



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 15 September 2010

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
19th Meeting 2010, Session 3

CONVENER

*Maureen Watt (North East Scotland) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Aileen Campbell (South of Scotland) (SNP)
Karen Gillon (Clydesdale) (Lab)
*Liam McArthur (Orkney) (LD)
*Elaine Murray (Dumfries) (Lab)
*Peter Peacock (Highlands and Islands) (Lab)
*Bill Wilson (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Rhona Brankin (Midlothian) (Lab)
Jim Hume (South of Scotland) (LD)
Jamie McGrigor (Highlands and Islands) (Con)
Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lloyd Austin (Scottish Environment LINK)
Roseanna Cunningham (Minister for Environment)
Mike Daniels (Scottish Environment LINK)
Sheriff T A K Drummond QC
Bob Elliot (RSPB Scotland)
Alex Hogg (Scottish Gamekeepers Association)
Dr Deborah Long (Scottish Environment LINK)
Constable David McKinnon (Grampian Police)
Mark Rafferty (Scottish Society for the Prevention of Cruelty to Animals)
Dr Paul Walton (Scottish Environment LINK)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 4

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 15 September 2010

[The Convener opened the meeting at 10:02]

Subordinate Legislation

Loch Lomond and the Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 Modification Order 2010 (SSI 2010) (Draft)

Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010 (SSI 2010) (Draft)

Cairngorms National Park Elections (Scotland) Amendment Order 2010 (SSI 2010) (Draft)

The Convener (Maureen Watt): Good morning everybody. I welcome you to the committee's 19th meeting of the year. I ask everyone to switch off their phones and BlackBerrys because they buzz in the ears of the people in broadcasting.

The main purpose of today's meeting is to take evidence on the Wildlife and Natural Environment (Scotland) Bill. However, we will start by taking evidence on three draft affirmative instruments: the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 Modification Order 2010; the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010; and the Cairngorms National Park Elections (Scotland) Amendment Order 2010. The Subordinate Legislation Committee has made no comments on the instruments. I welcome to the committee Roseanna Cunningham MSP, the Minister for Environment; Helen Jones, who is head of the national parks and outdoor recreation team; and Andrew Crawley from the Scottish Government's legal directorate.

Agenda item 1 enables members to ask questions about the content of the three instruments before we move to formal debate on them. Officials can contribute at this point, but cannot participate in the debate. I invite the minister to make a brief opening statement on all three instruments.

The Minister for Environment (Roseanna Cunningham): I will set the scene by explaining that this is the first time there has been any change to the original orders that set up the two national parks. Each national park was established by means of two orders: first, a designation order, which established the area of the park, the membership of the park authority and its functions; and, secondly, an elections order, which set out the arrangements for direct elections to the national park authority.

Today we are dealing with two orders to modify each of the original designation orders, and a third one to amend the Cairngorms elections order. Those changes are due to take place at the beginning of October.

I will deal first with the two draft modification orders. A primary purpose of both those orders is to reduce the size of the 25-member boards of the national park authorities. The issue of board size was addressed in 2008 in a strategic review of Scotland's national parks. The review recommended a reduction in size to streamline decision making and maintain effective governance. It found that there had been clear benefits in having large boards when the parks were first set up, but that the park authorities were now well established and their strategic direction had been established in their national park plans.

I therefore decided to reduce the number of members on the park authority boards to below 20. In doing so, I have adopted the same principles in each national park. The number of local authority nominees and ministerial appointees will go down, but the number of directly elected members will remain unchanged at five on each board. That will strengthen the element of local democracy on the park boards.

I will explain how the number of local authority nominations will be determined. The two larger authorities in each park will have two nominations to the board and the remaining authorities will have one apiece. As Loch Lomond and the Trossachs national park has four councils in its area and Cairngorms national park will soon have five, the number of local authority nominees will be reduced from 10 to six and seven respectively.

The number of ministerial appointees has to mirror the number of local authority nominees: that is a requirement of the primary legislation. As a result, my intention is that the overall sizes of the boards will be 17 in Loch Lomond and the Trossachs and 19 in the Cairngorms.

I turn to the Cairngorms national park boundary extension. The committee's predecessor in the previous session of Parliament—the Environment and Rural Development Committee—concluded, after hearing evidence while considering a

member's bill that was introduced by John Swinney, that there was a strong case for extending the park to include Blair Atholl and highland Perthshire. The committee concluded that on geological and geographical grounds, highland Perthshire was naturally part of the Cairngorms; the local residents felt themselves to be part of the Cairngorms. Michael Russell announced our intention to proceed with the boundary change in a national parks debate in 2008. Scottish Natural Heritage has since consulted on the precise line of the boundary and its report was laid before Parliament last year.

The third and final order will amend the Cairngorms elections order. That is necessary because of the boundary change, and will simply allocate the extended area of the national park between two of the existing electoral wards. Those wards are used solely for the purpose of direct elections to the national park authority. We have taken advice from Perth and Kinross Council on the linkages that the new electors will have with the rest of the national park.

Finally, I draw the committee's attention to the considerable amount of public consultation that has taken place on the changes. First, there was consultation on the national parks review recommendation that there be smaller boards. There were then two further stages of consultation, as required by the National Parks (Scotland) Act 2000.

I am happy to answer any questions from the committee on the orders.

Liam McArthur (Orkney) (LD): The minister will recall that part of the process on which the Government has consulted—the boundary and the size of the boards—is caught up in the quinquennial review that was agreed when the legislation was passed. I note from the orders that you now suggest that a post-implementation review will be conducted within 10 years. Is that a deliberate decision? Would a five-year period be viewed at this stage as being too short a timeframe in which to carry out subsequent reviews?

Roseanna Cunningham: The quinquennial review took place in 2008. It was felt that because we are making these changes now, it would be too soon to have another review in only three years. We are looking at a longer period.

The Convener: We move to item 2, which is the formal debate on the first of the three instruments: the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 Modification Order 2010.

I remind everybody that officials cannot participate in the debate—although I do not think

that there will be one—on this or the two other instruments.

Motion moved,

That the Rural Affairs and Environment Committee recommends that the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 Modification Order 2010 (SSI 2010/draft) be approved.—[*Roseanna Cunningham.*]

The Convener: Do members have any contributions?

Bill Wilson (West of Scotland) (SNP): The title is awfully short.

The Convener: The question is, that motion S3M-6944 be agreed to.

Motion agreed to.

The Convener: We will now have the formal debate on the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010. I invite the minister to move the motion.

Motion moved,

That the Rural Affairs and Environment Committee recommends that the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010 (SSI 2010/draft) be approved.—[*Roseanna Cunningham.*]

The Convener: Does any member wish to contribute to the debate?

Peter Peacock (Highlands and Islands) (Lab): I do not oppose the order in any way; I simply want to record that, although the southern boundary has been taken care of in the order—the minister outlined some of the background to that—one dilemma for any national park, but particularly the Cairngorms national park, is exactly where to put the boundaries. It could be argued that what is on the right-hand side of the A9 as one drives up it, which is in the national park, is in environmental terms absolutely no different from what is on the left-hand side. The problem is that if we extended the park to the left side, we could end up going right to the coast.

To the north, there has been an outstanding concern about two small areas—at Dava moor and a second smaller area that is reckoned to have been omitted because of a cartographic error in the original designation. The order does not tidy up those issues. I just want to record that people at the northern end of the park would like consideration to be given to Dava moor becoming part of the park in the future.

Roseanna Cunningham: It remains open to us at any point in the future to reconsider the boundaries of any national park. I imagine that that

might happen in relation to different communities. However, I cannot say what the decisions will be.

John Scott (Ayr) (Con): Given the welcome success of the national parks, I ask the minister to say in her closing remarks whether she has any plans to extend the national parks scheme to anywhere else in Scotland. I am thinking particularly of the south-west of Scotland, which would be a prime candidate.

Roseanna Cunningham: Is that a Conservative call for more money to be spent by Government?

John Scott: I just wonder what your views are.

Roseanna Cunningham: In the current circumstances, it is difficult to envisage that happening. At present, there is only one other part of Scotland in which a significant issue has been raised about potential national park designation, and that is on Harris. People on Harris are still negotiating with Comhairle nan Eilean Siar about the council's support or otherwise for the idea. The only real proposal that has come from the south-west has been for a biosphere, rather than a national park. We are not inundated with people from throughout Scotland looking for national park status. However, that is another thing that might change in the future.

Liam McArthur: I am interested in the minister's response to Peter Peacock's point about potential extension along the northern boundary of the Cairngorms national park. The case that people in Blair Atholl and other areas made about the southern part of the boundary was well understood when the primary legislation was passed. Notwithstanding John Swinney's member's bill, it was thought that the quinquennial review provided a basis on which the issue could be considered in a reasonably short timeframe. Are you suggesting that consideration of the case for extending the northern boundary could take place only within the context of the 10-year review that is set out in the order, or might the issue be dealt with at any point during those 10 years?

Roseanna Cunningham: Well—

The Convener: Hold on a minute, minister. Those kind of questions should have been asked in the first part of the process. This is supposed to be a debate. Before the minister responds, do any other members wish to make a contribution or ask a question?

Members: No.

The Convener: Go ahead, minister.

10:15

Roseanna Cunningham: In fairness, our view is that the situation is pretty settled now. It would probably be six years before the process of a

review would be set in motion. Notwithstanding that, it will always be open to any Government to decide at any point to reopen the issue for particular reasons. If strong cases were made in respect of particular communities, a future Government might well decide to move outwith the review period. I cannot say what decisions a future Government might take.

The difference with the order that we are discussing today about the extension of the Cairngorms national park is precisely as Liam McArthur said. A strong vocal and settled case was being articulated right from the start and over quite a long period of time. We have not yet seen that with other areas. From time to time, communities might wish to express their desire to be in a national park because of what they perceive to be the potential benefits of certain developments not being allowed to go ahead, or otherwise. Different communities might come to that conclusion for a variety of different reasons, and the proposal for an extension to include those communities would have to be interrogated quite closely to see whether it fulfilled all the criteria that we want to be fulfilled for national park designation.

However, I could never be in a position to rule out anything that a future Government might choose to do if it was presented with an incontrovertible case. Our view, at this stage, is that we have dealt with outstanding issues and we do not envisage anything major coming up in the near future.

Motion agreed to.

That the Rural Affairs and the Environment Committee recommends that the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010 (SSI 2010/draft) be approved.

The Convener: Finally, we move to the formal debate on the Cairngorms National Park Elections (Scotland) Amendment Order 2010.

Motion moved,

That the Rural Affairs and Environment Committee recommends that the Cairngorms National Park Elections (Scotland) Amendment Order 2010 (SSI 2010/draft) be approved.—[*Roseanna Cunningham.*]

Motion agreed to.

The Convener: That concludes our discussions on statutory instruments. I will suspend for a moment to allow witnesses to change over.

10:17

Meeting suspended.

10:18

On resuming—

Wildlife and Natural Environment (Scotland) Bill: Stage 1

The Convener: Item 5 is continued consideration of the bill. I welcome the first of the two panels, which comprises representatives from different organisations that belong to Scottish Environment LINK. Lloyd Austin is the convener of Scottish Environment LINK WANE group, a LINK trustee and head of conservation policy with the Royal Society for the Protection of Birds Scotland. Dr Deborah Long is the convener of the LINK biodiversity task force, the chair of the LINK board of trustees and conservation manager for Plantlife Scotland. Dr Paul Walton is a member of LINK's biodiversity task force and head of habitats and species for RSPB Scotland. Mike Daniels is a member of LINK's deer task force and chief scientific officer of the John Muir Trust.

To maximise the time that is available to us, we will not ask the witnesses to make opening statements, but will move directly to questions. Bill Wilson will start.

Bill Wilson: You are probably aware that we have received evidence in favour of expanding single witness provisions to other aspects of wildlife crime and of ending them altogether. What is your view on single witness evidence?

Lloyd Austin (Scottish Environment LINK): From the bill it is obvious that the single witness provisions of the old game acts and in relation to birds' eggs have been carried forward unchanged. However, because the issue has been dealt with purely as a consolidation measure, there are anomalies in that the provisions will apply to some wildlife crime offences but not to others. Removal of such anomalies would be a logical step. The provisions exist in the first place because the crimes take place in remote and rural areas where the likelihood of having two witnesses is lower than it would be in, say, a city street. Our preferred option would be to extend them to a wider range of offences, notwithstanding our complete acceptance that corroboration must also be provided alongside a single witness statement.

We also perfectly accept that it is a logical position to seek to remove the provisions entirely. Nevertheless, although the two options are logical solutions to removing the anomalies, we would, as I said, prefer the provisions to be extended to all wildlife crime offences because we feel that this is a serious problem that requires additional measures if it is to be cracked.

Bill Wilson: While we are discussing witnesses, I note that in its submission RSPB Scotland seeks

"A reconsideration of admissibility issues—to ensure that any evidence of wildlife crime is accorded sufficient weight to permit prosecution and that, for instance, the civil wrong or irregularity of trespass ... does not, unnecessarily, prohibit prosecutions."

Would you care to expand on that suggestion?

Lloyd Austin: That question also falls to me. That comment is about the issue of witnesses or potential witnesses being on certain land and the court having to determine the admissibility of their evidence. In many circumstances, witnesses might be on land because they are exercising access rights under the Land Reform (Scotland) Act 2003, but it could be argued in certain cases that they are not exercising such rights because their purpose for being on the land is outwith those rights. The court will have to balance the public interest benefits of pursuing a prosecution against the private disbenefits of the civil wrong or potential irregularity of trespass, and the prosecutor might well decide not to pursue a case. We are suggesting that if a potential witness has been on land to carry out activities that would otherwise come under the access rights that are set out in the 2003 act, their evidence should be deemed admissible. Does that make sense?

Bill Wilson: If I understand you correctly, you are saying that if a hillwalker who is striding across the hills finds a poisoned bird, that would be deemed to be evidence because he is exercising his hillwalking rights. However, if an individual from the RSPB is sent to look for and finds such a bird, it would not be deemed to be evidence because he has been on the land to look for a poisoned bird, not to go hillwalking.

Lloyd Austin: That is correct.

Bill Wilson: Great—well, not great. *[Laughter.]* I mean that I understand what you are getting at.

Liam McArthur: In last week's discussion of the issue it emerged that because of the requirements of the Procurator Fiscal Service, we could end up with more cases being brought but not proceeding to court. That would be the worst of all worlds: we would raise expectations that something is being done while prosecutions and any such actions are regularly thwarted. How would you respond to that assertion? Have you discussed the matter with the fiscals themselves?

Lloyd Austin: It is an issue on which the next panel will certainly want to comment. If you are saying that the law should be constructed on the basis of whether you have the resources to carry out prosecution in the types of cases that are reported to the prosecuting authorities, that sounds like the wrong way round. It should be determined on what you believe the public interest is and what will create a sufficient deterrent to prevent crimes from taking place.

Liam McArthur: The question was less to do with resources and more to do with the requirements of corroboration. There would be an expectation that a single witness statement was sufficient, albeit that in practice, I think, it is not really accepted as applicable in any circumstances.

Lloyd Austin: There are existing cases in which there is single witness provision, and they do not include just rural and wildlife crime cases. For instance, there is in one of the environmental protection acts existing single witness provision in relation to littering, and there is a similar provision in relation to dog fouling. The police, other reporting agencies and the fiscal service have a lot of experience of circumstances in which single witness provisions arise. I would have thought that the reporting agencies would either have already or would develop knowledge of the type of corroboration that would be sufficient. They would therefore not bring lots of cases in which there was not sufficient corroboration.

Liam McArthur: That is helpful.

John Scott: This, too, will probably be a question for Lloyd Austin, but before I start I should declare my interest as a farmer—I should perhaps do it at every one of these meetings.

In essence, the bill will add game birds to the schedule of quarry species. The RSPB Scotland evidence states that

“The bill retains, as legitimate quarry, a number of native wild birds whose conservation status is less than robust”

You are not seeking removal of those species from the quarry list—correctly, I am sure. Will you explain your position on that a little more fully?

Lloyd Austin: The quarry list includes many wildfowl and waders as well as the game birds that are being moved into the quarry list in the Wildlife and Countryside Act 1981. Many of those species have a less than robust conservation status, but in the circumstances we do not think that removing them from the quarry list is the best way to address the issue.

We suggest that a system needs to be put in place better to monitor mortality through hunting and shooting. The question is whether we can introduce a system of recording bags, take and so forth, so that the Government can be better informed in the future about whether any decisions need to be taken. It is not necessarily appropriate at this time to decide to take birds off the list or to put others on it, but we need a better reporting system so that future discussions and decisions can be better informed.

Dr Paul Walton (Scottish Environment LINK): The point is particularly relevant with regard to geese—I am thinking about the resident breeding

greylag geese in the Western Isles and inner Hebrides in particular. There is serious agricultural damage in a number of instances, and it is likely at some stage that collectively we will have to move towards an adaptive management scenario for the populations. That can be based on science and done in such a way that we can pretty much guarantee that the conservation status of the target species will be maintained and not threatened and agricultural damage will be minimised, but we can do that only if the science is informed properly about the mortality levels.

