OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 18 August 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 18 August 2020

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
17th Meeting 2020, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Campbell Gemmell (University of Strathclyde)
Dr Viviane Gravey (Brexit and Environment Network)
Professor James Harrison (University of Edinburgh)
Alison McNab (Law Society of Scotland)
Isobel Mercer (Scottish Environment LINK)
Professor Eloise Scotford (University College London)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 18 August 2020

[The Convener opened the meeting at 09:30]

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 1

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's 17th meeting of 2020. We are taking evidence from two panels on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. I welcome our first panel. We are joined by Professor Campbell Gemmell, who is a visiting professor at the University of Strathclyde law school and a partner at Canopus Scotland Consulting; Professor Eloise Scotford, who is from University College London; and Professor James Harrison, who is from the University of Edinburgh.

Colleagues, if someone is answering a question and you would like to add to it, it would be very helpful if you could put an "R" in the chat box. You do not need to do anything else on your computer screen, because broadcasting staff will manage all of that for you.

My opening question is about how the continuity bill might work with the United Kingdom's proposed internal market bill. We anticipate that the UK bill will affect the Scottish ministers' decision to use the keeping pace powers. I draw your attention to what the Finance and Constitution Committee said last week. In its response to the UK white paper, the committee said:

> "it is unclear, especially in the absence of robust intergovernmental institutions including effective dispute resolution mechanisms, what happens if agreement cannot be reached on harmonisation in specific policy areas. The Committee's view is that there is a real risk therefore that the regulatory competences of devolved nations will be challenged either because regulatory standards are determined by UK legislation—particularly if necessary to comply with the UK's international obligations under new trade deals—or because legal challenges in UK courts seek to enforce market access principles."

That will have an impact on environmental considerations, too. Who would like to kick off with their views on what the Finance and Constitution Committee has said and on how the internal market bill might cause tensions between the two Governments?

Professor Campbell Gemmell (University of Strathclyde): Other colleagues might be better placed to lead off than I am. It is right to observe that the position is difficult and unclear, particularly given that the office for environmental protection is not finally specified, although it does seem rather weak. It is extremely hard to determine how the various regulatory inputs are finessed into an overall position. Given that the long-term position is that the environment is more often viewed as a potentially tradable element, I am deeply concerned that the current arrangements are inadequate to protect the high qualities and standards that are expected in the Scottish environment. Sufficiently robust protections do not appear to be in place, but I say that in the absence of clarification. There are no explicit things that cause immediate concern; from my perspective, it is the lack of detail that is a concern.

Professor James Harrison (University of Edinburgh): Campbell Gemmell is perfectly right in saying that it is very difficult to give clear answers because we do not yet have an internal market bill—we just have the white paper, which contains very vague indications of the direction of travel.

The bigger picture is that this is a pivotal moment for our constitution in the UK and the ways in which actors at various levels will be able to operate independently of each other. We have left the EU and we will be out of the implementation period at the end of this year. That means that a fundamental layer that has kept a common standard across the UK—EU regulations and other measures—will disappear.

There are arguments that something needs to be put in place; it is not simply a matter of not doing anything. The big question is about how you design that and ensure that there is some kind of compatibility between measures taken in Scotland and those taken in the rest of the UK and that there is sufficient regulatory space for the Scottish Parliament and the Scottish ministers to act when it is appropriate for them to do so. In the EU, we have the principle of subsidiarity, and it would be appropriate for there to be some kind of reflection of that principle in the new UK set-up.

It is worth bearing in mind that, before the EU was given competence over the environment, none of its early environmental measures were taken under the single market provisions with a view to promoting access. Inevitably, the environment will be tangled up in the internal market discussions, and we need a serious, robust conversation about what we want the future UK to look like.

The Convener: Of course, what I have not mentioned is the issue of keeping pace with EU environmental standards, which the Scottish

Government has committed to doing. That does not seem to have been echoed by anything in the UK proposals—or am I wrong?

Professor Harrison: It seems that the UK Government is proposing to take a different path from the EU and is less keen on keeping pace than Scotland is. That is a policy choice. In the future, the Scottish Government will be faced with a policy choice, because the provisions in the continuity bill allow the Scottish ministers to keep pace but do not require them to do so. There will be political choices about whether Scotland keeps pace with the EU, adopts similar standards to the rest of the UK or takes a completely different tack.

Professor Eloise Scotford (University College London): I agree with Professor Harrison and the other witness. I will point out something that is probably obvious. If it turns out that there is an internal market bill for the UK that replaces some of the EU's function in creating common standards, specifically in the environmental field, there will be a high risk that part 1 of the bill that we are discussing today will be incompatible with that and will therefore be struck down.

The Convener: When you say "struck down" do you mean the continuity bill?

Professor Scotford: As James Harrison said, we are speculating. However, if we end up with an internal market bill that removes the Scottish Government's discretion to keep pace, the provisions on that in this bill will be redundant and will not be able to be exercised.

The Convener: Mark Ruskell wants to come in on that issue.

Mark Ruskell (Mid Scotland and Fife) (Green): The prospect that the continuity bill could be struck down is pretty chilling.

I want to ask about whether there are particular areas where policies could be challenged under the proposals in the white paper. The white paper mentions a deposit return scheme. Are there other areas where there might be divergence?

Professor Scotford: A deposit return scheme is a classic internal market measure—it certainly is under EU law—so it would be appropriate that that would be within the scope of the internal market. James Harrison is right: it becomes a matter of how the UK wants to design its own internal market. It may decide that a lot of the areas fall under environmental competence, and there might be agreement between the devolved nations and the UK Government about sharing powers and it being a matter of subsidiarity. It might be that a lot of environmental matters get caught up in an internal market set of standards.

That is all to play for, but with no clarity it becomes very difficult to talk with certainty about the discretions that the continuity bill gives to the Scottish ministers to set or bring in regulatory powers to keep pace with the EU. It is great in principle, but it is a matter of sequencing. The bill brings those in before it is clear what the Government's discretion to keep pace potentially is.

Professor Harrison: The internal market principles of mutual recognition and non-discrimination that are talked about in the white paper do not necessarily preclude each constituent part of the UK from taking its own actions; rather, they restrict certain types of actions that prevent products or services from other parts of the UK from accessing the market. Scotland is not necessarily precluded from going down its own path, but what can be done against products and services from other parts of the UK is restricted.

What happens might not be as extreme as striking down. If we go down the route of internal market reforms and there is a single standard-setting process across the UK, that could be the case, but what happens might not be that extreme. However, there will certainly be implications for levelling the playing field—to use a phrase that comes from another context—in the UK internal market.

The Convener: We have such questions because there has not been an awful lot of progress on common frameworks to this point. That is why we still have a lot of question marks against how the four Governments will interact with one another and how they will reach agreements on any kind of divergence in policy or on keeping pace versus what will happen with any trade deals. Is it fair to say that?

Professor Harrison: Absolutely. It is terrifying that we are four months away from the end of the implementation period, when EU law will no longer be relevant. Actually, we still do not know whether that is true, because we do not know whether there will be an agreement, although that is looking incredibly unlikely.

Things are very uncertain. There is not much time left to figure out the basic structures. We are not talking about substance here; we do not know about the basic structures that will be in place, and that is worrying.

Professor Gemmell: [*Inaudible*.]—are intimately connected. The two different dimensions of the implications of seeking to keep pace and the nature of the internal market and how regulatory arrangements work there raise a whole bunch of separate issues. On the first, it is important to stress that many of us would think that, from the Scottish Government's point of view, that requires hardening up so that that is an explicit

commitment rather than simply something that seems desirable.

For example, water trading internally within the UK market could become a very challenging issue if that resulted in the levelling down of standards for water quality in Scotland. That would have a series of follow-up consequences as far as industrial use and drinking water quality, for example, were concerned. However, there has been a long-term desire south of the border to—literally and metaphorically—tap into Scottish assets. The pricing model and the way in which that currently works could be seriously at risk.

That is a very important area, but it is just one of a number of areas in which a longer-term commitment to European standards would definitely help to secure, or at least indicate a desire to secure, that set of higher standards.

The Convener: Finlay Carson has a question on that theme.

Finlay Carson (Galloway and West Dumfries) (Con): We have heard concern from the likes of NFU Scotland that the bill will lead to divergence between Scotland and the rest of the UK. However, is there not also the potential in the bill for Scottish Government ministers to have free rein to align Scotland with the EU without scrutiny, which could potentially lead to a division in the UK?

Professor Harrison: It is worth noting that EU regulations have always been implemented separately by Scotland and the rest of the UK, so there has always been the potential for small divergences even in the implementation of EU directives. There has never been complete similarity on EU law across all jurisdictions in the UK. Therefore, the threat is perhaps a little exaggerated. There will be differences, and that is good. At the end of the day, the extent of those differences is a policy question, and it will be up to the Government of the day to decide how to align itself.

The Convener: Claudia Beamish wants to come in on that subject before I go to Stewart Stevenson.

09:45

Claudia Beamish (South Scotland) (Lab): It is just a brief question. I want to ask what the status of the—[*Inaudible*.]—might be in relation to the internal market discussion that we are having and, of course, the acts that underpin the devolution settlement. It is, of course, enshrined in law. Does that have any relevance? It might be a very quick answer.

