



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 24 November 2020

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Tuesday 24 November 2020

CONTENTS

	Col.
EUROPEAN UNION (WITHDRAWAL) ACT 2018	1
Animal Welfare and Invasive Non-Native Species (Amendment etc) (EU Exit) Regulations 2020	1
UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) BILL: STAGE 2	2

ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
32nd 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)

*Liz Smith (Mid Scotland and Fife) (Con)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)

Liam McArthur (Orkney Islands) (LD)

Alex Rowley (Mid Scotland and Fife) (Lab)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 24 November 2020

[The Convener opened the meeting at 08:30]

European Union (Withdrawal) Act 2018

Animal Welfare and Invasive Non-Native Species (Amendment etc) (EU Exit) Regulations 2020

The Convener (Gillian Martin): Good morning and welcome to the 32nd meeting in 2020 of the Environment, Climate Change and Land Reform Committee.

Item 1 is consideration of the Animal Welfare and Invasive Non-Native Species (Amendment etc) (EU Exit) Regulations. Members will recall that there is an agreed protocol between the Scottish Government and the Parliament in relation to instruments that are made by the United Kingdom Government under powers in the European Union (Withdrawal) Act 2018 that relate to proposals that are within the legislative competence of the Scottish Parliament. I invite comments on the regulations.

As there are no comments, do members agree to approve the Scottish Government's proposal to consent to provisions being made in the UK Parliament on this UK statutory instrument?

Members indicated agreement.

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 2

08:31

The Convener: The next item of business is stage 2 consideration of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

As agreed by the Parliament, this committee will consider amendments to part 2 of the bill. Amendments to the rest of the bill will be considered by the Finance and Constitution Committee at its meeting tomorrow. The numbering of the amendments that will be considered today starts at 1000. You will be glad to hear that there are not 1,000 amendments, although there are a lot. That numbering is being used to distinguish the amendments that this committee will consider from those that the Finance and Constitution Committee will consider. We will start at section 9.

We are joined by the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, and her officials. We will also be joined by Liam McArthur MSP and Alex Rowley MSP. I welcome you all.

We have a lot to get through this morning. We have provision to meet this afternoon, if required. I will take a view on the need for that as we progress through the bill.

Everyone should have a copy of the bill as introduced, the marshalled list of amendments, which sets out the amendments in the order in which they will be disposed of, and the groupings. I remind members that requests to speak should be made by typing R in the BlueJeans chat function once I have called the relevant group. Please speak only when I call your name.

Only committee members are eligible to vote, and voting will take place using roll call. I will call names alphabetically. Once I have read out the result of the vote, if you consider that your vote has been incorrectly recorded, please let me know as soon as possible; I will pause to provide time for that. If we have tied votes on any amendment, I will, as convener, vote as I voted in the division. I will do that consistently throughout the process.

If we lose connection to any member or to the cabinet secretary, I will suspend the meeting until we reconnect. In the unlikely event that reconnecting is not possible, we will need to continue our meeting in the afternoon. I will suspend for a comfort break at a suitable point this morning.

I strongly encourage succinct contributions from everyone who speaks.

Section 9—The guiding principles on the environment

The Convener: Amendment 1022, in the name of Mark Ruskell, is grouped with amendments 1053 and 1054, 1001 and 1001A, 1002, 1023, 1003, 1024 to 1026, 1055 and 1056, 1027, 1058, 1028, 1030, 1033, 1052 and 1064.

Mark Ruskell (Mid Scotland and Fife) (Green): This is a good place to start detailed consideration of the bill, the aim of which is, of course, to maintain the good progress that the UK delivered by working in solidarity with other countries across the European Union.

None of my amendments in this group is about putting detailed policy goals into law or introducing new, untried and untested concepts into law—they are simply about retaining the way in which principles have been applied for many years. In many ways, they are quite conservative; they are about preserving the way in which principles have been and continue to be applied. I would be concerned about unintended consequence if the status quo were changed.

About 80 per cent of our environmental laws come from European directives, which have a high level of environmental protection, sustainable development and animal sentience integrated into the policy process. If, up to now, we had implemented domestic laws in contravention of those directives, they could have been challenged and struck down. Those principles are with us now and should stay with us as we develop new policy in parallel with the European Union.

Article 37 of the Charter of Fundamental Rights of the European Union 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.”

Those words are also reflected in the Treaty on the Functioning of the European Union.

The amendments in my name in this group enshrine those principles in the continuity bill, as they are about continuing with how we apply the four main environmental principles. They deliver a high level of environmental protection in an integrated and sustainable way.

We heard evidence at stage 1 from Professor Scotford that the absence of a principle of high-level environmental protection was a

“glaring oversight,”

particularly as the four main principles can be interpreted

“in slightly stronger or slightly weaker ways”.—[*Official Report, Environment, Climate Change and Land Reform Committee*, 18 August 2020; c 11.]

Setting an explicit commitment to a high level of environmental protection avoids diluting the ambition of the other environmental principles.

I welcome Claudia Beamish’s amendment 1001A, which picks up on the sustainable development aspect to complete this suite of amendments. I also welcome her amendment 1054 to apply the precautionary principle more broadly to human health, noting the relevance of that to issues such as air quality.

With regard to my amendments on animal sentience, starting with amendment 1022, we reached a consensus during consideration of the first continuity bill, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, that that principle should be maintained, so it is disappointing to see that that is not reflected in this bill. If the Government is considering a very different way of enshrining animal sentience, I would like to know broadly what it is considering and when that will be ready. If those provisions end up being different from the EU definition, how will we maintain alignment in future?

I will leave it there, but I look forward to hearing the cabinet secretary’s comments and the comments of fellow committee members.

I move amendment 1022.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): In the committee’s stage 1 report, we concluded that an amendment should be lodged to bring the integration principle into the bill. In essence, that is the high-level reference that we have just heard Mark Ruskell make. I have five amendments that seek to bring the integration principle into the bill. Amendment 1003 from Mark Ruskell is a necessary adjunct to my five amendments, and it should be supported by those who support my amendments. I had originally lodged an amendment very similar to amendment 1003, but it was excluded for being identical.

I believe that my amendments are effective, and they work with other provisions. Basically, “developing policies” becomes more widely drawn as “making policies”. My amendment 1055 provides a definition of that to create the principle that I am seeking to bring in.

There are lots of other amendments in this group that seek to do other things that I think go substantially beyond providing continuity from the status quo ante. I will listen carefully to the arguments, and I will hear what the minister and others have to say, but the other amendments may have a place elsewhere, rather than in a continuity bill that is relatively focused on particular issues.

Claudia Beamish (South Scotland) (Lab):

Amendment 1054 amends section 9 so that the precautionary principle is included in its entirety rather than being limited to how it relates to the environment. The amendment expands the principle to include human health hazard considerations.

Members will recall that that was recommended by the committee in the stage 1 report and that it was also raised by the Faculty of Advocates and a number of others in written evidence. Human health hazards can often be impacted by environmental wrongdoing. Many will be reassured to know that a cautious approach would be taken to our health in cases of air pollution, hazardous chemical spills or flaring, to name but a few of the concerns that are often raised with me and others.

My amendment 1001A is an amendment to Mark Ruskell's amendment 1001, which adds the principle that ministers must aim for a high level of environmental protection. I am supportive of that. Amendment 1001A adds a particular reference to the notion of sustainable development. It is important that such a reference be included here, in the general principles section of the bill. In the words of the EU,

"Sustainable Development ... aims at the continuous improvement of the quality of life on earth of both current and future generations."

That is a core tenet of both the EU and Scotland. I therefore courteously disagree with Stewart Stevenson. It is, in my view, a core tenet and it is right that sustainable development should be front and centre in the guiding principles of a bill that focuses on keeping pace. That is the case, in my view, even if that tenet is also recognised elsewhere in the bill.

I also support all of Mark Ruskell's other amendments in the group, including on animal sentience. It is important that that is recognised as part of keeping pace.

I also support Stewart Stevenson's amendments.

Liz Smith (Mid Scotland and Fife) (Con): I apologise for any information technology problems. I seem to have a connection problem, but I understand that the committee can see me.

Although I agree with the principles of improving animal welfare and recognising animal sentience, I am not convinced by Mark Ruskell's amendments, because I do not think that they deliver what he is trying to achieve. There are other opportunities to do that in other areas of legislation.

I am happy to support Stewart Stevenson's amendments.

Liam McArthur (Orkney Islands) (LD): Like Liz Smith, I am experiencing IT problems.

I thank Mark Ruskell for lodging his amendments and congratulate him on managing to do so at the head of a queue of members looking to do so.

As I said in the stage 1 debate, although the principles that are set out in the bill are fine as far as they go, they do not go far enough. The key aim is to deliver the highest level of protection for the environment and Claudia Beamish's amendment 1001A, which promotes sustainable development, helpfully underpins that.

Amendments 1002 and 1003 further ensure that the bill incorporates other relevant Lisbon treaty principles and do so more robustly than Stewart Stevenson's amendment 1053. However, if Mark Ruskell is unsuccessful, I will support Stewart's efforts.

I look forward to hearing what the minister has to say.

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): It might be helpful to start looking at this large group of amendments by setting out the broad purpose of the environmental principles measures that are in the bill.

We are seeking, through the provisions of the bill, to ensure a role for domestic environmental principles—informed by the four EU environmental principles—in the development of law and policy in Scotland. There is broad support for continuing the role of the four environmental principles as they operate at EU level. They had the highest level of buy-in when we consulted on the bill. That was clear from the responses to our 2019 consultation and has been clear from the work that we have done since then with a range of stakeholders. That is the focus of the principles and provisions in the bill.

I am concerned about attempts to amend those provisions to include other measures drawn from the Treaty on the Functioning of the European Union that are unrelated to policy and law on the environment. That would expand the reach of this part of the bill without relevant stakeholders having had any meaningful opportunity to consider and respond.

08:45

Amendment 1023 is the first of a group of 10 amendments, including 1022 to 1028, 1030, 1033 and 1052, that Mark Ruskell has introduced to extend the guiding principles on the environment so that they also cover animal welfare. I do not think that sufficient attention has been paid to

section 12, which sets out the purpose of the duties as

“protecting and improving the environment”

and

“contributing to sustainable development.”

Animal welfare is an important subject, but it is not environmental policy. Article 13 of the TFEU, to which Mark Ruskell refers in amendment 1024, does not relate to environmental policies but relates rather to the European Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies. There are many policies listed in that article but, conspicuously, there is no mention of the environment. It is inappropriate to shoehorn the subject of animal welfare—however important—into those guiding principles on the environment.

Proposals that would require ministers and public bodies to have regard to the welfare requirements of animals as sentient beings in making law and policy would need full consultation, taking into account the legislation on animal health and welfare that is already in force. The farming and land management sectors have, at the very least, the right to be consulted before a change of that nature is introduced in Scots law.