At the moment, the gathering of bag statistics in this country is generally poor in comparison with other countries. We do not know for sure how many birds are shot for sport by estates. We know some other pieces of information on mortality—for example, we have an idea of the number of birds that are shot under licence—but there is no robust mechanism for us to be absolutely confident in the mortality levels. If we are not confident of those levels, the science and, therefore, our whole adaptive management approach falls apart and it becomes more difficult for conservation bodies such as the RSPB to support it.

We want to use the opportunity that the bill provides to set in train a process that will provide us with properly robust gathering of bag data. In Iceland, the provision of gun licences is dependent on people reporting what they shoot; people have to supply the right wing of every goose that they shoot. There was a huge furore when the system was introduced but, after about a year, things settled down and now everyone is pretty happy with it. I am not suggesting that exactly the same model should be adopted in Scotland, but it is possible to get good bag statistics. In our opinion, those will be needed.

10:30

The Convener: I cannot believe that you do not think that estates count what they shoot, as that is one of the points on which they compete with one another. Each gamekeeper will know how many brace of grouse and other things are shot per day. The figures will appear in their records. Are you saying that those records are not widely available?

Dr Walton: I am. In a number of instances—for example, on South Uist estate—we have had difficulty getting information about how many birds have been shot. When we get it, it is verbal and varies quite a lot. There is no compulsion on estates to reveal those data. I agree with you that estates have a long history of detailed recording of bags, but that information is not necessarily made available to third parties.

John Scott: From anecdotal evidence, we know that there is a growing problem throughout

Scotland of geese overwintering on agricultural land. Is there any provision in the bill to deal with the problem? If not, should there be?

Dr Walton: The point that we are making is important, but we should remember that a review of the national Scottish provisions on the goose and agriculture issue is under way. That review will report to the national goose management review group, which is chaired by the chief agricultural officer. We will look at the report this autumn, so that is imminent. The review concerns the seven local goose management schemes throughout Scotland that have been set up to address the issue.

I will set out the broad political background. During the 1980s, when very serious damage was being done to big, important agricultural units on Islay, for example, argument about the issue reached fever pitch. Broadly speaking, the seven local goose management schemes that have been established since then, which are overseen by a national group of stakeholders that is chaired by the Government and for which SNH provides the secretariat, have worked reasonably well. However, in Orkney there is a growing issue that will be difficult for the Government. The population of Icelandic breeding greylags that used to come down to the whole of Britain is stopping in Orkney now, because grass is growing there through the winter. There may be a financial issue.

John Scott: It appears that climate change may be changing the birds' migratory patterns.

Dr Walton: That is a fair comment.

John Scott: Any further evidence that you have on the issue would be of interest.

Dr Walton: All that I can say is that the matter is being examined in considerable detail at the moment. However, arrangements are in place to manage severe goose problems fairly successfully. There are precedents for that—Islay is a good example.

John Scott: Presumably, you have records for the number of geese that are shot there.

Dr Walton: Yes, when it is done under licence. It is more difficult to establish how many are shot on sporting estates. There is also the issue of people coming to this country as visitors and shooting with agents. There is no way of getting accurate figures for how many are shot in that way or of recording the information formally. That is done in other countries and will be needed to inform the science that will properly underpin goose policy.

Liam McArthur: Are the proposals that emerge from the process in relation to geese and agricultural land likely to be published within a

timeframe that will allow amendments to the bill to be lodged, if that is seen to be necessary?

Dr Walton: I believe so. I am not in a position to guarantee that, though.

Liam McArthur: Thanks.

Dr Walton: We have not seen the report yet and we do not know how contentious it will be, or what the ministers will think about it.

Elaine Murray (Dumfries) (Lab): What are your views on the need for a close season for brown and mountain hares? As you know, the bill proposes to introduce a close season. The Scottish Gamekeepers Association has recognised the benefit of a close season but does not feel that the times proposed reflect the time between the breeding seasons. The Game and Wildlife Conservation Trust argues that the numbers of both types of hare are healthy and that culling of hares on grouse moors is therefore not jeopardising their status. On the other hand, the Hare Preservation Trust argues for full conservation status and says that, because of their capacity for carrying ticks, the culling of hares is in breach of the habitats directive. Could you add anything to that rather divergent set of views?

Lloyd Austin: First of all, in relation to the game law proposals generally, you will see from the LINK evidence that LINK members collectively have made no assessment of that issue, so I refer you to the submissions from the RSPB and the Scottish Wildlife Trust. We think that the introduction of a close season for the breeding period of any mammal species is a good thing. That is a welfare issue relating to nursing mothers and so forth, so it is not within our area of expertise, but we acknowledge the issue.

The management of ticks and so forth is an area that needs some investigation, particularly in relation to the mountain hare species, which is covered by the habitats directive. That issue needs to be considered to ensure that it is done sustainably. It is another area in which information relating to the numbers that are being taken is unclear. The science would be better informed if we had more information on the population impacts.

Elaine Murray: Okay. We move to snaring, which is probably even more contentious. We had conflicting views about the need to use snares when we visited the Langholm moor demonstration project last week. Simon Lester, the head gamekeeper, told us that in some cases there was no alternative. He had lain out on the moor with guns, trying to take foxes. However, in some circumstances, snares were the only way in which he could control predators. Obviously, that is not the view of groups such as Advocates for Animals. What are the views of LINK members on

snaring? Do any of your members use snaring? Do you believe that it is necessary, particularly for successful grouse shooting or game management? What are your views generally on the argument that snaring is an indiscriminate trap? We heard evidence last week from Hugo Straker that fast-release devices have been developed that would allow badgers and so on to escape if they were caught in fox traps.

Lloyd Austin: Rather like the previous question, this is an area that is very much dominated by animal welfare issues, which are not an area of our expertise, which is much more in conservation and population management issues. That is why, collectively, LINK has not done any work on snaring. I will ask the panel members who represent organisations that are land managers to comment.

I will kick off, from the RSPB's point of view. In the past, our main concern with snaring was related to the bycatch of capercaillies in snares that have been poorly set or set in the wrong place. There are unfortunate examples of capercaillies being caught. The improved regulations have helped to address that problem, but bycatch is the one conservation issue that must be addressed.

Our elected council has approved a vertebrate management policy for our land holdings, and we abide by that. The council has taken advice on the methods that we use from the Royal Society for the Prevention of Cruelty to Animals and the Scottish Society for the Prevention of Cruelty to Animals, as we have properties north and south of the border. On the basis of their advice, we have decided not to use snares as a form of vertebrate management.

As far as we can tell, our fox control and the other activities that we carry out on our land are as successful as we want them to be. They are subject to scientific monitoring and so forth and use alternative methods. I am aware that you are visiting estates in Strathspey, including ours, next week. No doubt you will be able to see that on the ground.

I ask Mike Daniels and Deborah Long to comment from the points of view of their organisations.

Mike Daniels (Scottish Environment LINK): The John Muir Trust does not generally do predator control, and we certainly do not snare. As a landlord, we have crofting land, and crofters have rights to carry out predator control. As far as we are aware, some snaring goes on there. Our main reasons for not snaring are, first, that we are not into individual species management and, secondly, that we are concerned about the indiscriminate nature of bycatch, with otters, pine

martens, wildcats and other species getting caught in snares. As Lloyd Austin has indicated, we do not really take a position on the welfare side, although we are obviously aware of concerns from some of our members about welfare issues in relation to snaring.

Dr Deborah Long (Scottish Environment LINK): Similarly to the RSPB, the board of Plantlife Scotland has approved a vertebrate control policy to which we all adhere on the land that we own and manage. That means that we do not use snaring as a form of vertebrate control. We will control vertebrates only where they are having a damaging impact on the plant interest for that site.

Elaine Murray: If you do not use snares, what are the main alternative methods of predator control? Lamping?

Lloyd Austin: As I understand it, our main method of vertebrate control on our land is shooting. You will get a lot more evidence on that next week, when you visit Abernethy.

Mike Daniels: Generally, we do not carry out predator control but, where we do, it is lamping.

Aileen Campbell (South of Scotland) (SNP): I am trying to reconcile today's evidence with what we heard in Langholm last week. We were told that people had been out in the hills all night but could not shoot the foxes. If you are saying, Mr Austin, that your main control is shooting, I am trying to work out what you do differently or how that is successful for the areas that you control.

Lloyd Austin: I am sure that, because of factors such as the weather on a given day or the state of the vegetation at a certain time, there are circumstances where attempts to shoot are unsuccessful. As I understand the overall success of fox control, however, our monitoring of fox numbers and their impact on prey species shows that the efforts that we have made have been as successful as we wanted them to be.

Aileen Campbell: You might have different levels of need in the respective areas that you manage. I am trying to work out how you manage with shooting but others do not.

John Scott: I do not wish to put words in your mouth, but could the explanation be that the operation that we saw at Langholm was essentially a commercial one? Commercial operations might relate to grouse, to farmers' crops or to lambs, for example. Your interest might be more environmental than commercial. Could that be a reason?

Lloyd Austin: That might contribute to a slight difference in emphasis, but I would not argue that we are in any way less commercial. We have shooting tenants on some of our land, and they

are just as successful as any other shooting enterprise. We also work with farming tenants and graziers who work in just as commercial a style as any other grazing tenant or farm partnership. There are circumstances in which productive activity of various types takes place alongside and within nature reserve-type situations. The JMT's situation is much the same.

10:45

Mike Daniels: The JMT does not do predator control, as I said. We are not producing a crop and we are not about single-species management. It is possible to demonstrate different methods of predator control, but we do not really have to do any of it.

Elaine Murray: As I understand it, some of the witnesses' arguments are less about animal welfare than they are about bycatch. Does habitat play a part in choices about methods of predator control? The people who work on Langholm moor strongly argued that they were not about single-species management when we saw them last week, but they said that there was little evidence of bycatch in the snares that they had set. I think that they had set 500 snares and, apart from foxes, caught two badgers and one other species.

Mike Daniels talked about how snares have the capability to catch wildcats, pine martens and a range of other species. Are snares inappropriate in habitats where many other species could be caught?

Lloyd Austin: We certainly have in mind situations in which birds such as capercaillie could be caught as bycatch. We want to try to avoid that. There is also a more general issue to do with predator-prey relationships and the quality of habitat, which Paul Walton will talk about.

Dr Walton: If someone is growing a crop of potential prey species at a high density, it is likely that predators will respond. Predator populations are often limited by prey density. It might be that, because the conservation bodies are aiming for species diversity, we end up with lower densities of predators. However, that is not necessarily always the case.

This might appear confusing but, in policy terms, the RSPB simply does not have a locus on the welfare issue. If we were to start being an animal welfare organisation, we would spend all our time doing animal welfare, because it is such a huge issue. We leave that policy area to other, capable non-governmental organisations. However, on our land we choose to adopt a higher standard of welfare than is required by the law, because we are aware that when a conservation organisation owns land there is an animal welfare dimension to what it does. That is our choice as a landowner.

Foxes and small predators can have impacts on birds, particularly ground-nesting birds. It is increasingly evident that in the absence of larger predators those effects can be intensified. We have an active programme of research into habitat-mediated solutions to predator problems for rare and declining species. We aim to manage our land in such a way that the effects of predators can be reduced. There are a number of ways of doing that. We can use fences in the short term—that approach is used more often in southern Britain—and we aim to reduce the suitability of areas of cover for small predators such as foxes in locations that are close to wader breeding areas, for example. We choose not to use snaring, because we choose to adopt a higher standard of welfare than is required by the law.

Bill Wilson: The people in Langholm said that they shoot 80 per cent of the predators, so they might be snaring a relatively small number.

Do any of your shooting tenants think that the lack of snaring is leading to inadequate predator control, or are they content with the situation?

Dr Walton: We have shooting tenants where the retention of shooting rights in an area was a condition of sale of the land. You will get more detail on the issue when you visit the RSPB reserve at Abernethy, because the forest reserve there has a small grouse moor on it. The family who sold us the land retain shooting rights on that part of the reserve and, as I understand it, they are completely satisfied with the way in which the land is managed and with the predator situation.

Peter Peacock: I want to move on to the issue of invasive non-native species. The general provision is that it is a bad thing to allow the release of non-native species that might be invasive but we might not know that at the time. There are two exceptions to that in the bill—the red-legged partridge and the pheasant—and we have also received written evidence from the shellfish growers who are asking for a specific species of oyster to be added to the list of exceptions. We heard evidence last week that there can be adverse environmental impacts from the mass release of red-legged partridges and pheasants. What are the panel's comments on that? Do you think that those two species should be excepted from the provisions in the bill generally, or might the Government retain some power to have another look at them if they become a problem at some point?

Dr Long: The general approach is that non-native invasive species are a problem for biodiversity conservation, and it is accepted that they are its second biggest threat. That is why we are so keen to see good provision in the bill to protect Scotland. Islands particularly—Scotland is part of a small island chain—have a special

biodiversity and we pride ourselves on our environment as part of our international image. That environment is susceptible to non-native invasive species because we are an island. The selection of species here has evolved as part of a unique package, and new introductions to that package have a great capacity to disturb that balance. A good parallel to our situation is New Zealand, which has similarly innovative legislation to protect its special environment against the impact of non-native invasive species. That is why LINK members believe that the bill will enable us to take an important step. The precautionary approach that is embodied in the no-release presumption is an innovative way of looking at the issue.

Dr Walton: It is quite surprising how little research has been done into the environmental impact of pheasants and red-legged partridges given that, by biomass, they are the most abundant birds in the country. However, the research that has been done has revealed that they can have a negative impact, particularly at high densities. They can reduce the species diversity of ground vegetation layers, particularly in woodland. They can alter hedge structure, and some work has shown that that impacts on declining farmland bird nesting habitats, such as those of yellowhammers. They can reduce the availability of overwintering invertebrates, which are an important food source for native wildlife. They can cause the overnutrification of soil; they add nutrients to soil and leave it with nutrient levels that go way beyond what would be expected in woodland. There is also quite a bit of evidence that, at high densities, there can be disease transfer to native birds, particularly at feeding areas.

There is published scientific evidence that pheasants and red-legged partridges can have negative impacts. LINK is therefore asking the Government to give itself some capacity to regulate releases at locations where, in situations in which and during periods when negative environmental impacts are materialising. There is one case of a site of special scientific interest in Perthshire at which a high-density release of red-legged partridges led to damage being caused to the SSSI, and important moss and liverwort communities were seriously damaged. It was difficult to make an appropriate response to that through any regulation.

At the moment, the bill's total exemption for pheasants and red-legged partridges gives too little scope for regulating, especially given the potential for negative impacts. It is not just the RSPB or LINK that is saying that there could be negative impacts. The Game and Wildlife Conservation Trust provides guidelines on the release of those species that make some good

and sensible points. Among those are the recommendations that release pens be kept quite small—they should not occupy most or all of a woodland—and that the density in release pens is kept below 1,000 birds per hectare. It is quite hard to find information on this, but what information is available suggests that the average density in release pens is twice that—2,000 birds per hectare—and can be much higher in some instances. The reason why the GWC has said that there should be a limit is that it feels that, above that, there could be environmental damage. There is an indication that that level is already being exceeded in some instances. As research results are produced and we look in more detail at the impacts, there will be the potential for regulation.

That is not to say that we want to ban hunting or pheasant releases everywhere—that is far from our point. Indeed, like the RSPB, we acknowledge that there are certain environmental benefits to the shooting industry. One of those is the retention of woodlands in the lowlands, which are retained by land managers largely because they support small pheasant shoots. That has biodiversity benefits. The provision of game cover can also have biodiversity benefits for small birds such as finches. We are not saying that it is a bad thing altogether but, nevertheless, it would be folly to allow super-high density releases to proceed with no capacity for regulation.

Peter Peacock: That is very clear. Thank you. I want to pick up another point that Deborah Long touched on, which is a particular interest of mine. You touched on the integrity of islands. On Colonsay, the native Scottish black bee remains, although there are all sorts of arguments about whether it is actually native and wild or whether it is livestock. Would your thinking on the introduction of non-native species apply, for example, to taking imported bees to places such as Colonsay? If you want time to think about it, please write to us subsequently.

Dr Long: I should refer that question to colleagues in Buglife and the Bumblebee Conservation Trust.

Peter Peacock: That would be helpful. My other point is on the Government's general policy position. I think that the Scottish Rural Property and Business Association told us last week that the focus of this bit of the bill is misdirected and that, instead of being concerned about whether a species is non-native per se, we should be concerned about whether it is invasive and damaging. What is your view on that?