The Convener: I do not know whether everyone picked that up, Claudia, because there was a little glitch just as you said what your question referred to.

Claudia Beamish: It is about the devolution settlement and the acts that underpin it. Do those have a status in relation to the internal market and the position of Scottish ministers and the Scottish Parliament?

Professor Harrison: It seems an age ago that we were talking about the European Union (Withdrawal) Act 2018, but, if I remember the discussions correctly, the powers of the Scottish Parliament were changed and the restrictions relating to EU law were removed. I think that the principle now is that everything that was previously an EU matter is devolved, but there is a regulation-making power that allows the UK to reserve particular matters that have been repatriated from the EU. If I remember correctly, that is how the discussions about the competence of the Scottish Parliament were ultimately resolved. Therefore, it is possible for the UK Government to reserve certain aspects of repatriated EU law using the regulation-making power in the Scotland Act 1998.

The Convener: Stewart Stevenson has questions on the same theme.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Since we are talking about a context determined by frameworks, I want to ask the academics a very simple question about them: does any of our witnesses know how they are going to come into being? Is it simply that a couple of ministers at Westminster will get together in a wee room, write something down and tell the rest of us that that is it? Or is there a process that involves the other nations of the UK? I invite Professor Campbell Gemmell to comment. I am asking only whether anyone is aware of how it is going to happen.

Professor Gemmell: I am definitely not aware of a mechanism or model that is in place for that. It is an important question, and there has clearly been a lot of informal discussion, but I am unaware of what the formal meetings and process will be.

Professor Harrison: It is not as simple as saying that there is one way in which common frameworks will come into being. Some frameworks will be legislative. For example, the Fisheries Bill that is going through the UK Parliament involves the creation of a common framework in that sector whereby there will be a joint fisheries statement that will be commonly agreed by all the relevant Administrations, and then there will be fisheries management plans under that, which again will involve input. There are provisions in the UK Environment Bill for common regulation-making powers, sometimes

with the consent of the Scottish ministers and sometimes in parallel.

It is complicated, and each common framework will differ, depending on the sector concerned. I do not know whether Professor Scotford has anything to add to that.

Professor Scotford: I do not know the details. I suspect that Professor Harrison is right in saying that it will depend on the negotiations in each sector.

I would have thought that, at the very least, it will be based on agreement and that, once there is a clear sense of how much reserved power the UK Government has and how much power devolved Administrations have over policy areas, there will be an agreement. The idea of common frameworks is that they are based on agreement, not on diktat.

This is not an uncommon problem in countries that have devolved power over environmental issues, and there are variations of such agreements in different countries around the world. Australia is a good example, and Canada has such agreements as well. Those countries have come up with a bespoke model of agreement that then carries some constitutional authority. They have created a new, higher-order agreement.

It will be interesting to see what the UK comes up with, but I would expect it to be based on agreement, otherwise it will not be a common framework; it will be the exercise of the UK Government's reserved power, which is a different kind of instrument.

Professor Gemmell: I agree entirely with what Eloise Scotford has just said, but it is interesting to reflect that, in the past year, the current Australian Administration dissolved the Council of Australian Governments. It is pretty obvious that processes that have been designed in detail in some Administrations to allow component parts of the Australian Commonwealth to work together can also be overwritten by the Government of the day.

Although I absolutely hope that the approach that is taken is agreement, that is not guaranteed. Recent evidence suggests that it is an area that we should be watching carefully.

The Convener: Finlay Carson has a supplementary question that relates to his theme.

Finlay Carson: I may not have asked my question very well. We have heard from Professor Harrison and Professor Scotford that these things are often done through joint agreement or consent. We have seen that in relation to the Environment Bill. One issue is that there appears to be a reluctance on both sides to produce these common frameworks.

My first question, to which I did not quite get an answer, was about the Scottish Government wanting to align Scotland with EU laws, without scrutiny. As the Law Society of Scotland has suggested,

"neither the UK nor Scottish Governments and stakeholders would have had the opportunity to influence those proposals or even to become familiar with them".

Is that not a risk for the bill?

The Convener: Who are you addressing that question to?

Finlay Carson: Professor Harrison, who answered the question in the first instance. The issue is not necessarily about differences across the UK, because that is ultimately what we want through devolved settlements, and it is quite likely that there are retained and devolved issues that we deal with in different Parliaments. Specifically, if the Scottish Government were to align with the EU, would that not cause problems right across the UK, because we would have very little or no influence over the direction that the EU might want to take when we were aligned with it?

Professor Harrison: There are two answers to that question. In the policy memorandum to the bill, the analogy is given of the powers under the European Communities Act 1972 to implement EU law. In a sense, there is an attempt to say that we will need similar powers in the future.

However, I think that there was a fundamental difference with the powers under the 1972 act, as the UK had been directly involved in the negotiation of those instruments. It was able to influence the development of EU law and it had obligations to implement the instruments within particular timeframes. None of that will be true once we are out of those decision-making processes—we are already out of them, even though, this year, we have an obligation to implement the instruments. From 1 January next year, it will be the Scottish Government's choice whether to align itself, and it will not have had any chance to influence the rules. That is an interesting position to take.

Obviously, there is a political undertone. The documents that accompany the bill make it explicit that it is intended to help Scotland to become a member of the European Union again one day, and to ensure that its laws are ready for that day. That seems to be the policy of the current Scottish Administration, and that is for it to decide. At that stage, we will be implementing measures that have been decided by a foreign legislature, which is an unusual position to take.

Angus MacDonald (Falkirk East) (SNP): I will look at the reciprocal and related proposals in the UK Environment Bill. Would the panel members care to compare the UK and Scottish

Governments' proposals, especially around whether there are areas where the UK Environment Bill is stronger or better defined than the Scottish proposals? If there are such areas, what might the implications be?

Professor Scotford: That is a difficult question. Do you mean "stronger" in the sense of stronger environmental protection?

Angus MacDonald: Yes.

Professor Scotford: It is hard to unpack that. It is easier to compare just part 1 of the UK bill with the Scottish continuity bill, because the UK bill has lots of provisions that relate to specific policy areas, such as air quality. However, in relation to environmental governance, there is much in the Scottish continuity bill that is stronger. It would be good to go through the things one at a time.

For example, two things are stronger in the UK bill: the first is the definition of the environment, from which a lot of consequences flow in relation to the compliance mechanisms; the second is the retention of the integration principle, which is an important distinction although it might get filtered down in the way that those principles bind ministers in the UK bill. There is much that is stronger in the mechanics of the continuity bill.

The Convener: Are you happy with that, Angus?

Angus MacDonald: Yes. Do other members of the panel want to make a contribution?

Professor Harrison: A broader point to make on the interesting decision to frame the Scottish bill as a continuity bill is that the emphasis is on filling gaps left by the departure from the EU. That gives the whole rationale for the proposals in the Scottish bill, whereas the UK Government has decided to take a slightly different tack with the UK bill, which addresses environmental governance much more broadly. It is not just about the institutions; there are some great things in there about environmental targets and long-term environmental plans, so the UK Government has thought about environmental governance in the round. From an environmental law perspective, it would have been nice to see some of that broader thinking in Scotland. We have an environment strategy for Scotland but, at the moment, it is non-statutory, although there was an opportunity in the bill to give it a statutory underpinning. We have climate change targets in Scotland; would it be useful to have other environmental targets such as those that we will see south of the border? There is a strategic choice about the framing of the bills that makes them difficult to compare.

10:00

Professor Scotford: [*Inaudible*.]—point is quite obvious. James Harrison is quite right about environmental improvement plans, which are strong. We could spend a lot of time talking about the target-setting provisions, because they are a mixed bag; there is good stuff and bad stuff. I will make the obvious point that, in the latest revision of the UK Environment Bill, the OEP has powers over climate change targets. That is a big difference to the continuity bill.

Professor Gemmell: It is apples and oranges. The two bills are clearly being designed for the two different domains, but there is scope for some cherry picking back and forth between the territories. I am glad that Professor Scotford raised the issue of powers over climate change targets, because that is an important distinction as those powers are clearly lacking in the current Scottish proposals. The way in which the regulatory oversight will work cannot be automatically concluded from what has been described.

Overall, there is some very encouraging breadth to the UK proposals, but how they will be operationalised is not yet completely clear. The way in which improvement plan-type thinking is applied is encouraging, and, depending on how environmental standards Scotland develops, that would take us down an interesting path in relation to the difference between higher-level strategic analysis of policy and practice and what happens around individual cases, claims and complaints. As always, it is helpful to look across the border to see whether there is anything that might be beneficially adopted into any revision of the Scottish position.

The two bills highlight, in a sense, the continuing divergence of paths and are, therefore, tailored to their particular context.

The Convener: We will move on to environmental principles. Before we do so, Stewart Stevenson has a short supplementary question to ask. Can you tell us who it is addressed to?

Stewart Stevenson: It is not for anyone in particular, but it is short. We have twice heard that the intention is to adopt EU law into Scots law without scrutiny. However, I have the bill in front of me, and it says:

"The Scottish Ministers may by regulations"

make provision and, equally, if I read it correctly, the Parliament may reject those regulations. So, there is a place for scrutiny. I just wanted to give you the opportunity to tell me whether there is or is not an opportunity for scrutiny as the bill is drafted.

