles. We have yet not touched on the potential for making the principles that are in section 13B of the continuity bill subject to a more general objective of pursuing a sustainable environment. If a principle of that sort were introduced, it could be argued that the requirement for a non-regression principle might fall away. There is a certainly debate to be had around the inclusion of that and other principles, but it would need to be worked out quite carefully so that they work together in a rational way.

The Convener: Does anyone else want to come back on that specific point before Mr Lyle follows up?

Richard Leslie: We have to be careful that we do not create a stick to beat ourselves with in the future. There may be good reason why laws have to be changed so, although non-regression might be a principle, I would not necessarily want to see it put into statute. We do not know who in the future would come along and say that something is a regression. It becomes very subjective.

Richard Lyle: You must have seen my second question, Mr Leslie. Like Finlay Carson, I cannot pass up the opportunity to ask you this. In your

opinion, on leaving the EU, do we need to review, update or accept every law that has been passed by the EU since we joined, or so we just accept those laws entirely?

Amy Hill: I will just make a quick, general point. From the ClientEarth perspective, it is very important that there is no initial loss of environmental protections. It would be about retaining and then, we hope, improving on EU law. We certainly do not want to lose anything that is currently in that law.

Professor MacLeod Little: I agree with that. I also observe that the UK has often been a major driver of large parts of EU environmental law, so it would be very much a retrograde step if we were to take that course.

Richard Leslie: The great repeal bill simply retains all existing legislation, so it is up to individual Parliaments to legislate if they want to change that. From day 1, we will be accepting everything that we have previously accepted, and most of our environmental law is derived from Europe, including the habitats directive and the water framework directive, so we are on a good footing and I do not see any need for change unless there is a specific area in which we need to do that.

10:15

Mark Ruskell: I was looking back at the answer to a written question on the principle of non-regression and how we keep pace. To summarise, the Scottish Government response was that it believes that the mechanisms that have been put into the continuity bill are adequate. Those mechanisms are the enshrining of the guiding principles in legislation, the keeping-pace provisions under section 13, and the duty to consult on a governance structure going forward. What is your view on that? If you take those alongside the political commitment of the current Administration to keep pace with the new laws, is that in effect non-regression, or is there a need, as Professor MacLeod Little said, to go further within the keeping-pace provisions? Does that reassure you that that is in effect non-regression?

Professor MacLeod Little: In the vast majority of cases, it is likely to be just that. The point that I was making about a broader, overarching principle of pursuing a sustainable environment and having that as a key objective was aimed at making the provision for the principles more coherent, rather than saying that if the provision was not there, it would result in a serious regression.

Amy Hill: I will not speak about the details of the Scottish continuity bill, but I think that the Government's approach is not to regress in bringing EU law into UK and Scots law. A non-

regression principle might be useful 10 years in the future, as we develop our law independently—provided that the UK does not end up back in the EU somehow. It would enable us to benchmark as law reform happens domestically.

Richard Leslie: We also do not know what the future of Europe is going to be. Laws in other European countries may change or regress, and it is important that we do not simply keep step with European law but look after our own. We have already mentioned aquaculture, where we are very different from the rest of the UK, which does not have a big salmon fish farming industry, so we want to keep an independent line and not necessarily always follow Europe, especially if Europe goes backwards.

John Scott: Let us go back for a moment to the broader picture of a hierarchy of principles. The Law Society has said:

“To pick out specific principles and give them special status which goes beyond that currently applying, runs the risk of unintentionally giving the principles a greater status than other relevant principles.”

Richard Leslie spoke of rods to beat our own backs with. Is that the sort of thing that you mean? I realise that I should have declared an interest earlier, but I am doing so now. With reference to this committee's remit for environmental matters, what would you suggest a hierarchy should look like if there were to be one?