Dr Walton: I have heard the idea that there is a false polarity, if you like, but I strongly disagree with it. A huge proportion of global biodiversity exists because evolution proceeds independently in different regions because of barriers such as

oceans, mountain ranges, rain shadows and deserts. That means that areas are biologically separate. Because of that, we end up with the tiger as the forest cat in India and the jaguar as the forest cat in Amazonia. That effect works throughout the living world. When people move animals and plants across those barriers, they break down that isolation with the result always being a decline in biodiversity regardless of the mechanism, which can be predation, disease transfer—which would probably be an issue with the bees—hybridisation or any of a range of different mechanisms. The net result is always a decline in biodiversity. Therefore, the concepts of native and non-native have a very important ecological sense.

The argument that you are citing, which was put forward by the SRPBA, says that it is just a matter of semantics and that feeling that the introduction of non-native species is not a good thing is just a kind of xenophobia whereby conservationists do not like things that are not Scottish. That is absolutely not the case. It is much more about our responsibility to address effectively the fundamental ecological principle that, when biotas are mixed, problems are caused and biodiversity is reduced.

11:00

I commend the Government's proposals in that respect. What is good about the no-release presumption is its simplicity. Around the world, and in Europe in particular, one of the big difficulties has been the fact that the legislative provisions for non-native species have been complex, very difficult to work with and poorly enforced pretty much universally. We have not managed to stop the problem.

It is also worth bearing in mind the urgency in all this. There is strong evidence that, as climate change proceeds, the new species that have been deliberately introduced by people—not those moving under their own steam as a result of such change—will find it easier to become established. At the moment, quite a few species that get released into the wild hit a Scottish winter and die out. Increasingly, that will not be the case. I was very interested to hear mention of the Pacific oyster, because it is a case in point. When there was a proposal to farm such oysters in this country, a wee risk assessment was carried out and at the time—this was back in the 1970s, I think—scientists reckoned that the oysters could not breed because it was too cold. Well, they were wrong. Pacific oysters are now breeding and spreading in this country as non-native species. As climate change proceeds, the pressure on our ecosystems will increase. Indeed, with the globalisation of trade, more and more non-native

species will arrive, so we really need to shore up our arrangements and ensure that we protect the very high-quality ecosystems that we have in Scotland.

Peter Peacock: That was a very clear answer. However, from my recollection of discussions about the Marine (Scotland) Bill, I believe that the Pacific oyster is breeding in the south of England but not yet in Scotland. Is that right?

Dr Walton: That is my understanding, but there is also evidence of breeding further north in the Republic of Ireland. It seems to be moving up. We should not forget that over the past 15 years or so there has been a 1°C increase in sea surface temperature in the North Sea, which is quite big as far as these species are concerned. Water temperature is absolutely critical to spawning. Look, for example, at the chub in the river Endrick. That fish, a non-native freshwater species that was probably introduced by anglers, is recorded once every two or three years, but fish biologists reckon that the water temperature during spawning time needs to increase by only 0.3°C for it to spawn successfully. That is a serious problem waiting to happen.

The Convener: I see that John Scott, Bill Wilson and Liam McArthur want to get in. Perhaps if they ask their questions our four panellists can decide among themselves who will answer them.

John Scott: Do you agree that the habitats that we are seeking to preserve and enhance and that are used in particular for rearing pens for pheasants and partridges have often been created by landowners, who are perhaps the most conservation minded group of people in the countryside? These habitats were originally created for hunting—and, indeed, shooting—and are primarily kept now for shooting. Going back to Peter Peacock's initial question, I wonder whether you can indicate the scale of the problem of the overpopulation of release pens. How much land is affected? Does its biodiversity recover? Finally, do you agree with my understanding that were pheasant and partridge not to be put down annually in their thousands they would probably die out very quickly? Is that not fair comment?

Dr Walton: I am not sure whether your last comment is fair. Both species probably have an established breeding population in the wild. The British Ornithologists Union classifies them as sort of naturalised, which I think is true in southern Scotland, anyway.

As I said before, I fully acknowledge that the hunting industry has provided and continues to provide certain environmental benefits. However, my point is that the practice is not always universally beneficial. For example, we know from the literature that, at times, very high densities of

pheasant and red-legged partridge releases can have negative environmental impacts, some of which we probably do not even know about yet.

John Scott: What is the scale?

Dr Walton: It is very difficult to get sound data on that. As far as we can tell from the Department for Environment, Food and Rural Affairs poultry register, there were 5 million pheasants and red-legged partridges—4 million and 1 million respectively—in Scotland in 2009. We cannot say how many are released.

A Public and Corporate Economic Consultants study in 2006 showed that, as far as it was possible to tell, the number of pheasants that are released in the countryside in the UK as a whole is increasing sharply. Interestingly, the number that are shot is not, so the surplus is not being utilised, and it appears to be growing.

The data are not great in this area, and I cannot comment on the overall scale because we simply do not know. I reiterate that in the complete absence of the ability to regulate outside designated areas, the approach seems to us not to be proportionate or viable.

John Scott: I suppose the physical aspect of a pheasant release pen is around half an acre, or perhaps not even that: around 40m or 50m by 40m or 50m. We are talking about perhaps one or two pens for each estate, which might cover 3,000 or 5,000 acres. The scale of the impact around the pens is very localised, is it not?

Dr Walton: Any pheasant release pen on that scale would—as long as the density of birds was not greater than a thousand per hectare—be within the GWCT's guidelines. From what we can tell from the limited published evidence, there is a strong density effect.

That type of small-scale pheasant release is almost certainly benign, and in some ways potentially beneficial because of the associated habitat management, but it is far from universal. Some pheasant release pens cover five hectares.

John Scott: I did not know that.

Dr Walton: Some of the pens can be big, and the densities can be very high. I worked with pheasants in their native range in southern Asia, and they occur naturally at a very low density, as opposed to the super-high densities that some commercial pheasant releasers are working with. There are all sorts of problems such as diseases—pheasants have to be injected, for example.

John Scott: Are there any 5 hectare pheasant release pens in Scotland? That is 12 acres; I know what 5 hectares looks like.

Dr Walton: I am not sure whether there are any in Scotland, but there are certainly some in northern Britain. As I said, there are not much recorded data on that.

The Convener: Bill Wilson and Liam McArthur can both ask their questions before any of the panel members answer.

Bill Wilson: One thing occurs to me from what you have said. It sounds as if it would be economically inefficient to produce a lot more red-legged partridge than people are going to shoot, or am I missing something? Can you give us an idea of how you propose to regulate the area? Would it be a complex system, or is it straightforward?

Liam McArthur: I accept the point about species xenophobia, and I do not for a moment accuse the witnesses of that, but where do we draw the line with regard to non-native species? Plenty of species are now widely considered to be native simply by dint of having 3,000, 4,000 or 5,000 generations in the graveyard. To what extent should we be able to apply the provision retrospectively in weeding out non-native species? Which point in history do we define as the point at which our biodiversity was set and anything that came thereafter can be deemed a non-native species?

Lloyd Austin: I will start by answering Bill Wilson's second question, which was a technical point about how the system might operate.

Pheasants and red-legged partridges are covered by the bill as a sort of permanent exemption. We propose that the permanent exemption is removed from the bill, but we would expect those species to be covered by the provisions in section 14(2) of the bill, under which ministers can specify the types of animals to which the presumption does not apply. We would expect ministers to make an order as the bill comes into effect that would effectively create the same exemption as the one that is currently proposed.

In the immediate future, we would expect a different method to be used to achieve the same result. If the evidence that Paul Walton described of a serious issue in a particular place or at a particular time appeared, ministers would be able to amend the order to say that the exemption no longer applied in such circumstances or in such places.

We would not expect the bill's introduction to cause a dramatic change of practice overnight. We suggest that ministers should give themselves the power and the flexibility to put in place a more adaptive management regime, rather than anything that is permanent and inflexible, which is how we perceive the regime as drafted.

Deborah Long will answer Liam McArthur's question on drawing the line.

Dr Long: I will talk about drawing the line between what is native and what is non-native. I trained as a palaeoecologist, so I spent many years looking at the vegetation history of Britain and Scotland, and the issue was central to that research. We are lucky in Scotland, because we had a glaciation about 10,000 years ago that wiped the slate clean, in effect. After that, species came into the environment in their own way. As they evolved as part of an ecosystem, that ecosystem was ecologically balanced—until about 5,000 years ago, although when the change happened is much debated. That is the approach from which we come.

The debate has occasionally been hijacked by xenophobia; that is not our angle. We are interested in retaining the ecological integrity—the ecological specialness, if you like—of Scotland's ecosystems. One of the biggest threats to that integrity is non-native invasive species. That is why a precautionary approach is appropriate. That is the best approach to ensure that we maintain ecological integrity and that the system does not get out of balance.

At the last count, in a recent SNH survey, about 1,000 non-native species were present in the wild in Scotland. It is important to remember that not all those species cause a problem. The rule of 10s means that a small percentage of the species in the wild cause a problem in the wild. Where they cause a problem, that is where we want to put our energies, because those species have a bad influence on the rest of our environment. The bill could give us more tools to control the impact of such species.

Is that enough?

Liam McArthur: Yes.

The Convener: Can we move on? Liam McArthur has other questions on non-native species.

Liam McArthur: Dr Long talked about species in the wild. The bill creates the offences of releasing an animal outside its native range and of planting or causing to grow in the wild a plant outside its native range. Concern has been expressed that those concepts could be vague. Do the panel members agree?

Dr Long: Those definitions have been the subject of much debate in the Scottish working group, on which LINK members sit. We have been fully engaged in those discussions. We are convinced that we can define those terms clearly and have useful definitions that will support the bill. Those discussions have been long and they continue. We think that the code of practice that is

being developed will be strong enough to help to define those terms in a way that is useful to the bill.

Liam McArthur: As the bill creates criminal offences, the degree of legal certainty needs to be pretty high. From the discussions that you are having, are you convinced that that legal certainty exists?

Dr Long: We will get there through the Scottish working group. A range of organisations are members of that group, so we can draw on a huge range of expertise to contribute to the discussion.

Liam McArthur: The RSPB, possibly within LINK, has expressed concerns about the lines of responsibility on invasive non-native species. Will you expand on those concerns and on which agencies you would like to have that responsibility under the bill?

11:15

Dr Walton: I will answer that. If you are going to take action to combat the threat of invasive non-native species, it is critical that you act at the earliest invasion stage possible. It is preferable to prevent establishment in the first place. Once establishment has happened, it is preferable to nip it in the bud as early as possible. That is not just desirable in ecological terms; it makes financial sense on an enormous scale. Some invasive non-native species are costing us millions of pounds that could have been saved if the invasion had been nipped in the bud. In principle, therefore, it is important to act.

In our experience, it is important to have clear, short lines of responsibility to achieve that, but they do not exist at the moment. One example that involved the RSPB was with the species called *crassula helmsii*, which is also called the New Zealand pygmy weed and has a number of other common names. It is a highly invasive freshwater aquatic plant from New Zealand. It could never have come here other than by human agency—by people bringing it—as it could never have arrived naturally.

It is not well established in Scotland yet, but we know from evidence elsewhere that it can be highly invasive and spread very easily. We found some of it growing in a wee pond outside a visitor centre at our Lochwinnoch nature reserve. We set to work getting rid of it, but the worry was that there was more of it in the surrounding area and perhaps the local catchment, which feeds into the Clyde.

My job was to phone the relevant authorities. I knew that there was an SSSI in the area, so I phoned SNH. The area staff's view was that it was probably a matter for the Scottish Environment

Protection Agency, but when I phoned the relevant people in SEPA their view was that it was probably a matter for SNH. We were left in a situation in which neither of the agencies nor anyone else was clear about who would take a co-ordinating role.

We needed there to be some monitoring in the local area to find out the extent of the problem and we needed some decisions to be made on the appropriate action to take. It fell to the RSPB to find a local botanist who had expertise in identifying the species. We gave him some money and he carried out a quick survey. We then pulled together the local stakeholders and, luckily, in that instance the Clyde Muirshiel regional park authority took the lead co-ordinating role. We are grateful to it for doing that, but our worry is what would happen if there was such an invasive establishment somewhere other than on an RSPB reserve. That is bound to happen, and it will happen increasingly.

We are calling for some mechanism whereby there are clear lines of responsibility. The difficulty is that imposing a duty on just one agency would be a pretty heavy burden. Invasive non-native species issues are unpredictable and can happen in all different sectors: there are coastal, freshwater, upland and woodland elements, and there are elements that involve sporting estates and so on. The imposition of a duty is one route that people might want to take, but an alternative might be a requirement to produce implementation plans for the species identified by the Scottish working group as the most dangerous and to identify in those plans the appropriate body to take the co-ordinating role. That should be done by statute so that it is absolutely clear. It would mean that there was a central body whose task is not to solve the problem but to take the lead co-ordinating role to ensure that monitoring happens and so on.

That is our thinking on the detail, but the principle is clear: without short, clear lines of responsibility, obfuscation is inevitable. Given budgetary concerns, it is difficult for organisations to park money for unforeseen circumstances, particularly at the moment, but there will be delays if we do not identify the lines of responsibility. That is why I think it is important.

Liam McArthur: There is an irony in a country that is exalted for its approach to non-native invasive species sending invasive weeds over here.

On the focus of that endeavour, Dr Long highlighted that there are a number of existing invasive non-native species that would need to be the priority. There is an on-going piece of work on the presumption against release and dealing as early as possible with those species that are present. Within budgetary limitations, what would

be the focus of that co-ordinated effort? Would it be enforcement of the presumption against an early intervention? Would it be dealing with some of the worst effects of current invasive non-native species? What do you see as the key task?

Dr Walton: It is difficult to be absolutely prescriptive. Broadly speaking, there is the principle of prevention, then control and eradication or long-term regulation—that is the three-stage approach that is recommended by the Convention on Biological Diversity, which is the framework that has been broadly adopted by the Great Britain-wide non-native species process in which Scotland is involved. The principle is, as I said earlier, to act at the earliest possible stage of invasion. That is a cost-effective way in which to do it.

Let us not forget that invasions are happening as we speak. Only a few days ago, I got reports of four separate sightings of stoats on Orkney. You may have heard about that.

Liam McArthur: It wisnae me.

Dr Walton: They were almost certainly released by some well-meaning individual—as were the hedgehogs on the Uists—but it is a serious issue. The experts at controlling Mustelids, the gamekeepers, tell us that they are pretty successful in controlling some species but that stoats can be difficult. It is a potentially very serious invasion that is happening right now and which needs to be nipped in the bud. I am glad to say that as we speak SNH is engaged in that and is bringing experienced mink trappers from the Western Isles to address the issue.

The Convener: We must move on. I ask members and panel members to keep their questions and answers brief.

Bill Wilson: Is there some disagreement between Plantlife and RSPB Scotland on the INNS issue? Plantlife is calling for

“a duty to control, eradicate or contain priority invasive non-native species, as listed by the GB secretariat on non-native species”,

but Dr Walton seemed to imply that a duty is not the way to go. Can you clarify the situation?

Dr Walton: What I said was that a duty may be one way in which to do it but that, if that was deemed too difficult, there are other ways in which to do it. With this sort of thing, people often say that a duty would be incredibly difficult and would extend SNH's remit into areas that belong to other agencies, so we cannot have a duty. All that I am saying is that it is difficult to identify lines of responsibility. It is a complex issue and we do not want to fall at the first hurdle.

Bill Wilson: So, you would like a duty but you would settle for—

Dr Walton: We would certainly settle for a duty.

Dr Long: The confusion perhaps stems from the fact that, ideally, we would like a duty to control or at least do something. There is also the duty to have a co-ordinating body responsible for ensuring that action is taken. We have used the same word in two slightly different ways.

Bill Wilson: Who will have the duty?

Dr Long: Paul Walton talked about it in relation to having a co-ordinating role. That is how we would—

Bill Wilson: So, it would not be a duty for local authorities. You are talking about a single body, whether SNH, SEPA or—

Dr Long: As Paul Walton said, that is one potential solution. That is one mechanism that we recommend that you consider.

Bill Wilson: Could you estimate a cost for that duty, or is that a how long is a piece of string question? The cost of eradicating one species in England was estimated to be £3 million.

Dr Long: That was specifically for *crassula helmsii*, and England has many more sites of *crassula helmsii* than we have in Scotland. Because we have so few sites, the cost would be lower. Apart from that, though, I am afraid that it is a how long is a piece of string question—it depends on the species.

Bill Wilson: I presume that that emphasises the importance of getting in early.

Dr Long: Yes.

Dr Walton: Absolutely. Some estimates have been made of the relative costs of early and late action, and it can be between 100 and 1,000 times more cost-effective to act at the early stage of an invasion. If it can be stopped before there is a serious problem, that is far cheaper. It is common sense.

Bill Wilson: You referred to prohibition, then control and eradication—

Dr Walton: Prevention.

Bill Wilson: Sorry—prevention, then control and eradication. Normally, one might think of prevention, eradication and then control. Could you clarify that?