Animal sentience has been implicitly recognised in Scottish legislation for over a century, most recently in the Animal Health and Welfare (Scotland) Act 2006. Our newly established Scottish Animal Welfare Commission has a specific remit to report annually on how the welfare needs of sentient animals are being addressed in all areas of relevant legislation. I ask Mark Ruskell not to move the 10 amendments seeking to introduce consideration of animal welfare into the guiding principles or, failing that, I urge the committee to reject the amendments.

Amendment 1053 is part of a set of five amendments that would add a principle of integration to the set of principles. I support those amendments and amendment 1003, in the name of Mark Ruskell, which supplies the reference to integration in the treaty. The Scottish Government remains of the view that it is not a necessary step to achieve the desired integration of environmental policy, but I am happy to support the amendments as an effective way to respond to stakeholder concern that it should be more explicit in the guiding principles.

Amendment 1054, in the name of Claudia Beamish, relates to the precautionary principle. The precautionary principle is best known as it applies to environmental protection, but it can have wide applications, for example to health. This is not the time or the place to discuss the merits of such a wider approach. Equally, this is not the bill

or the set of principles where such an approach should be enshrined. If Claudia Beamish wants to argue for a precautionary principle to be applied to matters other than the environment, she can make that case when relevant legislation is being considered. However, it cannot be right to apply a general precautionary principle under the guise of the guiding principles on the environment, because that is not what we consulted on. It is not a continuation of the effect of the EU environmental principles and it is not fair to stakeholders in those other policy areas who have had no opportunity to consider or react to such a proposal. Accordingly, I ask Claudia Beamish not to move amendment 1054 and, failing that, I urge the committee not support it.

I turn to amendment 1001, in the name of Mark Ruskell, on the principle of a high level of protection, and amendment 1001A, in the name of Claudia Beamish, adding sustainable development to the principle. Amendment 1001 is not particularly well drafted and the inclusion of the Scottish ministers in the text of the principle itself would make a bit of a guddle of the application of the principles to other duty holders.

However, that is not the primary reason why I am opposing amendment 1001. I do so because the bill already has provision at section 12 that I believe will be more effective in protecting the environment than introducing the principle of a high level of protection. Section 12 sets out clearly that all those to whom the duty applies

“are to comply with the duties with a view to—

(a) protecting and improving the environment, and

(b) contributing to sustainable development.”

That is a much clearer and richer expression of the purpose of the provisions and it includes reference to “improving” as well as “protecting” the environment. I hope that Mark Ruskell will not move amendment 1001 and I recommend that the committee rejects it if it is moved.

Finally, we come to amendments 1002 and 1003. Amendment 1002 is Mark Ruskell’s version of an integration principle. The drafting is broad because it applies only to the implementation of the Scottish ministers’ policies and activities, but the guiding principles apply to other duty holders too. I therefore invite Mr Ruskell not to move amendment 1002 but instead to support the integration principle that is introduced by Stewart Stevenson’s amendment 1053. I will recommend support for amendment 1003 as it provides the definitional reference relevant to Stewart Stevenson’s version of the integration principle.

The Convener: I invite Mark Ruskell to wind up and to press or withdraw amendment 1022.

Mark Ruskell: Amendment 1022 is about animal sentience. I am disappointed by the lack of progress on the issue. As I said in my opening comments, we had several debates about it during consideration of the first continuity bill, and I understood that a definition that more fully reflects the European definition of animal sentience was going to be carried forward. I do not know what has happened between then and now.

Last week in the chamber, the Cabinet Secretary for the Constitution, Europe and External Affairs, Mike Russell, indicated that the Scottish Animal Welfare Commission was probably looking at the issue and at what legal changes may be required. Today, we have an opportunity to ensure continuity with European principles. If there is a better way to do that, I would like the cabinet secretary to tell us what that is. In the light of her comments, I will not move the relevant set of amendments today, but I will seek greater clarification in the run-up to stage 3 on what the Government is proposing and which areas of legislation still require to be changed to ensure continuity in that area.

Turning to Stewart Stevenson's amendment 1053, I am reading the words, but they do not have any basis in European law. It might be continuity with Stewart Stevenson's thinking, but it is not continuity with the European Union. That point is made by the fact that, as Stewart Stevenson admits, amendment 1003 is a necessary adjunct to his amendment, which is needed to give it some kind of basis in European law. I am a little uncomfortable with it, to be honest. If the committee prefers to come up with a new form of words that does not relate to the Treaty on the Functioning of the European Union and which is not in the EU charter of fundamental rights, it should do that, but amendment 1053 is not about strict continuity and I have concerns about that.

In the points that she made about the other amendments, which reflect well-founded and deeply embedded European principles about high-level environmental protection, the cabinet secretary referred to section 12 of the bill. I am looking at it now and it does not identify the aim of a high level of environmental protection. It talks about

"protecting and improving the environment",

which are laudable aims, but that could mean improving the environment a little bit or improving it a lot—it could mean a low level of environmental improvement or a high level. The fact is that all the European treaties and the charter of fundamental rights point to a high level of environmental protection. Those are the words that are missing from the bill and which I would like to be included in it.

In view of the cabinet secretary's comments, I will not move the amendments in question, but we might need to return to the issue. I have no further comments to make.

The Convener: For clarity, I will take each amendment as it comes. Are you withdrawing amendment 1022?

Mark Ruskell: In the light of the comments that have been made, I am.

Amendment 1022, by agreement, withdrawn.

Amendment 1053 moved—[Stewart Stevenson].

The Convener: The question is, that amendment 1053 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Abstentions

Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 1053 agreed to.

Amendment 1054 moved—[Claudia Beamish].

The Convener: The question is, that amendment 1054 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

Against

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 1054 disagreed to.

Amendment 1001 not moved.

The Convener: Amendment 1001A, in the name of Claudia Beamish, falls.

Claudia Beamish: I am happy to continue discussions.

09:00

Amendments 1002 and 1023 not moved.

Amendment 1003 moved—[Mark Ruskell]—and agreed to.

Amendments 1024 to 1026 not moved.

Amendment 1055 moved—[Stewart Stevenson].

The Convener: The question is, that amendment 1055 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Abstentions

Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 1055 agreed to.

Section 9, as amended, agreed to.

After section 9

The Convener: Amendment 1016, in the name of Claudia Beamish, is grouped with amendments 1016A, 1016B and 1057.

Claudia Beamish: Amendments 1016, 1016B and 1057 would require ministers to produce an environmental policy strategy that sets out their proposals to protect and recover our natural environment, in line with the environmental principles and in consultation with—*[Inaudible.]* That is vital, not least because our natural world is in crisis—one in nine species in Scotland is at risk of extinction—and because the European Commission is pressing ahead with its new biodiversity strategy to 2030, which will address the crisis.

My amendment 1016 sets out much of the detail. Ministers would have six months from the date when the proposed section came into force to lay their strategy before the Parliament. I am happy to discuss whether, on reflection, that timescale is too short, given the forthcoming election and the challenges from the virus.

I am aware that the Scottish Government is developing an environment strategy, which is welcome. However, there is no statutory requirement for such a strategy to be implemented or for regular monitoring of and reporting on whether it has achieved the Government's stated outcomes.

My amendment 1016 would require a strategy to be produced and would create a clear mechanism for scrutinising the Government's progress, much as with Scotland's climate change ambitions. My amendment 1016B clarifies that the Scottish ministers would have to set out how the targets that they have proposed in the strategy would be legally binding, which would help to ensure that we keep pace with what emerges from the EU on the creation of a nature recovery target arrangement in the EU's biodiversity strategy to 2030. Provisions to set out nature recovery targets for England are included in the UK Government's Environment Bill. That element is not being taken forward in such a way in Scotland, and we should at least match the ambition that is being shown in other parts of the UK.

Amendment 1057 follows on from amendment 1016 and would require the Scottish ministers, when developing environmental policies, not only to consider the guiding principles on the environment but to act in accordance with their strategy. That would ensure that the strategy would be actively implemented and would become a true guide for Scotland's environmental and nature policies.

I welcome amendment 1016A, in the name of Mark Ruskell, which clarifies that the purpose of the environmental policy strategy would be to secure the

"improved protection, restoration and enhancement of the environment and biodiversity of Scotland."

That makes clear what the ultimate aim of Scotland's environment policy should be.

I move amendment 1016.

Mark Ruskell: I thank Claudia Beamish for the constructive work that we have done on not just the amendments in this group but other amendments that the committee is discussing.

We return to the debate that we had in the chamber last week. If we take the twin crisis approach of dealing with biodiversity and climate change together, that means putting the environmental strategy on a statutory basis, so that the nature emergency is underpinned with the same status and urgency as the climate emergency is.

Ministers need a strong duty to deliver on legally binding targets. There should be a requirement in law to monitor and report on that. My amendment 1016A underlines the core objective of the restoration of nature under the strategy and the targets that should flow from that.

We need to keep continuity with the ambition on the nature emergency that is being shown in the European Union, which has committed to a biodiversity strategy up to 2030 that will include

nature restoration targets. That is why the amendments in this group are critical. They reflect the broad consensus that was expressed in the chamber last week on the importance of statutory underpinning.

I move amendment 1016A.

Finlay Carson (Galloway and West Dumfries) (Con): The Scottish Conservatives appreciate that we are in a climate and biodiversity emergency. However, we must consider the implications of the Covid-19 pandemic and the forthcoming elections next May. I look forward to the cabinet secretary giving us an indication of the ability of civil servants to deliver the amendments that Claudia Beamish has lodged. The issue certainly needs to be tackled as a priority, but I appreciate that civil servants might find it difficult to carry out the work at this time.

Roseanna Cunningham: As members know, earlier this year, I published “The Environment Strategy for Scotland: vision and outcomes”. The publication includes the key outcomes that we need to achieve that vision and sets the direction for further work on the strategy, which includes developing a strategic environmental assessment.

I was keen for Scotland to have a clear environmental strategy partly so that we can underpin our environmental policy once we are outwith the EU and reinforce our commitment to maintaining enhanced standards. Therefore, I can see that there is a case for providing for an environmental strategy in the bill. However, as I think that Claudia Beamish and Finlay Carson have already recognised, the amendments, in their current form, would create some difficulties. The provisions are too inflexible and, frankly, the timescales are not realistic.

To be effective, any such strategy must be developed with a broad range of stakeholders. In addition, if it is to achieve the desirable aim of increasing the integration of the environment into other policy areas, we will have to involve policy makers and stakeholders in those policy areas, too. I also think that the further development of the strategy must fit in with the work that is already being done.

There is a bit of confusion around the approach to statutory targets in Claudia Beamish’s amendment. I will shortly be publishing a monitoring framework for the environment strategy that will bring together the existing statutory targets, elements of the national performance framework and indicators from other strategies. Stakeholders have contributed to that effort. There is a wide understanding that this a complex area, with a lot of targets already in place. There are a lot of technical difficulties in designing meaningful strategic targets.