The Convener: Does anyone want to come in on that, or is what Stewart Stevenson is getting at self-evident?

Professor Harrison: Stewart Stevenson is, of course, right that there is opportunity for scrutiny. Usually, that would take place under the negative procedure, but, for certain regulations laid, it would take place under the affirmative procedure. That opportunity is there.

The Convener: Mark Ruskell will kick off talking about environmental principles.

Mark Ruskell: I am looking at the Charter of Fundamental Rights of the European Union—I have a little souvenir copy here. Article 37, on environmental protection, states:

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

It appears that none of those three principles is included in the bill, although we were reassured by the bill team last week that the bill is written in a way that ensures policy integration. What are your reflections on those missing principles, on the principles that are in there and on what the practical implications might be of missing certain principles out?

Professor Scotford: That is a very good question. I have spent a lot of time thinking about the environmental principles in the EU treaties—as well as being in the charter, they are contained in the EU treaties.

The lack of an objective in the Scottish bill and in the UK bill to indicate that a high level of protection drives environmental governance and supports the environmental principles is a glaring oversight. It is particularly glaring in the continuity bill, given that section 9(2) of the bill states that the guiding principles "are derived from" article 191.2 of the Treaty on the Functioning of the European Union, which contains the high level of protection commitment.

The environmental principles are quite flexible and open-ended notions of environmental protection—they are policy ideas that can be applied in slightly stronger or slightly weaker ways—so there is a distinct advantage in setting an explicit commitment to a high level of environmental protection.

On the integration principle, I take the point that the Government officials made about the construction of the bill being such that regard must be had to the principles across different policy-making areas, but I am not sure that that fully addresses the challenge of including, for example, the integration principle. The TFEU has an integration principle whereby environmental protection requirements should be integrated across all policy making in the European Union. It puts that principle up front in article 11.

The integration principle has a history of creeping up from just being within environmental competence to covering all aspects of EU policy making and becoming stronger in the formulation. The integration principle in article 11 of the TFEU says that environmental protection requirements

"must be integrated into the definition and implementation of the Union's policies and activities".

That is a higher and stronger duty than that of having regard to the principles in the bill. Therefore, the integration principle in the EU sense puts a stronger and higher-order obligation on the integration of environmental protection requirements. There are a series of such integration principles in the EU treaties, and the environmental protection one is the most mandatory and of the highest order in terms of the obligation that it sets that there must be integration of environmental protection. It provides a stronger commitment.

Mark Ruskell: I would be interested in hearing other reflections on the principles.

Professor Harrison: Professor Scotford has given a really good answer, and I fully agree with everything she said. She is the expert on the principles.

Last week, members of the bill team pointed to section 12, on the purpose of the duties, to explain why they had not included a high level of protection and why they had not included sustainable development as a principle. However, although section 12 refers to

"contributing to sustainable development"

and to

"protecting and improving the environment",

that is different from saying that there must be a high level of protection, so I completely concur with Professor Scotford that there is something missing here. If the aim is continuity with the EU approach—which is how the Scottish Government has chosen to frame the bill—that would seem to be lacking.

Professor Gemmell: That is exactly the supplementary point that I wanted to make. I completely agree with what Professor Scotford and Professor Harrison have said. I think that the full set of principles should be present in the bill.

I also think that there should be additional clarity on exactly how the Scottish ministers would advance the various elements and on the extent to which they become duties rather than areas to which mere lip service could be paid.

Professor Harrison: As Professor Scotford has said, the principles that there is a duty to have regard to are derived from equivalent principles that are provided for in the European treaties. That has to be read alongside the duty to have regard to the guidance that has been adopted by the Scottish ministers, which can include how the principles should be interpreted. It does not necessarily require the Scottish ministers to follow in detail the prescriptions of the European courts, for example; they have to have regard to those interpretations but they can adopt their own view. The guidance that is developed by the Scottish ministers will be critical to understanding what the impact of the principles will be in practice.

The Convener: Mark Ruskell wants to ask another question.

Mark Ruskell: I will be brief, as I know that time is marching on. Is the bill compliant with the requirements of the Aarhus convention?

The Convener: Who would like to take that question?

I see that James Harrison wants to answer, so we will go to him.

Professor Harrison: I did not realise that smiling counted as an indication that I wanted to answer the question.

The bill will do no harm to Scotland's prospects for compliance with the Aarhus convention. Whether it will bring us into full compliance is a separate question.

Professor Scotford: I agree with James Harrison that the bill will do no harm in that respect, but it certainly does not aid the cause—it will not do anything in particular to improve compliance.

The exclusion in section 39(2) of

"disclosure of, or access to, information"

from the definition of "environmental law" seems strange. There are similar provisions in the UK Environment Bill, which I also find strange. I guess that there are reasons for the exclusion, but it is strange in the context of environmental law because access to environmental information is one of the three pillars of the Aarhus convention. It seems odd that the bill will not be a mechanism for compliance with that component of the convention, which is a big aspect of environmental law.

The Convener: Mark Ruskell is happy to move on, so we come to Claudia Beamish, who has some questions on the principles in the bill.

Claudia Beamish: I will ask both my questions at once, given that we are short of time. With regard to the principles specifically, the Faculty of Advocates says:

"These principles make no mention of environmental equity (in a redistributive sense), and/or human rights",

and highlights that the bill does not refer to the

"protection of human health"

or equity.

Are there any comments on that? As I understand it, those aspects are enshrined in EU law.

My second question—which we have touched on already—concerns the implications of having a

"duty to have regard to"

the principles in the bill, rather than a requirement to act in accordance with them. That issue was mentioned in quite a lot of submissions, which I will not go into now, but perhaps we could explore it a little further.

The Convener: Time is running away from us, and we have a number of areas to cover before half past 10, so I will ask only one panel member to answer that question. I see that Eloise Scotford wants to come in.

Professor Scotford: On the point about principles that are not included in the bill, the question of which principles the Scottish Government wants to include and sign up to is—as I said in my written evidence—a political choice. A case can be made politically as to whether or not the principle of equity should be in the bill, although it is not a strong principle in the EU with regard to how it has been constitutionalised.

With regard to Claudia Beamish's point about the protection of human health, it is interesting that, as I note in my evidence, the bill refers to:

"the precautionary principle as it relates to the environment".

I find that odd because in EU law and policy, the precautionary principle very much extends to human health. That might be something to reflect on, and I have included a few notes about it in my written evidence.

10:15

Human rights are a different bag. They are not principles, but legally enforceable rights that you can choose to construct, create and defend. They are conceptually different from principles.

I agree that the

"duty to have regard to"

the principles is weak. The UK Environment Bill was challenged on a similar point, and the wording of the duty in that bill has now been upgraded to "have due regard to". The UK bill is therefore stronger on that point, but it is still not that strong. The Scottish bill could be stronger—if you really

wanted to embed the principles in policy making, you could go further by using alternative formulations such as “take into account”, “must be integrated” or what have you.

The Convener: We have a lot of questions about the bill’s purpose and the proposed environmental standards. In the interests of time, we will move on to questions about environmental standards Scotland, starting with Angus MacDonald. If we have time, we will come back to any issues around the environmental principles that we might have missed, but I am worried about time.

Angus MacDonald: With regard to the purpose of the bill, I am keen to hear the witnesses’ views on whether the bill will, through the proposed new body, ESS, provide for continuity of governance after Brexit. If it will not, where will the gaps be? Are the proposals in the bill, including the ESS model, the most effective solution?

Professor Gemmell: To a degree. The commitments are positive and well received, but the weaknesses in the bill as it is currently drafted are a concern. As I said in my submission, the fact that various mechanisms are included is good, but the way in which improvement reports and plans would be deployed is definitely a weakness. The bill does not have the robustness that would be desirable in that respect.

To answer your question explicitly, I would say no—the proposals are not an adequate or fully sufficient substitute for the current arrangements. As I pointed out at some length in the Scottish Environment LINK report, it is essential that we view the existing arrangements as a fairly complex system of checks and balances and components. The proposals in the bill focus on the European Commission-type element of the system, without seeking to do anything either through existing governance in other parts of the system or through the inclusion of a dedicated environment court.

Even in focusing on the Commission element specifically, the bill does not have the required robustness. For example, it does not pursue matters at the level of an individual case; it looks only at the more general and strategic aspects. That is a very big gap.

The argument for that approach seems largely to be that we are all terribly fearful of being overwhelmed by a large number of cases. If there is a large number of failures in the system, perhaps there should be a large number of cases. However, the experience in respect of the existing Commission model, and in other jurisdictions where similar arrangements apply, suggests that, through proper triage and the provision of dedicated advice and support in advance, the numbers can be winnowed down quickly to a certain amount of priority cases.

The main proposal is a good step, but it is flawed in a number of ways. That is my overall comment; I am happy to come back on any details if that is required.

Professor Harrison: In some ways, the proposal in the bill goes beyond what the Commission could do. The Commission’s procedures apply to compliance with EU environmental law, whereas the proposal in the bill would apply to any Scottish environmental law. It is to be welcomed that we will finally be getting robust compliance mechanisms that do not rely on judicial review in order to ensure that our public authorities comply with all forms of environmental law.

I agree with Professor Gemmell’s comments about the larger system, which echoes a little of what I was saying earlier.