Dr Walton: We prevent release. We want to stop these non-native species getting into the wild. We now have a no-release presumption. That does not finish the issue, of course. We have to deal with species such as *crassula helmsii* that are not well established but small populations crop up

here and there. We need provisions to deal with that. We also need to deal with more chronic species such as *Rhododendron ponticum*. A strategic approach is needed to these species; we have to choose priority habitats where we want to prevent the spread of these species. We will never eradicate species such as *Rhododendron ponticum* in this country, but we can prevent them from degrading high-quality habitats.

Elaine Murray: My questions are on section 18, on species licensing. I will save time by putting my two questions together. First, the provisions of section 18 enable species licences to be issued

“for any other social, economic or environmental purpose”,

so long as significant benefit is achieved and no other satisfactory solution can be found. Secondly, section 18 enables the delegation of licence-granting powers from the Scottish ministers to Scottish Natural Heritage or a local authority. In the latter case, the authority has to consult SNH. The provision appears to enable local authorities to issue licences to themselves—for example, for the control of gulls. What are your comments on the provisions?

Lloyd Austin: We completely agree with the principle that circumstances should exist under which licences are granted to kill or take protected species. That principle is contained in the derogation licences in both the birds and the habitats directives. As Paul Walton said earlier when talking about geese, we completely accept that circumstances can make that necessary. The important point is that the circumstances need to be well defined. The case that has to be made for the social and economic—and even the conservation—purpose of taking or killing a species should be significant and serious. For example, the directives use the phrase: “serious damage” to livestock and fisheries. In the LINK/RSPB evidence, as is the case in other evidence such as that from the Scottish Wildlife Trust, we say that we find the phrase

“any other social, economic or environmental purpose”

too wide and ill defined on how and where those circumstances might apply. The argument could be made that anything falls under the camp of “any other ... purpose”. We are concerned that the phrase gives too much perspective for licences for purposes that do not meet the serious circumstance that should apply.

I turn to the delegation arrangements. We completely understand the potential benefits of putting all the licensing provisions within SNH. There is logic in having a single authority, and not some licensing being done by the Scottish ministers and other licensing by SNH. There is also logic in consideration being done by the statutory conservation body that has the scientific

expertise to reach a conclusion on whether the circumstances are serious enough to permit a licence and so forth. We do not object to the delegation to SNH. We understand the logic of putting all the responsibilities on to one single body.

Finally, I turn to the question on local authorities. I have nothing against local authorities, but resource constraints mean that they do not have the expertise that SNH has. In most cases, authorities want to consult SNH to seek its views—

Elaine Murray: I think that they are required to do that.

11:30

Lloyd Austin: Yes, they are required to consult SNH and get its views, so why not just use SNH as the body? We do not know what the arrangements would be if SNH gave advice and a local authority chose to do something different. Would ministers intervene in that circumstance? There is a lack of clarity on that. Before the Protection of Birds Act 1954, which is going back a long way, local authorities had such powers. The 1954 act and the 1981 act consolidated all the powers and gave them to central Government and its agencies to ensure consistency throughout the country.

Having said all that, one issue on which the Government has stressed that local authorities have a role is when a licence comes about as a result of a planning decision that is related to the development of a project that has been given planning consent or whatever. We can see logic in simplifying that process, but there is no reason why SNH cannot be involved so that the process is streamlined.

Peter Peacock: I want to clarify something that Lloyd Austin said in his answer to Elaine Murray's first question. His answer embraced animals, plants and birds, but the provision under which a licence can be issued

"for any other social, economic or environmental purpose"

does not appear to apply to birds. I ask Lloyd Austin to clarify whether that is his understanding.

Lloyd Austin: Yes, that is my understanding. The 1981 act is framed differently because it is a transposition of the two directives—the birds directive and the habitats directive, which deals with plants and other animals. The provision in the bill applies only to the other animals.

Peter Peacock: We had evidence last week from Alex Hogg, who is sitting behind you in the public gallery. He argued strongly, as others have, that there ought to be a system for licensing the

taking of otherwise protected birds if they were impacting on, for example, pheasant and red-legged partridge—we touched on that earlier. What is your view on that? We have touched on the issue in relation to geese, but what is your view on buzzards and other raptors that might be caught?

Lloyd Austin: I simply repeat what I said earlier, which is that we have no objection to there being provision for licences to take otherwise protected species. Those provisions exist in the birds and the habitats directives. The important thing is that the provisions are robust, that the tests are applied robustly and that the circumstances in which licences are given comply with those tests.

Dr Walton: I agree. We are not saying that there are sacred cows and that certain things must never be done. It is worth remembering that the European nature directives work. The way in which annex 1 species have fared since the introduction of the directives has been an extraordinary turnaround for some of Europe's most threatened species. The directives are delivering the public good of nature conservation. The tests that they prescribe for licensing make sense and we believe that they should be the minimum provision. There is plenty of evidence to indicate that that is a sensible approach.

Peter Peacock: I am grateful for that.

Convener, I should have clarified earlier, for the record, that I am a member of the RSPB and the Scottish Ornithologists Club.

Aileen Campbell: I apologise to the panel members: I have to move an amendment in another committee meeting, so I might have to shoot off at some point.

Several submissions mention the environmental impact that deer have on peatland and woodland and the increasing number of deer. Will you say a bit more about the environmental impact that deer numbers are having? We have heard that it might be a bit too simple just to say that deer numbers are increasing.

Mike Daniels: I think you are right. It comes back to one of the themes that we have touched on this morning; the data on deer are not great. We do not have great numbers from population counts; we have estimates for some parts of the country. The general trend across the northern hemisphere for ungulates is that their populations are rising. That is to do with climate change and a range of other factors.

The focus in Scotland is on impacts on the ground rather than numbers. Our general concern is that although the bill is a step in the right direction it has not quite gone far enough. The

Government published a national strategy for deer a couple of years ago. It recognised all the multiple benefits of this iconic species for our country but recognised the damage that they do, whether on peatlands or in stopping regeneration. There is a strategy and there is recognition that, to deliver it, we need some sort of planning system.

We have had 50 years of voluntary deer management groups. Some answers to parliamentary questions suggest that that approach has not worked very well and that we need to take our approach to the next stage and, to answer your point, to look at local circumstances. It is important not to make generalisations and say that there are too many deer or there are too many this or that; it is necessary to look at the impacts on habitats, on peatlands and on carbon sequestration in local areas and get to a position where we are not looking only at private sporting objectives but taking the general public interest into account.

Aileen Campbell: Would anyone else like to comment?

In the 50 years of the voluntary system, have there been changes of practice that have led to increasing numbers, or has practice remained the same?

Mike Daniels: What evidence there is—I repeat the caveat—from looking at Deer Commission for Scotland count reports is that there has been a general, steady, increase in the population from about the time the system started, but we are really not concerned about that as a generalisation; it is only in specific areas that you need to think about it. For example, there has been a huge increase in forestry as a result of planting in south-west Scotland, so there are big deer populations in a habitat that can sustain higher numbers than there were previously, but that is not the point; the point is the damage that they are doing to some of our special habitats, either within or outwith designated sites.

Aileen Campbell: Last week we heard from the landowners' organisation—the SRPBA—that it did not feel or believe that the roe deer population was as big a problem as the red deer population up in the Highlands. Can you differentiate between geographical areas and say that some may need more close scrutiny, or would you say that, on the whole, we need to improve deer management across the country?

Mike Daniels: There are certainly very different issues with roe deer, as they do not form big herds and they do not roam over open habitat, but there are increasing concerns about, for example, vehicle collisions, and if we are trying to achieve Government targets on carbon sequestration through planting, there will be issues with deer

management in lowland areas, which are more likely to be roe deer areas. No matter where the situation occurs, a framework has to be in place to manage deer effectively and collaboratively.

Aileen Campbell: Why is there a difference of opinion between Scottish Environment LINK and the SRPBA, which suggests that it is perhaps not a big problem in the south or in lowland areas?

Mike Daniels: I cannot speak for the SRPBA. Generally, the original consultation document recognised that the current system of voluntary deer management groups had to be addressed—it is easy to kick something, but it is not fair because they were not set up to do the job that they are now required to do; they were set up as a way of collaborating on sporting objectives and since then a whole lot of access legislation and reforms have come in, so they now have to deal with things that they are not really constituted to do—and that we need more of a statutory framework to manage them in. We understand that there were not many objections to that in the responses to the consultation, so we are slightly surprised that the bill does not take that approach and puzzled as to why it seems to be rolling back on it.

I do not think that there is a big difference in respect of recognising that deer management groups do not work. When you speak to the SRPBA and landowners, you find that a lot of them are frustrated with the current process, although maybe for different reasons and they may have different objectives. Because the deer management groups do not sit within a framework, people sit around and discuss things and the process takes up a lot of resources but does not deliver very much. Less than 10 per cent of deer management groups have any plans in place or collect data in a way that they can use.

Aileen Campbell: If there were a greater obligation on deer management groups to have such plans and strategies, what would you use to inform decisions about the objectives or about agreeing cull levels? How would those be determined? How would the system work in practice if there were a greater obligation to produce plans?

Mike Daniels: There are examples. Under section 7 of the Deer (Scotland) Act 1996 there are agreements around designated sites. There is good coverage of at least half a dozen sites across the country, from Glen Feshie to Breadalbane. We have just signed up as a landowner for one in the Breadalbane area. Obviously, that is about a designated site, but the current system takes into account social and economic factors, and when a deer management plan is produced the first bite is given to local landowners and deer managers to try to agree what kind of habitat monitoring is required and

what targets need to be put in place. We have a system that works already, but there are areas to work on. That system has to work. We have to sit around the table and discuss the objectives.

What will be difficult is the more general test of what is the public interest in deer management. SNH, which took over the functions of the former Deer Commission for Scotland, is developing a code, on which we have input. It is a bit like the discussion that we had earlier about non-native species. We have to come up with a form of words that defines the public objective in deer management and covers carbon sequestration, biodiversity, tourism, venison and the income and employment that derives from sport shooting. Deer management delivers a range of objectives and it is a case of thrashing out a plan that will deliver all those objectives rather than just one sporting objective in an area.

Aileen Campbell: I would be interested to find out a wee bit more about other ways that are used to control deer. You spoke about using fences, for example. Are such methods common in the area that you control? Are they effective or is there a need for the cull?

Mike Daniels: Fencing tends to be controversial for lots of reasons. If you are planting new trees, which are very palatable, in an area where there is no seed source, in most circumstances you will need to protect them somehow. More generally, under current guidance, if you fence an area out and exclude deer, on welfare grounds you should do a compensatory cull of the deer that were dependent on that area for shelter or habitat. So, fencing an area off does not mean that you will not need to kill extra deer; you will still need to kill the deer that were living in that area. If you have too high a density of deer, all that will happen is that you will move the problem elsewhere. Fencing is a tool that land managers use along with lots of others, but it is not a universal solution. Equally, on our own properties, we are not just concerned with one particular habitat; we are concerned with habitat ecosystem health from the summits right down to the bottom. Rather than fencing one area, we would have to fence the entire property, which is not a practical or cost-effective mechanism.

Aileen Campbell: It is proposed that SNH would take the lead in this. The committee is led to believe that SNH currently has a number of powers. Is there a way for it to employ those powers better, whether the powers under the Nature Conservation (Scotland) Act 2004 or others, to improve deer management? Do you think that that needs to be up-front in the bill?

Mike Daniels: The principle, which is that we need to have a responsibility for sustainable deer management, needs to be up-front in the bill. I defer to Lloyd Austin. I am not sure what the best

technical way of doing that is. We have some proposals. At the moment, the proposal seems to be that there is a code or a duty on SNH to do something, but it has no force in law. I am not sure how a code for a public body will deliver something. What we need is a statutory framework or plan. There is a precedent for that kind of national resource. SNH is the obvious partner to lead on that, but I will leave it to others to sort out the details.

Lloyd Austin: I want to add to the point that Mike Daniels made about the statutory duty. You will recall that the Government's original consultation paper proposed a statutory duty for sustainable deer management to apply to everyone, but that has not come forward in the bill. You heard in evidence from the Government officials that there were legal technicalities from a human rights points of view that prevented that, because, in the form that I have just described, it would be an unclear type of statute; if you were to charge someone with not carrying out sustainable deer management, it would not be clear what he or she was intended to have done or not done. We recognise that that difficulty needs to be got over.

What we propose is that the solution is not to say, "We won't have a duty, then," but to make the duty clear, and that means having a statutory form of planning system. We might encourage deer management groups to produce clear management plans, but if that does not happen, we believe that SNH should have the power to step in and produce plans. Alternatively, you might take the approach that, as public bodies determine how to plan for natural resources throughout the country—for example, SEPA produces flood management plans and river basin management plans and local authorities produce development plans—SNH should take the lead in producing deer management plans but that it should do so in a participative way.

11:45

There are different ways of producing deer management plans, but once a plan is in place, land managers should have to comply with it, in the same way that householders and developers have to comply with development plans. The plan should contain a clear definition of the actions that people are supposed to take. In effect, that will produce a duty for sustainable deer management, although technically we could say that it is a duty with a small "d" in that it is a requirement to comply with all the detail in the plan rather than, somehow, to know out of the blue what sustainable deer management means.

To some extent, the proposals in the bill that revise sections 7 and 8 of the Deer (Scotland) Act 1996 start to go along that road. Our argument is

that that is a good start but we are not convinced that it goes far enough to deliver an overall step forward towards a really sustainable system.

Aileen Campbell: Throughout the questions and answers that we have heard, there has been a lot of talk of giving SNH powers to do this and that. It seems that the duty that you would require it to take on is quite onerous. How practical would it be for SNH to do that when there is less money in the coffers?

Mike Daniels: On a point of principle, we talked earlier about the cost benefit of nipping things in the bud in relation to non-native species, and a similar thing applies in relation to deer. Downstream costs arise from having too many deer in certain areas, such as carbon release from trampled peatlands, not getting carbon sequestration from woodland growing, flood catchment issues, and a loss of biodiversity. We tend to think in the short term, and I know that the parliamentary session is short, but there are long-term gains to be had here, so I make an appeal that we need to do the right thing.

I take the point about resources. However, on the point about how practical the proposal would be, I have the pleasure of sitting on four or five deer management groups—usually there is an SNH staff member on the group, or previously a DCS member, and a Forestry Commission representative—but those groups are unable to do anything because there is no framework for them to operate in. We are not talking about huge resources. To put it in context, there are 50 or so deer management groups and they meet once a year. As I said, SNH has experience of doing section 7 agreements, as did the DCS, and we are signed up to a couple of those. They are not vastly resource intensive and the experience and expertise are there, so it is not a question of imposing a completely new duty on SNH. It has expertise in the area and it is able to deliver.

Aileen Campbell: So it is about getting a much quicker response to what is going on and acting quickly to prevent the problem, and you believe that the resources are there if you rejig things a wee bit.

Mike Daniels: Yes. Obviously I cannot comment from SNH's point of view, but that is the perception from the outside.

John Scott: Can we turn to different types of muirburn practice? How do you think the power for ministers to make orders that vary the muirburn season in particular areas, particularly on grouse moors in August and September, would be used? What evidence exists that that would allow muirburn to be prohibited on sensitive habitats? One of the submissions mentions that. There are a whole lot of questions there. Discuss.

Lloyd Austin: In general, we welcome the introduction of greater flexibility. The changes of dates that the bill proposes in relation to muirburn on grouse moors have been discussed at considerable length with all stakeholders, through Scotland's moorland forum, and there is considerable consensus that the proposed dates are acceptable to all parties.

It is worth pointing out that that means that there has been a compromise and that changing the proposed approach would upset the apple-cart one way or another—if we move one way we will upset some parties and if we move the other we will upset others. We very much support the compromise that is proposed, because it has agreement across the board.

The concept of flexibility is important, because of different circumstances such as weather events. Also, as members will see next week, we are interested in having the ability occasionally to burn within regenerating woodlands, to encourage blaeberry and other ground vegetation for the benefit of woodland grouse, for example. Such activity constitutes burning for an environmental or conservation purpose, so the Scottish ministers' ability to grant licences for out-of-season burning for research, scientific or conservation purposes is welcome.

I have mainly talked about pure moorland—grouse moor—situations, in which the dates issue arises from the need to avoid the egg laying and breeding season for ground-nesting birds. In other circumstances, muirburn has serious consequences for vegetation. In that regard, I will hand over to Deborah Long, who is the plant expert.

Dr Long: The main issue is the moss and liverwort communities. Those communities grow all year round and have no quiet time, which is why timing is an important issue, particularly for bryophytes and lichens.

Plantlife and the British Bryological Society are particularly concerned about the oceanic heath, which is a very sensitive habitat. Scotland has the most extensive distribution of oceanic heath communities in the world: they are heather and blaeberry communities that are underlain by a special and internationally important layer of bryophytes and liverworts, which are very sensitive to burning.

There has not been much research on oceanic heath communities. We know that they are special and that the largest remaining extent of such habitats in the world is in north-west Scotland. Ireland was formerly a headquarters for the species, but environmental degradation in Connemara has meant that a type site for oceanic communities has in effect disappeared.