I ask Claudia Beamish not to pursue amendment 1016 in its current form, but I offer to work with her to design an amendment that sets out an obligation on ministers to continue the work on an environmental strategy. I think that we will be able to keep the essence of her proposals, but it will need to be set in a framework that allows for development at a pace that will lead to an effective strategy, with broad acceptance by stakeholders and relevance across Government. That really cannot be done in the coming six-month period, which is pretty much all that we would have during an extraordinarily complicated time, which includes Brexit, Covid, parliamentary elections and the likelihood of Parliament itself not really being in a position to look seriously at the issue until autumn 2021.

I ask Claudia Beamish to enter into conversations with us and not to press amendment 1016, or to move her other amendments in the group.

The Convener: I call Claudia Beamish to wind up on amendment 1016.

Claudia Beamish: I listened carefully to the cabinet secretary’s comments. For the record, Mark Ruskell and I have worked together on this amendment and a number of other amendments, as he highlighted.

Finlay Carson highlighted a point that I touched on briefly and which the cabinet secretary elaborated on, which relates to the challenge of publishing the legally binding strategy that my amendment provides for within six months. I acknowledge that that is an unrealistic challenge.

On the basis of the commitment that has been given that an obligation on ministers will be developed at stage 3, as long as it is possible for me and others with an interest—I have already highlighted who those people are—to work with the cabinet secretary, I will not move amendment 1016.

I also highlight that I will want to discuss the statutory targets before we get to stage 3, because they are a fundamental aspect of what our party has declared as a nature emergency. As was highlighted in the Green Party debate last week, legally binding targets will focus minds in Scotland.

I will not be moving either of the two amendments in my name today.

09:15

The Convener: Given that you have already moved amendment 1016, would you like to withdraw it?

Claudia Beamish: I would—thank you.

Amendment 1016, by agreement, withdrawn.

The Convener: I am therefore unable to call amendments 1016A and 1016B.

Section 10—Ministers’ duties to have regard to the guiding principles

Amendment 1056 moved—[Stewart Stevenson]—and agreed to.

The Convener: Amendment 1065, in the name of Finlay Carson, is grouped with amendments 1006, 1007, 1004, 1005, 1029, 1059, 1066, 1008, 1017 and 1009. Please note that amendments 1065 and 1006 are direct alternatives, amendments 1066 and 1008 are direct alternatives and amendment 1029 pre-empts amendment 1059.

Finlay Carson: Amendments 1065 and 1066 seek to address the “have regard to” question, which was examined in paragraphs 95 to 105 of the committee’s stage 1 report. The committee’s recommendation was:

“The Committee ... recommends the Scottish Government brings forward amendments at Stage 2 to strengthen the wording in relation to the duty to have regard to the principles. The Committee highlights the suggestions made to it which includes a duty to ‘have due regard to’ or to ‘act in accordance with’.”

Liam McArthur, in amendments 1006 to 1009, has proposed the wording “act in accordance with”, while my amendments 1065 and 1066 offer the alternative of “have due regard to”. I understand that there may be some issues with the amendments that propose the wording “act in accordance with”.

The strength of the duty to apply the principles is an issue that needs to be addressed at stage 2. The committee recommended that, and it is disappointing that the Government has chosen not to respond positively. The same recommendation was made in relation to the UK Environment Bill by the Westminster committee that conducted the pre-legislative scrutiny there, and the UK Government responded by agreeing to take the “have due regard to” approach.

The recommendations are based on stakeholder concern, and the stakeholders have experienced Government exercising similar duties. The concern was probably best summarised by the Law Society of Scotland, which the committee quoted in paragraph 94 of the stage 1 report. It commented:

“you could ‘have regard to’ something but attach little or no weight to it. The phrase is, by its nature, limited in scope.”

That observation is correct. However, in the Government’s response to the committee, it concluded that it would not lodge amendments on

the subject. That appears to be predicated on the different structures of the UK bill and the bill that is before us. In particular, the Government’s response says:

“We would also note that the equivalent duty in the UK Environment Bill is a duty on UK Ministers to have regard to a policy statement, to be published by UK Ministers themselves on the environmental principles, and not to the principles themselves.”

That is correct as far as it goes, but it fails to observe that section 13 of the bill requires Scottish ministers to publish guidance on the principles and that duty holders must exercise their duty having regard to that guidance. The structure may be different, but the effect is the same.

For those reasons, the duty must be strengthened in order for us to ensure that the principles are applied in a manner that is as consistent as possible with the current EU application.

I move amendment 1065.

Liam McArthur: Like the amendments in Finlay Carson’s name, my amendments 1006 to 1009 would strengthen the duty on ministers and public authorities to comply with the overarching principles that we discussed earlier.

The bill requires ministers to “have regard to” the principles, which is too weak and offers insufficient assurance that policy and actions will adhere to the principles. Finlay Carson’s amendments would beef up the provisions in line with the wording in the equivalent UK bill, which requires ministers to “have due regard to” the principles, but that might not be sufficient, in and of itself.

Amendments 1006 to 1009, therefore, would require ministers and public authorities to “act in accordance with” the environmental principles that the bill incorporates into Scots law. They are strongly supported by Scottish Environment LINK and reflect the committee’s recommendations in its stage 1 report. I hope that they attract the support of the committee.

Mark Ruskell: Amendment 1005 would remove the exemption from the duty to apply the environmental principles in relation to matters of budget and finance. No such exclusion applies to the principles in the Treaty on the Functioning of the European Union; EU finance and budgets are subject to the principles. If the bill is about providing continuity, the same approach should apply in Scotland.

The cabinet secretary might argue that budgets do not determine policy. She might say that budgets only implement policy and that it is the policy to which the principles apply. That might be correct in theory, but it neglects the issues, on

many policies. First, in practice, spending decisions do not always follow policy. For instance, transport policy at a strategic level is generally in line with environmental ambitions, such as the aim to meet net zero targets and set out a transport hierarchy, yet spending decisions, which are essential to implementing policy, regularly do not reflect those aims. For example, road-building programmes are prioritised, ahead of spending on active travel infrastructure.

Secondly, finance or fiscal policy in itself has the potential to harm or benefit the environment. The use of green taxes and charges on or permits for resource use are all policies that should be underpinned by the environmental principles. How can the polluter-pays principle, for instance, be fully applied if it is not applied to our choices on taxation?

Thirdly, the application to the budget of the precautionary principle should ensure that long-term thinking about the cost of not taking early action is factored in. For example, budgets to tackle non-native invasive species should be seen as long-term preventative measures, which will save far more money than they initially cost. In the prioritisation of budget spend, it would make sense to consider how preventative spend can deliver better budget outcomes.

In the committee's recent report, "Pre-Budget Scrutiny 2021-22", we said:

"all public expenditure should be consistent with addressing the climate and ecological crises, building a wellbeing economy and delivering a green recovery."

We recommended that the Scottish Government use the next budget to

"set a pathway towards a green, just and resilient recovery."

By backing amendment 1005, members can ensure that matters of budget and finance are in line with the key environmental principles, in all future budgets.

Amendment 1004 would remove the exemption in relation to defence matters. I am sure that members can think of examples of Ministry of Defence action in Scotland that could show better regard to environmental principles, outwith periods of national emergency. For example, in Dalgety Bay, radioactive pollution from world war 2 waste disposal continues to pollute the local beach. Consideration of the polluter-pays principle should have resulted in the MOD progressing the clean-up of the Fife coast decades ago.

Another example is the generation of acoustic noise pollution associated with naval exercises. That is a real problem for beaked whales on the west coast of Scotland where, in 2018, the largest mass stranding in the world was recorded. The

Ministry of Defence should be undertaking acoustic monitoring of the offshore habitats of beaked whales in which it operates, as required under the EU habitats directive. It should then use that field data to carry out environmental impact assessments, and it should consider operating outside those beaked whale habitats until the EIAs have been finalised. My amendment 1004 would ensure that the MOD gives greater consideration to Scotland's environment.

Finally, the committee has heard detailed evidence from experts in environmental law on the deficiencies in the phrase "have regard to" in the bill, as Finlay Carson and Liam McArthur outlined. The wording is clearly weaker than that in the UK Environment Bill. If we are serious about delivering on environmental principles, the wording "act in accordance with" says what we mean. It says that policy will be based on the principles, and the wording is in line with the Treaty on the Functioning of the European Union. I hope that the committee will support Liam McArthur's amendments to enable the bill to deliver on that objective.

Roseanna Cunningham: There are quite a lot of amendments in the group. I will speak first to amendments 1006 to 1009, in the name of Liam McArthur. They are intended to change the form of the duty on the Scottish ministers, ministers of the Crown and responsible authorities required to carry out a strategic environmental assessment in all cases. They seek to amend the form of the duty to "act in accordance with" the guiding principles.

Under sections 10(1) and 10(2) of the bill, there are duties on ministers to

"have regard to the guiding principles on the environment",

which should apply

"in developing policies (including proposals for legislation)"

in relation to Scotland.

Under section 11, there is a duty on responsible authorities to

"have regard to the guiding principles"

when they are considering anything that would require an SEA. It remains my clear view that a duty to "have regard to" is effective and proportionate and will work well with the other duties and functions of ministers and public bodies.

I am aware that there has been debate about the framing of the duties in respect of the guiding principles on the environment, stretching back to the publication of the consultation paper last year. The duties to "have regard to" the guiding principles reflect the effect of the environmental principles in EU law. The guiding principles on the environment are important guides to decision

making, but we need to ensure that the duties in respect of the principles—those duties on ministers and on public authorities—are proportionate and effective and work well with the wider range of statutory duties and other relevant factors that ministers and public authorities may have to consider in any decision-making process.

It is therefore important that, while the environmental principles are taken into account in decision making, those duties should not be framed in a manner that would result in their dominating all other duties and objectives. We believe that a duty to “have regard to” strikes the appropriate balance.

Liam McArthur’s amendments, which aim to change the form of the duties to “act in accordance with” the principles, would constrain the ability to take into account other legitimate considerations when developing policy. Indeed, it is possible that, if the environmental principles duty was specified in such terms, it could lead to perverse effects or hold up decision making. The wording in the amendment is a very strong form of duty that is generally seen in areas such as company law, where directors must “act in accordance with” very specific rules and provisions, and in other areas where there are clear, detailed rules that must be followed.

The guiding principles on the environment—as is the case with the EU environmental principles—are guides to decision making of a subjective nature, and they require interpretation and application to individual situations. They are not rules or procedure that can be precisely followed. Liam McArthur’s amendment would have a particular impact on local authorities, which have a wide range of duties and objectives to balance and produce a lot of SEAs for strategic planning functions in particular.

We have discussed the form of duty in the bill with the Convention of Scottish Local Authorities, which also responded formally to the 2019 consultation. There is broad agreement that the proposals in the bill are proportionate and would ensure an appropriate place for the guiding principles at the level of a project or plan that is subject to environmental assessment.