Professor MacLeod Little: If such a hierarchy were to be developed, it should not be set out in statute. We could have a statutory provision, as there is in section 13B of the continuity bill, but how those principles are addressed by decision takers can be dealt with as a matter of policy. Any view on how a hierarchy might be established would be a matter of policy, rather than something that you would necessarily want to set out in statute. In fact, I can see how, under the law of unintended consequences, setting it out in statute could be quite a risky step to take.

John Scott: Would you go as far as to say that it would be a bad idea?

Professor MacLeod Little: Yes.

John Scott: Do the others share that view?

Richard Leslie: I do not think that there is currently a hierarchy of the principles and I do not see why we need to have one. They will all sit together to be looked at in the round.

Amy Hill: I agree with what has been said.

John Scott: Thank you. That is very clear.

The Convener: Thank you. We move on to Mark Ruskell.

Mark Ruskell: I turn to the issue of trade deals and whether the principles might have an impact on them. I think that Richard Leslie has already touched on that, but can I get more thoughts on how it might play out?

Richard Leslie: It is going to be difficult. The UK Government is going to be responsible for trade deals with other countries, but Liam Fox said on the radio this morning that the UK would have its own standards. Are we talking about importing chicken from the United States of America, which is currently not allowed? Pressure might be put on the Scottish Government to look at the wider UK picture and, in such circumstances, there might be regression and we might have to look to our own farmers and producers for these items and stick with them. After all, the environment is a devolved subject and we do not have to agree to UK standards.

Mark Ruskell: Do you see the principles as they are currently enshrined in the continuity bill having an impact on the negotiation of any UK trade deal?

Professor MacLeod Little: Not necessarily. I suppose the position would be that the UK Government would also be considering the environmental principles but would be viewing them solely as policy principles. The Scottish authorities would be looking at them because they are in statute. That does not necessarily mean that they would take a different view on how the principles are to be interpreted in an instant case.

Amy Hill: We would see them as informing the Government's approach to its trade policy. ClientEarth would hope that the UK continues to push for high environmental standards and environmental protections in its international relations and trading, and perhaps having them as the domestic background could inform that. From my limited understanding of trade agreements, I believe that the principles do not tend to feature in them, although trade agreements increasingly have environmental chapters and so on. Michel Barnier spoke of a non-regression clause in a future free-trade agreement, which is conceptually quite different from having a domestic non-regression clause that is about our domestic environmental standards and is, in fact, about trade competition. I think that Barnier sees it as making sure that the UK does not undercut the EU by lowering its standards, so what he is referring to is a tool in the trade context.

Mark Ruskell: Could a future trade agreement prevent the Scottish Parliament from putting environmental principles into Scots law at a future date?

Professor MacLeod Little: I am not an expert in international trade; I am more of a domestically

focused specialist. However, on the face of it, I cannot see how they would prevent the Scottish Parliament from passing legislation that would apply to devolved areas, particularly if it is a fairly general, non-specific provision of the sort that is in section 13B of the continuity bill. The issue is not so much whether the principles are considered in decision taking but what the decision is on how the principles should be applied.

Mark Ruskell: That would suggest that some form of impact assessment around a particular trade deal would need to be produced that would enable citizens, devolved Administrations and others to look at the impact and how the principles were being applied. What would your view be on that? How should the principles inform an impact assessment on a trade deal and any subsequent consultation? Are there particular issues that you could focus on?

Professor MacLeod Little: I suppose that there could be debates on public health issues or food standards in particular trade deals. Let us take genetically modified organisms as an example. At the moment, we are subject to a strongly precautionary regime. If we fall out of the European Union and still wish to apply a strongly precautionary regime in Scotland but find ourselves unable to do so because of a trade deal, that would at least initiate a considerable debate about the nature of the precautionary principle and how we view it.

Stewart Stevenson: I will take us to a slightly different view of the subject. Do the witnesses agree that trade deals are, of necessity, bilateral? In other words, they are about one country imposing conditions on the other for trade in one direction and vice versa. Therefore, the conditions that might be imposed on what will be imported into Scotland are separate from the ones that we might have to meet to export to another country. I just want to get the nodding heads that agree that that is the point.