Burning and overgrazing have a severe impact on oceanic heath communities. We want ministers to retain the flexibility to ensure that the habitats are protected from burning. In this context I am talking exclusively about oceanic heath communities on the west coast, in particular on steep and rocky slopes. If the muirburn code is adhered to, those areas should not be burned anyway. We want there to be the flexibility to protect those important communities in areas that should not be burned.

John Scott: That was fascinating, thank you. Do the other witnesses want to talk about oceanic heath communities?

The Convener: I ask the other witnesses not to do so unless they really want to. Time is pressing.

There is a specific problem in Langholm with the heather beetle, which means that burning might have to take place outwith the normal burning season. Do the witnesses have no objection to such burning, if its purpose is to tackle a specific problem?

Lloyd Austin: We would have no objection as long as the burning did not take place in the ground-nesting bird breeding season. That is why we support the flexibility that we have spoken about.

Peter Peacock: In its submission, the RSPB talked about the Loch Garten area of special protection. In layman's terms, what is the difference between the current position and what is proposed?

Lloyd Austin: Loch Garten, which, under its designation in the 1954 act, is known colloquially as a bird sanctuary, was turned into an area of special protection in the Wildlife and Countryside Act 1981. There are seven such areas but, in the bill, ministers propose to abolish the designation because more modern legislation can provide the same levels of protection against, for example, disturbance. In theory, we agree with that, because the Land Reform (Scotland) Act 2003 and the Nature Conservation (Scotland) Act 2004 both contain mechanisms—either byelaws or ministerial orders—that can provide the same levels of protection as an ASP. However, if you abolish the ASP provision in the 1981 act without replicating its effectiveness in byelaws or ministerial orders, you are effectively doing away with the status quo, if that makes sense.

I said that there are seven ASPs. With regard to six of them, we agree with the Government that they are redundant; they reflect the circumstances in which the designation was made and since then things have changed. However, we believe that Loch Garten's ASP designation serves a very valuable purpose in protecting ospreys and capercaillie and enabling us to run what we hope

is a successful tourist operation that lets people see the birds up close without disturbing them. By drawing people in to Loch Garten to see the ospreys and capercaillie, we are helping to protect other areas in Strathspey from being disturbed by people going elsewhere to try to see them. Without the ASP designation, it will be much more difficult to manage the site as we do at the moment with not only a number of staff but lots of volunteers, who find it much easier to refer visitors to the ASP designation and tell them that in certain months of the year they cannot go into the area, than to explain the whole Scottish outdoor access code and so on. As a result, we disagree with SNH's current analysis that we see whether it is possible to work with the responsibility mechanism in the code rather than with some form of protection mechanism. We feel that, before ASPs are done away with, a simple nature conservation order, byelaw under the 2003 act or some other mechanism in that modern legislation needs to be put in place at Loch Garten.

In summary, we agree in theory that ASPs are replicated in other legislation, but we think that such replication should be enacted on the one site that is important to our conservation and business needs.

Peter Peacock: So if you had a guarantee or commitment that one of the triggers that you suggested would be enacted, you would be quite happy.

Lloyd Austin: Yes. If we get a copper-bottomed guarantee that something else will be implemented, we will support the abolition of ASPs.

Elaine Murray: During the passage of the Marine (Scotland) Bill, you convinced the committee of the virtues of having a requirement to establish an ecologically coherent network of marine protected areas. In your written submission, you suggest that the bill could do the same with Natura 2000 sites, but that the opportunity has not been taken. Can you convince us of the virtues of such a move as you did with regard to marine protection sites in the Marine (Scotland) Bill?

12:00

Lloyd Austin: I will kick off and see whether anyone else wishes to add anything.

No protected area exists on its own; it is part of the wider countryside, the wider ecosystem and the wider environment. That is one of the reasons why ecologists talk about the kind of coherent network of protected areas that, as you say, is now set out in the Marine (Scotland) Act 2009. We support such a great step forward and are grateful that the committee moved in that direction.

In that respect, however, this bill has missed an opportunity to make it more than the sum of its parts. It consists of lots of different bits about deer, non-native species, species licensing and other issues that we have talked about but, at the moment, it is silent on what I would describe as the big picture or long-term conservation objectives. Most of those long-term vision statements exist in policy statements rather than in legislation; I agree that it would be difficult to set down a vision in law, but nevertheless we feel that the delivery of those vision statements is often weak. A classic example is the Scottish biodiversity strategy, with its 25-year vision of where we want to get to with biodiversity in Scotland's terrestrial and marine environments. As the recent Audit Scotland overview of environmental delivery in Scotland noted, the delivery of and outputs from the strategy have been very weak. In its section on biodiversity, the organisation concluded:

"The duty on all public bodies to promote biodiversity has had limited impact, due to a lack of sufficient guidance on how to implement it and the absence of any monitoring or reporting system to enforce it."

The bill could take this opportunity to link vision statements in the biodiversity strategy, the land use strategy, ministerial speeches or whatever to delivery, implementation, monitoring and enforcement. For example, it could improve the biodiversity duty and link it to the idea of an ecological network across Scotland. There is already talk in the national planning framework of a green network in the central belt; although that is very welcome, we need to hardwire some of these ideas about habitat networks, habitat restoration and so on and the links between protected areas and the wider countryside into day-to-day delivery across Government departments and agencies. An opportunity to have a big picture overview exists to bring together all the bits of this bill and existing legislation and make something that is greater than the sum of its parts.

John Scott: I am quite taken by your idea about land use planning, but would the spatial planning and land use strategy exercises that the Government is carrying out at the moment not be the place to feed in such suggestions? I am not saying that the bill is not the place for it, you understand.

Lloyd Austin: The answer to your question is yes. Indeed, that is what we are doing. However, the bill provides another opportunity to say to the Government that although there are good initiatives in the Scottish biodiversity strategy, the land use strategy, the national planning framework and so on, some of those initiatives and vision statements are not being delivered on the ground. The bill could refer to those different duties and initiatives and create a mechanism that puts more

responsibility on local government, agencies and so on to hardwire delivery into their budgeting and prioritisation processes.

The Convener: Unless members have any pressing questions, I will end this particular evidence session. I thank the witnesses for their evidence. Any supplementary evidence that they wish to provide should be given to the clerks as soon as possible. We would, for example, be particularly interested in the number of pheasant pens in Scotland rather than in north Britain.

I suspend the meeting for five minutes to allow a changeover of witnesses.

12:04

Meeting suspended.

12:10

On resuming—

The Convener: I welcome the second panel: Bob Elliot, head of investigations at RSPB (Scotland); Alex Hogg, chairman of the Scottish Gamekeepers Association; Sheriff T A K Drummond QC; Mark Rafferty, from the special investigation unit of the Scottish Society for the Prevention of Cruelty to Animals; and Constable David McKinnon, a wildlife crime officer with Grampian Police.

Again, we will move straight to questions, and Peter Peacock will go first.

Peter Peacock: I want to start with the general tightening up of wildlife offences in the bill, principally in relation to game law, snaring, badgers and non-native invasive species. Sheriff Drummond might want to comment on his separate paper about poisoning, although we might come to that later if his paper also relates to the issues I am raising.

In the panel's view, are the proposed changes necessary? Will they improve the law and the business of enforcement in relation to game law, snares, non-native invasive species and badgers?

Sheriff T A K Drummond QC: I am slightly concerned about the direction that the law is beginning to take. Professor Colin Reid has already expressed a similar view. The law is becoming fragmented, so it is getting difficult to find and to see the direction in which it is going. If it is difficult for people such as myself and academics such as Professor Colin Reid to find the law, I only ask the committee to have sympathy for the operators who are trying to apply it on the ground.

So I open with a plea for sympathy for the operators and enforcers of the law, and for an

attempt to focus the law more on the practitioner rather than on the academic. I do not know if that makes any contribution to answering the question.

Peter Peacock: What would you propose to do about that? The bill seeks to tidy up various issues that require tidying up because they have been lying around in different places for a while. Do you have any suggestions other than to make some kind of consolidation act, which would be quite complex?

Sheriff Drummond: Mr Peacock, I have been involved in the broad area for 30 years as a prosecutor, defender, trainer and judge. It used to be a pleasant and happy little legal backwater, but in recent years we have had a legislative tidal wave. If you think back, over the past few years, we have had the Protection of Wild Mammals (Scotland) Act 2002, which included the hunting legislation but never mentioned a horse, the Nature Conservation (Scotland) Act 2004, which amended the Wildlife and Countryside Act 1981, some of which is being amended again, the natural habitats regulations, and the Animal Health and Welfare (Scotland) Act 2006, which introduced some substantial issues. The snaring issue has arisen and the bill proposes to replace the snaring provisions in the 1981 act.

The situation is becoming overwhelming for the practitioner on the ground. I know that Professor Colin Reid strongly expressed the view that codification is necessary, but I fear that we might be getting past the stage at which codification is a realistic possibility.

Nobody has authorised this or asked me to do it but, in my function as the chair of the legislation, regulation and guidance committee of the partnership for action against wildlife crime Scotland—PAWS—I am trying, as far as I am able, to focus the committee on the production of forms of guidance, codes of practice or whatever for the benefit of the practitioner, which can eventually be gathered in some form of highway code for the countryside. I know that Professor Reid does not share my view on that. He sees the growth of codes taking us further away from the primary legislative source, and I share that view. Nevertheless, I am trying pragmatically to resolve some of the difficulties that practitioners on the ground experience and that I have to preside over, regrettably, routinely.

12:15

Peter Peacock: That is a helpful insight. Does anybody else have any comment to make on that or on the wider point that I raised?

Bob Elliot (RSPB Scotland): Sheriff Drummond's comments are well made. The law is complex and I remember that, when I started my

job, I wondered where to start with some of the Wildlife and Countryside Act 1981. It is, though, strong legislation. In this backwater, as it has been described, we have made some serious changes, and it is the Scottish Parliament that has done that in Scotland. We have a tradition of being speedier on our feet in legislating than is the case south of the border. I attend many conferences with police officers and so on south of the border, and we can say, with some pride, that we have some very good legislation in place. Interpreting that legislation can be an extreme challenge—I defer completely to Sheriff Drummond on that. However, there are still some fairly straightforward offences that we are having a lot of trouble in getting enforced. Perhaps we will return to that in a minute.

Peter Peacock: If there are no further answers to my original question, I am happy to leave it there.

Bill Wilson: Before I ask my main question, I have a quick question on wildlife crime. I understand that, at the moment, wildlife crime is not a recordable offence. If that is the case, does that give us any difficulty in understanding the incidence of wildlife crime and where the crimes are happening? Would it be useful to have it as a recordable offence?

Constable David McKinnon (Grampian Police): If it was officially recorded, that would give us some statistics to work from. All eight Scottish police forces submit monthly returns to the national wildlife crime unit, which collates returns for the United Kingdom. Quite detailed incident reports can be produced, but whether incidents are properly recorded as crimes and recognised in crime statistics is another matter.

Bob Elliot: There is quite a good recording system in the Scottish intelligence database. Quite a lot of work has gone into trying to get wildlife crime into that, but it still does not feature highly. In numerous cases, I have been incredibly frustrated by speaking to senior police officers, who may not necessarily have expertise in wildlife crime, who do not see the data on their system. I have tried to explain about some criminality that has been going on for X number of years, but they have looked at me and said, "That's really interesting, but the system is telling me that there's been no such crime in my area." We have a long way to go to get wildlife crime offences properly recorded. As Dave McKinnon says, the national wildlife crime unit has made a lot of effort to do that, but it is a small unit. Thankfully, it is based in Scotland, but it has a United Kingdom remit and faces huge challenges just now. With budget cuts on the horizon, that can only get worse.

We do not want to see police officers—especially wildlife crime officers—unduly burdened

with an enormous amount of extra paperwork, so the system must be slim and tight and must be modelled on the existing systems. We are not asking for some new bureaucracy to be created—I can see people's eyes glazing over. We are not always lucky enough to be working with a full-time wildlife crime officer such as Dave McKinnon—Grampian Police lead the way on that side of things; in some instances, we will be dealing with just a police constable, an area community constable or someone else who has no expertise in wildlife crime, and we have to try to persuade them to record the crime and ensure that the national wildlife crime unit and so on get the information.

Sheriff Drummond: I suspect that part of the problem is that there has never been a definition of what constitutes wildlife crime. It may be obvious when people see it, but as far as the number crunchers are concerned, there has never been a definition that allows them to tick an appropriate box. We now have a definition, although I have no idea whether it is a working definition that enables those involved in the collation of statistics to operate.

Mark Rafferty (Scottish Society for the Prevention of Cruelty to Animals): As a former police officer of 22 years and a wildlife crime officer in the Scottish Borders, I would add that because wildlife crime is not a recordable crime, senior management in the police tend not to put suitable resources into it. They are not judged on their performance in relation to wildlife crime, so it is perceived that they do not need to put the associated resources into it. If wildlife crime was elevated to a group 5 crime, they would be judged upon their ability to detect and investigate it. That might have the effect of encouraging senior managers in the police to put more resources into wildlife crime investigation.

Bill Wilson: Several members of the panel have mentioned resources, which brings me to my next question. There are clearly concerns about substantial budget cuts. Such cuts might impact on, for example, the amount of police time that can be spent on wildlife crime, or on procurators fiscal and wildlife and environment crime officers. Constable McKinnon, are you about to become an endangered species?

Constable McKinnon: Hopefully not. In my force, we have a resource of 1.7 full-time equivalents committed to wildlife crime, with a network of about 10 active part-time officers. Proportionally, for our force in Grampian, that is not a huge commitment. For the 10 part-time officers, wildlife crime investigation is a specialist skill that they have acquired, like any other specialist skill in the police force.

Bob Elliot: I am sure that even now there are challenges for the Grampian model with the amount of resource that the police force has. Although we in the RSPB would always ask for more, we would not say that huge amounts of police resource should be applied to wildlife crime. We are asking for a proportionate model to be put in place, which is really what happens in the Grampian model. At the grass-roots level, if something is discovered in the countryside, I know that I can get hold of a wildlife crime officer by contacting David McKinnon—he is on speed dial on my mobile phone. That is the simple reality of having someone available to co-ordinate. I suppose that Constable McKinnon has to take leave at some point, but even then someone else is able to attend to the situation. There is a system in Grampian Police that recognises that.

Fundamentally, though, there are senior officers in Grampian Police who get it—who understand the wildlife crime issue. They understand the issues that the committee has heard about, such as the economic benefits and so on of tackling wildlife crime. They read research papers that demonstrate that in some areas there are absences of various species, and they apply some resource to doing something about that. That is really successful. It is not about creating a massive force of police wildlife crime officers.

Mark Rafferty: Grampian Police is an exception to the rule, certainly for policing in Scotland. I am part of the special investigation unit of the Scottish SPCA, and as such we cover the whole of Scotland. We have statutory powers under the Animal Health and Welfare (Scotland) Act 2006 and on most occasions we work jointly with the police. Sadly, the reality is that most police forces see wildlife crime as low priority or no priority, and it is resourced accordingly. Certain police forces—I will not name and shame—do not have any commitment to wildlife crime. That poses problems when people report a crime, the SSPCA goes to assist the police and no police officers are available, let alone wildlife crime officers.

The reality is that there is too little enforcement and that the police afford too few resources to tackling wildlife crime because it is too low a priority. There will always be a reason why the police cannot go. As a former police officer, I can accept those reasons. There are other angles that need to be investigated.

Bill Wilson: To follow up on that, it has been suggested that SSPCA inspectors could be given the same powers in relation to wildlife crime as they have in relation to animal welfare. Will the panel comment on that suggestion? What kind of training would be required? Would it be expensive to do that? Are there other organisations to which such powers could be extended?

Mark Rafferty: The SSPCA has been a reporting agency to the Crown for more than 100 years. In 2009-10, it reported nearly 200 cases for prosecution to the Crown Office and Procurator Fiscal Service. The special investigation unit reported nearly 50 cases in its own right. Those cases involved animal welfare, but there is no restriction on what the SSPCA can report. For example, offences under the Wildlife and Countryside Act 1981 are routinely reported.

Prior to the introduction of the Animal Health and Welfare (Scotland) Act 2006, it was routinely accepted that the SSPCA dealt with animals and offences that related to animals, but it had no statutory powers to do so. The Animal Health and Welfare (Scotland) Act 2006 gave the inspectors—of whom there are 62 in Scotland at the moment, from Shetland all the way down to Dumfries and Galloway, supported by support inspectors—the powers to deal with animals and animal welfare. That extended to wild animals as well, but only in circumstances in which they were captive. Animals that had not been protected, such as foxes and wild birds, fell under the welfare legislation if they were captive, and the SSPCA could deal with such cases.