The ultimate impact of a duty to act in accordance with the guiding principles would not be known until tested in court. However, it is possible to foresee some potential impacts of such a duty. A duty to act in accordance with the precautionary principle could lead to disproportionate expenditure to protect against very low probability events. A duty to act in accordance with the polluter-pays principle could prevent provision from grants to assist the most vulnerable in society with energy efficiency. After all, a domestic householder is, by definition, a

polluter. Generally, there would be conflicts between a duty to act in accordance with a principle and other policy goals and statutory duties. For those reasons, I urge Liam MacArthur not to move these amendments, and, if they are pressed to a vote, for the committee to reject amendments 1006, 1007 and 1008 and the consequential amendment 1009.

09:30

Finlay Carson’s amendments 1065 and 1066 seek to change the duty on Scottish ministers and responsible authorities from “have regard to” to “have due regard to” the guiding principles. Finlay Carson is not seeking to amend the duty on ministers of the Crown, as I understand it. I am aware that the equivalent duty in the UK Environment Bill has been amended to read “have due regard to”. However, I emphasise to the committee that there are significant differences between the bills. In the first place, the duty in the UK bill applies only to UK ministers. Secondly, unlike the duty in our bill, the duty in the UK bill applies not to the guiding principles but to a guidance document separately written by UK ministers. Thirdly, there is a condition placed on that document that there should be proportionality between environmental and other policy goals.

Therefore, it remains my clear view that the current wording of the duty, as “have regard to”, is effective and proportionate and will work well with other duties and functions of ministers and public bodies. I am not sure that Finlay Carson has worked through the interaction of his amendments with the duties on UK authorities. I do not think that it is right that there are amendments before the committee that would lead to a different specification of the duty in different places. Therefore, I ask Finlay Carson not to press his amendments today, so that we can discuss with him the framing of those duties ahead of stage 3. However, if the amendments are to be voted on today, I ask the committee to reject them.

I will turn now to consider amendments 1004 and 1005, lodged by Mark Ruskell, which seek to remove the exemption from the principles for duty for defence and for finance or budgets. The provisions in section 10(3) of the bill reflect the exclusions in the Environmental Assessment (Scotland) Act 2005 and the European environmental impact assessment directive. National defence was never within the competence of the EU. Therefore, to include defence in relation to our domestic guiding principles for the environment would not be a continuation of their effect in the EU. I cannot see any good reason for removing that exemption. With regard to Ministry of Defence sites, considerations relating to policy areas that are not

specifically defence related, such as water abstraction, will already be in the scope of the principles.

Many significant environmental policies also have some financial consequences, and the intention is not to exclude policies on that basis, in the same way that such policies are not exempt from the requirements of the 2005 act. Rather, the provision in section 10(3) removes purely financial and budgetary processes from the scope of the duty, in a similar manner to the 2005 act. The intent of that exclusion will be explained in guidance, again in a similar manner to the guidance on environmental assessment. It is unclear how the guiding principles could apply to the budgetary process itself. The guiding principles will have their due place in influencing the design of the policies, which will then be subject to the budgetary process. I do not believe that these exclusions will have any impact on the achievement of environmental objections. Therefore, I urge Mark Ruskell not to move these amendments, and I urge the committee to reject them if they are pressed to a vote.

Amendment 1029, in my name, has the effect of removing from ministers the power to make regulations to remove more matters from the scope of the principles duty. On consideration of comments about the initial proposal, not least from the Delegated Powers and Law Reform Committee, I concluded that that power cannot really be justified, and ministers had no intention of taking any further matters out of the scope of the principles. I recommend that the committee supports amendment 1029. The amendment would pre-empt amendment 1059, in the name of Alex Rowley, which seeks to apply the affirmative procedure as the regulation-making procedure, because that change would clearly not be required if the power to make further provisions were removed altogether.

I turn to Angus MacDonald's amendment 1017. As members know, our intention is indeed that responsible authorities should consider the environmental principles in carrying out environmental assessments and that that consideration, and its impact on decisions, should be reported in environmental reports. That was the reason for aligning the duty of regard to guiding principles with the requirement for an SEA.

The means in the bill to achieve that consideration through guidance is sufficient, more effective than amendment 1017, and allows us to set out in far greater detail how the duty should be achieved through the stages of the process of environmental assessments. I do not believe that amendment 1017 is necessary, and I invite Angus MacDonald not to move it.

Alex Rowley (Mid Scotland and Fife) (Lab):

Amendment 1059 would provide that the regulation under section 10(4) would be subject to affirmative procedure, which would ensure a higher standard of parliamentary scrutiny in the making of those regulations.

As the cabinet secretary has said, amendment 1029 pre-empts that change. I certainly support amendment 1029, which means that amendment 1059 would not be required.

Angus MacDonald (Falkirk East) (SNP): I will keep this contribution brief. Amendment 1017 seeks to ensure that, when public authorities apply the EU environmental principles during the SEA process, they have a responsibility to set out how that has been done. The purpose of the amendment is to add transparency and scrutiny to the process.

In light of the cabinet secretary's comments, however, I am minded not to move the amendment.

Claudia Beamish: I will be as brief as I can. I had considered supporting Liam McArthur's amendment 1006 in relation to the requirement to "act in accordance with", because it would lead to consideration of the vital importance of our environment to the future of Scotland. However, I listened to the cabinet secretary and I am less minded to support the amendment, for some of the reasons that she gave.

I will strongly support Finlay Carson's amendment 1065 on the requirement to "have due regard to", should he decide to press it. The phrasing "have due regard to"—I stress the word "due"—would enable evidence to be more clearly shown that those fundamentally important guiding principles had been regarded. I will listen carefully to what Finlay Carson says when he winds up, however, as he might decide to withdraw his amendment because of what the cabinet secretary has said about consideration of the detail. In principle, I want to support his amendment.

In relation to the removal of the exemption for national defence, the points that Mark Ruskell makes about the pollution at Dalgety Bay and acoustic noise pollution are really important examples. However, I am not able to support that amendment today because I think that it should be clearer. The cabinet secretary used the example of water as one of the issues that the Ministry of Defence would have to deal with anyway because of legislation. I have concerns about the slowness of the Ministry of Defence in dealing with—*[Inaudible.]*—although I do not feel that I can support the amendment today, because there should be more clarity on the issue.

I support Mark Ruskell's amendment 1005, which removes the exemption for finance or

budgets. I will not reiterate the reasons that he gave, but I absolutely align myself with that. As I understand it, the exemption would follow EU legislation. Finance is utterly in need of scrutiny, because the policies might be right but the finance might be wrong, to put in a nutshell what Mark Ruskell said.

I support the cabinet secretary's amendment 1029, and I respect Alex Rowley for not moving his amendment on the basis that he explained. I also respect Angus MacDonald's position.

The Convener: I call Finlay Carson to wind up and to press or withdraw amendment 1065.

Finlay Carson: I still believe that the duty must be strengthened to ensure that the principles are applied in a manner that is as consistent as possible with the current EU application. I lodged amendments 1065 and 1066 to do that as an alternative to Liam McArthur's amendments, and I will bear in mind the cabinet secretary's response to those. I welcome the assurance that the cabinet secretary will work with me and others to strengthen that duty at stage 3. On that basis, I withdraw amendment 1065 and look forward to discussions with the cabinet secretary.

Amendment 1065, by agreement, withdrawn.

Amendment 1006 moved—[Liam McArthur].

The Convener: The question is, that amendment 1006 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ruskell, Mark (Mid Scotland and Fife) (Green)

Against

Beamish, Claudia (South Scotland) (Lab)
Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 1006 disagreed to.

Amendments 1027 and 1057 not moved.

Amendment 1058 moved—[Stewart Stevenson]—and agreed to.

The Convener: I call amendment 1007, in the name of Liam McArthur, already debated with amendment 1065.

09:45

Liam McArthur: I will not move amendment 1007. I should also indicate now that I do not wish

to move amendments 1008 or 1009. I am slightly concerned that amendment 1009 is your penultimate amendment today, and I am also due to attend the Justice Committee. Given the earlier vote, it seems sensible for me not to move any of those remaining three amendments in my name.

Amendment 1007 not moved.

The Convener: Okay—we will take a note of that. I will check that with the clerk.

Liam McArthur: Thank you, convener.

Amendments 1028 and 1004 not moved.

Amendment 1005 moved—[Mark Ruskell].

The Convener: The question is, that amendment 1005 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

Against

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 1005 disagreed to.

Amendment 1029 moved—[Roseanna Cunningham].

The Convener: If amendment 1029 is agreed to, amendment 1059 will be pre-empted.

Amendment 1029 agreed to.

Section 10, as amended, agreed to.

Section 11—Other authorities' duty to have regard to the guiding principles

Amendments 1066, 1008, 1030 and 1017 not moved.

Section 11 agreed to.

Section 12—Purpose of the duties under sections 10 and 11

The Convener: Amendment 1031, in the name of the cabinet secretary, is grouped with amendments 1032, 1014 and 1049 to 1051. I ask members to note that amendment 1014 pre-empts amendments 1049 and 1050.

Roseanna Cunningham: Amendments 1031, 1032 and 1049 to 1051, in my name, expand the bill's definition of "the environment" expressly to

include habitats and species, in response to stakeholders' concerns that were raised at stage 1.

Officials consulted further with NatureScot to assist them in drawing up those amendments. They provide an expanded definition of "the environment" and make it clear that the references to "the environment" in sections 12 and 40 include those to wild animals, plant life and their habitats, which appears to have been the issue at the heart of stakeholders' concerns. The amendments will ensure consistency between the two definitions of "the environment" in part 2 of the bill. They will also put it beyond doubt that environmental standards Scotland's functions and governance arrangements extend to the domestic legislation, transposing the obligations contained in the Eh habitats directive and the EU birds directive in so far as that legislation is within the legislative competence of the Scottish Parliament.

I turn to amendment 1014, in the name of Claudia Beamish. I have accepted the need to respond to stakeholders' concerns about the bill's definition of "the environment". However, I am not sure that Ms Beamish's amendment is the way to do so. It is not clear how the definition in her amendment would interact with other provisions in the bill. It would also be difficult to interpret provisions about measures that protect, maintain or restore the environment in that definition. The definition in amendment 1014 contains a list of things, which is an appropriate approach for the Environmental Information (Scotland) Regulations 2004, but in this context is not as effective as the simpler approach taken in the Government's amendments. Moreover, it does not make sense for the protection of the environment to include the protection or restoration of genetically modified organisms. I am not quite sure what that element was about.

Therefore the Scottish Government cannot support Claudia Beamish's amendment 1014. I ask her not to press it to a vote.

I move amendment 1031.

Claudia Beamish: My amendment 1014 seeks to address a concern that the committee heard when it took evidence at stage 1, which was that, as section 40 is currently drafted, the bill's definition of "the environment" omits habitats, species and landscapes.