The proposed body has roughly the right set of powers, but how it decides to use them will be critical. The strategy will be really important.

I am not sure that I entirely agree that individual cases will be outwith the new body’s remit. Certainly, the formal enforcement powers which relate to improvement reports and compliance notices cannot be used in individual cases. However, a lot of the European Commission’s practice in resolving complaints about environmental law has been very informal. It has not relied on going to court or formal decisions. That shows that issues can be resolved.

In schedule 2 to the bill, which deals with the strategy, there is an emphasis on putting in place a similar system, whereby issues should be resolved as quickly and effectively as possible without necessarily having to rely on the hard-hitting powers that are contained in the body of the bill.

It will be interesting to see how environmental standards Scotland develops its strategy and priorities for looking at different types of complaint. It will have to do all those things. The devil will be in the detail.

Professor Scotford: I agree with pretty much all of that. However, I think that, in some respects, the bill’s definition of

“a failure to comply with environmental law”,

in combination with the use of improvement plans, will mean that big systemic breaches of environmental standards might not be subject to enforcement by ESS.

I find the concept of

“a failure to comply with environmental law”

—which also appears in the UK Environment Bill—really odd, because a failure to comply with the law is exactly that. However, there we have it.

There are some good aspects of the definition—for example, it will potentially enable a broader sweep of authorities that might have contributed to a failure to comply with environmental law. However, given the way in which the concept is defined, it might enable public authorities to say that they have taken all the actions that they might reasonably take to achieve compliance—for example, on water quality or air quality standards—but nonetheless the standards have not been attained. Under EU law, there is a mechanism to enforce compliance by ratcheting up the pressure to achieve those standards. I do not think that the definition of

"a failure to comply with environmental law"

would capture the type of case in which there is ultimately a failure to achieve standards despite best efforts being made.

The compliance notice power is a strong provision. What is great about it is that there is a sanction for failing to comply with a compliance notice, which the UK Environment Bill does not have. However, such a notice cannot be issued where an improvement report has been issued, which might apply in a strategic or more complex case—for example, where more than one public authority is involved.

The evidence from Government officials to the committee last week indicated that the improvement report route would apply only where the law needed to be improved. In fact, it would also apply to compliance, where there was a failure to meet environmental law. If the improvement report route was chosen, the compliance notice route would be knocked out.

Environmental issues such as water quality and air quality are often complex to resolve, and require different Government departments to work together. I worry that, on complex questions of compliance with environmental standards, cases might go down the improvement report route and would therefore not be fully resolved. For example, in a case in which standards were ultimately not attained under the definition of

"a failure to comply with environmental law',

there would not be an ultimate compliance notice route to try to bring about compliance.

The Convener: Claudia Beamish has a question about the independence of ESS. I see that Campbell Gemmell wants to come back in on the previous point, so I will bring him in after the question has been asked.

Claudia Beamish: Last week, we discussed with the bill team whether ESS will be sufficiently independent and resourced to enable it to deliver its environmental governance functions.

I would appreciate the panel's answers on an issue that the committee highlighted last week. The appointment process for the interim body, the permanent ESS board and the first chief executive will involve nominations by Scottish ministers. Is that appropriate? How do the witnesses see the process developing?

The Convener: I will bring in Professor Gemmell to make the point that he wanted to make and to pick up on the question from Claudia Beamish. I will keep an eye on the chat box for indications that any other panel members wish to contribute.

Professor Gemmell: In addition to agreeing with Professor Scotford, I will say that, although we are currently moving quickly, we are rather late in doing so. I hope that there will be considerable flexibility in the final specification for the duties of ESS before the body reaches statutory status. There is quite a lot to work through, including issues to do with case typology and the way in which individual issues might be handled—for example, the difference between a complaint and a more egregious failure to comply with the highest element of the law.

As I set out in both the reports that I was involved in producing, and as I have recommended, the independence of ESS and the nature of it as a parliamentary commission would certainly require ministers not to be directly involved in the specifics of recruitment and engagement. That would give ESS a much clearer locus as a body that would be genuinely independent but empowered on a cross-party parliamentary basis.

It is clear that any arrangements can be made to work at a provisional level in order to get the body established. As long as there is a transparent process, I do not think that it would necessarily be a fundamental flaw to have ministers make appointments. However, that would raise interesting questions about the power locus in the longer term. I continue to believe that there should be a genuinely independent and parliamentary locus for the body, rather than a governmental locus or any such perceptions in that regard.

The Convener: As no one else wants to come in on Claudia Beamish's question, we move to a question from Angus MacDonald about gaps in the powers.

Angus MacDonald: The committee has pursued the issue of what the Law Society of Scotland has referred to as

"a potential lacuna in environmental governance".

Any action that Scottish ministers may take by using an executive devolved power in a reserved policy area would be excluded from the remit of ESS, while UK ministers exercising powers in areas of devolved competence would be excluded from the remit of the OEP.

What issues might arise if UK ministers exercising powers in areas of devolved competence and Scottish ministers exercising executive powers in areas of reserved competence fall outwith the remits of both the OEP and ESS?

Professor Gemmell: Other colleagues probably feel as cheery as I do about entering that space.

That is an area that clearly needs to be worked through. It will help once we know, finally, what the OEP will look like. Getting involved in devolved or non-devolved territory at the other end of the jurisdiction would be a potential challenge. I do not have any clever observations to make, other than to say that, if we are to make the system work properly, there should be no gaps. There is a complex set of arrangements in place now, and there will be in future.

Anything that relates to policy and practice in Scotland should be within the scope of ESS's oversight capability. However, it is difficult to be definitive about how that would be achieved, given the nature of reserved arrangements and the potential changes in that regard. It would seem odd for Scotland to be the subject of environmental policy without being able to influence or oversee it. The issue that Angus MacDonald highlights is still to be determined, and it is not straightforward.

10:30

The Convener: James Harrison wants to respond, but we have an issue with his microphone. It is back on now.

Professor Harrison: All that I would add is that the two bodies will have to work together. From a citizen's perspective, we require the process to be smooth and seamless. If an individual makes a complaint to ESS that does not happen to fall within that body's remit, one would hope that ESS could forward the complaint to the OEP to ensure that the matter was resolved. We would not want to make the system too complicated to operate from a layperson's perspective.

The Convener: We have time for a final question from Mark Ruskell, who wants to go back to some issues that he raised earlier in the meeting.

Mark Ruskell: I have a wrap-up question about the scope of the bill, which is tightly linked to the provisions on strategic environmental assessment and plans and programmes to do with that. It is also linked to particular public bodies, and there are some exclusions in relation to budgets, for example.

Do the witnesses have any final thoughts on the scope of the bill? Is it correctly drafted in that respect, or could the scope potentially be broadened? Does anyone have any thoughts on exclusions?

Professor Scotford: I included some detailed paragraphs on that subject in my submission. It is welcome that the scope of the bill is broader than that of the UK Environment Bill, in that it applies to public authorities other than ministers.

When it comes to having a strategic policy-making power that is based on principles, having a link to the Environmental Assessment (Scotland) Act 2005 is neat and elegant, but the downside to that is the huge legislative complexity. We will have such complexity anyway, because that is what leaving the EU results in, but that approach will create a bit more obscurity in the legislative landscape with regard to understanding the extent of the scope of the bill.

As I said in my written evidence, there is one part that could be extended, which the committee might like to consider. The role of the principles should extend to all decision making by public authorities on areas to which they may be relevant. There are good reasons for doing that. The EU principles tend to work in that way, and it would ensure that very large planning applications, for example, would be captured. However, there are other reasons for not doing it, such as the fact that it might create a lot of complexity. I will leave the committee with those thoughts.

On finance, a debate is raging about the greening of budgets and whether the bill could be used as a mechanism for having a greener approach to budget setting. That is a political argument.

The Convener: As no other members of the panel want to comment, I will round off the session by thanking everyone for taking part. We had a lot to discuss and there was probably not enough time to enable us to cover everything, but the evidence that we have received has been very helpful.

I suspend the meeting to allow for a change of witnesses.

10:34

Meeting suspended.

10:40

On resuming—

The Convener: Welcome back. We continue to take evidence on the UK Withdrawal from the European Union Continuity (Scotland) Bill, and I welcome our second panel of witnesses. Isobel Mercer is from the governance group at Scottish Environment LINK, Alison McNab is policy executive at the Law Society of Scotland, and Dr Viviane Gravey is from Queen's University Belfast, and is here on behalf of the Brexit and Environment Network.

I assume that the witnesses listened to the evidence from our first panel; we will cover similar themes with you. My initial question theme is concerns that have been raised with the committee by the Finance and Constitution Committee, and by witnesses in their submissions, about the Scottish Government's desire to keep pace with the environmental standards and laws of the EU, about the emerging internal market bill from the UK Government, and about a possible lack of compatibility between the two bills. If panel members want to come in with their thoughts on that initial theme, they should indicate that in the chat box.

Dr Viviane Gravey (Brexit and Environment Network): I do not necessarily see incompatibility. The problem is more that the internal market, as it is promised in the white paper, would include Scotland's being able to keep pace with EU rules, and to adopt more ambitious rules, while products from the rest of the UK—England and Wales—that did not follow those rules would be available in Scottish shops. There would then be issues for Scottish businesses in terms of their perhaps being held to higher standards than their Welsh and English competitors. It would be perfectly possible to do that, but it would come, potentially, at a very high economic cost.