The wildlife police network came into force in the late 1980s or early 1990s. Prior to that, it was only the SSPCA and a selection of police officers with a particular interest in wildlife crime that investigated such cases. It is proposed that the SSPCA should be given additional powers—primarily, those that are contained in section 19 of the Wildlife and Countryside Act 1981—which would allow authorised inspectors to go on to land to recover evidence. Once they had recovered that evidence, the investigation could start. Sadly, as Bob Elliot will confirm, we come across incidents where an eagle might lie on a hillside for a week or two. By the time the police can resource the recovery of that piece of evidence, it is no longer there, which means that an investigation cannot take place and there is no detection or prosecution.

No additional legislation would be needed; section 19 of the 1981 act could simply be amended. The structure is already in place—the SSPCA inspectors are there. The positives would be that more crimes would be identified and investigated and there would be more detections as a result, which, in turn, would produce a reduction in, and would help to prevent, wildlife crime. People would realise that there was a real threat that someone who committed a wildlife offence in Scotland just might get caught for it, and that if they got caught for it, they would go to court. That could prevent wildlife offences from being committed and could stop people taking part in criminality. The cost would be absorbed by the

SSPCA, primarily; very few resources would be required from the police.

That would take the burden off the police. Very often, such offences are committed in extremely rural places such as on hillsides and mountainsides. In reality, the further an offence takes place from the road, the less likely it is that a police officer will go to the scene. If an offence is committed at the side of the road, the police are likely to go; the further up the hill it is, the less likely they are to go. Ultimately, what is proposed would benefit animal welfare in Scotland.

The Convener: Are there any downsides to that?

12:30

Sheriff Drummond: Big ones. You have moved straight on to what is probably the single biggest area of fragmentation. Section 19ZC of the Wildlife and Countryside Act 1981, which was added by the Nature Conservation (Scotland) Act 2004, introduced the powers of wildlife inspectors—ministers may appoint wildlife inspectors. We now have a situation in which there are local authority inspectors, private inspectors—the organisational inspectors—and police officers. Nobody has yet given any cohesive thought to the various powers that the organisations and individuals should be able to exercise.

The statutes clearly distinguish between the powers of inspectors and the powers of constables. Someone who gave evidence this morning—I cannot remember who it was—referred to trespass and the admissibility of evidence. I think that it was Bill Wilson who put his finger on the answer.

Those private investigators—or private inspectors, if I might so call them—should not have greater powers than the police officers; we cannot have them going in to carry out an investigation of a crime. Many convictions have been lost in this country because of the way in which investigations have been carried out.

Reference was made to trespass, but in 35 years in practice I have never dealt with a case of trespass; it is not a concept with which we live in Scotland. We are talking about people who go on to land to carry out an investigation of a crime where they do not have the authority to do so, and where a police officer would require to go to a sheriff and obtain a warrant to do so. It is entirely different from a hillwalker stumbling across a piece of evidence. That is where one of the single biggest areas of conflict arises.

To give a relatively recent example, during the course of some submissions that were made to me—which fortunately did not come to a full

discussion, otherwise I would not talk about them—it was not clear whether a wildlife inspector can interview a suspect. Can he caution him? What are his powers? Will the evidence that is obtained in that way be admissible? We have created an atmosphere of uncertainty, and we do not know where we are going. I do not see any certainty emerging at the end of the bill process.

The road that Mark Rafferty has just advanced is one road. Whether it would be the right road is another question, and that step should not be taken without careful consideration of much wider principles in relation to crime enforcement. We should remember that we are talking about crime in the context of the presumption of innocence and proof beyond reasonable doubt, and of the rules on the admissibility of evidence in court.

The committee touched on the question of single witness evidence and corroboration in the evidence session earlier today. We must not forget that we are operating in the context of criminal law—it is dangerous to fiddle with some of its elements in isolation.

It is that fear that gives me cause for concern about the direction in which we are going, and the uncertainties that we are moving towards because of the lack of cohesion in the broad picture of our wildlife legislation. The laws themselves are robust, and they are good, but there is an awful lot of detail on the fringes that requires careful attention.

John Scott: In that regard, you are talking about a tsunami of legislation in recent years, which others have to endure. You have been long on the analysis of the problem, but can you offer some solutions to give us a sense of direction?

Sheriff Drummond: My own thinking on the matter is to try to focus the crime element of environmental law—wildlife law—in the 1981 act, so that we do not have to chase through a variety of statutes. This is off the top of my head and not thought through, but if that were able to take place, it might be possible to extract from the Wildlife and Countryside Act 1981 the criminal element of the environmental activities and codify that single element. I have no idea whether that would be possible—that is just one suggestion.

We said that we will come to the paper that I produced a year ago in due course. It was an attempt to reconcile some of the complexities that we have moved into between the pesticide regulations, the Wildlife and Countryside Act 1981, with its various moving implications, and the biggest single problem that exists in wildlife crime: the poisoning of raptors. It is the poisoning of raptors that gets the most public attention and that, in my opinion, most needs to be focused on.

There is a lot of loose talk about vicarious liability. One respondent to the committee refers to vicarious liability being used or introduced as a sanction in the bill. Vicarious liability is a textbook all on its own; it is not a simple concept or a magic bullet that we can just introduce. The whole subject area must be looked at in the context of criminal law, the presumption of innocence, the need for proof beyond reasonable doubt and the ordinary rules of evidence. That is sometimes lost sight of in discussion of the broader environmental aspects, if I can put it that way.

John Scott: In that regard, is the bill, as it stands, adequate or inadequate? From your elevated position, can you see any way in which we can easily improve it? Can you make any suggestions—if not now, on reflection?

Sheriff Drummond: I hesitate to answer the question, as it is not my position as a member of the judiciary to tell the legislature what direction it should take.

John Scott: So, we have a conundrum.

Sheriff Drummond: We have a conundrum. I have been encouraged by what I have seen through the mechanism of the legislation, regulation and guidance committee of PAWS. I regard my function within that committee as being to focus the conflicting interests, to formulate what the conflicts are and to attempt to reconcile them. That seems to be a very good mechanism for approaching the subject, although it is in its early stages and we are all just feeling our way. Also, an administrative attempt is being made to restrict the committee's size in order that it remains manageable. That kind of thing might be a useful mechanism, or a standing committee on the issue, but I have no idea. Those are just random thoughts off the top of my head.

The Convener: We will come back to vicarious liability. Let us go back a bit. Constable McKinnon, do you have anything to say about the idea of increasing the powers of other bodies?

Constable McKinnon: That is more a matter for policy at the level of the Association of Chief Police Officers in Scotland. In Grampian, I work closely with the SSPCA on the investigations side and with the uniformed inspectors. Joint working is not a problem. We often undertake joint inquiries, and the SSPCA will take on an inquiry after it has passed through us or we will take it on after it has passed through the SSPCA. That is not a problem. Mark Rafferty's proposal of an increase of 62 inspectors in Scotland would provide a potential added resource. However, as we have a good working relationship with the SSPCA in Grampian with a 1.7 full-time equivalent resource, could the situation not be managed by the Scottish police service addressing that issue?

Bill Wilson: Sheriff Drummond, I understand that one of your concerns is that the SSPCA would have these powers but would not require a warrant, which is different from the position for the police. Would it not be possible to ensure that the SSPCA had to get a warrant before they went on to land to pick up the carcase? Clearly the problem is that because the areas involved are very large, it is often difficult for the police to get to the scene and it is very difficult to acquire the evidence in time. We clearly need to find some way around that. Would what I have suggested be a solution, or would you still not be happy with that?

Sheriff Drummond: I have no difficulty with whichever solution the committee chooses; you should simply be clear about what that solution is. At the moment, the proposals seem to be all over the place: limited powers are being given to wildlife inspectors; there are different categories of wildlife inspectors; and specific powers are being given exclusively in relation to constables. Other organisations would express concern about private bodies having the power simply to walk on to their land and carry out police investigative powers without being subject to the controls that exist in relation to police officers. There is no public control over the activities of the RSPB or the SSPCA. They are private bodies and charities and are able to operate within their own policy statements. They are not within the control of the Parliament, the judiciary or anybody else; they are free individuals. On the other hand, the police are a mechanism of the state and are under very clear control.

The question of the liberty of the subject begins to arise: to what extent do you grant power to a private individual—because that is what those bodies are—to interview, investigate and enter premises? The compromise that we have reached on this is that the form of the warrant under the Wildlife and Countryside Act 1981 enables a police officer with a warrant to enter premises accompanied by any person whom he chooses. Even that still gives rise to problems, because the police are supposed to be our lead in the investigation of crime.

I will give you an example. The police brought in computer experts to assist with a search that was conducted in connection with pornographic videos or videos of children. I cannot remember the details of the decision, but the issue that the court had to examine was whether the lead role in that search was being carried out by a person who did not have the authority to do it—namely, the civilian computer expert as opposed to the police officer.

I suggest that we widen these powers at some risk, given questions of personal liberty. Where the balance is to be struck has to be a matter for the

legislature, but I simply urge you to be conscious of the fact that we are operating within the realm of criminal law. Do you authorise a private investigator to enter somebody's house? There is no recourse with private individuals, but there is recourse with a police officer.

12:45

Mark Rafferty: We are talking about something that is in place at the moment: SSPCA inspectors, as authorised by Scottish Government ministers. We are not acting as individual persons. As the law stands, throughout the whole of Scotland, both the special investigations unit and our uniformed colleagues in the inspectorate obtain warrants to enter houses in relation to animal welfare offences. That primarily involves domestic animals, such as cats and dogs, but it also involves agricultural animals, such as sheep, horses, cattle and the like. It also extends to wild animals that have been made captive, which would cover an eagle in a trap or a fox or badger in a snare. We have those powers at the moment under the Animal Health and Welfare (Scotland) Act 2006, which gives powers to both a constable and an authorised inspector—the position of SSPCA inspectors is defined.

Therefore, what the SSPCA is asking for is not new but has been in place since 2006. We are asking for a simple amendment to section 19 of the Wildlife and Countryside Act 1981, to extend our powers to cover circumstances in which traps or snares have been set or poisons laid but a live animal has not yet been caught. If there is a live animal in a trap we can exercise our animal health and welfare powers—we do not need new powers for that situation. However, if we find a line of 100 illegal snares that have not yet caught an animal, we do not have the power to deal with the situation and we rely on getting a police officer to come and exercise powers under the 1981 act.

Bob Elliot: From an RSPB perspective, the 1981 act is quite clear—I defer greatly to Sheriff Drummond on that, of course. Under section 19, a police officer can go on to land “without warrant”. Someone before I arrived took that big step to ensure that a police officer could go and seize the eagle or poisoned bait or respond to whatever had happened and collect the evidence. That is the bit that we are trying to get at.

Nobody is suggesting that there will be a team of mavericks out there, sweeping through people's private grounds. Let us think about the countryside that we are talking about. We are talking about mountains, moors and glens, well away from curtilage, buildings or anything else. That is the land that it is proposed that people should be able to go on to collect evidence under section 19.

I have spent far, far too many hours standing on a hillside—apart from Grampian, of course—next to a dead golden eagle, waiting for a police officer to respond. Sometimes the person on the main desk asks me to give a postcode for where I am. I can give a 10-digit grid reference, but I am nowhere near anyone's house. I am not interfering with anyone's livelihood. The degree of intrusion is zero, but time and time again I feel that blocks have been put in place to prevent us from collecting the evidence.

Of course the collection of evidence has to be done properly and fairly, which is why I want the police to be able to respond. The SSPCA's idea is an absolute no-brainer. The SSPCA has trained, uniformed officers who have been doing the job for I do not know how many years and who have successfully investigated and prosecuted people not just for wildlife crime but for all sorts of offences.

It is funny that the police do not seem to mind the SSPCA dealing with lots of issues involving domestic animals. Mark Rafferty will correct me if this is wrong, but I think that it was the police who decided that the SSPCA and the RSPCA should do that, because they could not cope with all the incidents that involved cats, dogs and farm animals. We are at a point in Scotland at which the same can be said for some police forces in relation to wildlife crime.

I am a realist. Everyone is going through all sorts of cuts. I read about the doom and gloom, just as everyone else does. Chief constables are worried about all the areas that they must deal with, and wildlife crime will be at the bottom of the pile. A charitable body has suggested a solution and deserves serious credit for doing so.

Of course, as Sheriff Drummond said, there must be checks and balances. There is a role for wildlife inspectors under the 1981 act, but traditionally that was to enable people who are experts in their field to check caged bird rings and do all sorts of other things; it was not for the purpose that we are talking about. Amendments could be made to section 19 to allow people to enter land.

The Convener: We will take the issue forward.

The committee has heard that many gamekeepers work as special constables. Do Alex Hogg and other panel members think that such an approach should be encouraged?

Alex Hogg (Scottish Gamekeepers Association): During the thematic crime review the SGA's response was that all wildlife crime should be recorded, but that never happened. We also said that we support the police 100 per cent and we would rather that the police were trained to identify birds, feathers, eggs and so on. We would

rather have a fully trained police force, because the police are neutral, which is important when we consider the different sides that are involved. People want to be treated fairly.

There has been a bit of uptake in keepers becoming special constables.

I just want to say that a quick phone around the country last night showed that keepers were involved in capturing paedophiles and murderers—in one estate alone, there had been seven murders—and dealing with drugs that had been dropped out of aeroplanes into remote lochs and so on. All of those things are noticed by the keeper, who is the first guy who has to deal with them and contact the police.

The Convener: Constable McKinnon, do you have information on special constables?

Constable McKinnon: My understanding is that Tayside Police ran a scheme, but I cannot comment on the uptake, as that is not my force. We have a special constable network in Grampian. The special constable who was assisting me with a wildlife inquiry last night is an air traffic controller, not a gamekeeper, but I would welcome greater participation by people who work in the rural community—stalkers, ghillies, keepers, bailiffs or whoever. We want to explore that through the Cairngorms National Park Authority. In my opinion, the pool of people who become special constables is far too narrow, and it should be widened to include anyone who has something to contribute and has an interest in their rural community.

John Scott: Sheriff Drummond, in terms of the right of an individual to private enjoyment of his own property and, therefore, not to have individuals who are not police officers on his land, would the European convention on human rights have an impact on the issues that we are discussing?

Sheriff Drummond: Yes. Indeed, when I was reading over some of the existing powers that are in the relevant legislation last night, I wrote, "query ECHR" in the margins. I do not know to what extent compliance has been checked in relation to some of the powers. I would like to think that the Government's legal people had scrutinised the legislation properly, but I believe that it raises ECHR issues. Today's discussion has demonstrated the sensitivities that exist in this area and the fragmentary nature of the problem that we face. The issue is right on the front line of the investigation of wildlife crime, and it has to be resolved sooner rather than later.

Aileen Campbell: There has been a huge increase in wildlife crime. To what do you attribute that rise?

Sheriff Drummond: To the fact that wildlife procurators fiscal have been appointed. Because I am known as having an interest in wildlife matters, fiscals will give me anything that involves an animal. I have found myself dealing with somebody who has gone away on holiday without leaving food for his cats, because someone thought that that was a wildlife crime.

There might well have been an increase, but I have no idea whether that is the case; I take no interest in that side of things. It might be that better reporting and better publicity have raised the profile of this area. However, it would be much more interesting to view the reporting figures and the conviction figures on a single graph.

Bob Elliot: The question is a good one. We dealt earlier with the problem of recording, but another issue concerns the number of incidents that are found every year. You will see headline news that says that more things have been found or fewer things have been found year on year, but that is because items such as poisoned baits and so on are rarely found. We know that more is going on out there, but we just cannot get to it—hence our previous conversation.

We are slightly frustrated about the issue of the resourcing that we need to go and investigate these matters. It is almost as if we are looking at the countryside through a window and we cannot get to the bottom of what is going on. That is why we are building good partnerships at the moment with rural industries and individuals such as Sheriff Drummond.

The discovery of a poisoned golden eagle is an incredibly rare event, although we know that there must be more going on because research shows us that that is the case. It is the ecological trap idea that there is nothing breeding in those areas, overlaid with land management techniques.

The elephant in the room is that we are not finding everything that we could find. That is perhaps why we have had amendments to the legislation over the years. The Wildlife and Countryside Act 1981 is now quite bulky because we have tried to fill the gaps, and in Scotland we have gone further than anyone else has with such legislation. However, we have a lot more to do—that is a slight understatement—if we are to move on.

Aileen Campbell: So the figures might suggest better reporting rather than an increase in the incidence of wildlife crime, but at the same time we are only scratching the surface.

Bob Elliot: Absolutely. PAWS is quite a good network in Scotland. I do not think that the UK-wide PAW network works as effectively as ours does—but I would say that. A lot of education work is being done by countryside managers and other

interested parties, and a lot more awareness raising is going on. We are able to speak directly to people such as you. The Science and Advice for Scottish Agriculture reports confirmed incidents every year. They are mapped, and we work hard with the SRPBA on that. The maps were published earlier in the year. We are starting to get there with our work to identify the extent of the problem. From an RSPB perspective, when I am trying to assist with something such as an eagle that has been poisoned, it just backs up for me what the science is telling us. It is one of those rare occasions when you see cause and effect and think, “I now know that that is true,” whatever the concept is.

Mark Rafferty: There is a general feeling in society that our natural heritage and wildlife are extremely important to Scotland, and with that comes the attitude that the public do not want wildlife crime, that they want it stamped out, and that they want the authorities to do something about it. Between 2009 and 2010, the SSPCA dealt with 150,000 calls in which animal welfare issues were reported, some involving wildlife crime, and the figure goes up every year. As society realises the importance of its natural heritage, the authorities will come under increasing pressure to protect the resources and environments that we have in Scotland.

Sheriff Drummond: Please be careful, though. You heard one of the most fundamental errors of logic. Absence of evidence is not the same as evidence of absence, but those things tend to get conflated in the course of discussions such as ours. We assume that, because we are not finding stuff, it must be there. There might be many reasons—for example, the birds might have left—but the assumption is made, and that is where the resentments come in. When an investigation is carried out, nothing is found and it goes down as an investigation with no result. That is the kind of area in which damage is done on a public relations level between the investigator and the investigated. I would dearly love to see those being able to be merged.

Aileen Campbell: I want to ask about the dangers of our becoming overzealous and getting people to report wildlife crime or animal welfare crimes too much because they do not understand. How do we get the right balance to ensure that people are making appropriate reports?

13:00

Mark Rafferty: From experience, I have found that most people tend to say to police officers as well as to the SSPCA, “I’ve never reported this kind of thing before because I didn’t think you would do anything about it.” However, people are slowly beginning to realise that they should report

these things. As a result, I think that there was very much an underreporting rather than an overreporting of these crimes.

Bob Elliot: On the question of research versus evidence on the ground, I have to say that there is hardly any evidence on the ground because no one is going to find it. That is the obstacle that we face.

Even research published over the past 20 years or so from people who are experts in their field, who eagerly monitor birds of prey time and time again and who have given us one of the best data sets ever about the raptor population in Scotland—it is absolutely second to none—shows ecological black holes. For example, a recent paper made it clear that, although the same number of red kites had been released on the Black Isle as had been released in the Chilterns, the Black Isle population was not growing as fast as the population in the Chilterns. That excellent piece of work was presented to the raptor priority working group, which is an offshoot of the PAWS network, and we found it to be compelling science that demonstrated that something was going on. We know that those birds are dying. They have been radio-tracked and have been found poisoned. Every single year, the Government publishes the Science and Advice for Scottish Agriculture-confirmed poison maps, which display geographically where the problems are.

John Scott: Are you not making a big leap in concluding that, because the birds have disappeared, they have been poisoned? You are talking about two climatologically different areas 500 miles apart that support environments for the species and yet you are saying in evidence to the committee that those birds have definitely been poisoned. Is that not a big leap?

Bob Elliot: No. What I am saying is that the birds that went to the SASA were definitely poisoned. Either a bird has been poisoned or it has not—either it will prove positive for a substance such as carbofuran or it will not.

John Scott: And all the birds that have disappeared have been traced and sent to the SASA.

Bob Elliot: No. What happens is that natural mortality will be considered in the research. You work out whether the food supply and productivity are the same and, in that regard, the fact is that the red kite population on the Black Isle produces just as many chicks as the population in the Chilterns. The issue is not food supply. The young raptors are slow to breed because they wander widely. Members will have seen the story in the press about Alma, the golden eagle. This bird, which had been satellite-tagged and was into the third if not fourth year of a particular study, had

been roaming on the lookout for nest sites, but ended up dead, poisoned on the grouse moor.

In the east and south-west of Scotland you will see sub-adult juvenile eagles but not adults, even though there should be adults because there should be secure nesting opportunities for them. The research is very careful and rules out things such as a decrease in deer gralloch or other food, lack of nesting locations, changes in habitat as a result of an increase in forestry and so on. All those issues are taken on board in these peer-reviewed and published scientific documents. SNH's golden eagle document, which is one of the best I have ever seen, looks at all those factors, and the fact is that there are no eagles in the north-east or the south of the country. In fact, just after I started this job, we had the tragic poisoning of the golden eagle in the Borders. That was a nightmare to deal with, because she was half of the only breeding pair in the area.

All the breeding golden eagles in the UK are in Scotland. The pair in the lake district have not produced any young for a long time but must have produced an estimated 60 young, but where have they gone? The Borders pair produced young, but where have they gone? There is no pioneering going on, there are no new individuals, and the population is static.

Alex Hogg: I think that you have to be careful. As you guys saw for yourselves last week in Langholm, two pairs of harriers laid and then failed. If they had not been under such close scrutiny, the RSPB would have said right away, "Oh, they must have been poisoned." There are many different reasons why things happen.

Bob Elliot: Hen harriers do not get poisoned. They get shot.

Peter Peacock: This is rather intriguing stuff and I want to dig into it a bit deeper. It has been put to me that the number of poisoned birds that we discover is the tip of the iceberg and there are many more that we cannot discover, because people do not come across the evidence, given the scale of the territories that we are talking about. I do not know whether that is the case. I said last week that it had been put to me that up to 50 golden eagles a year could be poisoned. The evidence is not that they did not hatch, but that at a certain age of maturity, they vanished from the scene. The witnesses are involved with this issue day by day. Are we seeing only the tip of the iceberg? If so, how big is the iceberg?

Mark Rafferty: As a wildlife crime officer, I dealt with an incident in the Scottish Borders when I went on to an estate and recovered 25 poisoned birds in one day, which resulted in a conviction. The person involved had been a gamekeeper for somewhere in the region of 13 years. I have

consistently found that persons who are involved in the most serious levels of wildlife crime will also use all the lesser methods of criminality. That means that if they are poisoning animals, they are likely to be using illegal traps and if they are using illegal traps, they will be using unlawful snares. When you find one offence, you inevitably find a series of offences. It is a particularly difficult area to quantify. Given the resourcing difficulties, you are just not going to get a conclusive figure, but a significant amount of wildlife crime is happening in Scotland.

Bob Elliot: You asked how big the iceberg is. You must try to quantify these things properly and scientifically and not just pick things out of the air. I know that a paper on that subject is being prepared at the moment. Using the excellent golden eagle framework document, you could look at the 420 nest sites, see how many birds fledge and how many die and work out the figure.

Most eagle experts would say anecdotally that 50 eagles in Scotland are illegally killed every year. One would suppose that most of the golden eagles found in Scotland would not be illegally killed—people stumble over the birds, which go for toxicology testing, and the results come back negative. All those statistics are held by the SASA, so that work could happen—the number could be quantified. RSPB Scotland would welcome that sort of study to give us the figure.

The situation with the dead eagles that are reported to the police or to us is interesting. I really am generalising here, but if a bird dies on the west side of Scotland, where there is a breeding stronghold of birds, generally speaking, the death is from natural causes. In fact, we found a very old bird that had died of natural causes. Where the dead bird is a sub-adult bird that was pioneering, as Alma was, you will generally find that the poison tests will come back positive, because those birds are roaming. Adult golden eagles in the west of Scotland have their territories—they are very territorial and they really make sure that no other birds go there. They can live up to 40 years, so they will have really strong territories in the glens.

You get problems where the young birds are trying to pioneer to expand the golden eagle range in Scotland. They do not see adult golden eagles, for the obvious reason that no eagles are breeding in the area. Some of the nest sites that are named in the literature are historic sites. The birds are trying to pioneer; they see a suitable crag, which is probably ideal for eagles, they do not see any competitors, they probably see a good food supply and they hang around. That is when we get the problems of illegal killing.

Peter Peacock: The figure on which the eagle experts seem to be agreed—on the broad

scientific basis that you set out—is really quite staggering. People get upset in Scotland when we hear of two or three eagle poisonings in the course of a year, but you are postulating that the number could be up to 50, as I understand it.

Bob Elliot: That is correct.

Peter Peacock: I am probing this issue because I want to know what the motivation behind the practice is, and we can seek to address that through the law. It seems to me that people do not go out and poison eagles for the sake of it; there must be an underlying motivation. For instance, eagles might not be the target and might end up eating poisoned bait or becoming ensnared in traps that are intended for another purpose. What motive do you attribute to the practice?

I do not have the figures to hand, but I understand that reported poisonings doubled between 2009 and 2010. In the short term, there seems to be an upward pressure, with the figures moving about a bit. What is changing in the wider management of the environment that is giving rise to what seems to be an increased rate of poisoning, which results in the kind of scenario that you have described?

Bob Elliot: There are lots of reasons why people put down a poison bait. Some of them might think that it is simply easier than doing lawful things, such as snaring.

In a lot of the problem cases in which I have been involved, a rabbit has been splayed open on a prominent rocky knoll at the top of a glen. That is designed to attract birds of prey, which like to soar along those levels. People who put those things there know what they are doing. That is a classic method of killing whatever you like.

Very rarely do I come across poisoned bait that is half buried and is probably meant to attract a fox or something. Usually, a member of the public trips over a rabbit carcass that is liberally covered in blue granules of poison.

The Convener: Mr Elliot, can you answer the question, which was to do with why people are poisoning eagles, not how they are doing it?

Bob Elliot: In some areas, it is to maximise game management. If you want lots of grouse, you do not want lots of predators.

In some areas, the motivation might be different. It might be general predator policy, pheasant protection or whatever. There are lots of motivations. However, whatever the motivation is, it is indiscriminate. One could find on the edge of an estate a dead cat that had eaten bait laced with carbofuran—bait that could have killed birds of prey, crows or whatever, although I am sure that 12 dead crows would not make the headlines.

Peter Peacock: As you wander about the countryside, do you detect a change in the broad practices of some estates that might give rise to an increase in poisoning while others continue in their usual steady state? Is something happening with regard to the commercial management of some estates that is giving rise to what, on the face of it, might appear to be at least a short-term increase in poisoning?

Bob Elliot: We should say, as well, that not everybody is poisoning wildlife. We sit around tables and discuss this issue a lot, when we are not talking to you. In some areas, we still have a big problem with poisoning. We are good at working together, but we are not actually seeing the results on the ground—that is, we are still seeing poisoned eagles and buzzards.

There has been a huge positive change in Scotland, particularly in low-ground areas. The resurgence of the common buzzard is a major success story, as is what has happened with red kites in the central belt and Dumfries and Galloway. There are some really enlightened land managers, farmers and gamekeepers. A gamekeeper rang us up and said that he had a kite stuck in a pheasant release pen, which was an absolutely excellent thing for him to do.

There have been a lot of positive developments, but some parts of the uplands area in the north-east and the south are no-tolerance zones for raptors.

Elaine Murray: I wonder what can be done when you find evidence of the poisoning of raptors on particular estates. The SRPBA states in its evidence that it is frustrated by the amount of poisoning that has gone on, and it has made public statements condemning estates that poison raptors. We have tried to explore what can be done when poisoning is found on an estate. Would it be helpful if the SRPBA was able to throw the estate out and not have it as part of its membership? Would it be helpful to name and shame estates so that people know what is going on? What sanctions should be taken when evidence comes to light that estates are behaving in that way? From the point of view of the estates, they will all be tarred with the same brush when such things happen unless something can be done to isolate the bad guys from the guys who are observing the law.

13:15

Sheriff Drummond: May I address that, lest this become a private RSPB discussion between Mr Peacock and Mr Elliot?

Bob Elliot: I thought that you did quite well earlier.

Sheriff Drummond: I have checked sentencing manuals, sentencing material and a document called “Costing the Earth” that was produced for magistrates in England and Wales and I have not found a single case in which there has been a successful prosecution for killing a bird of prey; not one. All the prosecutions have been for possession of pesticides, laying of poison baits or whatever. I am not saying that there has not been such a case, but they are rare. I hesitate in this context to say that they are like hens’ teeth: there are not many of them, yet we talk as if sentencing in such cases is the central issue. The first and most important thing is detection.

I have no idea whether what is being said is correct, but I am not prepared to accept that the absence of evidence is evidence of absence. We must get our investigative processes and our legal framework into a healthy state so that people stop engaging in speculation and we have some hard facts. We also want to have some legislation in place that acts as a real deterrent. I have no idea how section 15A, which prohibits the possession of pesticides, found its way into the Wildlife and Countryside Act 1981. Frankly, it is a waste of time. There was already legislation that prohibits possession of pesticides. It was suggested that the mechanism would enable the 1981 act to address the question of pesticides, but it did no such thing.

You cannot send a man to jail for possession of carbofuran when you would not for possession of heroin. There has to be some balance in our society and in our disposals for such things. Equally, simply because a man pleads guilty to possession of carbofuran or alpha-chloralose, we are not entitled to draw the inference that he has killed a bird or intends to do so. He is simply in possession of a prescribed substance.

Elaine Murray: If Mr Rafferty goes on to an estate and finds 25 poisoned birds, as he has done, or if SASA has recorded instances of poisoned birds in particular areas, that is not an absence of evidence. That is evidence. What sanction should be applied when such evidence is presented?

Sheriff Drummond: It is not a question of what sanction should be applied. The question is what structure will enable those things to be effectively prosecuted, because if that happens, the sanctions that already exist in the legislation are robust. What we find in those circumstances is that a plea is adjusted to the possession of carbofuran outwith its statutory container. That is the framework within which we are operating and it is that which needs to be strengthened.

Bob Elliot: Sheriff Drummond’s point about the rarity of somebody being prosecuted for killing a bird is entirely correct. We can contrast that with

egg collectors. We do not have too much of a problem with egg collectors any more, but it was all the rage a good number of years ago. In the early days, egg collectors probably thought that a fine was their membership fee, but as soon as sanctions came in, which meant that they could be jailed, many of them simply gave up. The threat worked and they stopped collecting eggs. People were being jailed. That happens more often down south because people come up here, nick all our rare stuff and go back down south again. I am generalising slightly again, but that is what happens. Golden eagle and osprey sites are targeted and such egg collections are coveted. Around 20 to 25 people are still involved in such egg collecting. They are always repeat offenders, so they tend to be treated severely. People regularly get six-month prison sentences for committing that offence.

Conversely, we really struggle to articulate properly how serious the possession of carbofuran, for example, is, and we fail to make it clear why it is so serious. Traces of cocaine may be found on many £10 notes that are in circulation. If you swabbed the £10 notes in your pocket, you might find traces of cocaine on them, because cocaine is widely out there in the environment. Carbofuran turns up only in wildlife poisoning cases. It is a banned pesticide and is so toxic that it was taken off the list. It was banned years ago. Why should anybody have a bottle of it in their shed? We must wonder whether that is the equivalent of “going equipped” or “intending to use”. As Sheriff Drummond rightly pointed out, the bill does not give us a provision to suggest that. The issue is possession, and being dealt with. The circumstances of that and the history of the use of that chemical should be considered. People would never have it left over at home or have used it domestically. Finding it is incredibly rare.

Elaine Murray: Sheriff Drummond argued that pesticide provisions should not have been part of the Wildlife and Countryside Act 1981. He argued that that act is not the right place for them. Is there potential to address the matter within the scope of the Wildlife and Natural Environment (Scotland) Bill, or would such provisions still not be in the right place?

Bob Elliot: Suggestions have been made that need to be considered, one of which is to go back to vicarious liability. I would describe such an approach more as community responsibility. A selection of people who are concerned in the use of something would be involved. Pesticide results may be obtained via SASA from people’s knives, game bags, vehicles or whatever on an estate. However, things must be absolutely fair and proportionate. We do not want a disproportionate law, but it must be recognised that line managers and contractors, whoever they are, have a social

responsibility to ensure that such practices are not going on.

We welcome the fact that 200 estate owners have written letters to say that they condemn wildlife crime, and we look forward to seeing results from that. We welcome that as a sea change in attitudes and a recognition that we have a problem. We all agree that we have a problem, but we are arguing about its extent. We are arguing about how many rotten apples are in the barrel, and the argument is circular.

In respect of legislation, we think that phrases such as “concerned in the use of” and “going equipped” could be used, but we need expert opinion on the matter to sit down and sort things out. Sheriff Drummond is an expert. It is individuals who get charged for possession of carbofuran—no one else. No connections are made. What is their line manager doing to stop that? Where are the checks and balances?

The Convener: We will come on to vicarious liability shortly. Sheriff Drummond was nodding his head vigorously, and Alex Hogg wants to say something. Could there be so many raptors and birds of prey that land management would be severely affected? Could land managers ask SNH, for example, for permission to control the number of raptors?

Alex Hogg: We are at that moment in time with the buzzard population. An inventory needs to be done of the wildlife on an estate each year. It would be fine if 10 pairs of buzzards were found, but if the annual inventory showed an increase to 30 pairs, it would be obvious that there was a need to reduce the species. As I said, we all need to sit round the table and find common ground. If a licence needs to be applied for, we should see whether we can work out a system and a protocol to allow it to be instigated. In saying that, the number of raptors must be at a level at which SNH can say that removing some of the population will not affect the overall population. Everyone has to agree on that.