I am pleased that the cabinet secretary has also noted those concerns, which are reflected in her own amendments. However, my approach has been to seek continuity with existing definitions and to add clarity and completeness. My amendment adopts the existing definition of "the environment" as contained in the Environmental Information (Scotland) Regulations 2004, which

has previously been agreed and found to function well, rather than seeking a new definition for the purposes of the bill. Members will note that that approach has been supported by Scottish Environment LINK. The definition in my amendment states:

"the environment" includes all elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements."

I recognise the point about genetically modified organisms, which the cabinet secretary highlighted. However, as I said earlier, that is the full definition that has come from the Environmental Information (Scotland) Regulations 2004, so I did not want simply to cut off the end of it. It is also in line with the definition in the EU's directive on access to environmental information, which enhances the continuity of our bill with existing European arrangements and which is of course key to our whole approach.

Finlay Carson: I welcome the cabinet secretary's confirmation that she will take action on NatureScot's concern about the definition of "the environment", which omitted habitats and species. I support the cabinet secretary's clarification and the inclusion of amendment 1031 in the bill.

The Convener: I call the cabinet secretary to wind up.

Roseanna Cunningham: There is nothing further that I want to add. I have made it clear that lifting a definition from regulations and placing that into legislation is not an appropriate way forward. In respect of everything else, my position is as stated at the outset.

The Convener: The question is, that amendment 1031 be agreed to. Are we agreed?

Members: No.

For

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Beamish, Claudia (South Scotland) (Lab)

Abstentions

Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 5, Against 1, Abstentions 1.

Amendment 1031 agreed to.

Amendment 1032 moved—[Roseanna Cunningham]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Guidance

Amendment 1033 not moved.

Sections 13 and 14 agreed to.

Section 15—Environmental Standards Scotland

The Convener: Amendment 1034, in the name of Mark Ruskell, is grouped with amendments 1035, 1036, 1060, 1037, 1010, 1011, 1021, 1038, 1039, 1061 and 1041.

Members should note that amendment 1037 pre-empts amendments 1010, 1011 and 1021, and amendment 1039 pre-empts amendment 1061.

Mark Ruskell: During the committee's stage 1 evidence, we heard from stakeholders that the model of a non-ministerial office as proposed for environmental standards Scotland is at risk of not being sufficiently independent of Government.

Under that model, the Government would be involved in ESS's recruitment, reporting and operations, as well as in setting the budget for ESS. I gather that the interim body is already being recruited by Government and that it may morph into the new body that the bill establishes.

10:00

In the stage 1 report, the committee highlighted that we were

"not yet convinced that a non-ministerial office would provide ESS with sufficient distance and autonomy from the Scottish Government."

That is reflected in the range of amendments that seek to increase Parliament's involvement in the appointments and to increase the transparency of ESS's funding arrangements.

Amendments 1034 to 1039 and 1041 propose that ESS be set up in the model of a parliamentary commission. The best way to ensure that Scotland's new environmental watchdog is fully independent of Government is to establish it as a parliamentary commission.

To explain how I have come to that view, I draw the committee's attention to some points raised by Professor Campbell Gemmell in a report that was commissioned last year by Scottish Environment LINK. He said that an independent parliamentary commission

"would have the powers and resources to perform independent assessments, checks and investigations"

and that it would sit

"outside the Government of the day and its agencies."

That model is in place in New Zealand, which has a parliamentary commissioner for the environment. The commissioner leads a small multidisciplinary team to investigate issues including, but not limited to, river water quality, invasive species and coastal management. Much of the commissioner's work, as the Gemmell report highlights, is undertaken in response to public complaints or requests. A lot of effort is put into assessing those issues and engaging with public authorities to seek resolutions.

Amendments 1034 to 1036 make small drafting changes to accommodate that change. The new body would be known as the environmental standards commission. Amendment 1037 requires that the chair be appointed by the Scottish Parliament. Amendment 1038 sets out the conditions that would disqualify a person from being appointed to the board under a parliamentary commission model. Amendment 1039 sets out the detail of a commissioner's term of office. Amendment 1041 sets out the terms of the commission's financial arrangements.

If we want an independent body that operates more like a commission than a non-ministerial office, we should call it that—a commission—and we should give it a clear role, powers and operation. That is why I am putting that option to the committee.

I move amendment 1034.

Claudia Beamish: The success of ESS hinges on its ability to robustly hold the Scottish ministers and public authorities to account in relation to environmental complaints. That is why paragraph 1 of schedule 1 is concerning and significant. ESS is said to be

"not subject to the direction or control of any member of the Scottish Government."

However, that is immediately followed by an exception that the provision is

"subject to any contrary provision in this or any other enactment."

That gives the Government a great deal of flexibility to curtail ESS's independence in future legislation or in a future revision of the bill. The committee recognised that area of concern in its stage 1 report.

Amendment 1060 seeks to clarify that the exemption is not intended to have such a broad scope. It would add clarification that the Scottish ministers can direct or control ESS only in order to take account of changes in public authority accounting requirements. I understand from the Scottish Government's response to the committee's stage 1 report that that is in line with the Government's reasoning for including such an

exception in the first place. The amendment would make that clear in the bill.

If the Scottish Government indicates today that it is willing to discuss enlarging the specific list of exemptions before stage 3, I am willing not to move amendment 1060. The amendment would build in protection of ESS's independence against any future Government that, perhaps many years from now, may seek greater control and direction of a watchdog that has the power to take it to task as we approach critical years for climate and nature.

Amendment 1010 would increase Parliament's involvement in the recruitment of the ESS board. The committee's stage 1 report noted that the appointments process for the interim board has involved little engagement with Parliament to date, which is understandable because it needed to be set up rapidly, and that there is a need for genuine parliamentary involvement in the appointments to the statutory board. My amendment would set a requirement for Parliament to sign off on the terms and conditions of any appointment to the board—in other words, the “person specifications or experience” requirements. I stress that that is only for the long-term board, not the interim board.

Amendment 1011 would require the Scottish ministers to seek “nominations or recommendations” for ESS board members from Parliament. That would ensure that there is a truly open and collaborative approach to recruitment to the watchdog, which, I am sure, aligns with the cabinet secretary's intention to have a transparent process. Again, that is for the long-term board.

Alex Rowley will speak to amendment 1061, so I will just briefly say that I am supportive of it.

In relation to Mark Ruskell's amendments, I will put slightly more flesh on the bones. I support his amendments that would make our new watchdog body that follows on from the EU a commission. That is of fundamental importance if we are to send the right message to the people of Scotland and beyond—that it is an independent body. The word “commission” might seem unimportant, but that is the best message to send in order to enable the body to function independently.

Angus MacDonald: Amendment 1021 provides for an additional requirement in the appointment process and seeks to underline the need for the chair and members of ESS to be qualified and/or experienced in matters relevant to its functions. The current recruitment process for members of the interim non-statutory body appears to follow that good practice, and the amendment would ensure that that continues to be the case in further recruitment rounds and under future Governments.

The drafting of amendment 1021 follows the precedent set by section 11 of the Land Reform (Scotland) Act 2016 in setting out the desired type of experience for members of a public body. It also mirrors the approach taken in schedule 1 to the UK Environment Bill in relation to appointments to the office for environmental protection in England. In effect, the amendment would ensure that the board of ESS includes members with a range of environmental expertise or experience relevant to its functions and that future rounds of recruitment continue to follow the good practice that there appears to be for recruitment to the non-statutory board.

Alex Rowley: Amendment 1061 would impose a duty on the Scottish ministers to consult the chair of ESS prior to giving notice to remove a member, providing an additional layer of scrutiny. That requirement on the Scottish ministers to consult the chair would help to ensure that the Scottish ministers' actions are open and transparent.

Stewart Stevenson: I think that a bit of a false argument is being deployed. I am not terribly in favour of commissions that are entirely independent of Government; I think that such an approach lets the Government off the hook, because it is the commissioner, rather than the responsible minister, who goes before the Parliament.

Let us look at how the UK Committee on Climate Change works. It is able independently to report on and advise the four Governments in the UK. It is also required to take inputs from Government and do research that Government commissions. The CCC's chief executive has appeared before this committee on a significant number of occasions. That relationship with Government provides a better model than one in which a commission is detached from Government, which enables the Government to say, “Well, we don't have to say anything about this at the moment; that's the commission's job.” I would rather that ministers were responsible to the Parliament, when necessary, on a timetable that the Parliament determined.

I will listen carefully to the debate, but I have always had a bit of a concern about commissions, and my concerns have not been allayed so far.

Liz Smith: I will make two brief points. I have sympathy with the principles that Claudia Beamish and Alex Rowley developed, because it is important that there are checks and balances on ministerial power and that environmental standards Scotland should be independent. However, I am not comfortable with the way in which amendments in the group are drafted. I will not support the amendments, but I think that there

are further discussions to be had about the whole issue, which I hope can take place before stage 3.

Roseanna Cunningham: Amendments 1034 to 1039 and 1041, in Mark Ruskell's name, are pretty fundamental and would change entirely the established structure of a future governance body from a non-ministerial office to a parliamentary commission.

In its stage 1 report, the committee asked for more information about why the Government was proposing a model of a non-ministerial office, and I gave a fairly detailed response. I will not go back into the detail now; I simply emphasise again that I believe that the model in the bill will give environmental standards Scotland the highest level of independence. I also believe that an independent body that sits between ministers and the Parliament will provide for better continuity with the current arrangements.

To put it simply, ESS will be outside the Government of the day. It will be part of the Scottish Administration, but it will not be part of the Scottish Government.

The main point that I make today is that the pressure of time is now very much against us. The end of the transition period is some five weeks away. I have presented a plan to set up ESS on a shadow basis from 1 January and to move it to a full statutory basis once the bill has been enacted. There are challenges to that plan, but it is the only plan that is available, as far as I am aware.

Unless some preparations are going on of which I am not aware, I understand that switching to a parliamentary commissioner model at this point would mean that there was not the remotest opportunity of having a workable body in place by 1 January and that there would be a substantial gap before the arrangement could be put in place. Even if the Parliament had the capacity to take the matter forward, the potential for a governance gap should give us all cause for concern. I therefore invite Mark Ruskell not to press the amendments in his name in this group; if he presses them to a vote, I ask the committee to reject them.

Amendment 1060, in the name of Claudia Beamish, would restrict the provision in paragraph 1(2) of schedule 1. As members will no doubt recall from the lengthy discussion at stage 1, the purpose of paragraph 1(1) of schedule 1 is to emphasise the independence of ESS, by providing:

"In performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government."

Similar provisions are included in other acts establishing bodies with a similar status.

Paragraph 1(2) of schedule 1 provides that:

"Sub-paragraph (1) is subject to any contrary provision in this or any other enactment."

That is an absolutely standard provision, and there is no suggestion that it has created problems anywhere else. The legislation that established the Scottish Fiscal Commission and Revenue Scotland contains similar qualifications.