There is then the question of pitting high environmental ambition against business competitiveness. That would be very problematic, especially in terms of Covid recovery.

Another aspect is that, while the Scottish Government wants to keep pace, Northern Ireland will have to keep pace in some areas, but that is not taken into account well in the internal market proposal. Potentially, Wales, Scotland and Northern Ireland could keep pace with EU rules, whether by political will or because of the protocol, with England being the only part of the UK to diverge from them. That might lead to different economic consequences.

In any case, we have to remember that with England being the much bigger market, there would still be pressure and the potential problem of English products undercutting Scottish products in Scottish shops.

Alison McNab (Law Society of Scotland): Dr Gravey has raised some interesting points on the practicalities of the internal market arrangements. At this stage, of course, we have only the white paper. What an internal market bill will include remains to be seen.

The internal market provisions—whatever they might look like, in due course—on-going development of common frameworks and future trade and other international agreements will all impact on how the power to keep pace can be used by the Scottish Government. The bill provides for that, I suppose, in that the Government "may" introduce regulations—it is not a requirement that it do so. Of course, there is no requirement to maintain or exceed EU provisions in relation to environmental standards.

The answer is that we need, to some extent, to wait and see. However, the continuity bill provides a degree of flexibility to accommodate whatever the arrangements might be.

10:45

Isobel Mercer (Scottish Environment LINK): These are excellent questions. All the panellists this morning have made interesting points about the topic.

I reiterate what Alison McCabe has just said, which is that the system has many moving parts and uncertainties, at the moment. We see what is in the bill, but it is difficult to comment on some of its provisions, just now.

Scottish Environment LINK is obviously mainly concerned about what the environmental outcomes of the proposals will be. We are most interested to ensure that there is, in the internal market, a shared set of common standards that will ensure that there is no race to the bottom across the UK countries, and no cap on the ambition and ability of any devolved Administration to go above and beyond the requirements, where it chooses to do so.

The question is how that will interact with the continuity bill and the keeping pace provisions. Scottish Environment LINK hugely welcomes the ambition to keep pace and to have dynamic alignment with EU standards. However, we would like the bill to go further, and we would like a firmer commitment to non-regression of environmental standards. That could be done by a formulation that would ensure that the keeping pace powers are actually used to achieve high environmental outcomes, perhaps through the powers having a kind of overarching purpose.

There are a lot of unanswered questions, but we feel that it would be excellent if, in the midst of all the uncertainty, the bill could make even firmer the ambition that we have seen to align with EU standards, so that it will achieve a high level of environmental protection. Provision, in the bill, of real clarity about the ambition from Scotland's perspective would help to do that.

Dr Gravey: The white paper on the UK internal market has to be compared with what we already know about it and how it works. The EU internal market is able to go beyond common environmental rules, and every part of the UK was previously able to go beyond common EU rules.

The UK internal market white paper is quite funny, in that the UK Government states that it is ambitious on plastics, although we know that Wales and Scotland have, using the same provisions in EU law, been more ambitious on plastics than the central UK Government.

We also already had the principles of non-discrimination and mutual recognition in the EU context, but we were always able to go beyond them to pursue objectives in public health and environmental ambition. The UK white paper proposals do not have similar strong environmental exemptions to those principles. That is where there is a lot of tension: on paper, you might be able to continue to be ambitious, but it will cost you. In the current EU context, it does not cost you.

The Convener: In the background, as is mentioned in the Finance and Constitution Committee's report, is the prospect of trade agreements that could influence environmental standards thresholds across all the devolved nations. How does that fit into your thinking?

Dr Gravey: I would not say that there could be an influence

"across all the devolved nations",

because I think that Northern Ireland would be protected by its protocol. The aspects of environmental law that we are considering and those on animal welfare are covered by the protocol, but it does not cover all environmental policy. Regulatory dealignment from the EU is one of the aims of Brexit, which is partly about being able to do things differently. Among the drivers for doing things differently are the striking of new trade deals and, perhaps, moving closer to American ways of regulation. That is definitely part of the picture.

Something that comes across very clearly from the Scottish Government's response to the UK internal market white paper is that this is not about only the Scottish Government; the rules will have to be dealt with by UK and Scottish Governments for the foreseeable future. Even if we have political commitment from the current UK Government not to downgrade certain standards, the proposed rules would still allow such downgrades, and a future Government would not be bound by the same commitment.

Finlay Carson: It is important that we look at the white paper, but this evidence session is about the continuity bill, so we need to scrutinise potential issues in that. We have touched on the principles of mutual recognition or whatever, but my concern about the keeping pace powers is potential lack of scrutiny. My colleague Stewart Stevenson suggested that the Scottish Parliament could accept or reject conditions, but that would not give us the ability to influence policies that might come down from the EU, if we were to keep pace. The Law Society of Scotland highlighted in its written submission that neither the UK Government nor the Scottish Government would have the opportunity to influence proposals or to become familiar with them before they were put in place.

What are the witnesses' thoughts with regard to the direction that the Scottish Government is moving in, which is, potentially, to align far more closely with the EU than it does with the UK, and with regard to potential issues with legislation that we are unable to influence?

Alison McNab: The question raises some interesting issues. Policy divergence is, of course, a natural consequence of devolution, and there are already examples of policy divergence within the UK in environmental matters. That sets something of a backdrop for the continuity bill's provisions. However, it is recognised that the powers in the bill are, as I suggested earlier, discretionary, so that it would be within the Scottish Government's gift to decide whether to align with the EU. There are benefits to doing that, but EU provisions might come forward with which the Scottish Government does not wish to align, and instead decides that it would be better to align with other UK jurisdictions.

In terms of scrutiny, the keeping pace powers in the bill are very wide secondary legislative powers. The Law Society's view is that those powers are inappropriate unless there is some overriding justification and that, even then, there are opportunities for enhanced scrutiny.

The earlier witness panel referred to what would almost be the default position, which would be use of the negative procedure for scrutiny—other than in some scenarios in which the affirmative procedure would be used. There are opportunities to strengthen that by, for example, in effect reversing the position, so that the affirmative procedure would be used except in minor circumstances, or ensuring that the super-

affirmative procedure would be used. The earlier legal continuity bill provided for use of the super-affirmative procedure; that is certainly worth further consideration.

Isobel Mercer: I will build on some of Alison McCabe's points. A lot comes back to the question of the aim of the powers—going beyond thinking just about the aim to remain dynamically aligned with EU law and thinking also about what outcome you are trying to achieve. That goes back to my earlier point: if the bill was clearer about the powers being used to achieve a high level of environmental protection, that would clarify matters.

Coming back to the scrutiny powers, I note that Scottish Environment LINK is concerned that the way in which the powers are currently drafted means that potentially regressive changes to environmental law could be made through the negative procedure. For example, if the EU were to pass legislation that represented a regression in environmental standards, and the power to match Scots law to that were to be used, that could be done through the negative procedure, with limited scrutiny by Parliament. Therefore, were the bill to state clearly that the power is to be used to ensure a high level of environmental protection, that would resolve some of the issues that we have.

Dr Gravey: I would like to come back in on the issue of people not being aware of what EU law would be coming into effect. The EU legislative process is quite transparent, and the process takes quite a bit of time. Therefore, you would not end up in a situation in which directives would be developed overnight with which the Scottish Government would have to keep pace.

The ability definitely exists for the Scottish Parliament, through its committees, to survey what is happening in Brussels. If you are interested in what the Government might want to keep pace with, or you want to influence what the Government decides to keep pace with, it is in the gift of the members of the Scottish Parliament to set up a committee to do that.

In any case, it is important to remember that all parts of the United Kingdom have played a huge role in developing EU environmental rules, and it is unlikely that there will be radical shifts in how the EU handles environmental policy. That means that what you would be keeping pace with is the latest update of a policy that you played a key role in developing. Although the formal ways of the UK influencing EU decision making will have gone, there will still be informal ways to do that, and there will be ways in which non-governmental actors—environmental non-governmental organisations, think tanks and so on—that have played a huge role in designing the EU's environmental rules, can play a part. The fact that we are outside the EU does not mean that there will be no UK voices influencing the shaping of EU rules after Brexit.

The Convener: I understand that Stewart Stevenson would like to ask a supplementary question on that matter.

Stewart Stevenson: I would like to follow up on the issue of scrutiny, with Isobel Mercer. I understand that there is difference regarding when and how negative and affirmative orders come into effect, but I am completely unaware of any constraints on how Parliament may scrutinise one or the other. What constraints do you recognise with regard to the scrutiny of negative orders? When I was in Opposition, I successfully opposed negative instruments.

Isobel Mercer: I apologise if I was not entirely clear in my previous answer. I was mainly referring to the fact that, although there are exemptions that mean that some regulations would be subject to the affirmative procedure and some would be subject to the negative procedure, there is no clarity about whether the powers would be used to achieve high environmental outcomes, or about the powers being discretionary, which means that ministers would not be required to follow changes in EU law if they chose not to. That is what I was principally trying to get across. I apologise if that was not clear.

I whole-heartedly agree with what Dr Viviane Gravey said about informal processes and the ability to continue to engage with development of EU environmental protections. Maintaining those informal processes and engagement will continue to be extremely important as we move forward.