The SGA has, ever since it was formed, been trying to stamp out poison. There was a lot of secondary poisoning of red kites on the Black Isle—the chicks were eating stuff that had eaten rat poison, and ten or so chicks died in the nest. No feeding goes on at the Black Isle as happens in the Chilterns. The big question that really bugs me is this: where are all the poisoned ravens, carrion crows and seagulls? If poison bait is laid on somebody’s land, the first things to eat it are those species—the most common species—but their remains are never found.

Also, if the golden eagle population is such that the least bit of interference could knock it off, why are we continuing to export golden eagles? We

have exported 75 golden eagles to Northern Ireland and the Republic of Ireland, where most of them have been poisoned. Those are my observations.

Sheriff Drummond: What Bob Elliot said earlier prompts me to ask the committee to refer to my submission. I will not quote from it now, but the committee may wish to do that at a later stage.

Constable McKinnon: In Grampian, I have dealt with two cases of poisoned indicator species. In one case, ravens were found poisoned and in the other common gulls were found.

The Convener: Bill Wilson has a question. I remind him that we have already touched on egg stealing.

Bill Wilson: I will curry favour with you, convener, by combining my two questions on single witness evidence into one. Can the panel give examples or first-hand experience of where someone was convicted for poaching on the basis of single witness evidence? Most witnesses heard the earlier evidence session and Alex Hogg also heard the evidence last week. What are your views on single witness evidence? Should it be held as it is, expanded or abolished?

Sheriff Drummond: In 35 years, I have never had a case that turned on the evidence of a single witness. Let us think of the situation of a prosecutor who receives a report of a case that will be contested. In effect, one person is saying, "Here is the evidence that points to guilt" and somebody else is saying, "That is not what happened." The prosecution of the case may be weakened by the law saying that it can proceed on single witness evidence. I think that I have never in my entire professional career dealt with a case in which the only evidence was single witness. I see it as a gesture—

Bill Wilson: Have you had cases in which there has been single witness evidence with other corroborating evidence?

Sheriff Drummond: Hang on a second: if it is single witness evidence, there is no corroborative evidence.

Bill Wilson: I understand that. I was just expanding the question slightly.

Sheriff Drummond: On that basis, you could say in a murder case that you could proceed on the basis of single witness evidence. Single witness evidence is the absence of corroboration. In effect, it is statutorily saying, "There is no need for corroboration." It is saying that the evidence from one single source is sufficient for conviction. The statutory effect is the total absence of corroborative evidence. Anyone saying, "Single witness plus corroboration" just takes us back to the ordinary law.

Bill Wilson: Previous witnesses have referred to single witness evidence plus corroboration. That is why I was trying to clarify the matter.

13:30

Sheriff Drummond: An awful lot of muddled thinking goes on about such matters, frequently by people who have never spent a day in court. Single witness evidence plus corroboration means the ordinary law. Those are the two sources of evidence that are required.

Let us remember that corroboration is the safeguard in Scots law against wrongful conviction. Single witness evidence must be regarded as the exception. There may be historic and social reasons for it, but do not forget that a fundamental concept of our criminal law is that we require evidence from two independent sources. We regard that as a safeguard against wrongful conviction. It is also part of the reason why a jury can return a majority verdict in a murder case. An accused person could be found guilty of murder by a vote of eight to seven in Scotland, but that could not happen in England. When you start to compare the jurisdictions, you compare apples and pears. Corroboration is an important safeguard within the structure of our criminal law. To say that single witness evidence can found a conviction is to provide a serious exception to the rules of corroboration and means that there is no corroboration of any kind.

I have said enough.

Bill Wilson: Would you abolish single witness evidence?

Sheriff Drummond: That is a matter for the legislature. Sometimes, it is a gesture but, sometimes, it may be an evidential necessity for the kinds of reasons that have been pointed to. If you want to expand it into other areas under the Wildlife and Countryside Act 1981, by all means do so. However, I have never in my career seen a case that turned exclusively on single witness evidence.

The Convener: That is helpful clarification.

Peter Peacock: Sheriff Drummond, I will ask you about vicarious liability, on which you helpfully circulated a detailed and complex paper. I will clarify two things and separate vicarious liability from the points that you began to rehearse a few minutes ago.

In your paper, you talk about the need to unhitch the regulations on the unlawful possession of poisonous substances and create a specific, free-standing offence. You state what the terms of that offence could be. Do you advocate placing those provisions in the bill to cover the point that you make?

Sheriff Drummond: That is a matter for the committee. I produced the paper about 12 months ago for the partnership for action against wildlife crime. I called it a discussion paper and said in the introduction:

“it will ... give members the opportunity of discussing the matters raised within their membership if thought appropriate”

and that

“I emphasise ... that this is no more than a discussion paper and would welcome alternative approaches”.

I have had no adverse reaction from any of the organisations. I have had some supportive comments, but purely in private conversations. The matter has not gone anywhere. I had no idea what was intended to be done with it. For that reason, I asked the committee clerk whether he was aware of it and I put it into the frame. I hope that the paper is carefully reasoned so that people can criticise it and come to different views. For the reasons that I set out in it, the framework that I identified provides the mechanism that might be necessary to address poisoning incidents.

Peter Peacock: That is helpful. You have anticipated my next question, which would have been to ask what reaction the paper got. You have given me the answer.

In large part, you describe in your paper how we would create a better offence and, therefore, a better chance of securing a conviction, which I understand. Vicarious liability has been mentioned as a way of trying to reduce the number of offences that occur in the first place by creating a pressure within the management regimes of estates that would, in effect, require owners, agents or managers to make it absolutely crystal clear to every employee that any bird poisoning would be verboten, so to speak. You are clearly sceptical about that. Will you rehearse the reasons?

Sheriff Drummond: It is not a question of scepticism; to say that vicarious liability will solve the problem is, frankly, to talk about the wrong thing. Vicarious liability is a well-recognised and well-identified legal concept, which is worthy of a textbook—indeed, there are textbooks exclusively on the subject.

We do not simply say, “And there shall be vicarious liability”. That is meaningless. We need to spell out specifically what is meant and consider the issues that arise. What happens if the person who is the principal in the illegal activity is acting outwith the scope of his employment? What happens if he is acting in the face of specific prohibition? A gamekeeper who lays poisoned bait might have a contract of employment that says that he will not do anything like that under any circumstances. What do we do about that?

Many of the larger estates might be owned by trusts. Let me read from a decision of the court of criminal appeal in the recent past:

“In summary criminal proceedings ... we are of opinion that the trustees are not personally liable for the acts of the trust.”

However, the approach that is proposed would make trustees vicariously liable. If we want some elderly solicitor from Jersey to stand in the dock and be vicariously liable, we are going in the right direction.

What I am trying to say is that to wave the flag of vicarious liability is largely meaningless. If it had any meaning, the people who are seriously minded to get round it would simply make the gamekeeper self-employed. There are so many ways round it. Vicarious liability has been floated as some kind of answer. It is not an answer and, with respect, it is being floated by people who do not necessarily understand the concept that they are talking about.

The issue can be more directly addressed under existing health and safety provisions. We make the employer answerable for the regulated substances of which his member of staff is in possession. The member of staff might possess many regulated substances, for the treatment of dogs or birds and some crops. Records will be kept of such substances.

If someone has a regulated substance in a gun bag, a glove compartment or a film container, the person is not storing the substance in the appropriate container or under the appropriate circumstances and is therefore in breach of the pesticide regulations, but with respect—and I do not underrate this—a breach of the pesticide regulations is all that that is.

However, if we say that the possession of such a substance in such circumstances will give rise to a presumption that it is the same as setting and using poisoned bait—the formulation that I suggested was that

“such possession or storage shall, for the purposes of Sections 5 and 11 be presumed to be the equivalent of setting in position or use unless the contrary be proved”—

we would be saying to the person, “If you want to carry some of that in your gun bag or your glove compartment and you are caught with it, you will be presumed to have been setting poisoned bait. The onus to show that you were not doing so will be placed on you.”

Peter Peacock: That was helpful, thank you.

Bill Wilson: Let us say that we find on an estate half a dozen carcasses that have been laced with poisoned bait. How would your proposal deal with that situation? Would the estate be responsible because the carcasses were on it?

Sheriff Drummond: In the next part of my submission I gave a bit more detail and addressed some of that. Remember where your starting point is: it is that you have found a person in possession of a poisonous substance that was not being stored in its appropriate container or under appropriate conditions but in what would be regarded in law as criminative circumstances. If my suggestion is adopted, the law will say to the person, "You're going to have to offer an explanation for that, son."

If you also find 25 poisoned carcasses on the same piece of ground, which all happen to be poisoned with the stuff that you found in the person's possession, you have instantly created statutorily the evidential link, as opposed to having to chase around trying to find causation and find out whether it is the same stuff and so on.

Some kind of protection for the employee must be built in. I address that in the next proposed subsection. The gamekeeper should be able to keep a register of the substances that he possesses. I suggest that, if he has carbofuran in his register and a reason for possessing it, the presumption does not arise. It will arise only where the substance is found in those criminative circumstances.

Bob Elliot: Apologies, but I have a point of clarification. People cannot lawfully have carbofuran.

Sheriff Drummond: Pick any pesticide—it does not matter.

Bob Elliot: People cannot have any pesticide with alpha-chloralose, in its pure form.

Sheriff Drummond: I am obliged. Pick any name—it does not matter.

If somebody is found in possession of a regulated substance, the presumption, it is provided, is that he possesses it for the purpose of committing a criminal offence. If he is in lawful possession of whatever substance, we would expect to find it in his register and we would expect his employer to have countersigned the register. The employer would have acknowledged, "That is what my employee possesses. I know that he has it and I am happy with the reasons why he has it." That situation would give rise to exemptions. The guy we are trying to get is the man who has the stuff in the gun bag or the glove compartment.

The self-employed and hobby gamekeeper is a different kettle of fish. He should be addressed when he goes to a supplier and buys the stuff. The supplier should make the appropriate entry in his register.

Either way, that process would create traceability, responsibility and linkage to the

employer, as it would create the knowledge in the employer's mind. If the gamekeeper or other person was thereafter caught in possession of a substance, the short questions would be, "Why was it not in your book? Why was it not in its appropriate container? Why was it not in appropriate storage?" The person's failure to do those things would give rise to the presumption that they possessed the substance for the purpose of setting poison or whatever. I suggest that that structure be examined and implemented.

The Convener: We must finish shortly, but I have questions from Liam McArthur, Aileen Campbell and Elaine Murray.

Liam McArthur: Sheriff Drummond alluded to the link through health and safety provisions between the employer and the employee. When the issue arose at last week's meeting, the SRPBA pointed to the art and part provision that was introduced by the Nature Conservation (Scotland) Act 2004. Does that provide an alternative link? Can you cite any examples in which the art and part provision has brought in an employer?

Sheriff Drummond: The causing and permitting provisions have been in the Wildlife and Countryside Act 1981 since it came in. Off the top of my head, they are to be found in sections 1, 5, 11 and 13. I am not aware of ever seeing a third-party prosecution, if I can put it that way, based on those causing and permitting provisions. A causing and permitting provision does nothing to up the state of the evidence. It is an evidential problem.

Aileen Campbell: I hear what you say about vicarious liability and all the rest of it, but I still cannot get over the fact that there are persistent cases of estates contravening the laws. No matter how many times we get rid of the gamey, it still happens. So who are those people being directed by, if they are managing the land poorly, putting down snares wrongfully or poisoning?

Sheriff Drummond: You are asking the wrong man.

Aileen Campbell: It is all very well to have things written in a contract of employment, but if there are other levers that do not have the same paper trail, such as a tied house, ultimately we will never get the person on whom we want to pin the blame. How do we get round that in legislation?

The Convener: Other panel members might want to answer that.

13:45

Constable McKinnon: There is a danger that we see all the acts that we have discussed—we have touched on a few, but we have not gone into

all the legislation on badgers, salmon and deer—including the WCA, as not fit for purpose. The scenarios that the sheriff refers to can clearly be dealt with as a section 15(a) offence under the WCA. I have had three convictions for that offence in Grampian; it is straight possession of a banned substance. The substance involved was carbofuran, which has been banned for 10 years. A whole range of pesticides that are regularly used in wildlife crime in the context of poaching are listed in the order.

The legislation exists in the WCA, but the frustration that we feel as wildlife crime officers—I speak for my own force, but I also speak for my colleagues in other forces—is reflected in a scenario that I encountered in Grampian. A stash of carbofuran was found, in a sizeable quantity—kilograms of it—and traces of carbofuran were found in a vehicle and in a bag in a shed. Some months later, a dead bird was found and sent to SASA, which confirmed that the bird died from ingesting carbofuran. To me, the people managing that land were concerned with the use of an illegal pesticide. However, the problem was linking that to an individual. The phrase “body corporate” is used in the Protection of Badgers Act 1992. That touches on the point that people manage the land as managers, owners and so on.

I do not know where I sit with vicarious liability, but I see the potential of another offence under the WCA, which is a good act, as it contains plenty of powers and good charges. However, the problem is linking the offence to an individual. If provision was made for linking the offence to a body corporate, in scenarios like the one that I have outlined in which there was a lot of circumstantial evidence, the prosecutor would have a very strong case. They could say that the managers of the land or whoever were concerned in the use of illegal pesticides, which are clearly listed.

Elaine Murray: I ask for two points of clarification, the first of which we have touched on already. If someone is in possession of an illegal pesticide, the law at the moment is sufficient to enable the prosecution of that person for a criminal offence.

Constable McKinnon: That is correct, as it stands.

Elaine Murray: My other point relates to the scenario that Sheriff Drummond outlined. If an employer has signed off, if you like, the pesticide and given permission for it to be kept or used in a particular way, but you find 25 poisoned birds on the estate, who comes under suspicion and could be prosecuted? Is it the employer or the person who is in possession of the pesticide? It could be that the employer has sanctioned the illegal use of the pesticide.

Mark Rafferty: May I answer that? We have one case at the moment in which an employee has been detected in possession of poison, laying poison and killing wild birds. He has accepted his part in it and he blamed his employer. He said that he was provided with the chemicals and instructed to do it. That case is currently awaiting trial and, obviously, I cannot comment on it. Apart from that case, there are very few cases in which an employee blames his employer.

Elaine Murray: Sheriff Drummond suggests in his submission that there is a protection for all employees if their employer has signed off the way in which they use what could be poison.

Mark Rafferty: Because the chemicals are completely illegal—

Elaine Murray: I am not talking about illegal substances; I am talking about the scenario that Sheriff Drummond painted for us, when the substance is legal but there are restrictions on how it can be kept and used.

Mark Rafferty: Situations involving legal substances are few and far between. A legal substance called carbosulfan has featured in one or two cases in Scotland. I have dealt with one case that involved carbosulfan, but cases involving legal chemicals are almost non-existent. It is completely illegal in the UK to have the chemicals that we are talking about under any circumstance, therefore I cannot see that a register or a registration scheme would be useful. To equate the situation to that of drugs, it is illegal to have heroin or cocaine, but people do.

I am personally aware of a number of problem situations in which employers instruct their staff in how to deal with the authorities, how to avoid detection and so on. They distribute leaflets containing that information. Although they insist that their staff sign a contract to say that they will not kill wild birds, they instruct them to do so thereafter.

John Scott: Can you give us the names of those people?

Mark Rafferty: I am more than willing to do so. Obviously, I will not do that in an open forum, but I can make those names available.

Sheriff Drummond: I am sorry, but I am going to be very critical of someone on a personal basis, which is not something that is in my nature.

Dave McKinnon referred to the existence of the term “body corporate” in the 2006 act.

Constable McKinnon: It was the 1992 act.

Sheriff Drummond: Indeed. That is the 1981 act, in its original form, and section 69 contains exactly the same provision. Merely making provision for the prosecution of a body corporate

does nothing to establish the liability of the body corporate. It is a question of the evidential link. In cases like the one that was just described to you, the evidential link is that the person who was found to be in possession of the substance says, "I got it from him." That is your starting point, and you have the rest of the chain. You might also have corroboration for that. There might be another employee who says, "Yes, I heard him," and the employer will then be charged with causing and permitting. However, that is a rare sequence of events, as has just been recognised.

The question that you posed concerned the issue of who gets prosecuted in a situation in which dead birds have been found and an employee is found to be in possession of a controlled substance. The answer is that the employee gets prosecuted, because there is no evidence to prosecute anybody else—there is evidence, but it is not evidence of the guilt of somebody else. However, if, in the course of that investigation, that employee says, "I was instructed to do this by him," and, in further investigation, another member of staff says, "That's right, he's always getting told to do that," you are up and running. It is a question of finding the evidence. The structure is already there. The mere existence of the words "body corporate" neither adds to nor detracts from that.

The Convener: We must leave it there. I thank all our witnesses for their evidence and ask them to make any supplementary evidence that they might have available to the clerks. We have some questions that we have not covered today, and we will ask you to answer them in writing.

That concludes the public part of today's meeting.

13:53

Meeting continued in private until 14:01.

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