10:15

The provision is necessary to ensure that the annual accounts of the new body are subject to the appropriate directions from the Scottish ministers, and I think that Claudia Beamish's amendment is intended to address that point. However, the provision at paragraph 1(2) of schedule 1 also serves other purposes. It is necessary for other provisions in the bill, which specifically confer functions on Scottish ministers in relation to ESS, such as the powers of ministers to appoint members at paragraph 2, although it is clear that such powers for Scottish ministers are themselves to be subject to parliamentary approval as a result of paragraph 2(2).

Scottish ministers also have powers to approve the remuneration that ESS provides for its members and to approve the terms and conditions on which ESS appoints its staff, who will be civil servants. In addition, a range of other duties that have been imposed on public bodies over the years will involve some direction from the Scottish Government—for example, in the form of guidance on regulations. Examples would include the public sector climate change duty and duties on public bodies under the Equality Act 2010. It is not uncommon for duties that are placed on all public authorities to include some involvement by ministers in interpreting or monitoring the duty. There is no reason why ESS should be exempt from the normal range of duties on public bodies that have been established in legislation.

In general, we have presented a model for ESS that provides for a high degree of independence. Appointments are subject to confirmation by the Parliament and the body has to submit its strategy to the approval of Parliament. There is no intention to use the provision at paragraph 1(2) of schedule 1 in conjunction with new legislative proposals to put forward limits on the independence of ESS. Rather, that provision allows for the imposition of general conditions such as financial reporting requirements, and even then only through legislation, which itself will have been subject to parliamentary scrutiny.

Claudia Beamish's amendment 1060 would place restrictions on the provision at paragraph 1(2) of schedule 1 that could make other provisions of the bill potentially unworkable or unclear in their effect, and which would seem to take ESS out of the scope of some general duties

on public bodies. The amendment is unnecessary, as ministers cannot use the provision at paragraph 1(2) to exert any control other than is specifically allowed for in the bill or in other legislation. I therefore invite Claudia Beamish not to move amendment 1060. Failing that, I invite the committee to reject it.

The balance of this group is taken up by four amendments on the appointment of members to ESS. We should all be clear that these provisions will affect future regulated-appointment rounds under the bill when it is enacted. That will mean that the process will be supervised by the Commissioner for Ethical Standards in Public Life in Scotland, and that the Scottish Government will work fully within the agreed process for appointments that will be subject to parliamentary approval.

Claudia Beamish's amendments 1010 and 1011 are unnecessary, as there is full provision to ensure a correct process between ministers and the Parliament for those future regulated appointments. There is also the potential for conflict between her amendments and the provisions for regulated appointments. For example, I do not understand how the proposal for Parliament to nominate names would fit in with the steps that a regulated appointments process would involve. I therefore invite Claudia Beamish not to move those amendments. If they are brought to a vote, I invite the committee to oppose them.

Amendment 1021, in the name of Angus MacDonald, suggests a range of experience that ministers should consider when they are considering making appointments to ESS. I am happy to support that amendment, and I ask the committee to agree to it.

Alex Rowley's amendment 1061 makes sensible provision for ministers to consult the chair of ESS before contemplating a proposal to the Parliament for the removal of another member, for the reason that they are unable to perform their functions or are unsuitable to continue. That would, of course, constitute best practice, and I am happy to support the amendment so that there will be a requirement on ministers in those circumstances. I advise the committee to support the amendment.

The Convener: I invite Mark Ruskell to wind up and to say whether he wishes to press or withdraw amendment 1034.

Mark Ruskell: Having heard the response, I will press amendment 1034. It is important for the committee to have the option of deciding whether it wants a commission.

I take on board the cabinet secretary's concerns about the practicalities and the timescale. None of us is in the position that we wanted to be in at the

end of the withdrawal period, given the governance gap that is emerging. However, as Claudia Beamish said, it is important for the proposed body to be set up in the right way and to be future proofed, particularly for the critical years of 2030 and 2045, when we will need to meet targets and make hard decisions. Getting the arrangement right early is important.

I listened to Stewart Stevenson's points about the disbenefits of a parliamentary commission, but his arguments were missing the role of Parliament. Independent commissions have a hugely important role, but it is up to Parliament and parliamentary committees to use those commissions' independent and robust work in doing their job of holding ministers to account. That is where a commission sits, and an independent commission would play an important role.

As for the other amendments, I listened to what the cabinet secretary said. I support Angus MacDonald's amendment 1021 to broaden the membership's expertise. Alex Rowley makes an important point about a requirement to consult the chair; we need a chair who is robust and is fully independently appointed. I am happy to support amendment 1061.

The Convener: The question is, that amendment 1034 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

Against

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 1034 disagreed to.

Amendments 1035 and 1036 not moved.

Section 15 agreed to.

The Convener: Colleagues, we will take a short break and resume at half past ten.

10:23

Meeting suspended.

10:30

On resuming—

Schedule 1—Environmental Standards Scotland

Amendments 1060, 1037, 1010 and 1011 not moved.

Amendment 1021 moved—[Angus MacDonald]—and agreed to.

Amendments 1038 and 1039 not moved.

Amendment 1061 moved—[Alex Rowley]—and agreed to.

The Convener: Amendment 1067, in the name of Mark Ruskell, is grouped with amendment 1068.

Mark Ruskell: The independence of ESS will depend, in part, on the adequacy of its funding, which will be provided by the Scottish ministers. My two amendments in the group aim to increase the transparency of ESS's funding and to help with the question about the independence of ESS with which we are grappling.

Amendment 1067, which is modelled on provision in the UK Environment Bill, would require that ministers ensure that the funding of ESS is "sufficient" for it to do its work. I think that that is reasonable and will provide Parliament with the reassurance that future ministers will not be able to control indirectly the work of ESS by restricting its funds. If a UK secretary of state can make such a commitment to the UK Parliament in relation to the new office for environmental protection, I do not understand why the Scottish ministers should not accept a similar commitment in relation to ESS.

To add to that, my amendment 1068 would ensure transparency and scrutiny of the process of funding, by adding a requirement that ESS's annual report, which is to be laid before the Parliament, must include an assessment of whether the funding that has been provided in the financial year has been

"sufficient"

for it

"to carry out its functions."

The provision is modelled on provisions in the UK Environment Bill, and would enable the Parliament to review whether ministers have fulfilled their obligation to provide sufficient funding.

Members will be aware that such matters can sometimes be a bit delicate, particularly as the constraints on public finances are likely to continue for the next few years. My amendment would require the watchdog to raise any concerns

that it might have about funding simply as a matter of course, and to do so transparently in order to ensure that members of Parliament are aware of any financial constraints on ESS's ability to be a robust body.

I move amendment 1067.

Claudia Beamish: I support amendments 1067 and 1068, which are important and targeted. I am determined and hopeful that they will be agreed to because, in straitened times for public finance, I do not want there ever to be a situation in which the new watchdog is in any way struggling to do the robust work that could be needed as we go forward, whatever the complexion of a future Government.

Roseanna Cunningham: Amendments 1067 and 1068, in the name of Mark Ruskell, would place more structure around the funding arrangements for environmental standards Scotland by requiring the Scottish ministers to pay to ESS

"such sums as they consider are reasonably sufficient to enable it to carry out its functions."

In addition, the annual reports of ESS would contain

"an assessment by Environmental Standards Scotland of whether, in the financial year to which the report relates, the Scottish Ministers provided it with sufficient sums to carry out its functions."

I am satisfied that the intention of the amendments is proportionate, and that it would be helpful to provide structure around the funding of ESS.

However, there is a technical concern that the provisions clash with the process of resource allocation through the budget bill. There is no need to make special provision for ministers to pay moneys to ESS, because it will be part of the Scottish Administration. In addition, we do not want inadvertently to bypass normal parliamentary scrutiny of spending.

Therefore, I ask Mark Ruskell to seek to withdraw amendment 1067, and to not move amendment 1068, and I offer to work with him on revised amendments for stage 3 that take the spirit of the adequacy of funding on board without stepping on general budgetary rules. If amendment 1067 is pressed, and amendment 1068 is moved, I ask the committee to oppose them on the basis that they are not, as currently drafted, consistent with the budget process.

Mark Ruskell: I thank the cabinet secretary and Claudia Beamish for their comments, on the back of which I will not press amendment 1067. I look forward to having conversations in the run-up to stage 3 to develop something that fits with the budget process, as the cabinet secretary said. As we have seen in recent years, the budget process

is a shared responsibility between Government and Parliament; therefore, transparency in that regard is important. If there is a better way to crack the issue, I am happy to work on an amendment with the cabinet secretary ahead of stage 3.

Amendment 1067, by agreement, withdrawn.

The Convener: Amendment 1040, in the name of Mark Ruskell, is grouped with amendments 1015, 1042, 1020, 1012, 1013, 1047 and 1048.

Mark Ruskell: Amendment 1015 seeks to state explicitly that ESS, as well as monitoring and having regard to the developments of international EU law, should monitor use of the section 1 keeping pace powers and should, as it considers appropriate, make recommendations on use or non-use of those powers. Although that might be implicit in the general functions that are set out in section 16(1), it would be helpful to have it specifically stated in section 16(2). That would ensure that ESS has a role in ensuring that ongoing continuity is maintained between Scotland and the EU in relation to environmental matters.

Amendment 1013 is one of a pair including Claudia Beamish's amendment 1012, to remove the exclusion on climate change targets from ESS's remit. I think that I now understand the thinking in the bill behind allowing ESS to have a role in relation to climate adaptation. There is, of course, a natural overlap between, for example, flood management and adaptation plans. However, it cannot be ignored that plans for climate change mitigation also overlap with plans for the wider environment—peatland restoration and air quality plans being two examples. The bill is in danger of creating a rough edge between mitigation and adaptation when it comes to the role of the environment of Scotland in delivering both aspects via climate emergency response.

ESS's role will be statutory, while the UK Committee on Climate Change is advisory. I accept that there is a need for clarity about the functions of the bodies: for example, it would not be necessary for ESS to advise on the relative contributions of different sectors to a net zero target. That is why I have included under amendment 1042 a more detailed reporting framework than exists in the bill, and have specified that it should cover how ESS avoids overlap in its functions with the UK Committee on Climate Change and other bodies. The regulations would require reporting on

"public authorities' compliance with environmental law"

and the effectiveness of that law, as well as recommendations for future changes, with no restrictions placed on ESS on the frequency of those reports. That would be essential in

supporting our successor committee's work in scrutinising ESS.

I recognise that amendment 1040 conflicts with my amendments 1067 and 1068 in the previous group on funding, so I will not press it and will perhaps wrap the issue into discussions at stage 3 on financial reporting, where it could be dealt with more appropriately, if the cabinet secretary is willing.

I move amendment 1040.

The Convener: I call Angus MacDonald to speak to amendment 1020 and other amendments in the group.