The Convener: Stewart Stevenson, would you like to continue your questions about common frameworks?

11:00

Stewart Stevenson: Yes, I would.

Obviously, the common frameworks will sit around everything that might be done under the bill if it becomes an act. Do the witnesses have concerns about how we should get to those common frameworks? Clearly, there is an agreement between all the Administrations that common frameworks should exist—that is not a matter of contention at all—but there is not going to be a process for producing the common frameworks that reflects the needs and aspirations of the various Administrations and the need for flexibility. For example, tomorrow, in one of my other committees, we will discuss the Fisheries Bill that is going through Westminster. That looks like a good piece of co-operation, where the process is

working well. However, in other areas, the situation is less certain.

Perhaps we could start with Dr Gravey, because of her focus on Brexit and, hence, perhaps, on this matter. It would be useful to get some feedback on the common frameworks, how they should be created and what constraints there might be. That is all that I want to ask. I will listen carefully to the answers.

Dr Gravey: The common frameworks process has been a long time coming. We had an agreement in principle on common frameworks in October 2017, and there was already a lot of flexibility at that time. Common frameworks could be everything from a political or legal agreement all the way through to common standards or even just common objectives. However, what we are seeing is that very little has been confirmed. Only a few common frameworks will be in place by the end of December, and there will be a lot of provisional frameworks in other areas.

A lot of work has been done behind the scenes between officials of the four Administrations on common frameworks, but that work has been to do with specific issues such as radioactive substances or the emissions trading systems. Those are important elements of environmental rules, but we are missing the glue and all the horizontal issues. That is why there is some value to the discussion about the UK internal market, but the biggest missing piece of the jigsaw is the reform of the intergovernmental relations that govern how the four nations of the UK work together. As you rightly pointed out, one of the key issues around the common frameworks is how they are agreed. What happens if one of the nations stops abiding by the common frameworks? What are the procedures to make sure that the frameworks are updated and implemented and that any tensions between the four nations are addressed?

At the moment, there is slow but steady progress on some of the technical aspects of the common frameworks, but not a lot of work is being done on the governance of the common frameworks—if it is, it is being done behind closed doors and we are not hearing about it. That is completely the opposite of the process that we had at the EU level, where we started with the rules around how we develop and implement policies together and then decided on the policies. At the moment, in the UK, we are starting with common policies and trying to figure out the rules around how to agree and implement them afterwards. That is a weird way of proceeding.

Alison McNab: Dr Gravey has highlighted that we are coming up to the three-year mark since we started out in the common frameworks process, and it appears that we will not be in a position in which we have agreed a significant number of common frameworks by the end of the transition period.

The Scottish Government's response to the internal market white paper last week indicated that six common frameworks will be fully developed by the end of this year, with 25 or so being provisionally agreed some time after 2020. Some 21 policy areas have been identified as being subject to more detailed discussion in relation to whether legislative common frameworks are required. A number of those concern environmental matters. As Dr Gravey has indicated, although work appears to be going on behind closed doors between officials and, perhaps, between ministers, not much is evident in the way of outward facing material or detail so far. Consultation, particularly with those who will be affected by the frameworks operating in environmental and other markets, will be key to their success.

The governance of frameworks is an interesting issue. Mr Stevenson referred to the Fisheries Bill. That is a good example of a common framework in respect of which, on the face of it, things seem to be generally quite well agreed. However, there is, of course, no provision in the bill for what will happen if a joint fisheries statement cannot be agreed by the respective authorities. There may need to be some further consideration of what will happen in circumstances in which agreement cannot be reached or there is some kind of dispute.

Isobel Mercer: The points that have already been made are excellent. I will add two brief supplementary points.

The first is about stakeholder engagement with the development of common frameworks. We understand that phase 3, which is the next phase of the Cabinet Office process for developing common frameworks, is to reach out and engage in a process of stakeholder consultation. That has not really happened yet with most of the common frameworks, and we are keen to ensure that it does happen and that the process is transparent.

My second point is about the areas in which common frameworks are being developed. Our understanding is that nature conservation-type issues, such as the protection of species and habitats, cross-border protected areas and migratory species, currently fall outwith some of the analysis of the areas in which formal common frameworks will have to be agreed. Greater clarity about arrangements in that area as we move forward would definitely be much appreciated and very important.

Finlay Carson: What do the panellists think the issue is with getting the common frameworks

together? Is it simply that some of the common frameworks are very complicated? We have heard that the fisheries one is progressing well, but what is behind the lack of progress in the work on the other common frameworks?

The Convener: If anyone has a view on that, they should indicate that they do, please. I guess that an answer to that would be a bit speculative without knowing what is going on.

As no one seems to want to come in on that, we will move on to questions from Angus MacDonald. I am sorry—Dr Gravey would like to answer Fin Carson's question.

Dr Gravey: I agree that the complexity is part of the issue, but there is also uncertainty. A number of civil servants who have worked on common frameworks had to start work on no-deal preparations, and they were then put back on to common frameworks. They have gone back and forth. With Covid, a lot of strain has, of course, been put on Government officials in their respective ministries. If we add to that the fact that ministries such as the Department for Environment, Food and Rural Affairs were completely understaffed at the time of the referendum—they had lost around two thirds of their staff since 2005—we see that there is a huge strain on the civil service.

It is much harder to unpick and decide what to keep from EU rules than it was to go into the EU and start negotiating rules together.

Angus MacDonald: The panel will have heard me ask the previous panel about the proposals that are reciprocal and related to the UK Environment Bill. Will you compare the UK Government and Scottish Government proposals? In particular, are there areas in which the UK Environment Bill is stronger or better defined than the Scottish proposals? If there are such areas, will you discuss what the implications might be?

Isobel Mercer: That is an excellent question, and there were some really good responses to it from the previous panel. Professor Scotford highlighted that, in some ways, it is quite difficult to compare the two bills, because they have quite different objectives and scope with regard to what is included.

I reiterate the excellent points that were made about environmental improvement plans and targets. Scottish Environment LINK would like to see a commitment to introduce legislation in future that includes binding nature recovery targets and places the environment strategy on a statutory footing. Those two things should be linked in a future bill, if they are not in this bill. We would like to see a commitment to introduce such legislation at a future date.

Professor Gemmell commented that the legislation, policy and governance mechanisms create a system, or a framework, that allows high environmental outcomes to be achieved. Although the bill does some good things and plugs certain gaps, putting Scotland on a good pathway, other pieces of the jigsaw are missing. Those pieces would allow Scotland to be an environmental world leader and to play a leading role in tackling the climate and nature emergencies. We know that that is urgently needed. Principally, targets are one of those missing pieces.

Dr Gravey: If we look at the two regulators, we can see that there are some areas where ESS is better, some areas where it is as bad as, and some areas where it is worse than the OEP.

ESS is better because there are more direct enforcement powers in the Scottish approach. The principles themselves, not just the guidance on the principles, must be heeded by ministers and public authorities. ESS is slightly better when it comes to independence, although that is not perfect and I am sure that we will discuss that.

Where ESS is as bad as the OEP is in removing environmental information from the remit of the final arbiter role. For a continuity bill that claims to build on the EU approach, that is completely against the EU approach. Access to environmental information and justice is not only in the Aarhus convention; it is part of the EU acquis.

ESS is worse than the OEP in the idea of having regard to the principles. We have had so many discussions in Westminster about the UK Environment Bill that I would have hoped that that would have been picked up by the people drafting the bill in Scotland. The obligation to "have regard" to the principles is not strong enough. There is also no reference to climate change, which is outwith the remit of the bills. That is problematic. We had a lot of discussion about that in Westminster.

The bill was drafted after the Westminster bill, so there were opportunities to learn from the mistakes made in England and to do it better. That has happened in some areas but not in others.

Finally, as Professor Scotford said in the previous panel, there is a lack of an integration principle. To conclude: they are very different bills. We know that there is no advisory role for environmental standards Scotland and there is no big environmental strategy with any legal basis. That may also be something that you could do in another bill, but it must be done if Scotland is to remain ahead of the game regarding environmental ambition in the UK.

Alison McNab: There is not much more for me to say about the principles that has not already

been addressed by other members of this panel or the earlier one.

Regarding environmental governance and ESS, there are some similarities between ESS and the provisions in the UK bill for the OEP. It is clear that there are opportunities to strengthen what is there, both in independence and in matters of resourcing and of funding.

The devil will be in the detail as to how the body operates and how its strategy is set under the provisions of schedule 2 to the bill. To some extent, this is a "wait and see" matter, but there are opportunities there to strengthen the provisions.

Isobel Mercer: I want to pick up on Dr Gravey's point about the duty regarding the principles. We feel strongly that the framing of the duty should be strengthened. When the House of Lords select committee was investigating the effectiveness of the biodiversity duty in England, it found that the wording "have regard to" was weak and ineffective. I know, and Dr Gravey already pointed out, that there have been many discussions about that at the UK level. At a minimum, however, we think that that wording should be strengthened to say "have due regard" or "have special regard" to the principles. Much stronger wording could say "act in accordance with" the principles.

11:15

The Convener: Thank you. Continuing on the theme of principles, Mark Ruskell has some questions.

