OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 5 June 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 5 June 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

19th 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)
*Alex Neil (Airdrie and Shotts) (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:

Lloyd Austin (RSPB Scotland)
Professor Campbell Gemmell (Canopus Scotland Consulting)
Jonny Hughes (Scottish Wildlife Trust)
Professor Colin Reid (University of Dundee)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 5 June 2018

[The Convener opened the meeting at 09:35]

Decision on Taking Business in Private

The Convener (Graeme Dey): Welcome to the 19th meeting in 2018 of the Environment, Climate Change and Land Reform Committee. We have received apologies from our colleague Alex Rowley. I remind everyone present to switch off mobile phones and other electronic devices, as they might affect the broadcasting system.

Agenda item 1 is for the committee to consider whether to take items 6, 7, 8 and 9 in private. Do we agree to do that?

Members *indicated agreement.*

Interests

09:35

The Convener: Item 2 is for the committee to welcome Alex Neil and ask him to declare any relevant interests.

Alex Neil (Airdrie and Shotts) (SNP): I have nothing to declare beyond my entry in the register of members' interests.

The Convener: Thank you.

Round Table on Environment and Climate Change

09:35

The Convener: Item 3 is an evidence session on the environmental governance report of the round table on environment and climate change. I welcome Professor Campbell Gemmell, Lloyd Austin, Jonny Hughes and, by videolink, Professor Colin Reid. Thank you for your time, gentlemen.

John Scott (Ayr) (Con): Thank you for coming to give us the benefit of your evidence. I want to ask about the role of the European Union institutions in relation to environmental law. What specific functions do the EU institutions provide for member states in relation to environmental law?

Professor Campbell Gemmell (Canopus Scotland Consulting): That is a very big question that has taken us 40 years or so to develop. The functions start at a fairly simple level of dialogue between member states and between member state subordinate agencies; the exchange of information is a fundamental part of the structures. The functions span across a spectrum all the way to the ultimate powers of the Court of Justice of the European Union. There are components that come from the institutions that involve reporting requirements on, for example, environmental monitoring data, which are shared with the European Environment Agency, the European Commission and, through a number of other structures, with bodies that connect into EU institutions.

We have specific reporting obligations on compliance with directives. There are elements that connect with international agreements but which also have European institutional components. There is also the approach that is taken, and the powers that are held, by the European Commission to require clarification on member states' performance and institutional performance against the directives and the other components of legislation within the European system. That leads to what I would call soft pursuit: member states are asked to explain what is going on within them. There are also the more formal processes that result from the structures and powers of the European Union to require recourse and a process to be taken to the European Court of Justice.

There is a wide span of different components. I hope that I have responded to the question in a general sense. I suspect that my colleagues, particularly Colin Reid, will be able to clarify further. It is very important to recognise the breadth of the institutional connections and consequences.

Professor Colin Reid (University of Dundee): In a lot of recent work, there has been an emphasis on the reporting, monitoring and enforcement stage. We need to remember that the EU institutions are also important in creating law, setting standards and providing guidance. There will be a change in the way in which environmental matters are looked at when we are cut off from those processes.

Lloyd Austin (RSPB Scotland): I agree completely with what Campbell Gemmell and Colin Reid have said.

To illustrate the way in which the report has tried to address those matters, I note that paragraph 2.4 lists five categories of activity and function of the EU institutions: implementation of environmental law and policy; monitoring, measuring and reporting; checking compliance; enforcing; and institutional co-operation. In producing the report, we felt that those five categories summarised the range of functions of the different institutions.

John Scott: Those are a matter of record. More importantly, we are interested in what the panel envisages the likely gaps in oversight and governance of environmental law will be after Brexit.

Professor Gemmell: We have tried to set that out in a structured manner in the report by looking at different environmental media, including subjects that do not fit into a neat air, water and land classification.

We have looked at this issue across everything, including areas such as chemicals and nature conservation. First, we assessed the current arrangements. We then tried to identify the gaps that could emerge, and the report looks at potential ways of addressing those gaps. We detailed the different categories of gap, which span from informal and soft benefits, such as the sharing of technical expertise and being invited to participate in knowledge exchange groups.

We could lose out through not being able to access technical professional information. For example, in my former core field, individual member states benefit hugely from the scientific, technical and engineering underpinning work that is done by centres of expertise across the EU, which provide access to the best-available technology and techniques. Similar arrangements exist in each of the thematic areas that we have looked at. That includes, for example, the regulation of the registration, evaluation, authorisation and restriction of chemicals—REACH. It would be horrendously expensive to duplicate the EU law framework on chemicals in every jurisdiction or subordinate component of a jurisdiction.

There could also be gaps in citizens' rights of access to information and the powers that citizens have to request information and to initiate a process that can ultimately result in formal court proceedings.

We tried to detail the different categories of gap. In due course, it may be more efficient for the committee to digest what is in the report. The set of potential gaps is large. At this point, I stress that one of the challenges is simply knowing what the end of the story might be. Frankly, a lot of this will be subject to future agreement between Scotland and the United Kingdom, as well as between the UK and the EU. It is not entirely clear. We have identified the risk of gaps, rather than having any certain knowledge of what gaps will emerge.

My colleagues may want to pick up more detail.

Jonny Hughes (Scottish Wildlife Trust): Thank you to John Scott for the question, which sparked an idea in my mind.

As Lloyd Austin said, in the report we mainly covered monitoring, measuring and reporting, checking compliance, enforcement and institutional co-operation. We did not look at the policy development at the beginning of the process. Losing Scotland's contribution to and influence on policy development both through the UK and directly would be another major gap. It could be seen as a gap in governance or in policy co-operation and development. Whichever it is, the gap would be important because, as the committee may know, about 80 per cent of environmental legislation in Scotland is purported to derive from EU legislation. It is important to raise the point that there would be a gap, both in policy development and in the other issues, for which the report seeks to explore solutions.

09:45

John Scott: We will come to more detailed questions about that in a later series of questions.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to pick up on what Professor Gemmell has just said. There was quite a long list of references, but the first one was knowledge exchange groups and the next one was academic access to information. Just to help us understand, do either of those or any of the other things in the list involve non-EU actors?

Professor Gemmell: Yes, Several of them do. At the moment, for example, the European Environment Agency involves non-EU states. There are a number of other arrangements that connect very strongly between international treaty obligations and EU law in which non-EU member states are participants. There are issues on which countries with different categories of membership

have different voting rights, different powers and different abilities to access information. For example, the European Economic Area countries, such as Norway, have access to a lot of the data that are provided on technologies for environmental control, for example.

Stewart Stevenson: Just to pick up on that, it is very important that we understand what the boundaries are, because we are going to be on the other side of the boundary. Can you identify anything that Norway does not get access to as a non-EU state that would be material to and of interest to us in Scotland?

Professor Gemmell: Again, I suspect that my colleagues could provide you with some additional detail. During the water framework directive processes looking at intercalibration and the way in which data were shared, the groupings considered the design of the way in which a directive could be operationalised at member state level; countries that were outside the EU were able to access the results of that consideration but were not able to participate in the discussions around the detail and formulation. That is an example of a matter of degree, but I am not sure that I have an example to hand of an absolute difference. Perhaps one of my colleagues does.

Professor Reid: I am trying to think of concrete examples. There have been studies of the various European collaboration bodies, and each of them is different in terms of its constitution, the status of EU members and non-EU members and the levels of co-operation. There is therefore no overall, all-encompassing answer; it is a question of looking in each case at the particular formulation and way of working of the different bodies.

Lloyd Austin: Colin Reid said what I was going to say, but I agree that it depends on the terms of reference and constitution of the individual institution and on the co-operation arrangement that we are talking about. However, the non-EU member states engage much more in the informal data exchange end of the governance arrangements. They are not so much involved in the compliance and enforcement end, which relies on European law and directives, which apply only to full member states.

Stewart Stevenson: We will come to the issue of enforcement in another part of our questioning. However, in your initial remarks, Professor Gemmell, you painted a picture of a hierarchy of exchange of information at the softest end to legal oversight and action at the most robust end. Throughout our questioning, the thing that will be of interest to us here is what we will lose when we cross the boundary and what options we will have to opt back into arrangements once we are over the boundary. That is it as far as this committee is concerned and—I imagine—the Scottish Government is concerned. Are there particular options for the UK, not just Scotland, to participate in European expert bodies that we might want to focus on robustly to ensure that we are not excluded from them post-Brexit? That goes to the heart of the matter.

Professor Gemmell: That is a very good point, but I stress that, because we are not at the end of the process, we do not have clarity on what is negotiable in that particular space. For example, my current priority is looking at the management of radioactive waste across the UK. It is interesting to note that the Prime Minister has already indicated that she is seeking some sort of associate membership of the European Atomic Energy Community. Such membership does not currently exist; either a country is a member of Euratom or it is not. We have looked at the powers of the International Atomic Energy Agency and its mores in sharing information and so on. It has a broad span, but it does not have the intervention and holding-to-account powers that there are in Euratom. We might be allowed to have associate status, which might mean that we will have access to information and we will be able to seek assurance about the proper management of waste in the UK and in Scotland, but we might not. That is just one example of where being in and being out have distinct differences and benefits and disbenefits. However, we do not yet know where we stand.