Angus MacDonald: Amendment 1020 seeks to address concerns that narrow interpretation of section 39(3) could prevent ESS from exercising its various functions in circumstances in which Scottish ministers fail to transpose an "international obligation" into domestic law, either at all or sufficiently. Section 39 defines "environmental law"—the phrase that is used in all the previous sections that set out ESS functions and powers. Section 39(3) refers only to "domestic" law. Amendment 1020 will add relevant international law, which removes that potential limitation on ESS's role. However, if it can be clarified that the phrase "any other enactment" in section 39(3)(b) includes international obligations, I will be content not to move amendment 1020.

The Convener: I call Claudia Beamish to speak to amendment 1012 and other amendments in the group.

Claudia Beamish: The climate emergency is one of the greatest issues of our time. I am grateful to Mark Ruskell for supporting my amendment 1012, which seeks to delete section 39(4) of the bill, which removes climate change targets from the remit of ESS.

10:45

During our stage 1 evidence, we heard comments from stakeholders that it was an "extremely odd" exclusion in particular, because there is no such exclusion for the OEP in England. The cabinet secretary stated that there is no need for "an additional institutional voice" in the process that is currently in place for receiving advice from the UKCCC. However, I make the point as strongly as I can that, much as I respect it, the UKCCC performs only an advisory role. The enforcement power to take action on failure to comply, or on misapplication of environmental law as it relates to climate change, will lie with ESS. Finally, my amendment would provide continuity between ESS arrangements and those of the European Commission; we should include climate change in ESS's remit.

I state my formal support for Mark Ruskell's amendment 1013, which furthers this important change to the remit of ESS. I hope that the committee will consider our amendments favourably. I will listen carefully to what the cabinet secretary has to say on Angus MacDonald's amendment 1020. I support his amendment in principle, but I will defer to him as to whether it is necessary.

Roseanna Cunningham: First, I will address Mark Ruskell's amendments 1040 and 1042, which would remove the current flexible annual reporting provision in schedule 1 to the bill and replace it with an onerous reporting requirement in a new section. Under Mark Ruskell's proposals, ESS would have to report at least annually on public authorities' compliance with environmental law, the effectiveness of environmental law, and any recommendations that it had for the Scottish ministers to bring forward proposals for legislation. That would necessitate ESS taking a view of compliance across the broad scope of environmental law and public authorities, which is impractical and is not how governance functioned in the EU system.

Although the Commission was always keen to see that new laws were effectively transposed, there was no regular overall assessment of compliance with the law; rather, the system worked by exception and tackled instances of non-compliance, which, frankly, is where resources should be targeted. The proposal is analogous to expecting the police to write an annual report on the lawfulness of the population, rather than using their resources to pursue and thereby deter crimes. I therefore invite Mr Ruskell not to press those amendments; if they are pressed, I ask members not to support them.

I turn to the amendments concerned with how ESS's functions can reflect on international obligations. There was discussion of that at stage 1, and some concern that there was not sufficient provision for ESS to clearly address how well we are meeting our international commitments in all instances. We have amendments proposing three different approaches to that issue. Members will not be surprised to hear that I think that the Government amendments are the best approach.

Angus MacDonald's amendment 1020 would expand the definition of environmental law, which is central to the functions of ESS, to include international obligations of the UK. That would mean that the Scottish Environment Protection Agency and ministers could be judged against any international obligation, regardless of whether it had been brought into Scots law by domestic legislation. I do not think that that is the way to approach the issue, and it perhaps is not quite

what Angus MacDonald intended. I therefore invite him not to press his amendment.

Mark Ruskell's amendment 1015 seeks to give ESS a new function of advising on the use of the power in section 1(1) of the bill; however, the power in section 1(1) is about enabling us to align in future with EU standards, rather than with international obligations of the UK. There is some confusion here, and I invite Mark Ruskell not to press his amendment. The Government amendments 1047 and 1048 will ensure that ESS functions that relate to the effectiveness of environmental law will include consideration of its contribution to the implementation of any international obligation of the United Kingdom that relates to environmental protection. That will allow consideration of the effectiveness of the law in meeting our commitments under agreements, such as the Ramsar convention, in a proportionate manner. I recommend that members support amendments 1047 and 1048.

Amendments 1012 and 1013 seek to remove the exemption of climate change planning. It is important to clarify what is being excluded from the scope of ESS's functions by the provisions of the bill as introduced, as I think that there is some misunderstanding. The exclusion is of the consideration, construction and enforcement of duties in relation to the setting of cross-economy, greenhouse gas emissions reduction targets and the preparation of strategic cross-portfolio climate change plans to meet them.

Specific measures within environmental law to deliver emissions reductions would be within scope, as are strategic planning duties in relation to climate change adaptation. To bring cross-economy emissions targets and strategic planning into the scope of ESS would be to duplicate the current strong arrangements for oversight, advice and enforcement with something less effective. ESS will not have the capacity to match the advisory expertise that is already provided by the UK Committee on Climate Change, nor will it be able to match the strength of the oversight for the setting and subsequent achievement of targets that is provided by the Parliament itself. It would be wasteful for ESS to expend resources on those functions, given that any interventions seem likely, at best, to slow processes and confuse lines of accountability.

Amendments 1012 and 1013 give rise to a number of questions. For example, if ESS were given the role of oversight on the Government's achievements of climate change targets, what would that mean in practice? Would ESS need additional resource and capacity? Would it take time to consider any failure? Would ESS write an improvement report in that regard, if necessary? If so, it is not clear where that advice would be

drawn from, other than the existing expertise of the Committee on Climate Change. Would all of that add to the rigour of the system, or would it simply lead to duplication and delay?

Those questions notwithstanding, I am aware that there is a confusing comparison to be had with the equivalent position in the UK Environment Bill. As I understand the current position, following Government amendments, the UK's new office for environmental protection will have no advisory role with respect to greenhouse gas emissions planning, but it will have a role in enforcement. I am prepared to explore that further, so that we can get a better understanding of the difference. I ask Claudia Beamish and Mark Ruskell not to press amendments 1012 and 1013 respectively and, if they are pressed, I invite the committee to reject them.

The Convener: I invite Mark Ruskell to wind up and to confirm that he wishes to withdraw amendment 1040.

Mark Ruskell: Thank you, convener. I will seek to withdraw amendment 1040.

There is a lot to pick up on, and I am sure that we can do that in a more substantive discussion between the cabinet secretary, myself and Claudia Beamish between now and stage 3.

On the broader point on reporting, there is a reporting framework in the bill and I think that we have already acknowledged that it is not quite robust enough in relation to finance. The cabinet secretary said that reporting should be based on exceptions, rather than reporting on general compliance with environmental law, but within the framework that I have put forward, it is at the discretion of ESS as a fully independent body—although not a commission—to report on what it views as appropriate for the Parliament to consider. That may include changes in the law that it thinks are needed; it may include reports on levels of compliance in certain sectors, to which it wishes to draw our attention. The whole point of having an independent body is to enable it to determine that, with robust reporting. As I say, perhaps we could have more discussion about that between now and stage 3.

There are some mixed messages regarding climate. In relation to adaptation, which is clearly cross-portfolio and strategic in its nature, ESS does have a role. I am at a loss to understand why it does not then have a role in relation to aspects of mitigation that are directly related to the environment, such as peatland restoration, which is a large and important action and topic, to which the Scottish Government has committed over many years.

Again, there is perhaps more discussion that we could have ahead of stage 3. I would look forward

to that and to establishing whether we could do something more appropriate to pin down exactly what ESS's role will be in relation to adaptation, enforcement and mitigation. At the moment, that is not clear, and it is my sense from the evidence that we took from Chris Stark that it is not clear to the UK Committee on Climate Change either.

Amendment 1040, by agreement, withdrawn.

Amendments 1068 and 1041 not moved.

Schedule 1, as amended, agreed to.

Section 16—Functions

Amendment 1015 not moved.

Section 16 agreed to.

After section 16

Amendment 1042 not moved.

Sections 17 and 18 agreed to.

Schedule 2—Environmental Standards Scotland: Strategy

The Convener: Amendment 1062, in the name of Angus MacDonald, is grouped with amendment 1063.

Angus MacDonald: Members will recall that in the committee's stage 1 report we concluded that an amendment should be lodged to add to the list of persons to whom ESS must set out how it will avoid overlap in functions and its strategy. I understand that the Scottish Government remains of the view that that is not a necessary step, as schedule 2 allows for the strategy to set out that detail. However, I feel that it is worth pursuing.

I am grateful for the Scottish Government's support in lodging my amendments, which ensures that if an amendment is made to add to the list of persons in paragraph 1(1)(d)(2) of schedule 2, it will be done in an effective way.

My amendments would ensure that ESS would set out in its strategy how it will exercise its functions in a way that respects and avoids overlap with the exercise of functions by

"the Scottish Information Commissioner, Audit Scotland or the Committee on Climate Change".

I move amendment 1062.

The Convener: I call the cabinet secretary to wind up.

I have just realised that two other members wish to speak on this group. Could members please be a bit quicker about typing an R in the BlueJeans chat box if they wish to speak? I almost missed your requests.

Claudia Beamish: Apologies, I was waiting to hear what Angus MacDonald said before I indicated that I wanted to speak. However, I take your point.

In the circumstances, I am considering not moving my climate change targets amendment 1012. Instead, I will consider working with the Government and the cabinet secretary on how to look at that in relation to ESS's enforcement powers. With respect, I ask Angus MacDonald to consider not pressing amendment 1062, because it has implications in relation to amendment 1012, although that is, of course, entirely up to him.

11:00

Mark Ruskell: I have a similar point. I support what Angus is attempting to do, but it is difficult to consider the overlap with the UK Committee on Climate Change when it is still not clear what ESS's role will be in relation to the climate. I ask Angus not to press the amendment just now, if he wants my support.

The Convener: We can go to the cabinet secretary.

Roseanna Cunningham: Thank you, convener. [*Inaudible.*—not necessary and ESS would already have the flexibility to set out material on relationships with other persons in its strategy. I am nevertheless happy to support amendments 1062 and 1063, which would additionally require ESS to set out in its strategy how it will exercise its functions so as to respect and avoid any overlap with the functions of the Scottish Information Commissioner, Audit Scotland and the UK Committee on Climate Change. I am not sure that that in any way contradicts the previous discussion, and I invite the committee to support the amendments.

The Convener: I call Angus MacDonald to wind up and press or withdraw amendment 1062.

Angus MacDonald: As someone who is normally in favour of consensus, I am afraid that, on this occasion, I will press my amendment. I take on board what Mark Ruskell and Claudia Beamish said, but it is still important that we try to get the amendments through. I press amendment 1062.

The Convener: The question is that amendment 1062 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Beamish, Claudia (South Scotland) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0.

Amendment 1062 agreed to.

Amendment 1063 moved—[Angus MacDonald].

The Convener: The question is, that amendment 1063 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Carson, Finlay (Galloway and West Dumfries) (Con)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Abstentions

Beamish, Claudia (South Scotland) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 5, Against 0, Abstentions 2.