Mark Ruskell: The witnesses have perhaps touched on some aspects of the principles discussion, reflecting the earlier panel. Do you have anything more specific to say about the principle of integration and the principle of the high level of environmental protection?

Dr Gravey: I completely support the discussion in the first panel. We need high environmental ambition and integration added in; that would be the very least.

When we were first talking about principles a few years back in the Brexit process, we were talking about whether this is an opportunity to increase the number of principles and to look at international environmental law. There are questions there about avoiding transboundary harm. That should definitely be in the provisions if we are thinking of a four-nation UK. It should not just be in a Scottish bill; it should go across the UK. If there is divergence, we should make sure that it does not cost our neighbours.

Alison McNab: The detail that is provided in the guidance on the environmental principles that will be proposed in due course is key here. There are a significant number of principles within EU laws, not just in those that relate to the environment but in those relating to a number of other areas. It will be important that the guidance sets out clearly how the environmental principles in the bill are to sit alongside and work with or be interpreted alongside other principles in EU law. That will be key.

We might come on to discuss further the "have regard to" requirement in relation to the principles. There is of course some precedent in that, as established practice requires ministers to have regard to matters. To some extent, it will help to ensure that environmental concerns are taken into account when decisions are being made, but it is equally limited. You could "have regard to" something but attach little or no weight to it. The phrase is, by its nature, limited in scope. A high-level environmental aim or goal would help to strengthen the provisions on environmental protection, and that might be one of the other options that could be taken.

The Convener: Mark Ruskell, do you have any more questions on that? We have covered principles quite a lot.

Mark Ruskell: I have some questions for later.

The Convener: Well, carry on Mark. Are your questions on principles or do they go beyond that?

Mark Ruskell: They are on the scope of the bill.

The Convener: Carry on.

Mark Ruskell: You might have seen that, at the end of the first panel of witnesses, I was asking a range of questions about the scope of the bill. It is quite wedded to strategic environmental assessment, looking in particular at plans and programmes rather than individual decisions. Do you have any reflections on that?

Alison McNab: I am happy to come in briefly on that. As noted by the earlier witnesses, the provisions around essentially not dealing with individual cases mean that the provisions in the bill are not entirely in line with the current provisions under EU arrangements. I suppose that there are arguments for and against ESS dealing with individual cases as opposed to taking a more strategic approach.

The important provisions are those that enable the body to take steps, including producing improvement reports and compliance notices and instigating judicial review proceedings, where there is an alleged failure in relation to environmental law. Those provisions will be key and there is some degree of strength in them, compared with the provisions in the UK bill. For example, there are direct enforcement powers, and the provision for matters to be taken back to the Court of Session if a notice has not been

complied with is—I hope—a fairly strong power to compel compliance. That will be important. ESS must have sufficient teeth to enable it properly to take action where necessary.

Isobel Mercer: The point about whether ESS's remit and powers will cover individual decisions is important. I agree with a lot of what has been said so far; the provisions in the bill as drafted and the exemption that we are talking about do not achieve equivalence with the current EU arrangements.

It is not entirely clear why individual decisions are exempt in relation to some of the powers but not others. My reading of the bill is that a citizen or NGO could submit a complaint to the body about a failure to apply law in an individual decision and the body could then request information and try to resolve the issue informally but could not issue an improvement report or compliance notice. However, it could make an application for judicial review if it thought that an individual decision constituted

"a serious failure to comply with environmental law"

and could cause "serious environmental harm".

It is not quite clear why there is an exemption in relation to the middle portion of the enforcement powers but not the powers at the other two ends of the spectrum. Potentially, that will increase pressure on the court system, because, if members of the public make representations about decisions that they think have serious implications for the environment, the body might make more applications for judicial review. That is an outstanding issue.

In general, although Scottish Environment LINK supports the remit and function of the body to consider systemic issues and failures, which absolutely makes sense and fits with the existing governance framework in Scotland, we think that the exemption of individual decisions overlooks the critical role that individual decisions have played in setting precedents in the past. Various landmark cases at the Court of Justice of the European Union have involved individual decisions and set important precedents, for example in the context of how the birds and habitats directives are interpreted and applied across member states.

Dr Gravey: Let me quickly add something to the great points that have been made. It is also all about having the ability to review the powers, perhaps by starting with a wider approach that allows individual cases to be taken up. Once ESS has been up and running for a time, it will be easier to focus on more systemic issues. It is better to start with a very wide scope that potentially could be made smaller, gradually, than to establish a brand new regulator that ends up being unable to address the key problems of today.

Isobel Mercer: I will add a quick point. We wonder whether there could be a form of sifting mechanism, so that the body would not become overloaded with individual decisions. If the body's remit were widened, there could be some sort of screening process to ensure that lots of individual cases that did not potentially have significant environmental implications were not taken on.

Claudia Beamish: I will ask an additional question about environmental principles, then move to the wording regarding having due regard to the principles or going further than that. I highlighted to the previous panel that the Faculty of Advocates' written submission stated:

"These principles make no mention of environmental equity (in a redistributive sense)".

One of the panel members said that that might not be a principle. I would like the panel to comment on whether the principles should address the issues of human health in the environmental context and worldwide environmental problems in terms of equity.

Also, does the panel have any further comment on whether the wording of the bill should be to "have due regard to" or "act in accordance with" the principles? I note that Dr Gravey has already commented that she does not believe that the bill as drafted is strong enough. Have I got that right? I would value comments on that.

Alison McNab: On the point about the Faculty of Advocates' mention of additional principles, I go back to my earlier comment that there are a number of principles in EU law that require consideration. The guidance is probably key to addressing how the environmental principles in the bill are to be balanced and interpreted alongside the wide range of other matters, including other principles and existing substantive law and duties in relation to, for example, climate change, biodiversity and so on.

In terms of the "have regard to" duty, my comments have already covered that.

Dr Gravey: The big equity issue is the fact that financial matters and budgets are not covered in the scope of the bill in relation to the environmental principles. In terms of building back better, the green recovery and all those important debates, the bill does not help.

More generally, however, it goes to show that what we are doing is actually quite impressive, because we are talking so much about environmental principles. Of course, those principles, particularly the precautionary principle, are not just environmental principles but general principles. What we are talking about is plugging

the environmental governance gap, perhaps forgetting that the principles play a huge role in public health. It is quite worrying—Professor Scotford picked this up earlier—that we are talking about the precautionary principle only in relation to the environment, but it is a wider principle. We need to be careful about how we copy and paste from EU legislation to ensure that we do not narrow the scope of the principles to be just environmental, because they actually infuse the whole body of EU legislation.

The Convener: Thank you. Mark Ruskell has a further question.

Mark Ruskell: I think that that last answer partly covered my question, but the other witnesses might have views about the issue of exclusions from the bill, particularly the exclusion of financial budgets. I remember that that was discussed when the Environmental Assessment (Scotland) Bill was going through the Parliament, when the debate was around why, if we already had a plan or programme that captures policies, we would need to include financial budgeting within that. That was 15 years ago, so I am interested in other views on where financial budgeting sits at the moment and whether it should be excluded from the bill.

11:30

Isobel Mercer: That is an extremely interesting and relevant question, particularly in the current context, in which we are talking about a green recovery from the coronavirus crisis. We keenly welcome the Scottish Government's commitment to that.

That raises questions about whether the principles should be applied through the budget process. A number of them are very relevant, in particular the preventative principle, whereby we think about the cost of cleaning up after environmental harm has happened as opposed to spending money on prevention up front. For example, in the context of the spread of non-native species, the cost of implementing biosecurity measures is far less than the cost of cleaning up once species have spread throughout Scotland.

Alison McNab: This is a matter on which we require greater clarity. In the bill, there appears to be a blanket exclusion in relation to financial and budgetary matters. My understanding from the Scottish Government is that the intention is that that will apply only to matters that are exclusively financial or budgetary, but we need further clarification on that.

As Isobel Mercer said, given that overall exclusion, there appears to be some disconnect with the discussion about the importance of a green recovery and a green economy, particularly in the context of Covid-19.

The Convener: Angus MacDonald will ask about the purpose of the bill in the context of environmental standards Scotland.

Angus MacDonald: Do the bill's provisions on ESS provide for continuity of governance after Brexit? If not, where are the gaps? Are the proposals, and the ESS model, the most effective solution?

Alison McNab: I have referred to the fact that the role of ESS in individual cases is somewhat limited, which means that the new arrangements will not be fully comparable with the current EU arrangements.

On whether ESS is a good model, compared with other options, I think that having matters dealt with by a single body brings certain advantages over an approach in which additional powers are separately given to existing bodies. There are opportunities to strengthen the ESS model, particularly with regard to independence, membership and funding. That would strengthen the approach and make it more comparable with the current EU model, which takes a more arm's-length approach to some degree.

Isobel Mercer: I agree with Alison McNab that, if we are talking about how the proposed approach does not achieve equivalence with the current EU arrangements, the two issues that stand out are independence and the exemption of individual cases in the context of various powers of the proposed body.

It is worth mentioning that LINK commissioned extensive research from Professor Campbell Gemmell—I think that Professor Gemmell mentioned it in the earlier part of the meeting—the outcome of which was that a parliamentary commission model was advocated. Therefore, the proposed model falls short of LINK's hopes for the bill.

However, in general, the functions and most of the powers that are given to the body are sensible and largely match functions that EU bodies carry out.

There is also an outstanding longer-term question about environmental reports in Scotland—as the committee knows, there has been a live debate about that over many years. Campbell Gemmell's report sets out that, even with a parliamentary commission model or a watchdog model, which environmental standards Scotland would go some way towards achieving, ultimately a dedicated environment court is needed to work alongside it. That would address some of the issues to do with access to justice and the fact that the judicial review process can only

take a narrow procedural perspective, rather than looking at a merits-based argument, as the European Court of Justice is able to do.

As it stands, we consider that a couple of strengthening provisions need to be added to the bill, particularly in relation to independence and the exemption for individual decisions. We would also like there to be a dedicated environment court in Scotland to work alongside ESS. That would create a strong platform of environmental governance to help it to be a world leader in achieving high environmental standards.

The Convener: I throw into the mix the discussions around the role of ESS when it comes to international law and the agreements to which the UK Government is a signatory. Where should ESS sit in that regard? Should it have any locus at all?

Dr Gravey: The first point to remember is that ESS is trying to replace the Commission and the European Court of Justice. Those are not environmental regulators but general regulators that cover the whole remit of public policy and all EU competence. That means that there will be cases that the ECJ and the Commission might have picked up in which the environment is an element but not the core of the matter, and ESS will not necessarily be able to pick those up.

There could be cases involving the environment on the one hand and internal market rules on the other. It would make perfect sense for them to go through the Commission and the ECJ, but they might not go through ESS. We are not replacing like for like, and not just in independence terms. The only way to have similar levels of independence would be to have a four-nations regulator with members and funding coming from all parts of the UK in which none of the Governments could limit the powers of the body. That is not the direction that we are taking. Consequently, as the previous witness demonstrated, issues arise because the UK is acting in devolved areas—and vice versa—where issues fall through the gaps.

In terms of patching the gaps, do we still need a UK-wide level on top of the OEP for England and Northern Ireland and ESS and the proposal in Wales to deal with cross-border issues and instances when ministers are acting in areas that fall within the competences of others? ESS is not a like-for-like replacement and we will still have lots of gaps but, in many ways, it is stronger than the OEP for England and Northern Ireland.

Claudia Beamish: My question is for Isobel Mercer—I ask that you be as brief as possible at this stage. How would ESS and the environmental courts work in parallel? Could that cause confusion and difficulty? Along with many others, I have been involved in that discussion for many years.

My second question is about the independence of ESS, which is for all the witnesses. As I asked the previous witnesses, do you think that the fact that the Scottish ministers will be involved in making the appointments to the interim body will jeopardise its independence? The Government might be tempted to proceed to the next stage with those who are already in place.

Isobel Mercer: I see the environmental court operating in cases where ESS has perceived a serious failure to comply or where there is the potential for, or there has been, serious harm to the environment. Rather than applying for judicial review, there might be an alternative process under which ESS could apply to the environmental court for a merits-based review of the case, rather than a procedural review. I hope that that clarifies committee members' questions on that matter.

LINK thinks that the independence of the body could be strengthened if there were a role for a parliamentary committee to identify areas of expertise that should be covered by the board and perhaps to appoint rapporteurs to aid in the appointments process. At a minimum, there should be more parliamentary involvement in the appointments process in order to improve its independence. Those are just some ideas about how that might be carried out.

Claudia Beamish: Rather than simply highlighting issues of importance, can you tell us what sort of powers the environmental courts would have?

Isobel Mercer: My point was about the ability of dedicated environmental courts to undertake merits-based reviews rather than simply looking at the procedural issues. By having dedicated specialist experts and technical staff, environmental courts tend to be better equipped to deal with the technical issues that come up in environmental cases. It is worth highlighting—as was said earlier—that the Court of Justice can currently undertake merits-based reviews of the interpretation of pieces of environmental legislation, whereas judicial review is more narrow in that it looks at whether the process or procedure has been carried out within the law.

Alison McNab: Isobel Mercer has already referred to one option to strengthen the provisions on the independence and membership of the body, but other options may be for the bill to provide a fixed term for membership and for the provisions on consultation where a member may be removed from the body to be strengthened.

Our hands are probably tied in relation to the interim arrangements, given that the timing of the bill means that there is likely to be some time in

the early part of next year before environmental standards Scotland can be established as a statutory body. To some extent, there may be scope for strengthening the arrangements, but it is a natural consequence of the timing that interim members who are appointed to the non-statutory body will feed into the statutory body at such time as it is established. That is probably a better solution than having a gap without a body. There may be some means, albeit not statutory, by which the Parliament may engage with the process to ensure that it is as robust as possible.

Mark Ruskell: Do you see ESS having a role in relation to climate change? We have the UK Committee on Climate Change.

Dr Gravey: In the Westminster discussions on the Environment Bill, the UK Committee on Climate Change said that it did not make sense for the OEP not to have a remit in respect of climate change and that any potential overlaps could be dealt with by the two regulators talking to each other. If that works and the UK Committee on Climate Change can talk with the OEP to work that out, it can do it with ESS. It would be extremely odd for something with such a cross-boundary impact, such as climate change, to be covered by the OEP but not by ESS.

11:45

Isobel Mercer: I agree with that. It also comes back to some of the points that were made earlier about the definition of "environmental law" in the bill. To reiterate some of the points that have already been made, that definition is quite narrow at the moment and the Aarhus definition, which is in the Environmental Information (Scotland) Regulations 2004, would be preferable.

I agree that some sort of efficient working arrangement between the UKCCC and ESS could be achieved that would mean that the exemption on climate change could be removed from the bill.

The Convener: Angus MacDonald will expand on the gaps between the two agencies.

Angus MacDonald: We have heard from the Law Society of Scotland—I presume that the submission was authored by Alison McNab—about

"a potential lacuna in environmental governance"

in that an action that the Scottish ministers take using an executive devolved power in a reserved policy area would be excluded from the remit of ESS while the UK ministers exercising powers in devolved competence would be excluded from the remit of the OEP. Does the panel envisage that the UK ministers exercising powers in devolved competence and the Scottish ministers exercising executive powers in reserved competence will be outwith the remits of the OEP and ESS?

Alison McNab: I cannot claim authorship of the whole of the Law Society's submission, but we have certainly commented on the potential gaps that are of concern. For the system to operate fully, it needs to be able to cover all matters and, at least on the face of it, it appears that those two issues are not covered by either ESS or the OEP. However, they might simply need to be resolved further down the line.

I agree with the point that was made by the earlier witnesses that, for citizens making complaints to those bodies, it will be crucial that the bodies can work together to make sure that something that is passed to one body but is in fact within the remit of the other can be passed back and dealt with accordingly.

Dr Gravey: This is about the transboundary aspect again. If we end up in a position in which the action of a public authority in Scotland would have a negative environmental impact in England, or vice versa, we will need to make sure that there is good communications between the two regulators so that such transboundary harm is mitigated.

Claudia Beamish: [*Inaudible*.]—touched on enforcement powers and I would like to ask the panel for further comments on those for ESS. Are the compliance notice and the improvement reports sufficient for an environmental governance body and, if not, what would you like to see?

The Convener: We have touched on that issue, but we could expand on it.

Alison McNab: I will make two brief points. In relation to information notices and compliance notices, there are powers in the bill to take forward an intimation to the Court of Session to report on a failure to comply. I think that that will assist in compelling compliance.

In relation to improvement reports in particular, there would be benefit in having clearer reporting requirements so as to monitor how the improvement plan is being implemented; that would strengthen those provisions.

Isobel Mercer: I will be brief, because we have covered these issues sufficiently. We largely feel that those powers are sufficient if the exemption on individual decisions is removed. Other than that, it creates a tiered approach that, in some ways, replicates the current European Commission infringement process. We know from that process that the deterrent effect of a range of powers gets stronger with the ultimate backstop of recourse to the Court of Justice. In this instance, recourse to the Court of Session if a compliance notice or an improvement report is not complied

with, or an application for judicial review in serious cases, works to resolve issues early on in the process. That is quite a good feature of the bill.

The Convener: We probably have time for Mark Ruskell to ask the question that we skipped over when we were talking about principles. Mark, would you like to ask that question now as a final question to the panel?

Mark Ruskell: Thank you, convener. The question was about the definition of "environment" in the bill. We have already talked about climate change, but I am aware that the current definition does not include plants and animals, which seems a bit odd. What are your reflections on that?

The Convener: I will go to Isobel Mercer because she was nodding while Mark Ruskell was asking his question.

Isobel Mercer: No problem; I am happy to come in on that point. To reiterate my earlier point, there are some issues with the definition of "environment" and "environmental law" in the bill. We would like to see the bill use the Aarhus definition, which is in the Environmental Information (Scotland) Regulations 2004.

I agree with Mr Ruskell's point that animals, plants, other living organisms, biodiversity and ecosystems are included when defining "environmental harm" but not when defining "environmental law". That could just be an oversight in the drafting, but we would like to seek more clarity on it.

The Convener: We have asked you many questions and thank you very much for the time that you have spent with us this morning. It has been very useful to us.

We will now end the public part of our meeting. At our next meeting, on 25 August, we will take further evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

11:53

Meeting continued in private until 12:13.

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

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