Stewart Stevenson: I will make a remark and then hand back to the convener for the next issue. We here can contribute not simply by responding to what is or is not happening or what might or might not happen, but by informing. There is a bit of a lacuna or vacuum in information about what the real coalface options are. I think that colleagues will develop that point.

Lloyd Austin: We could inform the discussion about the arrangements that will go forward. Campbell Gemmell is right about radioactive waste and Euratom, but the Prime Minister has also referred to the European Chemicals Agency as opposed to the European Environment Agency. It would be worth encouraging the UK to continue to engage in that. Whether there is any possibility of Scotland engaging and the UK not engaging is another matter, but the more we can encourage the UK to think of ways of being engaged in information exchange and co-operation bodies, the better.

Professor Gemmell: I have a short postscript. It is important to note that we are already experiencing the potential disadvantages of being outside the ring in respect of horizon 2020 projects and academic institutions being disinvited from or not invited into particular dialogues. We are also seeing plans being made for things such as the

Seville group, which looks at best available technologies, to not invite the UK in any shape or form to discussions. Those things shape future industrial management policy in allowing companies to make engineering investment decisions. If we do not know what is happening, that brings a significant potential disadvantage. Again, that is just one example.

Claudia Beamish (South Scotland) (Lab): I want to push the panel a little further to explain the value of the European Environment Agency and whether there will be barriers to joining it. Lloyd Austin and Professor Gemmell have already touched on the EEA.

Professor Gemmell: I suspect that colleagues will be able to add a lot of detail to what I will say.

I have worked closely with the EEA since 2001. It has quite a complex governance structure of members and alternate members that attempts to bring in all member states and often seeks to emphasise particular subjects in devolved Administration areas. It has been very open to inviting expertise to participate.

The EEA was initially designed as a body that would, ultimately, hold members to account, although the proposals were modified when they went through the European Parliament and it has, in effect, played a substantial role—as has been confirmed—as a data manager and data interpreter for the European Union. In general, it has performed that role extremely well. The governance model would allow additional members, but the body has taken the pragmatic view that 54 people in a room can make only so many simple, rational and quick decisions.

It would be entirely feasible to consider associate membership, but I do not think that it would allow robust access to the kind of information and to the process influence that the EEA has in terms of advising the Commission about good and bad practice and performance.

Lloyd Austin: The EEA—there are two EEAs, but I mean the European Environment Agency—is very much a data collection, collation, analysis and publication body, and it is an adviser, so it is focused on the technical support side of things. It has associate members that are non-EU members, including Norway, Switzerland and some of the Balkan countries. Engagement with it—or UK associate membership of it, if Brexit happens—would be desirable, in my view, so any support that could be given to that proposal would be a positive thing.

Jonny Hughes: I have just two things to add. We cover this in section 4.2.13 of our report, in which we tried to provide a situation analysis, although we stopped short of recommending anything. I note that, in that paragraph, we say that membership of the EEA "should be actively pursued", so we broke our remit slightly there. That gives you a clear steer on what the round table thought.

I will also add that the EEA has a benchmarking function, in gathering data from across the European Union and pulling in reports on the laggards and the front runners. That is an extremely useful way of trying to bring up to standard member states that are not implementing various EU environmental directives. That will be missed if we are not members of the EEA, in the future.

Professor Reid: Some of that is covered in a substantial paper that the UK Environmental Law Association published at the beginning of the year, which is one of our references. It lists all the European bodies that have an environmental connection and talks about what they do, their constitutions and how accessible or available they are to non-members. There is a lot more detail in that paper.

The Convener: Let us move along and consider what future scrutiny might look like in terms of implementing environmental legislation post-Brexit. I would like you to comment on two aspects of that. What role do you see for the Scottish Parliament and its committee system in that regard? The other aspect is the suggested new office of environmental scrutiny and audit. Can you talk us through what that might look like? How quickly could it be set up?

Professor Gemmell: In section 4.3 and thereafter in our report, we have gone into that in some detail, but we also say quite explicitly that we did not want to go too far, because working out the aspirations that Scotland might have in that context is clearly an important process and, potentially, an iterative and participatory one. The Scottish Parliament currently sits at the "ceiling" of oversight, as we have called it, for implementation and performance by the Government of the day and by agencies. That is a perfectly satisfactory model that has worked very well.

We have also tried to stress that the processes at the top end—the Commission and onward to the Court of Justice of the European Union—are to be used in extremis. Those processes are not in everyday use, and the number of cases has reduced somewhat. Numbers are slightly tricky to get, so we gave, in the report, a 2016 figure for the number of infractions that progress to that stage. In a sense, we were highlighting their threat value, pour encourager les autres. It has been very much about attempting to ensure that everyone is aware that if we do not do the right thing, there will be consequences. A parliamentary committee such as this clearly has significant potential to highlight and—to be frank—to embarrass those who may

have something about which they should be embarrassed. There is an opportunity to highlight that kind of information in that way. However, in extremis, failures to comply with the law can currently result in robust legal sanctions.

10:00

We do not question the value of the Scottish Parliament—it is clearly a fundamental part of the current governance and pursuit model—but we suggest that without a higher body, the reporting and oversight responsibilities would fall to Parliament, so where there was clear evidence of failure, there would be a question about what the result would be, because there would be no consequences further than being hauled before the Scottish Parliament. The question is whether we want a higher power. There are already international bodies for some international agreements, but they have far fewer teeth and are less likely to use them than are the institutions of the EU.

I add that we also looked at existing bodies, including Audit Scotland, that have independent stances and powers to take things forward robustly.

As we have suggested, if we do not have other bodies, there is a serious danger that people will be marking their own homework and there may be a tendency to give a good gloss. As a former regulator, I am slightly leery of going too far with that line of argument because most people come to work in the morning hoping and intending to do a good and objective job based on their duties—they are professionals and should be treated as such. However, there are always risks, and the question "Who guards the guards?" should always be borne in mind. We do not have a problem with articulating that there should be a higher level of scrutiny and potential pursuit.

The office that we have identified in the report could be a variation of existing mechanisms; allocation of additional powers, responsibilities and resources to an organisation such as Audit Scotland, for example. It could be a parliamentary committee of some kind—a "capo di tutti capi"—that effectively has the power to operate above Parliament, but from within Parliament. The office could also be an entirely new independent body. The issue is credibility and the public's belief that their servants are being properly held to account for performance, as expected. Further work to fatten out, make meaningful and cost the proposal is needed.

We took a light look at international practice, and there is much more that could be done on that: we had very limited time to pursue the matter. There are broadly comparable bodies worldwide, including court and other models that could be tailored to our needs. However, that will require a wider and deeper conversation than the one that we have had.

The Convener: I want to follow on from that before I bring in Lloyd Austin. In Scotland, it is fair to say that we have environmental stakeholders who are not slow to voice their opinions, which is a good thing. They would undoubtedly want any such body to be credible and sufficiently expert. Have you fleshed that out any further? Perhaps Jonny Hughes could come in on that.

Jonny Hughes: We cover that in the report. There are two other options. The first is that the collective of non-governmental organisations tries to hold the Government to account. However, there are all sorts of issues with that, and it is in some ways the "marking your own homework" scenario: potentially, we could be seen as having conflicts of interests, as going too far and as no longer having the necessary independence.

Secondly, if responsibility were to be given to a body such as Audit Scotland, there would be an expertise gap, and even if the expertise were to be brought into Audit Scotland, the perception would be that it would, even as a much broader body, look only rather narrowly through a financial lens.

Although it might not be clear in the report, it is because we tried to present a situation analysis that we concluded that an independent scrutiny and enforcement body will be required. The convener asked why we need such a body. It is because we will clearly lose, when we exit the European Union, the oversight and scrutiny role of the European Commission, and its power to relay infringement up to the European Court of Justice. That function will go and is not really replaceable, so the closest we could get would be a new independent body.

Lloyd Austin: I would underline the word "independent". The key thing would be the body's relationship with the Executive branch—the Scottish Government and its agencies—and not its relationship with the Parliament. On the convener's initial question about the role of Parliament, we see that as being completely unchanged and of value in itself; indeed, the independence of the scrutiny body could be assured by its being responsible to Parliament, just as the office of the Scottish Information Commissioner is a parliamentary function, rather than an Executive function.

I completely agree with the convener about the need for the body to have credibility and expertise. It must have resource, staffing and sufficient powers to enable it to seek information from the Government and its agencies, and from other players, on whatever issue it is investigating. In a

sense, such a body would reinforce the powers of parliamentary scrutiny and oversight, in the same way as Audit Scotland supports the Public Audit and Post-legislative Scrutiny Committee, or the National Audit Office supports the UK Parliament's Public Accounts Committee. It would provide an opportunity for that sort of reinforcement of parliamentary oversight, rather than being a competitor with it.

Professor Reid: I agree. Perhaps the two arguments for having something separate from the parliamentary processes are, first, about the potential and desire to deal with many more specific individual cases than the parliamentary process can normally deal with and, secondly, about the very long-term nature of environmental objectives and goals. The political process as a whole may be influenced by economic matters and other things, whereas environmental goals are separate and long term, so a degree of independence and isolation from shorter-term political to-ing and fro-ing, which affects all parties, might be significant.

Richard Lyle (Uddingston and Bellshill) (SNP): I was a remainer, but we are now leaving the EU. You are suggesting that we will need to set up in Scotland a replacement for the organisations that we are leaving. I just do not get that, first, because of what it will cost and secondly because we have the Scottish Public Services Ombudsman, Audit Scotland, the High Court and the Standards Commission for Scotland. Why will we need to set up something to replace what we have just left?

Professor Gemmell: You are right, in so far as there is currently a complex of arrangements in place that we are reasonably comfortable with and accustomed to. However, that does not offer the ultimate "in extremis" model, which is the sort of formula that I referred to earlier that, potentially, will not allow us to maintain the complex level of knowledge gathering and information exchange that allow a sophisticated modern economy to operate effectively.

For example, our environmental standards are substantially different in many areas from those that apply in the United States, Australia and other parts of the world, but the citizenry and, in particular, the companies that operate in this country often have to comply with standards that are developed elsewhere in the world, but are substantially dominated by standards from the EU, including the Euro 6 emissions standard. Being able to shape those standards, to learn early what they are, to work with our European market colleagues and to share expertise and experience both ways with them is an extraordinarily valuable component of operating the Scottish economy.

I suppose that, in a sense, we will not know what we will lose until we have lost it, so there is preventive action to be taken. However, as I suggested earlier, it is clear that there are areas from which we are already being excluded in a way that is potentially hugely disadvantageous.

Finally, the reassurance of the citizenry and the rights of the public to be confident about what is and is not happening are greatly strengthened by our having the oversight bodies and networks of contact that we currently have through the structure of the European Union. It is quite possible that we could survive without them, but I want to explore the question whether that would be healthy for us. Such decisions may already be being made, but if we are to be a successful small progressive nation in the global context, our being outside such networks is a potential source of vulnerability, so it seems to be foolhardy.

The Convener: I am conscious of the time, and we have a lot of ground to cover. Jonny Hughes wants to come in briefly.

Jonny Hughes: I will be very quick. I say simply that I assume that when Parliament passes environmental laws it wants them to be implemented properly. If the mechanism by which such laws are implemented or not were understood to be deficient, that would be a worry for the Parliament. With the loss of oversight from the European Commission and the ECJ, we will have such a deficient mechanism. As we have clearly identified in our report, we will have a gap in Scotland that we think should be replaced by a structure.

Richard Lyle: We did not have that gap before we were in the EU, did we?

Professor Gemmell: We did not have the gap, but we also did not have the environmental standards that we now have and which fundamentally underpin the success of the Scottish economy and of our society. We are dependent on clean water, clean air—although there are still issues on that—and robust waste management and land-protection systems. Very few such things were fundamentally embedded in UK or Scottish legislation prior to our becoming part of the European process.

The Convener: Professor Gemmell, as the lead on the panel, perhaps you could sum up on this point, which I made at the start of the meeting. Jonny Hughes has spoken about potential gaps. There is a gap as regards setting up a scrutiny body, given how close Brexit now is. It strikes me that, realistically, to determine the role, scope and remit of such a body and to get resources in place would be very challenging. Have you thought about what might happen between now and then if your approach were to be adopted?

Professor Gemmell: We have thought about that to a slight degree. We have identified that there could be interim arrangements that would allow the position to move forward. That would to an extent depend on a factor that we have been discussing at some length—the nature of the fit with current UK models. Clearly, the sharing of expertise is a critical part of being able to keep the show on the road—if I may use the vernacular.

We have not gone into the detail on that question: we were not asked to consider what we would do in the short term to prepare the foundations for what might be needed subsequently. We will be very happy to offer analysis of and advice on that in due course, if we are asked for it.

However, the convener is right: the clock is ticking and there is not very long to pursue this. Of course, the UK Government is uncertain about how long the transition might take, so we might therefore still have the European institutions for a considerable time—which could, frankly, be to our advantage. However, equally, it would mean that some of the responsibilities that are not entirely robust would need to be pursued during that period, so I hope that people will continue to pay attention.

The Convener: Thank you. Let us move on to Claudia Beamish's question.

Claudia Beamish: Through the convener's questions, we have started to explore the possibility of there being a scrutiny body and we have touched on arrangements for courts. Let us explore those further and look at possible arrangements for access to environmental justice beyond Brexit. In your report, you highlight that environmental justice is one of the at-risk areas. First, do you have any broad ideas on that? Depending on your answer, my colleague Mark Ruskell and I might thereafter have more detailed questions.

Professor Gemmell: I suspect that my colleagues here—and particularly Lloyd Austin—will have views on the access point. Colin Reid will also be able to amplify the strictly legal position.

In summary, I say that it is very clear that a number of different court-based options could be pursued, either through existing courts that could be supplemented in some way, or by having a dedicated court. There are worldwide examples of such bodies from which lessons could be learned. They can suffer from a number of disadvantages, but they can also be very useful parts of the mechanism which—for me—often depends on the cultural environment in which the bodies operate. For example, what compliance currently looks like is often a critical part.

Claudia Beamish: Can you give any positive examples of the functioning of courts in other countries?

10:15

Professor Gemmell: The Australian environment, land and resources courts of New South Wales, Victoria and South Australia, for example, all deliver versions of what could be deployable. The South Australia model, in particular, is relatively modest in scale and works relatively effectively. In New Zealand, a lot of case law and practice is based on Maori rights and the management of land and the environment together.

We have a dedicated Scottish Land Court, but there are starting points from which arrangements could be made. During my time at the Scottish Environment Protection Agency, it was proposed that we have dedicated environmental fiscals, for example, and that we could then build a model towards an environmental court. I know that there are divergent opinions about the merits of such a court, but there are options.

Colin Reid and Lloyd Austin can perhaps come in, particularly on the robust detail.

Lloyd Austin: Access to justice is key. While we are part of the EU, the Scottish Government needs to implement European environmental law, and it does so in various ways. The Cabinet Secretary for Environment, Climate Change and Land Reform has made very welcome commitments on wanting to maintain those environmental standards, which I hope will include the standards on access to justice.

At present, citizens, communities, NGOs or any concerned person can ask the Commission through the complaint procedure to look into whether any executive body or national authority has complied with the provisions of EU law. As Campbell Gemmell said, the Commission, at the first stage, carries out quite a soft inquiry and investigation. However, in extremis, it has the power to refer the case to the European Court. If we remove ourselves from those institutions, we will remove ourselves from that access to oversight, inquiry and, potentially, justice.

As Richard Lyle said, we did not have those structures before we joined the EU, but we did not have political commitments to the Aarhus convention, for instance, before we joined the EU, so engagement between citizens, communities and Government was in a different area. Now, Governments, including the Scottish Government, have strong commitments to public participation and access to justice, which we would need to reproduce. A scrutiny board that has the ability to carry out such inquiries on behalf of communities

or citizens, and which has the power, in extremis, to refer cases to the courts—potentially, an environmental court—would be one way of delivering access to justice.

The Convener: Claudia Beamish has further questions, then I will allow Alex Neil, Donald Cameron and Mark Ruskell to come in. I know that Colin Reid is chomping at the bit to come in, so, once Claudia has asked her question, I will bring him in.

Claudia Beamish: Actually, convener, I think that it will be useful if Mark Ruskell develops our questioning.

Mark Ruskell (Mid Scotland and Fife) (Green): Is it your impression that the Scottish Government is currently compliant with the Aarhus convention? If it is not, how do we develop the structures to ensure that there is compliance with that fundamental route to access to justice?

Lloyd Austin: As you will note from the round table's report, the Scottish Government and some members of the round table sub-group were in disagreement in that area. The Scottish Government asserts that it is in compliance. However, at the foot of page 8 of our report, we provide references to the Aarhus convention's compliance committee, which has found the UK—and all jurisdictions in the UK, including Scotland—not to be in compliance. I will leave the committee to reach a judgment on that point.

The issues relate to the costs of review procedures and whether those review procedures can consider the merits of the case. In relation to both, the NGOs and some other legal practitioners believe that all jurisdictions in the UK, including Scotland, are not in compliance. That means that there is a need to revise the rules of court or to establish a separate entity, such as an environmental court, with different procedures. The Scottish Civil Justice Council is looking at costs. Although stakeholders have provided comments on the initial proposals, we do not know what the final proposals will be. There might be progress on that point, but we have not yet seen the results.

Mark Ruskell: There are two aspects here: one relates to costs and the other relates to a merit-based review. Is there any recourse to a merit-based review in the justice system at the moment? My understanding of judicial review is that it is much more about the process of how a decision came to be made. Is there any recourse to an analysis or judgment of the merits of a decision? That is quite a political question, and—

Lloyd Austin: Colin Reid is the expert on that.

Mark Ruskell: Sustainable development is about balancing economic and environmental interests. How do you incorporate in the justice system an analysis of the merits of a decision?

Professor Reid: You are right that the courts are not the place to decide on merits; traditionally, they just regard the legality of a decision. However, we have to bear in mind that, with a lot of EU law, we are faced with a very different set of duties on the Government from those that we have been used to on the domestic scene. EU law imposes a duty on the Government to achieve particular outcomes, whereas in areas such as planning, where we are used to judicial review, the law provides the process by which decisions must be taken. So long as a planning authority has looked at the relevant considerations and reached a reasonable decision, it is not for the courts to intervene. There is a monitoring of the legality of the decision-making process.

When we look at many of the obligations under EU law that are imposed on the Government—obligations that will become domestic law—we see that their purpose is to ensure that a particular standard of air quality or water quality is achieved. In deciding whether that law has been met, we inevitably have to start looking more at the merits and substance of decisions, rather than simply at the process. Our existing courts and way of dealing with cases are simply not accustomed to dealing with issues around whether there has been compliance with a specific, stated outcome.

The Convener: I will broaden out the discussion and bring in Alex Neil and then Donald Cameron.

Alex Neil: I want to broaden it out from access to justice, although that is extremely important. Are we going about this in the right way? It seems to me that we have an ideal opportunity for Scotland and the UK to assess where they want to be in terms of environmental standards in the round in 10, 15 or 20 years, and then to work out, given the new arrangements vis-à-vis Brexit, the best way to get there under those new arrangements.

One of the witnesses mentioned that the EU is often ahead of the game compared with other jurisdictions, but that is not always the case. For example, the environmental standards in California are ahead of the EU's in many respects, and some countries have tighter control of nuclear installations than we do in Europe—there is a range of such examples. There is a danger that people will just lament leaving Europe when they should be asking how we seize the opportunities that are before us and how, more broadly, we make Scotland a leading nation, as we are in relation to climate change. We should bear it in mind that action on climate change is not driven by the EU but by global agreements.

Jonny Hughes: Can I pick up on that?

The Convener: It is a tangential point, but you can comment on it before we move on to Donald Cameron.

Jonny Hughes: Mr Neil's last point is important in respect of the convention on biological diversity or the environmental aspects of the United Nations sustainable development goals. The EU uses those and translates them into tangible, outcome-based targets, as Professor Reid mentioned. The difference is between very loose, process commitments and the tangible biological outcomes that we are trying to achieve, which is the difference between signing up to something—

Alex Neil: Are you saying that we are incapable of doing that for ourselves?

Jonny Hughes: No, I would hope not. I come back to the point that if we are serious about collaboration with others and about our commitment to contribute to the global effort to halt biodiversity loss and tackle climate change, it is important that, as much as we can, we align with the commitments that we have made at international and European levels. That sense of co-operation and collaboration is very important.

Notwithstanding that, of course we can go further. In the transposition of some of the EU's environmental directives, particularly in relation to strategic environmental assessment and the framework directive, we have gone further than other parts of the UK. That is completely within our bailiwick.

In the future, we could look at targets at the domestic, UK and current EU levels and package them up in a coherent way, possibly under a new piece of legislation. That would not necessarily mean that we were not aligned. A political commitment is being made to continue to align with EU environmental targets. I agree that it would be a very good idea to get those commitments in place to have a coherent framework.

Alex Neil: Convergence is not just within the EU—there is global convergence for much of this stuff, just because there has to be. Environmental control of good-quality air does not stop when you go outwith the airspace of the EU, the UK or Scotland; that happens more and more on a global basis.

Jonny Hughes: That is another good argument for co-operation.

Alex Neil: You mentioned that 80 per cent of the environmental legislation going through the Scottish Parliament derives from EU legislation. What percentage of EU legislation is derived from global agreements? The UK is part of the global community.

Jonny Hughes: That goes back to my original point and the fact that the global agreements are very soft law, whereas when they are translated through European directives they become much more outcome focused.

Alex Neil: We can do that for ourselves.

The Convener: There is a lot of back and forth. We will let the witnesses answer the questions and then come back to any points. Lloyd Austin has been bursting to come in.

Lloyd Austin: I was going to underline the fact that most EU law comes from international agreements anyway, but I agree with Jonny Hughes that, at the international level, those tend to be softer than EU law.

In a very narrow sense, the report focuses on the governance gaps post-Brexit, because that was what we were asked to do. On the wider point, I would say that we should implement some of the options that the report highlights to address the post-Brexit short-term issues, but I agree with you that we need a long-term vision as well. The two are not incompatible—we ought to do both.

We welcome the First Minister's commitment in the programme for government to publish a long-term environmental strategy—I think that that is the phrase that is used. I am slightly unclear as to what it will be or where it will sit. However, in that commitment there is a hint that some thought is being given to a long-term approach such as you suggest.

In the short and medium term, particularly in a situation in which the Government is committed to moving EU law into domestic law, through the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill or the European Union (Withdrawal) Bill, and then maintaining standards, we need to ensure that we have the means to fulfil those commitments as well as think about our long-term strategy.

The Convener: That has been a very useful discussion. Thank you, Alex. Donald Cameron has been very patient and I will let him in now.

Donald Cameron (Highlands and Islands) (Con): I want to pick up on Alex Neil's discussion. Aarhus is a prime example of international environmental law, and it seems to me that our being a member of the EU has not given its implementation greater teeth, given that there are questions about whether we comply with the convention, particularly when it comes to access to justice.

Lloyd Austin: Aarhus has three pillars and some aspects of the convention have been translated into some aspects of EU environmental law, particularly in relation to public participation around emissions, consents and so on.

The key pillar on access to justice has not been translated into EU law. Member states resisted the Commission's proposal for a directive on access to justice to make the law harder. If we were to remain in the EU, the NGOs would be pushing for that pillar of the Aarhus convention to be converted into a directive. Aarhus is a Council of Europe convention under UN procedures—it is international law.

10:30

Donald Cameron: I want to focus on environmental courts. I refer to my entry in the register of members' interests—I am a practising advocate.

We have the Scottish Land Court, with a judge who has the same status as a senator of the Court of Session. That judge sits with lay members; currently, those lay members are agricultural or crofting specialists, but we could easily have environmental specialists. It is, in effect, a tailor-made solution.

What are the panel's observations on that point? Professor Gemmell spoke about the disadvantages—I think that that was the word used—of environmental courts. I ask him to expand on the disadvantages.

Professor Gemmell: For me, the issue is the effectiveness of the court model and whether it is good value or creates a formality around positions that are often softer in reality. Let me clarify that. Going to court is often a clumsy way of pursuing a particular matter that has to be highly specified.

Let me put it in personal terms. Receiving a phone call from Brussels about potential infraction proceedings somewhere down the line—rather than there being a sense that one is at the point of going to court—focuses the mind wonderfully. The weaponry that is in place needs to be considered carefully. The court should not be the weapon of first choice. We should design the whole system to be effective.

I have no particular reservation about the idea of modification of the Land Court. I referred to it because it is a potentially viable model. Whether it is the best model, and whether it would deliver the right outcome consequences in terms of behaviour or for the environment, is less clear.

Donald Cameron: On the question of the phone call from Brussels, would you not be as stimulated into action by a phone call from the new UK or Scottish enforcement agency?

Professor Gemmell: Absolutely. On the propriety of the use of investigatory powers, for example, I had similar conversations in my previous role. Consideration of heading down that path was enough to make us question and revise—or at least analyse—the situation that we found ourselves in.

There are a number of options, and there is no one pure right answer. We should rightly explore further possible options.

Lloyd Austin: I will expand on that. The point about the weapon of first choice—the phone call from Brussels, or from a UK or Scottish scrutiny body—is that it is much more effective as a soft measure if the recipient knows that, if he or she does not take action or look into matters, the scrutiny body has the power to refer the case to a court, just as the Commission has. The opportunity, in extremis, at the end of the process for the issue to be addressed by a court is an important part of the range of weaponry that is required.

On how provision might be made in Scotland and in which court, Donald Cameron's suggestion of expanding the Land Court into a land and environment court is particularly good. We have an opportunity in Scotland, where a relatively informal and merit-based court exists.

It is notable that in many similar courts around the world, as well as in the ones that Campbell Gemmell mentioned—in Sweden, Vermont, Hawaii and many of the Canadian provinces—land, agricultural and environmental matters are often combined. The important point about those institutions is that they have expertise available, such as the assessors that were mentioned. It is of equal importance that they create a body of jurisprudence that drives future decision making, so that standards are maintained and, ultimately, there is less uncertainty.

You may be interested to know that the one in Vermont was established by a very pro-business Republican governor, because of complaints about uncertainty and slow decision making. Creating a body of case law that set out the rules of a merit-based approach to how decisions should be made meant that decisions by the local authorities and agencies at first instance were much more consistent and much less open to challenge. That made the permitting systems that they have there much more efficient and effective in the long term, which was welcomed both by the development industries and by the environmentalists.

Claudia Beamish: Could I take us back to what has been described as the phone call? We all want to keep everybody out of the courts. In my view, what we want is a good environment and good people enacting what they need to do. The conversation about court structures has been valuable, but is there a role before we get to that stage for an environmental ombudsman or commissioner either in setting up the appropriate

frameworks with expert advice, or in dispute resolution, rather like what exists for tenants and landowners before cases reach the land courts?

Professor Gemmell: The answer to your question is, in essence, yes. The sustainable development commissioner in Canada operated a good model for about six years. It was based on seeking outcomes through alternative dispute resolution models and on holding bodies to account by scrutinising publicly available data and sometimes eliciting hitherto unavailable information. A similar sustainability commissioner in the state of Victoria in Australia operates effectively in that space. It gives time for independent consideration of issues, away from the routine. Appeal mechanisms can go through the vertical chain of an agency and then to the board and onward. They are often defensive—at least in part—which is inevitable, because the organisation can feel under attack to some extent. However, where there is a good relationship—as there is in Victoria, where the sustainability commissioner has been effective in unknotting particular cases—I would certainly strongly support the alternative dispute resolution model of finding solutions.

That also speaks to the point that Mr Cameron was making. I am concerned about the increasingly litigious nature of some audiences, particularly those who are well funded and who may have a particularly heavy axe to grind. That can distort the burden that is placed on the nominal notion of justice in general, as well as on the administrative capability of an organisation, and such disputes could easily have been resolved, in many cases, by proper, genuinely robust intervention at an earlier point. It is about proportionality and the efficiency of public operations. I know that in Scotland we are actively exploring, using and developing ADR-type models in law, and I think that suitably expert mezzanine intervention in some of those cases at an intermediary stage would be an effective way of resolving a number of issues.

Mark Ruskell: That neatly brings us on to the role that you see for third parties in dispute resolution and enforcement. Do you have anything more to add on that?

Lloyd Austin: Do you mean citizens and communities, for example?

Mark Ruskell: Yes.

Lloyd Austin: We have to understand that the most fundamental issue in all those areas is the way in which environmental law, as implemented, relates to decisions that have been made by public bodies—ministers, their agencies, local authorities and so on. Those decisions will be related to consent and planning applications and land management decisions, for example. In most cases, there is an applicant and a range of concerned stakeholders, who may be neighbours, citizens, communities, NGOs or local people. The extent to which all those players can participate in and understand all the issues and procedures varies, but the overall public participation and access-to-justice objectives of things such as the Aarhus convention are to make a level playing field and to engage people as much as possible. We would like those citizens and others to have greater rights to be able to participate and to have appeal or review rights at certain times.

My view is that, if there is a court at the end of the situation, there will be a greater chance of a body of case law building up, which will mean that decisions further down the chain will become easier and more definitive, and often faster and clearer. However, we talk about a range of options in that chain—a commissioner, an ombudsman and a scrutiny body—that can help the process and do mediation that involves all the parties. I do not think that, in that range of options, there is any need for all of them; we need to pick out the few options that we need to fill all the gaps, if that makes sense. It seems to me that there should be a scrutiny body or a commissioner with staff, plus a court.

Professor Reid: As well as the situation that Lloyd Austin started with, in which there is an application, we should remember that, because the environmental obligations on the Government that have been inherited from EU law are to meet particular outcomes, it may be that the failure is a cumulative one. For example, bathing waters often fail in particular areas not because of one particular decision or one failure to act; rather, they often fail as a result of a combination of things. We need a way in which concerned people can raise the problem and get it taken seriously by the appropriate people, whether that is through an ombudsman, a commissioner or the courts.

Mark Ruskell: One of the challenges that I see communities throughout Scotland facing—it does not matter whether the environmental issue that we are looking at is airports, bathing water quality or planning issues—is access to good-quality, understandable information about regulation and legal rights. Communities often have to become legal experts over a short period in order to engage with a particular dispute or an enforcement issue. Do you see not only access to information but building capacity in communities to understand and deal with environmental information as part of the new landscape? I see communities putting in thousands of hours, often on a voluntary basis, just to try to understand and work with the current system.

Lloyd Austin: That situation exists while we are in the EU and will do when we are out of it, so I am not sure that that is necessarily in the remit of the work of this sub-group. That currently exists as a challenge. As voluntary bodies that work with communities and others, we spend quite a lot of time trying to get information from public bodies using freedom of information rights and other rights, but that can be very long winded and can create a confrontational rather than a mediation-type situation, to go back to Campbell Gemmell's earlier examples.

On access to advice, Scottish Environment LINK has a group that is looking at environmental rights generally, and one of the things that we have identified is the absence of good advice on legal and technical points to citizens and communities. We are working towards trying to establish some kind of environmental rights or environmental law centre to provide greater support for people who are interested in those issues and how they can address them. However, I underline the point that that issue of environmental governance exists currently, while we are in the EU, and it will continue to exist after Brexit, unless we do something about it. We should do something about it now, anyway.

10:45

The Convener: We will move on. Claudia Beamish has the last question in this section.

Claudia Beamish: It is about the Scottish courts, on which we have had a fairly wide discussion. Should the courts be able to impose sanctions and remedies in the shape of financial penalties on the Scottish ministers and public bodies in the event of a failure to properly apply environmental law, as is currently the case with the EU? We have live examples of that, which I will not go into because of the time. What should the nature of the arrangements be for sanctions and remedies, as a deterrent and in addressing the problems?

Professor Gemmell: We addressed that directly. To again take Jonny Hughes's lead, we said, in effect, that we were not entirely convinced that it is a particularly good idea. The public already may have difficulty understanding why one public body pays another public body for its failures. That does not necessarily seem to be the best way of using public funds, not least when they are in scarce supply. Financial penalties certainly focus the mind, but are they an efficient way of delivering a satisfactory outcome?

Under the existing CJEU model, the Greek Government, for example, found it extremely difficult to deliver compliance even when it was being fined on a daily basis. That was deeply embarrassing for the Greek Government, but it could not do very much about it for a bunch of reasons. I am not making a direct comparison, but it seems potentially an awkward place to end up when surely there are better outcomes to be secured at an earlier point in the process. However, it could be done. There is perhaps a slightly different argument about the individual agencies that might be involved, but a similar logic potentially applies to that.

My personal view is that it is not an attractive approach. I would have thought that, friendly faced though you are, you are perfectly capable collectively of being really quite scary when it comes to holding to account individual public servants who have catastrophically failed to meet their duties. That notion of public embarrassment or public focus on a failure is a potent weapon.

Claudia Beamish: That is helpful. Having listened to Professor Gemmell, do other panel members agree with that answer? If we do not have financial sanctions, what else should we have? Naming and shaming can be valuable, and, as politicians and public bodies, we can be tough on what we hear about. It is important to try to understand this issue.

Lloyd Austin: I agree with Campbell Gemmell on fines. In a sense, shuffling money from one public body to another does not solve the problem. The court and/or the scrutiny body must have the power to impose sanctions. Those sanctions might include recommending that the person or the body be called before this committee for more detailed scrutiny. They may include orders. If the investigation has looked at the merits of the case, I presume that it may be able to identify what needs to be done to remedy the situation and therefore to make an order that the body should do A, B or C to implement a remedy. Those kinds of orders are possible sanctions.

In the ClientEarth air quality case, the court in England ordered the Secretary of State for Environment, Food and Rural Affairs to produce an air quality plan and so, in effect, it told the miscreant public body what it had to do to get it right. That is a much more important sanction than moving public money from one body to another.

The Convener: We still have a lot of ground to cover. Professor Gemmell, just to be clear, was the view that you articulated the unanimous view of the group?

Professor Gemmell: There was no significant dissent, if I can put it that way.

The Convener: That is fine; I asked that just in the interests of moving on.

John Scott: I want to ask about our capacity in Scotland and the timescales for implementation.

We note the idea that Brexit-related work in Whitehall may require a further 1,200 roles in the Department for Environment, Food and Rural Affairs. Do the Scottish Government and its environment agencies have the capacity in expertise, staff and funding to deliver a smooth Brexit in environmental policy areas?

Professor Gemmell: Again, without being clear about the ultimate scope, it is quite hard to know what the resource requirements might be. After a fairly extended period of restraint—and in some cases reduction—in resourcing, it is quite hard to imagine that it will be possible to achieve increased capacity very easily, so it is almost inevitable that additional resource would be required. For example, in the various institutions that are involved there is already significant capacity to provide information on reporting and monitoring issues. There are academic, NGO and other inputs to the models. I would tend to say that while it might be abused, we could assume that that model is reasonably robust at this point. When it comes to the oversight component, and preparing material, there is potentially a significant additional resource requirement, but obviously that would be for individual bodies to articulate on their own behalf.

John Scott: As all the panellists are happy with that view being expressed on behalf of the group, I will move on to my next question. Does Scotland have the capacity to replicate all the different roles that are played by the EU in relation to environmental law as it stands at the moment—apart from oversight, perhaps?

Professor Gemmell: My short answer is no, but Jonny Hughes might want to amplify that.

Jonny Hughes: We are really coming to the heart of the split between England and Scotland as regards what will sit in a UK framework or in a devolved one, which will have resource implications. If a number of environmental topic areas sit in UK frameworks, access to resources from down south could be used to implement such frameworks. If we take some of those powers back into Scotland and decide that they need to be delivered at the level of Scottish frameworks, there will be resource implications. In the end, I think that we will probably have a combination of the two approaches, because it will be pragmatic to have certain things operating at UK level.

Clearly, that is a politically sensitive issue and any decision to operate a UK framework will need to be a co-decision between the Scottish and UK Governments. However, there may be areas in which we want much tighter control of what happens at Scottish level, and that will clearly have resource implications. We did discuss that briefly, but we do not have the solution to it. There is no magic wand, and in some cases the resource implications could be significant.

John Scott: Would it be fair comment to say that the more control that we wish to exercise here in Scotland over our own affairs, the greater will be the cost of doing so?

Jonny Hughes: Is that a direct question for me?

John Scott: It is for the panel.

Professor Gemmell: Possibly. At the moment in Scotland we have significant control over a number of areas—and, arguably, most parts of the environment portfolio. None the less, we rely on sharing information with our UK colleagues. As I said right at the start of the meeting, if we were to try to replicate the equivalent of chemicals agency knowledge at the level of all four nations, that would be horrendously messy and unnecessary.

The Convener: Of course, mess would not make replication any less desirable or wise—particularly if Scotland were pursuing higher standards than the rest of the UK.

Professor Gemmell: Some of that information would exist through the European Chemicals Agency or through academic supplementation or whatever. The World Health Organization and the Food and Agriculture Organization of the United Nations also provide such information. Those standards could be deployed at the Scotland level. The question is whether you need a licensing model, a review model and an assessment model all replicated at the Scotland level.

If I may, I will bend that back to Alex Neil's earlier point. I agree with the basic point that being clear about our ambition would be the fundamental way of tackling that. At this point, we know where the floor is because the cabinet secretary has clearly said that we want to maintain existing standards, but where else do we want to go? The idea could be a strategy or deeper vision, rather like the Swedes. They were pretty much in full compliance with the European acquis, and they then decided to articulate their own ambition and have gone beyond the acquis in a number of areas. There are other ways of looking at this.

John Scott: What do we need to do to ensure that Scotland can develop the capacity—in the time and resources available—to ensure a seamless transition after Brexit? There are foreseeable problems and I am inviting you to ponder the imponderables. None the less, you can see the obstacles.

Professor Gemmell: That is an excellent question but it is not very easy to answer. I and this group have found that the discussions that we have had are interesting and clarifying. Colin Reid and I had a couple of international lawyers as part

of our group and we looked widely—although rather thinly—at the agenda.

We need to talk about it, chew on it and come to contingent and interim positions on a variety of things, and we need to test them against ambition. At this point, there are a number of areas where there is a lack of clarity about what a good answer might be. We have become used to a model that works very well. What kind of model we want in the future merits further discussion than we have been able to have.

Doing anything that changes from where we are might require the relocation of a number of the outcomes and a reconsideration of the resources and processes involved. That is fundamental and, I argue, far too hard to do in the time available, given that we are already effectively in the Brexit shadow.

John Scott: Thank you, Professor Gemmell, but that did not really give an answer. In essence, you said that it is too hard to contemplate. I am not being unkind, but we are looking for solutions, not defining the problem again. I really do not mean that rudely—forgive me.

Lloyd Austin: I agree with what Campbell Gemmell said, but we could encourage a few things to be done. To some extent, our work as a sub-group is complete because we submitted the report for the cabinet secretary to publish, which she has now done. The key thing is that discussions like this are needed to narrow down the options that the Government might wish to pursue. The Government then needs to commission more detailed work on those options. Getting some further impetus or sense of direction from the Scottish Government about the options that it wishes to look into in more detail would be the next step.

Reflecting on what Jonny Hughes said, the committee will be aware that the secretary of state has issued a consultation paper, "Environmental Principles and Governance after leaving the European Union". It is related to England and reserved matters, but we were talking about how Scotland and the UK might co-operate in those matters. Some deliberation about how Scotland might interact with the proposals in that consultation might be useful. This committee might be interested to know that the Environmental Audit Committee at the House of Commons is doing an inquiry on the proposals in that consultation, and there will be quite a lot of good evidence going into that inquiry. In particular, the Environmental Audit Committee will address a question about how environmental governance should be managed across the UK. That is not about a UK-imposition model, but about how the UK jurisdictions, with their different responsibilities, could co-operate effectively across the UK to fill the gaps in governance arrangements and maintain accountability to the appropriate Parliaments, while pooling expertise and resource where that is appropriate, useful and efficient for the participants.

11:00

Jonny Hughes: I will give you three recommendations. First, we should continue to implement the body of EU legislation and principles as if we were a member of the European Union; we can do that because we already have the processes and structures in place. Secondly, we should be ready with a new scrutiny body for when the transition period ends, because we might need it to plug the biggest gap that we identified in the report. Thirdly, in the longer term, we might see divergence between the UK position and the Scotland position in keeping up with environmental law in the EU, so we should introduce a rationalised policy that brings together the targets at the various levels so that we are a bit more coherent about what our ambitions as a country are, but co-operate with what is happening at EU level in the longer term.

The Convener: That is a useful summary.

Professor Gemmell: A fourth recommendation would be to seek those associate memberships and equivalent arrangements that would allow us to maintain access to networks from which we could otherwise be excluded.

Finlay Carson (Galloway and West Dumfries) (Con): I think that the witnesses have covered most of the points, but I want to get clarity on one thing. Scotland has a policy of not having any weaker environmental policies and, as Alex Neil said, we should be looking at what we want in 10 or 15 years' time. Is the Scottish Government doing enough to give us the direction of travel towards where it would like us to be? There was talk about Michael Gove's consultation paper. Is the Scottish Government doing enough right now to ensure that the direction of travel and the policies that we want to see in the future will fit within the inevitable UK frameworks?

Professor Gemmell: Part of the answer to that is about the kind of dialogue that is going on and the level to which the Scottish Government is being included in the processes that are determining where we might be going. That appears to have been relatively light or—I am tempted to say—minimal. I think, therefore, that it is quite hard for the Scottish Government—it is certainly hard for me—to know the extent to which Scottish perspectives are being taken fully into account.

Finlay Carson: Is that not putting the cart before the horse? Do we, as a country, not need

to decide what we want to see in 10 or 15 years' time and take that to Westminster, rather than sit back and wait for Westminster to decide what the framework will be and then just fit within it?

Professor Gemmell: I am not sure that it is an either/or decision—or a cart and horse situation. It is probably a both/and. In so far as outcomes have been identified for Scotland and we have the outline consideration of the strategy, that is a start, but there needs to be more in that space. It is very difficult, though, when in the European context we have been used to the member state speaking on our collective behalf, plus our dependencies on the extent to which the devolved Administrations' views are taken into account by the member state. Going much beyond that at this point is particularly challenging.

One of the things that we identified in the report that might be helpful is to look more systematically at all the things on which we report and build a clearer view of the current state of our environment, because there are quite surprising gaps in our knowledge of the state of the Scottish environment. For example, in the EEA's reports, quite often the UK is a blank because it has refused to provide information that Scotland has frequently held and offered to the UK, but it has not gone forward in the EU context. There are therefore a number of areas in which it would be very helpful simply to work out precisely where we were, in order to make any further discussion of ambition that much clearer. There are some challenges.

Jonny Hughes: I do not necessarily agree that the UK frameworks are inevitable, as Mr Carson said, because they are a matter for negotiation between the two Governments. As I said, the probable model will involve a pragmatic split between the two Governments. It is a question of implementation as much as one of ambition, though. We have a body of environmental legislation, much of which is not being implemented properly at the moment, so we need to focus on implementation. That was the European Union's conclusion a number of years ago when it said that we have a number of framework directives and that we need to implement them properly. Our focus in the future should be to implement them in Scotland.

I agree with what you say about agriculture policy, which has a tremendous impact on the environment. We need to start thinking quickly about what the vision for agriculture in Scotland is and the nuts and bolts of how we implement that vision in relation to our environmental targets, because we will not hit our agreed environmental targets unless we get agriculture policy right.

Professor Gemmell: To be fair, I should say that agriculture was not included in our remit. However, we know that Mr Ewing has commissioned a variety of pieces of work that are doubtless relevant in that area.

The Convener: Thank you; it is useful to have that on the record.

Donald Cameron: Each of our witnesses has touched on this issue, as the report does, too. Do you believe that there is a need for a UK-wide approach to environmental policy after Brexit?

Lloyd Austin: There is a need for the solutions to cover the whole of the UK, because all of the geographic area that is in the UK will lose its EU oversight, in a sense. As Jonny Hughes said, that does not mean that everything has to be UK-wide, because most of the environmental issues are devolved.

We believe that there are potential benefits, such as pooling resources and sharing information with regard to the issues that apply to the four countries of the UK in the same way that they apply to the 28 member states of the EU, or bigger families of nations under the Council of Europe or the UN.

Inevitably, there will be some areas where things might be best done across the UK in order to maintain commonalities and address cross-border issues—the Tweed and the Solway are quite important with regard to cross-border environmental management, as can be seen in the fact that there is a cross-border river basin management plan for that area.

The NGOs believe that all that joint working has to be co-designed and co-owned, so that the appropriate authority and the lines of accountability to the appropriate Parliaments are maintained. That means that dialogue between the Governments needs to be improved. As outside stakeholders, we find the entire intergovernmental process to be completely lacking in transparency and in stakeholder engagement. Recently, we supported a piece of work by the Institute for Government about how intergovernmental working could be improved in the interest of better delivery of environmental co-operation, amongst other things.

With regard to the scrutiny bodies, the secretary of state is proposing one for England and reserved matters, and there is a similar proposal for Scotland and devolved matters. Obviously, Wales and Northern Ireland will experience the same need. The issue is how people co-operate. Co-operation is necessary, but the answer should emerge from a process of co-design. Whether there is one body with four departments reporting to the various Parliaments or whether there are four bodies that each have a responsibility to co-operate on UK-wide or cross-border issues is unimportant. What is important is that the whole

biogeographic area is addressed and the proper lines of accountability are maintained. That is something that the various Government officials ought to be able to work together to co-design but, at the moment, it looks as though each of the Governments is working in isolation on that.

Professor Reid: There is also the aspect of reporting on international obligations. Any such reporting must be done on a UK basis, so there has to be a way of bringing things together. However, as has been said, that does not mean that there has to be a single UK body, only that there must be good ways of ensuring joint working and collaboration.

Jonny Hughes: The Joint Nature Conservation Committee collates the environmental data from the devolved Administrations and does the reporting. However, the answer to the question is no. There is no need for UK frameworks in areas of devolved responsibility, but it might well be pragmatic and sensible for there to be frameworks in some areas, such as chemicals. In fact, I would go further: it is probably more sensible and pragmatic for the chemicals regime to continue to operate at the European level. There might be some areas in which, geographically and institutionally, it makes more sense for us to have a fully Scottish approach and fully devolved frameworks, such as, debatably, in biodiversity policy.

Richard Lyle: Based on your evidence, we will need an environmental scrutiny agency. My boss always said that we have to look at the bigger picture. We will also need a transport agency, a fishing agency, a law agency, a land agency, a local government agency and so on. That will cost a fortune, which, I suggest, makes a bit of a mockery of the idea that the Parliament will take back control.

Once we leave the EU, and the EU has ratified a treaty but the UK has not, can we ignore that treaty? What would be lost in terms of environmental best practice if UK public bodies and stakeholders relied only on environmental commitments that are made by the UK Government?

Professor Gemmell: I do not think that we are empowered to respond in much detail to the first part of what you said.

Richard Lyle: That was just a comment.

Professor Gemmell: I surmised.

Having spent some weeks reflecting on the matter during a small number of meetings, it is clear to us that there is a huge amount of complexity in the existing systems. When we look at what we might lose, we become very focused on those components, some of which were clear before and some of which were not entirely clear before. A process of careful examination of the consequences of the decisions that have been taken is, potentially, quite painful, but it has been very informative.

On the second part of what Richard Lyle said, and reflecting on what Jonny Hughes said earlier, we have gone through a series of large legislative steps—from 1923 to 1946 to 1990 to 1995—that have dramatically changed the nature of environmental governance, environmental policy and environmental practice in Scotland. Increasingly, those elements have been devolved from the UK to the Scottish level. Unpicking that will potentially be damaging in a number of ways, particularly if we operate in some UK frameworks that take control and decision making away from the Scottish level to which they had previously been devolved. As Colin Reid articulated, signing up to a number of EU directives has meant that we have been much more focused on delivering outcomes rather than focusing merely on specific pieces of activity during that period. There is a coherent—although not always entirely comfortable—family of decision making and process that has given us the standards of environmental protection that we have today.

As colleagues have said, we are still weak in some areas, despite there having been a lot of effort and investment. Our water environment is among the best—if not the best—in Europe, but our air quality environment is often not among the best. Our ability to handle waste in the circular economy has improved dramatically, and it is now at the better end of the spectrum. Our ability to manage our land quality is still not entirely robust.

There are a number of areas in which we have made huge progress, but there is no counterfactual; we do not know what would have happened if we had not been in the EU. We are taking risks. Our process has perhaps helped to articulate the nature of some of those risks and helped to focus us all, including the Scottish Government, on how to address those risks and how to contingency plan for handling them. In a sense, this is a rebuttal of what John Scott said, but we are not in a position to offer a glib or straightforward solution at this point. We are part way through understanding just what we have got ourselves into, and there is a lot more to be done. I hope that our evidence has been able to articulate some of the challenges that we face.

11:15

Richard Lyle: I will try to cut this back so that other members of the panel can come in. What are the priorities for future work? What research and expert input are needed? Can we just adopt

EU laws in their totality or should we start to amend over 40 years' worth of legislation?

Jonny Hughes: We are getting into quite political territory. However, as I see it, there has been a political commitment from the current Scottish Government to keep up with implementation and track changes to environmental law in the future. That could lead to divergence between environmental policy and legislation in Scotland and the rest of the UK, and over time that divergence could be quite stark. The chair of the round table can correct me if I am wrong, but I think that we see a lot of merit in the outcomes-focused nature of a lot of EU legislation—Colin Reid mentioned that—compared with our more process-focused domestic legislation, so that political commitment is valuable.

To use Campbell Gemmell's phrase, I think that signing up to keep up in the longer term by tracking and implementing EU legislation—and going beyond it, if we so wish, in articulating a new vision for Scotland's environment—would be our preferred option for the future.

Lloyd Austin: Colin Reid might want to add to this, but my understanding is that the intention is that either the EU withdrawal bill at Westminster or the continuity bill that the Scottish Parliament passed will bring all the existing EU law over into domestic law, so the first option that Richard Lyle mentioned either will be or has been done. That is the starting point. There is also the issue, which Alex Neil mentioned, of our longer-term environmental ambitions and how we may track or exceed future EU law.

However, the report focuses on what monitoring, measuring, reporting, scrutiny, implementation and enforcement measures are necessary to make sure that all the EU law that we bring over under the withdrawal bill or the continuity bill is properly implemented and that the intended outcomes are delivered. It is about making sure that the good intentions in bringing that law over are delivered.

Richard Lyle: Thank you. I add that I appreciate your work, in case you think that I do not.

The Convener: I will give the final word to Professor Reid, who has been very patient.

Professor Reid: I was thinking, as my colleagues have said, that the short-term political decision has been taken to carry over all the EU law, rather than wiping the slate clean and starting again. That provides an answer on a certain date, but we will then need to make sure that it is implemented. There will be policy decisions to be made at the political level about whether we continue to track the changes and adjustments in EU law as it goes forward or whether we set off in our own direction, be that for higher or lower standards, for deregulation or for a system of environmental champions. Those political decisions will need to be taken for the future, but there is also the short-term issue of keeping the machinery going with things such as chemical approvals, chemical recognitions and ensuring that what we have today is actually implemented and taken seriously.

The Convener: Thank you all for your evidence. It has been very informative.

11:19

Meeting suspended.

11:26

On resuming—

Subordinate Legislation

Code of Practice on Litter and Refuse (Scotland) 2018 (SG/2018/81)

The Convener: The fourth item on the agenda is consideration of the Code of Practice on Litter and Refuse (Scotland) 2018. I invite comments on the instrument.

Richard Lyle: I welcome the updated code of practice on litter and refuse. I abhor people throwing litter on the street and I encourage people to put it in bins. I have encouraged my kids, and now my grandchildren, to deposit their litter correctly. I also abhor people throwing litter out of their cars when going along motorways and bypasses.

We are told that, previously,

"resources were focused on clear up rather than preventing the problem ... which is at odds with recommended prevention approaches".

Councils should now prevent people from littering, encourage people to deposit their litter in bins and ensure that street cleansing is done meticulously. When I go to other countries, I see streets that are absolutely clean. Some streets that you walk down in Scotland require a bit of extra care, and that is particularly the case for my constituents and other residents in the central belt. I encourage everyone to work towards the new code of practice on litter and refuse.

Claudia Beamish: I particularly welcome the new approach that is highlighted in the first duty, which is specifically about behaviour change and ensuring that litter is not dropped in the first place, rather than simply the process of collection. I am pleased to see an indicator on improving the state of Scotland's marine environment, which was not in the previous iteration of the code. I welcome the code and I am supportive of it.

Mark Ruskell: Likewise, I welcome the revised code. It is working at the right end, which is about prevention first rather than dealing with the consequences. However, I seek clarity on organisations that are contributing towards a litter problem that the public sector has to pick up. If a local authority manages a park that is right next to a McDonald's and there is litter everywhere, there is obviously a duty on the local authority to ensure that the park is clean and to provide appropriate bins, but what is the role or contribution of that other organisation, which is driving a lot of the production of the waste in the first place? Given the polluter-pays principle, it would be good to get further clarity from the Government about how it is approaching that side of the equation. Obviously, we do not want to put undue burden on public authorities when the problems are being created by other organisations.

The Convener: It seems reasonable to write to the Government, although there are other fast-food outlets next to parks.

Finlay Carson: I welcome the report. Keep Scotland Beautiful has done great work with Dumfries and Galloway Council, taking controversial decisions to remove bins from lay-bys along the A75. It has also worked with Stena Line and P&O to address the issue.

I look forward to more innovative ideas coming from the council working with those organisations to try different things to change people's behaviour on litter.

11:30

John Scott: As someone who picks up litter, both in Ayrshire and in Edinburgh, I encourage City of Edinburgh Council to empty the bins more regularly. Much of the problem in the Edinburgh area comes from bins that are overflowing and not emptied timeously.

The Convener: I am sure that the council will take note of your comments.

Alex Neil: I hope that the bins are not full of our speeches. [*Laughter*.]

The Convener: I, too, very much welcome the code of practice. Should the committee put down a marker that we want to look at progress, perhaps in a year or 18 months from now, once the provisions have been in place, to see whether they have made a difference?

Alex Neil: The other issue is enforcement. Mark Ruskell alluded to that. By enforcement, I do not mean that the local authority should pick up the tab for everyone else's litter problem. Perhaps we need to look at additional powers—for example, for dealing with fast-food restaurants and others that do not make any effort to ensure that there are bins round about. I do not see why council tax payers should have to fork out for wealthy fast-food chains that are not doing anything to address the problem.

The Convener: To be fair, some are active on that in the summer.

Alex Neil: In the summer?

The Convener: Donald, do you want to make a point?

Donald Cameron: I support what other members have said about the matter and the convener's proposal to revisit it in a year and a half's time.

The Convener: I take it that the committee does not want to make any recommendation relating to the instrument. However, we will seek information along the lines that Mr Ruskell has suggested and note that the committee wishes to return to the issue in a year to 18 months' time, to see what progress has been made.

Petition

Drinking Water Supplies (PE1646)

11:32

The Convener: Agenda item 5 is PE1646 by Caroline Hayes, on drinking water supplies in Scotland. Members will recall that the petition calls on the Scottish Parliament to urge the Scottish Government to review the role of the drinking water quality regulator in Scotland and to commission independent research into the safety of the chloramination of drinking water.

The petition was referred previously to the Environment, Climate Change and Land Reform Committee following scrutiny by the Public Petitions Committee, which has taken evidence on the matter from stakeholders. Paper 5 outlines the previous scrutiny of the Public Petitions Committee and suggests some possible options for this committee. Members may, of course, wish to suggest alternative actions in relation to the petition. I invite comments.

Stewart Stevenson: The committee requires some additional information—in particular, from Scottish Water—before it can come to a conclusion on the petition. Scottish Water does two things to provide potable water to customers: it removes physical debris from the raw water input and it removes bacterial load that might be harmful to human health. Equally, we should be interested in what the drinking water quality regulator does to enforce good decision making on Scottish Water. I have not been able to identify any particular merit in looking at the role of the drinking water quality regulator, which I have found to discharge its responsibilities well.

Mark Ruskell: I was interested to read from the petitioner that there is a different approach to the use of chloramination and other solutions in other countries around the world. It would be worth the committee examining that in more detail, alongside the decision-making process in Scottish Water on the use of chloramination as a particular tool.

Like Stewart Stevenson, I do not think that there is a strong case for reviewing the role of the drinking water quality regulator, which I think has been established in the correct way. However, there is still an issue with the technique of chloramination and how we benchmark ourselves against other countries in the use—or overuse—of it.

The Convener: I completely agree.

Claudia Beamish: My colleague Alex Rowley is unable to attend the meeting for personal reasons,

but he asked me to highlight the fact that some of his constituents have approached him on the issue. They say that research has identified that ammonia is a neurotoxin and a possible factor in Alzheimer's and that chlorine has been identified as a bad halogen that is known to displace iodine in the body and leads to thyroid disease. Mr Rowley's constituents say that the mixing of the two not only kills fish but presents itself as a toxic byproduct. That is a serious concern.

Chloramination is not used in France or Germany, and I understand that that is for health risk reasons. Therefore, Alex Rowley suggests that it would be useful to look at the health aspects of the issue, even if we do so in only a limited way.

Alex Neil: I agree with Alex Rowley's suggestion—it would be useful to look into that. However, the petition calls on us to urge the Scottish Government to look into it. To be honest, it would be more appropriate for the Government rather than us to look into it, because, as a parliamentary committee, we do not have the resources at hand to commission the necessary scientific advice and all the rest of it. If we were to take evidence on the issue just from Scottish Water—which, after all, is the supplier—I do not think that that would give us a sufficient range of positions. Therefore, I am inclined to believe that we should accept that part of the petition and urge the Scottish Government to commission the necessary research, as it is much better qualified than we are to do that.

I also agree with what Stewart Stevenson, Mark Ruskell and others have said—I do not think that there is a case for looking into the role of the drinking water quality regulator. However, there is an issue to do with the regulation of the water industry, including drinking water, which is an area in which there are a number of regulators. In certain circumstances, it is not just the water industry but local authorities that have a role in providing drinking water. The Water Industry Commission for Scotland is also a regulator, whose role touches on all aspects of Scottish Water, and, in addition to Scottish Water itself, there is the Scottish Environment Protection Agency, which has a role to play in certain circumstances. We would not be doing the job properly if we were to single out for scrutiny the role of the drinking water quality regulator.

If we were to review such matters, we would need to take a much more comprehensive, across-the-board look at how we could improve—if there was a need to improve—the regulation of the water industry in Scotland. I am therefore not inclined to support that part of the petition, because I do not see an urgent need for that. Nevertheless, I support the part of the petition that asks us to call on the Scottish Government to have the necessary research into the issue carried out.

The Convener: We might come to that conclusion once we have taken further evidence and gathered further information.

Richard Lyle: I agree with what my colleague Alex Neil says about the second part of the petition, about who would commission independent research into chloramination. He suggests that we should refer it to the Scottish Government. Any such investigation would take at least three months, and it could take up to a year. We cannot leave the petition open for that length of time, so I agree that we should ask the Scottish Government to deal with the second part of the petition.

Finlay Carson: If the petition is to be referred to the Scottish Government, we need to consider how we can compare the different methods of disinfection that are available, to ensure that decisions are not made purely on the basis of financial concerns and that more weight is given to health concerns.

The Convener: There is consensus on the need to get further information and to come, at least in part, to the conclusion that Mr Neil has suggested. If I am reading it correctly, we want to develop a better understanding of the options, perhaps from the regulator, and understand the regulator's view on why that particular course of action is being pursued when it appears that other countries choose to take other courses of action. Do we wish to seek from Scottish Water further information on the rationale behind that course of action, whether it was driven by financial considerations and why other options were discounted? Does that seem to be a reasonable approach?

Claudia Beamish: I completely take Alex Neil's point about the Scottish Government, rather than us, having the capacity, but I would like us to highlight the health concerns, if only from the perspective of constituents.

Alex Neil: I suspect that there is a large body of evidence on the technology available at national and international levels and that, if we wrote to the Scottish Government, we could readily access and get a summary of that evidence.

The Convener: As a way forward, we can keep the petition open and extend an invitation to the relevant regulator to come before the committee after the summer recess to address our concerns. We can seek further information from Scottish Water, as I outlined, and we can write to the Scottish Government, seeking information, as has been suggested.

Mark Ruskell: As part of that, we could do our own research into the international examples. I imagine that the policy of the water regulator of France—or wherever—is fairly readily available, so we can understand the basis of its policy decision. If the decision was made on a health basis, we will be able to understand it in detail without having to do the primary research.

John Scott: I do not disagree with Alex Neil that, ultimately, we should pass the matter to the Scottish Government. On the issue of conducting our own research as a committee of the Parliament, rather than asking the Government to provide information, we should also ask the Scottish Parliament information centre to provide some information, which we can then present to the Government subsequently, differentiating the roles of Government and Parliament. That might be reasonable in the circumstances and less conflicted.

The Convener: We are agreed to keep the petition open; we will seek further information from SPICe on the alternative methods that are available; we will seek any further information that we feel is appropriate from Scottish Water; and we will invite the drinking water quality regulator to appear before the committee after the summer recess, as relevant. Is that agreed?

Members *indicated agreement.*

Claudia Beamish: As long as we get the international viewpoint.

The Convener: Absolutely. It will be good to get that clear.

At the committee's next meeting, on 19 June, it expects to take oral evidence from the Scottish Government bill team on stage 1 of the Climate Change (Emissions Reduction Targets) (Scotland) Bill. We will also hear oral evidence from Scottish Government officials and Scottish Natural Heritage on biodiversity targets. Further, the committee will consider the Environmental Protection (Microbeads) (Scotland) Regulations 2018.

11:43

Meeting continued in private until 12:26.

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

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