Amy Hill *indicated agreement.*

Richard Leslie *indicated agreement.*

Professor MacLeod Little *indicated agreement.*

Stewart Stevenson: Therefore, broadly speaking, we are likely to be able to set our own standards for production—I am thinking of food in particular, but it would not just apply to food. However, it is possible that, for the sake of argument, the United States might require all chickens that were exported from Scotland to the United States to have gone through chlorination. So be it. That would not matter too much to the Scottish consumer. We ought to be able to retain authority over how we do things for ourselves in

Scotland. Can anyone identify any difficulty with that statement?

Amy Hill: I do not know whether this quite answers your question. I should say that I am by no means a trade expert. Scotland would be free to put in place whatever standards it chose, including higher standards than other countries. I do a bit of work in the fisheries context, and the fishing industry is thinking about the fact that divergence from EU standards would require certification and other measures on the border. Sometimes, complying with the technical requirements of another country or trading partner can create barriers. Therefore, that might mean that Scotland would wish to align itself closely with the EU rules for the sake of removing friction.

Stewart Stevenson: Therefore, in our own production, we will always need to meet at least the minimum standards that are acceptable to the trading partner to which we are exporting. That is self-evident, so is not the issue in the discussion really about what comes into the country? Trade deals are a matter for the UK Government and the Scottish Parliament has all but zero direct legislative competence in that regard. It might have influence but it has no legislative competence. The issue probably ends up being about labelling of origin so that people can decide to buy chlorinated American chicken if they wish to do so.

I would not recommend that they do that, but it is for them to decide. However, people would need to know that they were buying chlorinated chicken and it is unclear what our powers would be in that respect. Is it fair to say that therein lies the difficulty?

10:30

Richard Leslie: You are right. We have had a similar issue recently with the export of salmon to America, which has a different standard—we have either to comply or choose not to trade salmon to America—and the same would apply when we import something. It is more difficult when it comes to things, such as genetically modified soya, that are part of prepared food. We might not have the ability to stop something like that at the border of Scotland and say that we will not let it in. There will be difficulties and there is no easy answer.

Mark Ruskell: Is there a difficulty in the negotiation of any trade deal because we come to conclusions by applying the principles that we have been discussing, and those principles are treated differently in countries in other parts of the world? For example, we heard that the US has a different approach in its application of sound science in comparison to our application of the precautionary principle. Is that gap significant

enough to create friction and tensions around how principles are considered?

Professor MacLeod Little: You are right to say that the US, for example, takes a very different view of the precautionary principle. In a sense the US cleaves to a more traditional view of risk regulation, which is akin to the sort that we used to employ in the UK until the BSE-CJD crisis.

To go back to the earlier point, the process is likely to open up a wide-ranging discussion about what we mean by the application of the precautionary principle. At the moment, we sit in a very EU tradition of thinking about the precautionary principle, but, post-Brexit, we may have to have a discussion about what it means to apply precautionary decision taking. There are different views as to when precautionary action should be taken.

John Scott: Forgive me for butting in, but are you saying that there are different interpretations of the precautionary principle in Australia, New Zealand, South Africa and America?

Professor MacLeod Little: It is not so much that there are different interpretations, but that there are different ideas about when precautionary action ought to be taken. For example, the United States still considers that it is applying the precautionary principle in relation to the regulation of GMOs, but the US's view of how risk is to be balanced is different from ours. The principle itself is the same, but it is quite reasonable for different authorities to have different views on how to balance risk against benefit.

Claudia Beamish (South Scotland) (Lab): I have a quick comment on that. Will that not always be the case? We will come on to courts later, but surely the reason why the precautionary principle is sometimes challenged through judicial review is that different local authorities may interpret it differently. There will be differences even in Scotland, let alone Britain.

Professor MacLeod Little: That is right. The way in which we think about the precautionary principle in Scotland at the moment is heavily conditioned by the fact that we have been part of a very strong EU culture of precautionary decision taking since the 1990s. That is a very powerful influence on us. However, we have to be aware that different trade blocs may take a different view of the application of the precautionary principle in a given situation.

Alex Rowley (Mid Scotland and Fife) (Lab): I would like to ask about what we can learn from other countries. Are there countries that include environmental principles in legislation, and what can we learn from that? Are there examples of countries where environmental principles are

included in policy guidance rather than legislation? If so, how effective is that?

Amy Hill: I echo what a number of submissions said about the need to be cautious about how other countries do things, because the legal and political cultures are different in other countries.

Having said that, one interesting example is the recent Trinidad and Tobago case study that is in the ClientEarth written submission—it focuses specifically on the polluter pays principle. The reason why that might be useful for the committee to think about is that that country has environmental principles in a policy statement that all public authorities are under a duty to apply, and the Judicial Committee of the Privy Council has recently considered a case involving the policy statement. That might give an indication about how UK courts might look at something like that, even though it is not in a UK setting.

In Trinidad and Tobago, the policy statement operates to impact on how a public authority can charge for water discharge permits. The Privy Council found that the public authority's current way of doing things, which involved a flat, fixed-rate fee, was inconsistent with the polluter pays principle in the policy statement, and it required the public authority to reconsider how it levies charges for discharges, given that the system was supposed to be about keeping money aside for the cost of remediation. The Privy Council considered that the polluter pays principle, as set out in that policy statement, was also about ensuring that the public authority left itself the powers to charge for pollution and to levy a higher charge than a flat fee if a permit holder polluted.

Professor MacLeod Little: As Amy Hill has just indicated, there are a number of examples that we could draw on, but we have to be careful about the idea of legal transplants. Of course we can learn from the experience of other jurisdictions, but we have to be aware that those other jurisdictions are operating in different constitutional, legal and socioeconomic contexts, all of which are relevant when we are thinking about how examples can be drawn across into the Scottish context.

As I said earlier, probably the most relevant international scenario for us to continue thinking about is the European Union, which we are currently still part of. Its thinking on environmental principles has been absolutely fundamental to our law. We have huge intellectual and legal continuity with it, and that will continue for some time after Brexit. I would be wary of casting the net much further afield to see what happens elsewhere, because there is a danger that we could introduce inconsistencies into the way in which we think about the principles.

The Convener: This is a good line of questioning. Given that, when Brexit occurred, the academic community was quick off the mark to identify the risks and the potential pitfalls that we were facing, I assume that someone in the academic community has been engaged in a piece of work on how environmental principles are applied elsewhere across the globe and how they might be adapted. Are you aware of anybody having done that?

Professor MacLeod Little: There are certainly academics in other jurisdictions who work on environmental principles. I am not aware of any work that is specifically related to what the implications of Brexit might be in relation to how we could adopt models from elsewhere. However, no doubt that will come.

Finlay Carson: A number of written submissions suggested that it is important that there are enforcement mechanisms to ensure compliance with the environmental principles. The UK Environmental Law Association and Scottish Environment LINK suggested that that should be the case, and ClientEarth wrote:

"A new, independent statutory body should ... be established".

What are the benefits and risks of establishing a UK-wide enforcement body?

Amy Hill: I will speak to the ClientEarth submission. My colleague is doing the majority of the work on that and I can send some information after the meeting, if that would be useful.

ClientEarth sees benefits because, when we leave the EU, we will be leaving structures and institutions such as the European Commission, which currently provides a watchdog function and allows member states to be held to account. ClientEarth sees the watchdog body as something that would provide an enforcement function for public authorities. It could perhaps review policy practices or conduct investigations and, if we were to have the principles in place, it could take complaints and almost act as an ombudsman. It could investigate whether an act by a public authority had, say, considered the precautionary approach and, if not, how it might do that better.

We consider the external enforcement function of the European Commission to be important, and one that should be replaced in the UK. Again, ClientEarth would like that to be a UK-wide body, which is co-designed in a way that respected the devolution settlements. However, we know that there are great difficulties at the moment in that regard.

Professor MacLeod Little: I think that the establishment of any commission would have to be drafted in line with the principles of devolution if

it were to have any hope of purchase, and whether that is possible would depend on the political sphere.

It is also possible that an independent Scottish commission could be established to do broadly the same thing in the Scottish context, and there might be a strong weight of argument behind that, given that the devolution of environmental matters is a fundamental area of devolution. It is quite reasonable to say that there are areas in which Scottish practice and considerations might differ, so a Scottish institution might be appropriate.

Richard Leslie: At a local level, if legislation including the principles is introduced on, for example, water or contaminated land, the Scottish Environment Protection Agency already has an enforcement ability. There is a structure for enforcing environmental principles if they are breached, and there are the usual appeals mechanisms, sanctions and the courts process, so I do not see that there would need to be anything different as principles are applied to individual aspects of legislation. The commissioner would come in at the macro level of whether local authorities and the Parliament were adhering to the principles.

Claudia Beamish: Could I push that a little further and ask the panel what role an independent Scottish enforcement agency would have? Although I respect SEPA's work, one could question its independence. How would an enforcement agency relate to the Scottish Government, public bodies and other enforcement agencies around the UK?

There has been a lot of consideration by various parties and the Scottish Government of the possibility of an environmental court or environmental courts. In my opinion, they would perhaps be not dissimilar to domestic abuse courts. A range of models would be possible. Is that a viable possibility? If so, where would the final decision making be? Would the matter have to go to the UK, or could it stay in Scotland? That is about political will in a sense, but it is also about what could work.

10:45

Professor MacLeod Little: There is every reason for that to continue in the Scottish jurisdiction. Obviously, there has been a lot of thought and debate about having a separate environmental court. I suppose that there is the related question of whether the ordinary courts could be made to work more effectively in the environmental context. For example, specialist judges could sit in the ordinary court system.

The role of a commissioner perhaps operating rather like an ombudsman was touched on earlier.

That is a rather different role. It is clear that, if there was a dispute resolution mechanism that was focused on the environment and was not solely or narrowly legally based but took into account broader considerations of injustice through maladministration, an ombudsman-type model could be much more appropriate for many environmental disputes. Even if the commissioner was essentially an ombudsman-type figure, there is every reason why that role should be within the devolved ambit and a specifically Scottish ambit.

Claudia Beamish: You said “there is every reason”. Will you expand on that?

Professor MacLeod Little: The main reason is that the Scottish Parliament and the Scottish Government have the lead role on nature conservation and environmental protection issues and, notwithstanding Brexit, the subject area falls largely within the devolved boundaries. Therefore, there is *prima facie* a strong case for saying that any dispute resolution mechanism should essentially be part of that devolved structure.

Claudia Beamish: Where do you see the ultimate court being?

Professor MacLeod Little: If we are talking about civil disputes, there could be a system of appeals on points of law to the Court of Session and ultimately to the UK Supreme Court.

Claudia Beamish: Do other panel members have comments on the issue?

Richard Leslie: There has been some debate over time about whether we should have a separate environmental court for environmental matters, which are often criminal—if there is pollution, for example. Those matters go before the sheriff court, and procurators fiscal are not used to dealing with them; they are far more used to dealing with the usual crimes. We have seen sanctions and fines in Scotland that are far less than those in other parts of the United Kingdom. It has been thought that, if there was a dedicated environmental court, the environment would be looked after in a better way. That debate has gone on for some time, and we are no further forward.

I think that Professor Little said that an ombudsman is a good idea from the macro level of looking at wide areas, but we should not discount the fact that the courts are still the first point of reference, or the fact that third parties have an interest in looking to enforce where there are environmental issues, whether they are to do with fracking, wind farms or whatever. That should also be looked at. It is not just about the polluter and the enforcer; third parties should have an interest.

Amy Hill: I do not have anything to add beyond what has been said.

Professor MacLeod Little: SEPA has recently reformed its enforcement procedures, of course. In fairness, perhaps we need to wait and see whether they are more effective than they were taken to have been previously. I think that it will take a good couple of years before we start to see results feeding through.

John Scott: Mr Leslie, can I pick you up on your last point? Did you imply that we are less efficient in the way that our courts operate in terms of environmental law here in Scotland? I ask that not to make any point, but just as a point of information. Do we need to up our game? I do not want to tempt you into saying anything awkward, but I would be grateful for a straightforward view. If you think that there are shortcomings, this is the place to tell us.

Richard Leslie: I do not think there is a shortcoming in enforcement. However, some of the penalties and sanctions are less than those in other parts of the United Kingdom. Are they sufficient deterrents to stop people doing what they are doing? I am thinking of fly tipping, disposal of tyres and what have you. The fines in Scotland seem to be less than the fines in England and Wales. That is the general point.

Professor MacLeod Little: Historically, that has definitely been the case. I suppose the issue is whether the new mechanisms that have been adopted recently will have a significant effect on that scenario.

John Scott: Has that led to reduced environmental protection in the past?

Professor MacLeod Little: There have certainly been concerns that there has been a sort of regulatory arbitrage, potentially, north and south of the border on issues such as fly tipping. However, my understanding is that there has been quite determined action by SEPA and, I think, the Crown Office to try to remedy that situation.

The Convener: Thank you very much for your time this morning. Your evidence has been very useful.

10:51

Meeting suspended.

10:57

On resuming—

Subordinate Legislation

Loch Carron Urgent Marine Conservation (No 2) Order 2017 (Urgent Continuation) Order 2018 (SSI 2018/100)

The Convener: Welcome back. Agenda item 3 is subordinate legislation. The committee previously considered instruments relating to the status of Loch Carron last year. I invite members to comment.

Mark Ruskell: I am happy to support the order, but I would like some clarity from the Government on why we are moving from a temporary order to a temporary order with the eventual end point of a permanent order. I note that the business and regulatory impact assessment has been published for the permanent order. It would be good to have some clarity on the process and why we are going through temporary orders. There seems to be an obvious case to be made for moving to a permanent order and protecting this important site.

Claudia Beamish: I am encouraged that Marine Scotland and the Scottish Government have acted so quickly. That should serve as a warning to anyone who wants to flout the regulations. Anyone who fishes should be aware of where the relevant places are and make sure that they do not impinge on protected features.

The Convener: Following up on that very good point, perhaps we should also ask the Scottish Government what steps it has taken on the back of what happened at Loch Carron to remind fishing interests of their responsibilities to the marine environment. What happened was not illegal at the time but, nevertheless, it was deeply damaging to the environment.

John Scott: Might it also be worth while to ask the Government for an update on the situation? Has it stabilised? Has it been retrieved? Is there betterment of the damage that has been inflicted on the site? I am not asking for an in-depth investigation, but perhaps the Government will have some knowledge of the situation following the imposition of the order.

The Convener: Are we agreed that we should write to the Government on the issues that members have raised?

Members *indicated agreement.*

The Convener: Having agreed that, are we content that we should make no recommendations on the order?

Members *indicated agreement.*

The Convener: Thank you. At its next meeting, which will be on 8 May, the committee will hear from the Cabinet Secretary for Environment, Climate Change and Land Reform and the Minister for UK Negotiations on Scotland's Place in Europe on the EU environmental and animal welfare principles. We will also hear from the cabinet secretary on the advice received from the UK Committee on Climate Change on the forthcoming climate change bill.

As agreed earlier, the committee will now move into private session.

11:00

Meeting continued in private until 12:52.

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

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