Amendment 1063 agreed to.

Schedule 2, as amended, agreed to.

Sections 19 to 22 agreed to.

Section 23—Restrictions on preparing an improvement report

The Convener: Amendment 1018, in the name of Angus MacDonald, is grouped with amendment 1019.

Angus MacDonald: The purpose and reasoning behind amendments 1018 and 1019 are to help to ensure that ESS provides continuity with existing arrangements under the EU and upholds the rights of people in Scotland to see action taken in response to environmental complaints that they raise about decisions that have been taken by public bodies.

The amendments remove subsections in sections 23 and 28 that restrict ESS's powers in relation to individual cases. Members will recall that, in paragraphs 141 to 146 of the committee's stage 1 report, we raised concerns about those subsections and concluded that

"restricting the remit of the ESS to strategic issues (in relation to improvement and compliance reports) could be unduly restrictive and have unintended consequences."

It is worth pointing out that, within the EU, the ability of stakeholders to raise concerns about individual cases with the European Commission has been crucial. Many such cases have proven to be strategic and precedent setting, so there is an argument that restricting ESS's powers in such a way means that we would not be replicating the functions of the Commission.

I am aware of and understand the Government's concerns that, without the restriction, ESS would become an additional layer of appeal for all decisions, and that that would invite such a flurry of complaints that ESS would be overwhelmed and would need resources to address that avalanche. Indeed, since I lodged the amendments in the group, it has been suggested to me that removing the restriction could cause chaos, in that it would fundamentally alter the nature of the powers that are given to ESS in relation to overturning individual regulatory and planning decisions, and would cut across established regulatory appeals processes that already exist.

I am keen to hear the cabinet secretary's view before deciding how I wish to proceed. I am in a genuine quandary over the issue. Like other members of the committee, I have had concerns about the restriction on ESS's powers to act in individual cases. I have read the cabinet secretary's response on the matter. I appreciate that there will be no restriction on ESS considering information about individual cases; it will be restricted only in taking enforcement action in individual cases.

In addition, I understand that there are concerns among local authorities and regulators about the impact on regulatory structures and processes if ESS could review and overturn individual regulatory decisions.

As I said, I am in a real quandary. I am keen to hear the cabinet secretary's views. I will decide how to proceed once I have heard those views and comments from other members.

I move amendment 1018.

Claudia Beamish: In principle, I very much support Angus MacDonald's amendment 1018 on individual cases. He has set out the reason for it extremely clearly. In the EU, much of what has happened in the development of law and its enforcement has come from individual cases. That has resulted in robust protections for our environment, many of which could not have happened without such cases.

I am somewhat concerned about the capacity issue that might arise before ESS becomes a full body. I wonder if it might be possible for us to get some clarity, possibly before stage 3, as to how that element could be shaped in more detail in the

bill or whether there could be a commitment in regulation.

I very much support the amendment in principle, and I hope that I will be in a position—if not now, at least at stage 3—to support it in a vote.

Roseanna Cunningham: Angus MacDonald's amendments would fundamentally alter the nature of the powers that are given to environmental standards Scotland. If ESS were given powers to overturn individual regulatory and planning decisions, that would result in significant regulatory uncertainty and disruption. Such uncertainty could have significant economic costs and severe impacts on the development planning system in particular, and it could place untenable demands on ESS.

We would in effect be turning ESS into a kind of super-regulator. ESS should not be used as a means to review individual decisions or as some kind of substitute appeals process. Once all existing mechanisms of challenge have been exhausted, individual regulatory decisions should be deemed final. That is especially important in the current period of significant disruption and uncertainty for all organisations as a result of both Brexit and the pandemic.

Moreover, the integrity of existing statutory regimes that make provision for the appeal or review of such decisions must be preserved. Local authorities, regulators and representatives of regulated businesses have already expressed significant concerns regarding the potential impacts if ESS were to be given those powers.

Individuals and organisations will be able to submit concerns to ESS regarding individual decisions, and ESS will be able to investigate those matters and consider whether those decisions demonstrate failures in regulatory practice or the effectiveness of environmental law. Although the European Commission has, on occasion, investigated individual matters or decisions, it has focused primarily on decisions of a strategic nature, and that is the role that ESS is intended to fulfil.

I therefore invite Angus MacDonald not to press or move his amendments. If he does so, I urge the committee to reject them.

The Convener: I ask Angus MacDonald to wind up and say whether he wishes to press or withdraw amendment 1018.

Angus MacDonald: In the light of the cabinet secretary's explanation, I wish to withdraw amendment 1018. I now see the precedent that my amendments in this group would set on planning issues, as in the example that the cabinet secretary gave, and I welcome the assurance that

ESS will still be able to investigate individual cases.

Amendment 1018, by agreement, withdrawn.

Section 23 agreed to.

Sections 24 to 27 agreed to.

Section 28—Restrictions on issuing a compliance notice

Amendment 1019 not moved.

Section 28 agreed to.

Sections 29 to 35 agreed to.

Section 36—Confidentiality of proceedings

11:15

The Convener: Amendment 1043, in the name of the cabinet secretary, is grouped with amendments 1044 and 1045.

Roseanna Cunningham: The amendments will establish a simpler confidentiality provision and remove the restriction on the disclosure of information by third parties. The amendments were lodged in response to concerns that the Scottish Information Commissioner submitted about interactions with the Environmental Information (Scotland) Regulations 2004 and the Freedom of Information (Scotland) Act 2002.

Amendment 1043 adjusts section 36(2)(d) to clarify that the rule against disclosure of information by ESS under section 36(1) does not apply to a disclosure when an improvement report has been published or a compliance notice has been issued and the time limits for an appeal have expired or the appeal process has concluded, as well as instances in which ESS has determined that it wishes to take no further action.

Amendment 1044 adds further exemptions to the rule against disclosure by ESS when disclosure relates to civil proceedings, the investigation or prosecution of an offence or suspected offence, the detection of crime or an order of a court or tribunal, or when disclosure is

“made in accordance with any ... enactment requiring or permitting the disclosure.”

Amendment 1045 removes the imposition of confidentiality duties on public authorities under subsections (3) to (6) of section 36. It also removes the reference in subsection (7) to

“environmental information for the purposes of the Environmental Information (Scotland) Regulations 2004”,

as that is not required.

The amendments address the Scottish Information Commissioner’s concerns while allowing ESS to carry out its functions effectively.

Issues that involve confidentiality and the disclosure of information will be addressed in the strategy that ESS prepares, which will be subject to public consultation and will be laid before Parliament for approval.

I move amendment 1043.

Amendment 1043 agreed to.

Amendments 1044 and 1045 moved—[Roseanna Cunningham]—and agreed to.

Section 36, as amended, agreed to.

After section 36

The Convener: Amendment 1046, in the name of Liz Smith, is in a group on its own.

Liz Smith: Amendment 1046 was lodged because of the gaps in governance that are likely to occur when the transition period ends. The loss of access to the European Court of Justice will present issues, especially when environmental cases are examined for any breaches of the law. I fully appreciate that the newly established environmental standards Scotland and the judicial review process will address many concerns. However, under current practice in environmental matters in Scotland, there are examples of where access to a court process is an important fallback, especially if environmental agencies are unable to resolve a major concern. Amendment 1046 would require the Scottish ministers to bring forward and consult on proposals to fully address all gaps in governance that are left by our inability to access the Court of Justice of the European Union.

I move amendment 1046.

Roseanna Cunningham: Amendment 1046 seeks to introduce an additional reporting requirement within the first year of the operation of ESS, when ESS will not have had sufficient opportunity to become fully established and effective. We must bear in mind that the provisions in the bill give ESS a year from statutory establishment to prepare and lay a strategy before the Parliament for approval. That strategy will set out the detail of how it will exercise its functions, including how it will provide for people to make representations to it about any matter concerning public authorities’ compliance with environmental law or concerning the effectiveness of that law or of how it is applied. The provisions include procedures for consultation and parliamentary approval of the strategy. It does not make sense to run the process of reviewing the governance arrangements that are put in place under the bill and other matters at the same time as the Parliament is considering and commenting on ESS’s strategy for how it intends to exercise its functions.

I am grateful for the discussion with Liz Smith on her amendment. If the amendment were to be modified to provide a longer timescale for the preparation and publication of the proposals relating to environmental governance and environmental law, the proposals might support the on-going scrutiny of our approach to environmental protection and access to justice, following our departure from the European Union. That would allow ESS to become fully established and operational and for its strategy to have been consulted on, scrutinised and approved by Parliament. Questions surrounding the potential for the creation of a dedicated environmental court are much broader than the focus and purpose of the bill. In 2017, I committed to keeping these issues under consideration, and, over the next parliamentary session, the successor committee will wish to explore them. Therefore, I am willing to work with Liz Smith and my ministerial colleagues who have responsibility for justice matters with a view to developing an appropriate amendment for consideration at stage 3.

With that offer, I ask Liz Smith not to press her amendment today. If the amendment is pressed, I ask the committee not to support it on the basis of the undertaking that I have made to work with Liz Smith with a view to bringing forward an adjusted amendment or amendments at stage 3.

The Convener: I appear to have some connection problems. I wish to check that my colleagues all heard the cabinet secretary's full statement. I can see that everyone did, so it was just me who had the connection issue.

I call Liz Smith to wind up the debate on amendment 1046 and to press or withdraw that amendment.

Liz Smith: Thank you, convener. I thank the cabinet secretary for her engagement and for her comments. I understand that there are a few technical issues with the amendment, particularly given what the cabinet secretary says about the timescale. However, there are important principles behind the amendment, so I welcome her commitment to engage further before stage 3. On that basis, I am happy to withdraw amendment 1046.

Amendment 1046, by agreement, withdrawn.

Sections 37 and 38 agreed to.

Section 39—Meaning of “environmental law” and “effectiveness of environment law”

Amendment 1020 not moved.

The Convener: I ask Claudia Beamish whether she wishes to move amendment 1012.

Claudia Beamish: No, I do not, but I look forward to discussing the matter with the cabinet secretary.

Amendments 1012 and 1013 not moved.

Amendments 1047 and 1048 moved—[Roseanna Cunningham]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Meaning of “environmental protection”, “environmental harm” and “the environment”

Amendment 1014 not moved.

Amendments 1049 to 1051 moved—[Roseanna Cunningham]—and agreed to.

Section 40, as amended, agreed to.

Section 41 agreed to.

Long Title

Amendments 1052 and 1009 not moved.

Amendment 1064 moved—[Stewart Stevenson]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends our consideration of the bill at stage 2. I thank all committee members.

That concludes the committee's business for today. Our next meeting will take place on 1 December, when we will hear from the Minister for Rural Affairs and the Natural Environment as part of our inquiry on regional marine planning and we will also consider EU exit legislation.

Meeting closed at 11:30.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba