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Official Report

RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 22 December 2010

Session 3

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
30th 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:

Joyce Carr (Scottish Government Rural and Environment Directorate)
Roseanna Cunningham (Minister for Environment and Climate Change)
Judith Tracey (Scottish Government Rural and Environment Directorate)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 4

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 22 December 2010

[The Convener *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Maureen Watt): I welcome everyone to the committee's 30th and final meeting of the year. I remind people to turn off their mobile phones and BlackBerrys as they impact on the broadcasting system. Once again, Sandra White is substituting for Aileen Campbell.

The first item of business is a decision whether to take in private item 7, which is consideration of a draft letter to the Cabinet Secretary for Rural Affairs and the Environment on the Scottish Government's draft land use strategy. Do we agree to do that?

Members *indicated agreement.*

Subordinate Legislation

Vegetable Seeds Amendment (Scotland) Regulations 2010 (SSI 2010/425)

Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 (SSI 2010/426)

Scallops (Luce Bay) (Prohibition of Fishing) Variation Order 2010 (SSI 2010/429)

10:03

The Convener: The next item of business is consideration of three negative instruments. The Subordinate Legislation Committee has made no comment on any of the regulations, and no motions to annul have been lodged. Does any member have any point to raise on any of the three instruments?

John Scott (Ayr) (Con): I would like to raise a point on the Scallops (Luce Bay) (Prohibition of Fishing) Variation Order 2010. I draw attention to what must be a typo in the Executive note. Under the policy objectives heading, it states that the order

"will enable Luce Bay to reopen to scallop dredging from 8 November."

From everything that I have read, I am sure that that can only mean 8 December. I assume that it is a typo, but nonetheless I imagine that it should be sorted.

The Convener: We have that on the public record, and we will ensure that it is looked at.

John Scott: Thank you.

The Convener: Does the committee agree that it has no recommendations to make on SSI 2010/425, SSI 2010/426 and SSI 2010/429?

Members *indicated agreement.*

Reservoirs (Scotland) Bill: Stage 1

10:05

The Convener: The next item of business is to take evidence on the Reservoirs (Scotland) Bill. We welcome the panel from which we will hear today. It consists of Roseanna Cunningham, the Minister for Environment and Climate Change; Judith Tracey, head of flooding and reservoir safety policy; Fiona Quinn, reservoir policy manager; Joyce Carr, head of water environment policy; and Stephen Rees, solicitor in the food and environment division. All of the witnesses are from the Scottish Government. The minister has indicated that she wishes to make a short opening statement.

The Minister for Environment and Climate Change (Roseanna Cunningham): Good morning. The Government included in the Flood Risk Management (Scotland) Act 2009 a key requirement to reduce the risk of flooding from all sources in Scotland. Today I have the opportunity to talk about the progress that we are making in an area that does not get much day-to-day attention—reservoir safety.

There are 662 reservoirs in Scotland that are currently regulated, but there are many more smaller reservoirs that have never been subject to mandatory supervision. That means that currently we have little or no information about many reservoirs that hold more than the equivalent of four Olympic-sized swimming pools of water. The fact that we do not have reliable data on reservoirs of between 10,000m^3 and 25,000m^3 is a good reason in itself for introducing new legislation. Gathering that information on a central database, to be maintained by the Scottish Environment Protection Agency, will enable the risk of flooding from reservoirs to be thoroughly and consistently managed.

Additionally, in recent years there have been incidents that have raised concerns about the potential impact of the failure of smaller reservoirs. One such incident affected the Maich fishery in Renfrewshire. The reservoir in question was not regulated, as it held less than 25,000m^3 of water, but in August 2008 there was a near failure of the dam that required the evacuation of residents downstream, the closure of roads and the activation of emergency works to prevent an uncontrolled release of water. There is no doubt but that that near miss had the potential to cost lives, never mind to cause extensive damage to property and infrastructure. I consider the Reservoirs (Scotland) Bill a necessary step in our management of flood risk in Scotland that will help to ensure that nothing like the Maich incident happens again.

Although reservoirs are a key component of Scotland's water supply regime, the bill is not about ensuring the quality of drinking water in Scotland. It is also not about stopping people falling in, as was rather humorously reported in the press. The focus of the bill is on stopping water getting out; that is the legislation's primary concern.

Many of Scotland's dams are more than 100 years old, and they are not getting any younger. The previous piece of reservoirs legislation, the Reservoirs Act 1975, was fine for its time, but clearly times have changed. The 1975 act made any reservoir of more than 25,000m^3 subject to the same level of inspection and supervision requirements as any other such reservoir. However, we think that that is an arbitrary approach and are looking to move away from it.

The bill is based on the level of risk that each reservoir may pose to people and property. That makes sense for two reasons. First, reservoirs that are situated close to houses and other infrastructure will be more rigorously assessed, providing the highest level of security and protection for nearby residents. Secondly, reservoir managers will be treated fairly and proportionately. It seems only fair that an isolated, remote reservoir deep in the countryside should be subject to fewer mandatory requirements than a reservoir that is situated above a city, for example.

The probability of any reservoir failing is very low, but the bill will reduce that risk even further. Simply put, it is a natural improvement on the current situation. Under the 1975 act, each of the 32 local authorities has responsibility for enforcement in its area. Their work over the years since then has been appreciated, and their widespread agreement on our proposals, when we consulted on the bill, was crucial to our going ahead, but there are significant advantages in having one central enforcement authority for reservoir safety.

SEPA will hold a central register of all reservoirs in Scotland, receive details of all on-going maintenance and construction work and hold a comprehensive database of flood maps; in short, it will take an holistic view. The agency will be able to take decisions in a consistent, open and well-informed way. However, even with that change we will retain aspects of the current system that have proven to be absolutely reliable over the years. Technical advice and supervision from reservoir engineers, who are appointed to specialist panels by ministers in consultation with the Institution of Civil Engineers, has been a central feature of reservoir safety for more than 30 years. The

process is well understood by everyone who is involved in the system. The engineers' knowledge is second to none and will continue to be invaluable, not only to managers but to SEPA, which will rely on their specialist input to arrive at any technical decision. The engineers are the cornerstone of the system and we are lucky to have them.

The Reservoirs (Scotland) Bill represents a crucial step in our aspirations to manage effectively the risk of flooding throughout Scotland, whatever the source. We work constantly to do that to the very best of our abilities and the bill is as good an example as any of the continuing improvements that we are making across the board.

Peter Peacock (Highlands and Islands) (Lab): You mentioned that the level at which regulation will kick in under the bill is 10,000m^3—four Olympic-sized swimming pools. Why is it four, not three or five? What is the logic of that? Is it simply a matter of judgment or is there a technical reason for it?

Roseanna Cunningham: That was the professional advice that we took on the size of reservoir that, if it was breached, could create the kinds of problems with which we are concerned. The Institution of Civil Engineers said that a smaller reservoir would not be likely to cause those problems and that 10,000m^3 was the point at which it felt that some risk assessment was necessary.

Peter Peacock: We have picked up from evidence in the past couple of weeks—perhaps it was only last week—that one interpretation of a bit of the bill is that the regulation would cover inlets, pipes and so on into a reservoir. Scottish and Southern Energy, which manages many reservoirs, was concerned about that. There was a plea for that to be dealt with or clarified in guidance. Is it your intention to issue guidance to clarify those matters?

Roseanna Cunningham: We intend to lodge a number of stage 2 amendments—not a great number, as you might imagine, but some—and that is one of the matters that we will consider for stage 2. Do you want me to go into that any further?

Peter Peacock: No, that is fine. It seemed a legitimate concern that could be dealt with quite quickly.

There has also been a hint that there might be an argument for taking reservoirs that have a pretty stable structure, particularly those that have concrete storage dams, and are larger than 10,000m^3 but below the current 25,000m^3 threshold for regulation out of the regime in the bill because the risk is so low. Is there a case for exempting any such reservoirs? Has that been considered?

Roseanna Cunningham: We are talking about risk base, so the lower the risk, the lower the likely regulation. The bill allows for a power of exclusion if it is considered that the risk is so small as to be negligible.

Peter Peacock: So the implication of the low-risk regime would be that, so light would be the regulatory touch on reservoirs at the scale that I mentioned, there would be no practical effect?

Roseanna Cunningham: We are trying to move to a risk-based approach. An enormous variety of risk assessments will be involved and some reservoirs may be assessed as being so low risk that they do not require much regulation, despite their size.

My officials are busy searching through the bill to find the section for you.

Peter Peacock: Perhaps you can come back on that.

Roseanna Cunningham: It is section 2(3)(b). We have the capacity to assess the risk as being so minimal that we would, in effect, remove a reservoir from regulation, but we have to find the reservoirs to which we need to extend the risk assessment because, currently, reservoirs are all being assessed on their size, not their safety.

10:15

The Convener: Before Peter Peacock asks more questions, I will bring in Bill Wilson.

Bill Wilson (West of Scotland) (SNP): If somebody put up a new development downstream of a reservoir that you had declared minimal risk and more or less excluded from the requirements, would that bring the reservoir back into the requirements? Would it modify the risk in consequent assessments?

Roseanna Cunningham: Yes. On any sensible view that would have to be the case, although you would also want the planning authorities to look at the matter. If a reservoir is very low risk or no risk and there is a significant infrastructure or housing development in the area that would be caught by a breach, it would be reassessed.

Sandra White (Glasgow) (SNP): I am interested in the power of exclusion and how we get to the point at which reservoirs are identified for exclusion. Will the reservoirs be identified for exclusion before they have entered into new licensing arrangements? If reservoir managers, whether it be Scottish Water or individual reservoir managers, pay for a licence under the Reservoirs (Scotland) Bill, will the reservoirs be looked at and

the power of exclusion perhaps exercised before any money is parted with?

Roseanna Cunningham: There is no licence. There is a register but there is not a licence.

Sandra White: Yes, but people are having to pay money to put forward information—

Roseanna Cunningham: Registration is free for the first six months.

Sandra White: Yes, but will it be done within the first six months? I am talking about costs to people. We are talking about licensing all reservoirs over a certain size, but we are now being told that there is a power of exclusion if they are low risk.

Roseanna Cunningham: Can we not use "licensing"? I am sorry, but that is not what is happening.

Sandra White: But we were told by—

Roseanna Cunningham: The correct word is "registering".

Sandra White: Sorry—registering.

Roseanna Cunningham: It is not quite the same as licensing.

Sandra White: Okay. Perhaps I have taken up the information that I was given about licensing, or registering, wrongly. The point I am trying to get to is this: given that you now have the power of exclusion under section 2, will that power be exercised before reservoirs are registered? Will the reservoir managers concerned be refunded retrospectively if money is paid?

Roseanna Cunningham: If the power of exclusion comes into play—let us not become too obsessed with the power of exclusion, because I do not know how many reservoirs would be excluded in these circumstances; it might be only a tiny handful—reservoir managers will be advised that reservoirs have been formally excluded and that, therefore, they are not required to register. The situation you describe would not come into it, because they would not have to register—because the reservoir would be excluded. They would not be on the register. A risk assessment has to be carried out, though, because, obviously, you cannot make an exclusion without first assessing the risk. Whatever the risk assessment involves, different reservoir managers will have to comply with whatever is then required. If there is no risk, there is no need to comply and there will be no registration if the reservoir is excluded.

We cannot estimate at this stage how many reservoirs might be excluded. My instinctive feeling is that it will be very hard to make a ruling that there is absolutely no risk from any reservoir breach, although a few reservoirs may be in that position. The exclusion that we are talking about is for types of reservoir, which goes back to the way Peter Peacock asked the question in the first place: there are some types of reservoir that one could take the view are so constructed that risk will never be an issue. It is not about a specific reservoir; it is about the kind of reservoir.

Sandra White: I understand.

Roseanna Cunningham: I also ought to say that, even if something is not excluded, if it is low risk little in the way of management is required. The regime is extremely light. The point of what we are doing is not to apply the same regime across the board; it is to apply a proportionate regime, depending on the risk assessment.

John Scott: You said that a risk assessment might change if there were a downstream development subsequent to the initial risk assessment. If the risk assessment changed from low to medium or high in such a situation, and that became a burden on the dam owners, who would be responsible for the increased costs?

Roseanna Cunningham: There is a requirement to consult on development plans that involve developments downstream from reservoirs. I think that some authorities are already publishing main issues reports in relation to development plans. At that early stage, authorities are required to ensure that people who might be expected to comment are made aware of the consultation, which means that the reservoir manager ought to be made aware at an extremely early stage in the process and will be able to comment. Further, before anything happens, the Scottish Environment Protection Agency must be consulted.

Forgive me: my officials are passing me advice on who would be liable for the increased costs that you are asking about.

In the circumstance you describe, I think we expect that there would be a discussion with the developer about the developer taking on the liability for increased costs, because there would be a great degree of material change. However, that would be part of an early negotiation in the planning process. The discussion would not be entered into after the houses had been built or the plant had been installed. Developers are already expected to pick up costs for a variety of things, as you know. In the circumstance you describe, developers would be in the same position as they are at present with regard to various negotiations.

Peter Peacock: Perhaps one of the first things you could do in relation to your new climate change responsibilities is set a quota for the number of Post-it notes officials may use in evidence sessions, to help us to meet our recycling targets. Leaving that to one side, I would

have thought that to help to meet our climate change targets you will promote small hydro schemes. Is there any conflict between encouraging more small-scale hydro and being caught up in new regulation, potentially, by this regime?

Roseanna Cunningham: I am sorry, I do not understand why you—

Peter Peacock: Under climate change legislation, we are encouraging hydro—

Roseanna Cunningham: Yes. I do not see why there would be a conflict.

Peter Peacock: Are many of those schemes likely to fall into the new regime of reservoir regulation?

Roseanna Cunningham: I suppose it depends on how small you think small-scale is. Some of the extremely small hydro schemes that I have seen could not possibly be included under the new regime, but others might be. If they are big enough to come into the scheme, they will do so.

Joyce Carr (Scottish Government Rural and Environment Directorate): The majority of small-scale hydros would not be looking at reservoirs of this nature, where there are no run-of-river schemes or existing small weirs. They are far below the threshold that we are talking about.

Peter Peacock: So encouragement of such electricity generation is likely to be done below the threshold; above the threshold there will simply be a risk-based approach?

Joyce Carr: Yes.

Roseanna Cunningham: They would simply be in the same position; the process will be risk based. I have not seen many small hydro schemes in locations where this would become a huge issue. If you are thinking of any in particular, you can say so.

Peter Peacock: I am simply trying to anticipate a policy point. That is fine.

You touched on the six-month free registration period in your response to questions from Sandra White. Will new reservoirs get a six-month grace period or will the charge apply from the date on which they are registered?

Roseanna Cunningham: The six months applies to everybody. Obviously, we expect brand-new reservoirs to be built in such a way that they are at low or zero risk. If a reservoir is over a certain size, people will know that it will be assessed for risk. The same six months will apply.

John Scott: I declare an interest as a past student member of the Institution of Civil Engineers.

Peter Peacock: He is an expert on Mohr's circles.

John Scott: I am not an expert.

Should SEPA have to rely on input from the ICE to fulfil its duties, or should it employ relevantly qualified engineers? I see potential conflict in this area. SEPA says that it will be an "intelligent customer"—that was the phraseology it used last week—by buying in expert advice, but those engineers may also be panel engineers. How do you reconcile that? Should SEPA not have its own in-house expertise?

Roseanna Cunningham: Our view from the start has been that we do not want to replicate what already exists. That is why we have gone down the road of using the existing panel and not setting up a separate or alternative structure. There are lots of different ways in which to do this, but it seemed to us most sensible for SEPA's first recourse to be to the existing pool of expertise. I suspect that it would end up employing from that pool if it were to employ its own engineers. I am not sure that SEPA would be in a different position or that it would get advice from any different source by employing engineers; the engineers that it would have to employ would be likely to be on the panel.

John Scott: You do not see any possibility of conflict of interest? Depending on the same people to fulfil both functions seems an inherent weakness in a regulatory body. Perhaps I am being naive.

Roseanna Cunningham: When it takes advice, SEPA will go to the experts. It will always be possible, at some point on some issue, for SEPA to red flag a conflict if it feels that that is necessary. At the moment, we do not expect there to be a problem. The regime that is in place is pretty long standing and well tested. There has never been a challenge in 35 years of the current system. Unless you have a concrete situation in mind where you can see clearly that a conflict might extraordinarily arise, after 35 years of no conflict, I have to accept that there will continue not to be that conflict.

John Scott: We are talking about what-if scenarios. We are proposing regulation where there was none of a similar sort. We are moving the regulatory burden from local authorities to SEPA. In asking SEPA to be the regulatory body, I see an inherent conflict in asking it to take advice wearing two different hats. Perhaps I am being naive.

10:30

Roseanna Cunningham: A local authority is in exactly the same position, and there has been no

conflict over the past 35 years. What-if scenarios can be helpful, but they are most helpful when one can suggest a concrete scenario that is likely to occur. I cannot think of such a scenario offhand and nobody has suggested one.

The Convener: We will come on to that; the disputes are resolved anyway.

John Scott: Thank you—I will move on. The bill considers environment, cultural heritage and key infrastructure to be as important as human safety. Does the minister intend to offer guidance on a hierarchy of those factors for the purpose of risk designation?

Roseanna Cunningham: Yes, there will be guidance.

John Scott: Will there be a hierarchy of risk?

Roseanna Cunningham: Well, I think that if there was a real risk to life, it would not take a genius to work out what the hierarchy would be.

John Scott: Thank you for the explanatory—albeit slightly patronising—answer. At present, the bill puts all those factors on an equal footing, but you are telling me that it will not take a genius to establish what the hierarchy is, so they will not necessarily be equal.

Roseanna Cunningham: I do not want to be patronising, but I am pretty certain that any guidance is unlikely to say that if there is a choice between a ruin and 100 human lives, we will go with the ruin and not the human lives. I would find that extraordinary, and I cannot envisage that the guidance would be drafted along those lines. I may be wrong, but my guess is that I am not.

John Scott: I think that we have both made our points.

What is your view on the argument by the Institution of Civil Engineers that the consequences of failure should be the most important—indeed, almost the only—way of assessing risk?

Roseanna Cunningham: The consequences of failure being the result if a dam is breached?

John Scott: Yes. The ICE, as I am sure you are well aware from its evidence, has said that that should be the overriding priority in risk assessment, to the exclusion of almost everything else.

Roseanna Cunningham: We have to start on the basis that the probability of flooding from any reservoir is really low. When we are talking about the risk, we are not working on the basis of imminent or near-imminent breaches at any reservoirs. We have been extraordinarily lucky—although I use the word "lucky" advisedly, as it is testament to the engineers that in Scotland we have not had much in the way of problems.

The risk to which the bill refers is probably wider than what the ICE is talking about, but that does not mean that the ICE's argument would not be compelling. In any event, as we discussed in relation to the guidance, the biggest risk that we face is the risk to human life, and that will always be the case.

I suppose that that is what the ICE is thinking about, but probabilities are useful, too. It is not a question of having only one set of outcomes that we consider to be serious, and other sets of outcomes in which we have no interest. I am sure that that is not what the ICE meant, because it will be concerned about all potential outcomes. We are considering the question of probability, which includes probability of outcome not just probability of breach.

John Scott: It is the probability of breach that the ICE has said it finds so difficult to assess, which has led it to the viewpoint that only the consequences of failure should be taken into account. If you agree with that, should SEPA seek to quantify the apparent differences in probability of failure? From the evidence that we have heard, some types of structure are more likely to fail than others—for example, an embankment dam is statistically more likely to fail than a concrete dam. Do you intend to establish a hierarchy for the probability of failure, depending on the type of dam?

Roseanna Cunningham: We have already discussed the possibility that some categories of dam might be classified as capable of being excluded completely. Therefore, in a sense, some of that is already built into what we are proposing. An assessment will be made and, as was indicated earlier, some categories of dam may well be assessed as being such a non-risk that they can be completely excluded. Therefore, we start on that basis. There is then a risk assessment.

We are talking about a variable regime for regulation, and the risk assessment will have to assign a category of risk to sets of reservoirs at least in some broad fashion, even if the categories are as crude as high, medium, low and reservoirs that would be excluded. Obviously, there will be some categorisation of risk. It will not simply be said, "Well, there's a risk there. Whatever." In a sense, the bill would be pointless on that basis. We have to think about graduated risk. In the bill, risk is a combination of consequence and likelihood; there is not a simple tick-box scenario. There will have to be a proper professional assessment, but that assessment will take into account not only consequence but likelihood. Likelihood may be slightly harder to assess in the

circumstances, but that is why we have professionals to make such assessments.

John Scott: Indeed but, as I understand it, the professional advice from the Institution of Civil Engineers is that only the consequences of failure should be assessed, because it is so difficult to assess the risk that structures will fail.

Roseanna Cunningham: Probability of failure may be difficult to assess, but that does not mean that we should not consider and assess that probability. Basically, the more information we have, the better we are able to assess the risk. I would be a little worried if professional engineers told me that it was almost impossible to assess in advance whether a reservoir was a high risk. That would be a considerable concern. I would have thought that professional engineers might be able to give a better assessment of that. I do not understand what their work would involve if they did not look at structures and assess them. After all, the reservoirs have to be assessed at some point, and proper management must involve assessing whether they need to be repaired or reinforced. I presume that that is an on-going process, which involves engineers saying, "Yes, there's a weakness in the structure there now, and it will have to be reinforced."

John Scott: I do not wish to labour the point, but reservoirs are inert structures, so assessing the likelihood of their failure is different from assessing the maintenance of an on-going situation. Structural failure concerns us all. It is impossibly difficult to assess embankment dams or dams with a puddled clay core in particular because of their construction. That is the point that the Institution of Civil Engineers has made. I am not trying to catch you out.

Roseanna Cunningham: I am trying to be diplomatic about professionalism and the capacity of professionals to make considered judgments. I am certain that the institution does not mean to give the impression that professional engineers are not capable of making a considered assessment of the safety or otherwise of reservoirs. I think that people would find it very alarming if they thought that that was what was being said, whether the bill was in place or not. I am sure that the institution does not intend to convey that impression.

John Scott: Nor do I intend to convey that impression. The issue is merely the difficulty of assessing the risk of failure. I will find the piece in a moment wherein the institution said that it would prefer to assess the risk of the consequence of failure rather than anything else.

The Convener: Can we come back to that?

John Scott: We can discuss it later.

Liam McArthur (Orkney) (LD): We will move on to the establishment of a panel or panels of specialist reservoir engineers, in particular the appointment of construction engineers to operate a system of inspection, reporting and supervision. We have had evidence from the Law Society of Scotland and the ICE expressing concern that the bill appears to prohibit a construction engineer who has previously been involved in work on a structure from being involved in subsequent alterations, such as the enlargement or discontinuance of a dam or similar structure. The point was well made to us that the expertise that they could bring to bear on such assessments is, perhaps rather arbitrarily, being lost. SEPA appears to sympathise with that concern. Have you had a chance to reflect on the issue?

Roseanna Cunningham: That was unintentional. We accept and understand the concerns that have been raised and we will deal with the issue at stage 2.

Liam McArthur: Thank you. Another point that was raised was about the demography of engineers. The institution noted that, at present, there are 128 supervising engineers in the UK, of whom 28 are based in Scotland, which is perhaps a higher per capita showing than we might have hoped for. Nevertheless, given the amount of work that the bill is likely to entail, the number of engineers available is not necessarily adequate for the job in hand. What consideration has the Government given to the need to actively encourage more engineers to come through the system to take up the roles that are being created?

Roseanna Cunningham: Obviously, that is not part of the bill.

Liam McArthur: But it is a consequence.

Roseanna Cunningham: I understand that. It is arguably the same kind of discussion that we had about hydrologists for the Flood Risk Management (Scotland) Bill. At the moment, we are not convinced that we can say that there are 28 supervising engineers for Scotland and 100 for the rest of the United Kingdom, because the panel sits for the whole UK. The expertise of any of those engineers can be called on.

Liam McArthur: Absolutely. This is not specifically a problem from a Scottish perspective. As I suggested, the fact that we have 28 supervising engineers appears to put us in a better position than other parts of the UK. Nevertheless, the overall number and the apparent trend suggest that, if there is not a problem just now, there may well be one in the future.

10:45

Roseanna Cunningham: That is part of a bigger issue to do with getting young people to think about engineering as a career. Maybe, given the numbers that you indicate, Scotland has done better in the past in that regard, but the issues are UK-wide. We will talk to the ICE and the Department for Environment, Food and Rural Affairs about the UK situation and whether we can do anything about it. At the moment, we do not have in mind the kind of scheme that we had with the hydrologists, but that is not to say that one might not come to a similar view in the future, depending on the prognosis for numbers coming through.

I confess that I do not know what the current throughput of relevant qualified engineers is, but we can try to find out whether it is possible to establish the likely throughput and, indeed, the number of engineers who might successfully apply for the panel. After all, decisions about those who get on to the panel are part and parcel of decisions about those who get through to the final 128. We can certainly consider the matter, but we have not dealt with it in the bill because the existing system seems to work. We are not yet clear about what stress the legislation will put on the system, or what impact it will have, because we are not getting that information back. That is why we need to have discussions with DEFRA and the ICE.

Elaine Murray (Dumfries) (Lab): According to Scottish and Southern Energy and the ICE, chapter 6 will require a single inspecting engineer to be appointed for a reservoir permanently rather than just for the duration of the inspection. Is that interpretation correct?

Roseanna Cunningham: That is another provision that we propose to amend at stage 2. It is just one of those issues that people overlook in the early stages.

It might be helpful if I indicate at this stage what our stage 2 proposals are. Would that short-circuit some of the questioning? At the moment, we are looking at—[*Interruption*.] Sorry—

The Convener: It might be better if you provided those details in writing afterwards.

Roseanna Cunningham: I was just thinking about the questions that are being asked, some of which relate to—

The Convener: Yes, but they need to go in the *Official Report* as well.

Roseanna Cunningham: Do they? I do not think that every stage 2 amendment has to go in the *Official Report*—does it? Surely that would preclude us from bringing forward anything we thought about between now and then.

The Convener: I mean the questions that we are asking to get things in the *Official Report*.

Carry on, Elaine.

Elaine Murray: I will push ahead.

According to Scottish and Southern Energy, section 46 requires compliance with any direction in an inspection report. Of course, this might be a matter of interpretation, but it says that the provision will cover routine maintenance as well as safety issues.

Roseanna Cunningham: That is another one for stage 2.

Elaine Murray: I thought that it might be.

SSE was also a little bit worried that the supervising engineer might be required to supervise any proposed draw-down of water levels.

Roseanna Cunningham: Stage 2.

Elaine Murray: With regard to chapter 7, there was some disagreement about the level of information that should be contained in flood plans and, indeed, whether such plans should be publicly available. What are you thinking of including in future regulation on the preparation of detailed flood plans?

Roseanna Cunningham: I think that that matter is reserved because of national security issues.

Elaine Murray: Right.

Roseanna Cunningham: The difficulty is that there is potentially sensitive information to be considered. We think that the Westminster equivalent of a legislative consent motion will be required for the legislation that we are putting through, and we are discussing the matter. Most of the information in the register will be publicly available, but advice would need to be taken about inundation maps and certain other data, if it was considered to be a matter of national security. It is the same issue for England and Wales—it is all caught up. We have a principled agreement for a section 104 order, as it is known, which is the other side of the LCM coin. That matter has already been considered and dealt with, in a sense. It means, in any case, that not all the information will be publicly available.

Elaine Murray: Concern was raised that the proposals seemed to imply that the details of the supervising engineer should be in the public domain. Some witnesses suggested that that could—

Roseanna Cunningham: That is another issue for stage 2.

The Convener: Chapter 9 deals with new civil enforcement powers for SEPA. In oral evidence,

Scottish Water expressed concern that the bill allows SEPA to take enforcement action on every recommendation in an engineer's report, not just on safety recommendations, as is currently the case under the 1975 act. During our discussions, it was not immediately clear where the line between operational or administrative offences and safety breaches is. The example was given of not cutting the grass, which is to do with inspecting the safety of the dam, and whether that is an operational offence or a safety breach. Is the proposed regulatory toolkit proportionate with the potential offences? In light of the penalties that could be imposed, how can we ensure that a proportionate and even-handed approach is taken to enforcement by SEPA, particularly for operational or administrative offences?

Roseanna Cunningham: First, we need to set what is proposed against what we currently have. Currently, in the event of non-compliance, local authorities have a choice between sending a stiffly worded letter and going to a criminal prosecution. There is nothing between those two extremes. The bill fills that gap. With the bill, we are going from a situation where people can either do nothing much at all or pursue a criminal prosecution, to having provision for a more proportionate response.

The grass-cutting issue is not as trivial as it sounds. Engineers have to be able to see in order to make their assessments.

The Convener: I was not suggesting that it was trivial—grass cutting is important.

Roseanna Cunningham: Yes.

SEPA will be able to choose the most appropriate response in any given situation. Under the bill, there will be a much better range of potential ways of tackling situations than is the case now. The current set-up shows the weakness of the system.

Poor maintenance can indeed turn into a safety issue. However, I am not sure why Scottish Water should be concerned. Of all managers, it should be the most likely one to have good maintenance regimes. We hope to ensure that some of the currently less well-maintained reservoirs are brought up to a better maintenance standard. Reservoir safety is tied to good maintenance, so we cannot exclude maintenance issues.

The Convener: If disputes arise under the bill, how will they be examined, and who will they be referred to?

Roseanna Cunningham: SEPA is well placed to do that—it does criminal cases at the moment. We do not think that SEPA cannot do it. The Environment Agency is already able to use civil sanctions. SEPA is best placed to make a judgment call about what is appropriate, and we are not asking it to do anything that its sister agency down south is not already capable of doing. There can be an appeal against decisions, and there will be some clarification of the appeal process at stage 2.

The Convener: John Scott will ask about funding and costs.

John Scott: Before I do that, I want briefly to return to chapter 3, on risk, to try to express the concerns more elegantly. In essence, this is a request to you to reconsider the drafting of section 21(3) with regard to the point made by the Institution of Civil Engineers in both its written submission and the oral evidence that was given to the committee by Alex Macdonald. It stated:

> "Despite studies having been undertaken in the UK into quantitative risk assessment for reservoirs, reliable and accepted tools are not yet available to the reservoir profession to determine the probability of failure of any structure. In view of this we reaffirm the strong view we expressed at consultation stage that only 'Consequence' is important and that the Risk designation should be related to that and that alone."

That is the point that I was trying to make. Will you consider redrafting section 21(3) in conjunction with advice from the institution?

Roseanna Cunningham: We can come back and have a look at that, but I express some concern if the professional advice is that the engineers cannot give any assessment. I see that you are reading that evidence, and it is something that we will want to discuss directly with the institution. People will be surprised at that evidence—frankly, I am.

John Scott: I was too, I must say.

Roseanna Cunningham: There needs to be a discussion of what lies behind it.

John Scott: I move on to the financial aspects and costs of the bill. I will start with Scottish Water's position and the fact that it is not funded under the current regime to do anything under the bill before 2015. What further consideration will you give to Scottish Water's funding for redundant reservoirs that are retained specifically for flood management?

Roseanna Cunningham: As you know, matters of funding for Scottish Water are not in my gift. All budget decisions are taken on the basis of an assessment of the needs and requirements of each department and agency, and that will be no different for Scottish Water. I cannot sit here and say that there will be X amount of funding specifically in relation to the bill; that is not how the funding works.

I should say that new reservoirs will not be brought under the bill until 2015, which will allow a period of time to adapt at least in a certain sense. I

do not anticipate that Scottish Water's management regime of its reservoirs—which I presume is what it is concerned about—is likely to be a matter of the greatest concern. I expect Scottish Water's management regime to be what it already does as a matter of course.

John Scott: In evidence to us, Scottish Water has said that it has not been financed for the requirements of the bill in the regulatory period between 2010 and 2014 and that it is currently financed only by customer charges. Again, we can provide the evidence to you, but this is an issue that perhaps needs to be looked at more closely.

Roseanna Cunningham: We can discuss with Scottish Water what it means by that. It sounds to me as if it is saying, "We are not bothering now and, if we are required to bother by the bill, that will cost us money." I do not believe that it is not bothering now—that cannot be its starting position. If it is talking about building new reservoirs between now and whenever, the bill allows for those not to be brought into regulation under the bill until 2015. Any new reservoirs that Scottish Water is currently building will not be included until then. However, it must be managing, maintaining and looking after its reservoirs right now. It is not clear to me what it believes the huge difference will be in relation to well-managed reservoirs.

11:00

John Scott: Your financial memorandum predicts:

"the total implementation costs for Scottish Water up until 2016 will be in the region of £1.4 million".

However, Scottish Water predicts that the total implementation costs—I presume for that period—will be £2.7 million. The point that I am making is the point that Scottish Water is making to us—that it has not been financed for that. That needs to be addressed.

There seems to be a disparity between the additional cost in the financial memorandum and Scottish Water's prediction of what it is likely to cost the company. In fact, there are three different views. There is Scottish Water's view that it will cost £2.7 million, the financial memorandum's statement that it will cost £1.4 million and your view that it is not a problem. Those three points of view need to be reconciled.

Roseanna Cunningham: As you perfectly well know, I cannot sit here and promise funding to Scottish Water, because funding is considered through the budget process. Scottish Water is not funded through my department. We will go away and have a discussion with Scottish Water about what lies behind the issue, but the requirements for more money are many and various and we have to take a view on whether we consider providing more money to be the appropriate thing to do. Our view is that Scottish Water can manage this.

John Scott: All I am saying is that, to put the matter at its simplest, your financial memorandum predicts that the total implementation costs until 2016 will be £1.4 million—

Roseanna Cunningham: Yes, but that is over six years.

John Scott: So it is not a problem, then.

Roseanna Cunningham: I am not saying that it is not a problem, but we are talking about a cost over six years. The cheque will not be written tomorrow. The cost can be managed into budgets over that period of time.

John Scott: Okay. Would you like to give us more information on the charging regime under the bill, including registration costs, annual subsistence charges, flood plan preparation costs, and annual engineer inspection and supervision costs? When will those apply, and do you believe that private businesses should incur multiple costs for wider public benefit?

Roseanna Cunningham: You will need to outline each of those again. However, I do not think that we have information on the specific charges.

John Scott: When will they apply? What will they be? Is it reasonable that private businesses should incur multiple costs for public benefit?

Roseanna Cunningham: I remind you that the outcome of the bill will be that many private businesses will have reduced costs, because many reservoirs that are currently risk assessed will be taken out of the system—the ones that represent reduced risks. We are not talking simply about adding costs. We are talking about many reservoir owners and managers finding that their management regime can be reduced, so a lot of their costs will reduce.

I can give you a likely classification and numbers if that would help, but I do not have the precise costs as they have not been developed yet. I will give you the rough figures for the reservoir categories, but I stress that this is rough. I do not want the figures to be taken as absolute.

We have four categories. We think that there are currently 302 in category A, which means that lives in a community would be endangered. Endangering individual lives or causing extensive damage is category B and there are 173 reservoirs in that category. Category C is negligible risk to life and limited damage, and there are 128 in that category. In category D, no loss is foreseen and minimal damage is predicted, and there are 27 reservoirs in that category.

Categories C and D are therefore either medium or low risk.

Of the 662 currently regulated reservoirs, 205 are likely to be subject to a lower level of regulation than they are at present. I ask you to balance that against the way in which you have framed your question. On our broad assessment, the likelihood is that something like one third of the currently regulated reservoirs will be at medium or very low risk and will therefore incur fewer costs.

John Scott: Of course, it would be churlish of me not to welcome that predicted improvement in the financial burden of maintaining medium and low-risk reservoirs. Nonetheless, by my reckoning, that leaves 475 reservoirs that are likely to face a significantly greater cost burden as a result of the bill. There will therefore be winners and losers.

Roseanna Cunningham: Yes, there might well be winners and losers, but we have to look at the overall situation.

John Scott: I am trying to establish the additional costs that the losers are likely to have to bear.

Roseanna Cunningham: The cost regime will be developed, and SEPA will consult on it. It is not reasonable to expect us to be able to give you precise costs. We think that the cost might be somewhere between £100 and £300, but SEPA will consult on developing that cost regime.

John Scott: A particular issue that has been raised with us is the likelihood of reservoirs being decommissioned as a result of the increased burden of costs. One figure that was given to us was £300,000 for the decommissioning and drawing down of a reservoir. Self-evidently, individual owners of private reservoirs might not have £300,000 for that, so they could become insolvent as a result of not being able to meet the requirements that the bill will impose on them and trying to decommission. Have you any pointers on that conundrum? You previously asked for examples of problems. How should that be dealt with?

Roseanna Cunningham: Decommissioning is not a quick fix, and it would be a huge mistake to see it as such. Apart from anything else, the owner would need a licence to carry out that work. They cannot just pull a plug out and let it go. The work that would be required to decommission a reservoir would require a controlled activities regulations licence; I suspect many members are already familiar with those from different areas. That requirement would involve looking at a variety of issues, including other concerns about decommissioning, such as the environmental impact.

Ultimately, decommissioning will always be a decision for the private owner. We will not be in the position of making that decision for owners. However, owners would have to assess the cost of decommissioning against the likely savings.

John Scott: Perhaps I was not clear about what I meant. In a worst-case scenario, if an owner could not afford to maintain a reservoir, because of the cost of the new legislative burden—we established that there will be 475 losers as a result of the bill—or to draw down the reservoir, the only option would be for him to become bankrupt. There would be a problem. Who would pick up the tab? How would the issue be dealt with?

Roseanna Cunningham: Home owners are in that position all the time—

John Scott: Home owners?

Roseanna Cunningham: Home owners. Any owner of property has to make decisions when things change. People are often faced with things that they cannot afford.

Bankruptcy is in no-one's best interests. We could consider including in the bill provision for financial assistance in extreme circumstances. However, such an approach would put a cost on the public purse, so careful consideration would have to be given to whether it was the right way to go. We can consider the matter.

John Scott: I would have thought that you would already have considered the implications of such a scenario for a private owner, but I am grateful to you for putting forward the view that emergency help might be provided.

Roseanna Cunningham: However, if people own reservoirs that they cannot afford to maintain, there is a conundrum, which is not just about the possibility of their wanting to decommission and facing bankruptcy. There is a problem to do with the maintenance of reservoirs.

John Scott: The proposed approach in the bill would put people into insolvency. That is the conundrum.

Liam McArthur: By way of an example of what Mr Scott is talking about, at last week's meeting the committee heard from a gentleman who came into the ownership of reservoirs almost against his wishes. I think that a threat to his fishing rights resulted in his having to purchase the reservoirs.

I suppose that the committee is faced with a more philosophical proposition. Given the implications of the bill in relation to the costs of not just registration but insurance, private ownership of reservoirs might not be feasible for many people who currently possess them. Unlike a person's home, a reservoir is not a desirable asset. The issue is whether the state will require to intervene

to take reservoirs back into public ownership—I am not expressing a view on that, but the example that we heard seemed to throw that up as a credible scenario. Some private reservoir owners might be keen on or prepared to consider gifting their reservoir to the state, because the consequences of retaining ownership would be too onerous.

11:15

Roseanna Cunningham: Perhaps a discussion can be had on whether reservoirs ideally should be placed in private hands any more.

I remind everyone that the bill is about public safety. Anyone who owns a reservoir that is not safe and causes a problem will, by virtue of their ownership, likely face costs that are higher than the cost of maintenance. It is not as simple as saying, "Private owners can't necessarily afford this," because in some cases you might have to say to private owners, "Well, you can't afford not to, either." I understand your bigger philosophical question. The bill would be very different if it was the compulsory acquisition of reservoirs bill, but it is not.

We would need to consider whether there could be a mechanism for assuming some kind of public control of reservoirs from private owners who no longer wished to be responsible for them once the risk assessments were done, but let us not rush to the conclusion that—

Liam McArthur: To be fair to the gentleman we heard from last week, he was seized of the importance of public safety and all the rest of it. However, he tried to illustrate that he had been an almost reluctant purchaser and now, as a result of legislation, he will be in an even more distressed position. I do not think that it is possible for us to say whether he is illustrative of a wider problem.

Roseanna Cunningham: I assume that his reservoir is big enough to fall within the scope of the bill. It might be assessed as being of such a low risk that it is not an issue anyway. It might be given a risk assessment that does not create huge problems for him. I do not know how big his reservoir is. My official advises me that it is already more than 25,000m^3 and is therefore already regulated. If his reservoir is assessed as being low risk, he might end up better off under the bill. We do not know that because we have not done a pre-emptive risk assessment, but let us not forget that it is just as likely that some private owners will find their burdens reduced. Since that gentleman's reservoir is big enough to be under regulation already, I assume that he is already bearing a cost burden.

Liam McArthur: What you say might be a welcome Christmas present for him, and I am sure that he is watching today's proceedings with interest. His evidence threw up a potential issue that the committee found intriguing, but I am not sure that we necessarily have a way through the problem.

Roseanna Cunningham: I understand that. We can look at whether there would be a way to deal with extreme cases if the bill would cause enormous problems. However, because the reservoir in your example is already regulated, which I therefore presume already costs the owner, there is at least a possibility—although I cannot say for sure without knowing the reservoir—that the bill will introduce a system that improves his situation, rather than making it worse.

People must not assume that the situation will be made worse, because many reservoirs that are currently assessed as being in a particular risk category will be assessed as being lower risk. Wherever that gentleman's reservoir is, because of its size it will currently be assessed as posing the same risk as one that sits above Glasgow, which patently is silly—I assume that it is not one of those.

The Convener: We need to deal with that matter in our stage 1 report. Sandra, do you have something to add?

Sandra White: It is similar to the points that Liam McArthur and John Scott raised, so I will leave it at that, but I am pleased that the minister is looking at costs.

John Scott: I have a final question on the cost to SEPA. As you are aware, the draft budget suggests a reduction of £4.9 million in SEPA's budget this year. The bill's implementation will cost SEPA a further £4.12 million. Given those figures, are you confident that SEPA will be adequately resourced to carry out its functions under the bill?

Roseanna Cunningham: Yes. I am in constant discussion with SEPA about what it is doing and how it is managing the current situation. We have every confidence that SEPA can do it.

John Scott: And SEPA is confident too.

Bill Wilson: Assuming that engineers can identify risk as against consequence, is the designation of a reservoir as high risk liable to affect nearby planning developments?

Roseanna Cunningham: I anticipate that the designation of a reservoir as high risk will give planners pause for thought. It would be extraordinary if planners did not take cognisance of that when making their decisions. We are talking to planning officials about the consequences of the register for their work, but I anticipate that planning authorities will need to take the issue into consideration. SEPA is a

statutory consultee, so its views will input into the process.

John Scott: What timescale do you propose for bringing forward further consultation and subordinate legislation? If the bill is passed, which regulations will be consulted on?

Roseanna Cunningham: There is not yet a programme timetable, as stage 3 is scheduled for the day on which Parliament rises.

John Scott: I see. Are you afraid that the royal wedding will influence the outcome of the bill?

Roseanna Cunningham: No, we are just not yet at the point of having a timetable for issuing guidance and subordinate legislation. Most of what we are talking about is directed towards 2015, so it is quite long term. We have quite a period of time in which to do anything that comes in. We are not expecting implementation to require to be rushed. As soon as we have a rough sense of the timescale, we will let the committee know

John Scott: We will be the first to know.

Roseanna Cunningham: Given where we are in the four-year cycle, advising the membership of this committee would probably not be of enormous interest, as there may be new committee personnel after the election.

John Scott: As you would expect, we want to leave things shipshape and tidy for the next committee by providing legacy reports and so on, so that it knows what to expect.

Roseanna Cunningham: It can expect statutory instruments and draft guidance.

John Scott: Is there likely to be single or multiple guidance?

Roseanna Cunningham: I cannot say at this stage what the extent of the guidance will be.

Judith Tracey (Scottish Government Rural and Environment Directorate): You will have to excuse me, as I am losing my voice slightly. We will co-ordinate the introduction of the statutory instruments and guidance under the bill with that of the statutory instruments and guidance under the Flood Risk Management (Scotland) Act 2009, to ensure that whatever we do under the bill does not cause difficulties with the 2009 act. SEPA is doing a lot of work on both pieces of legislation, so we will co-ordinate that work closely. We will look at the implementation timetable for the 2009 act and schedule implementation of the bill accordingly. There will be more than one statutory instrument, but we will do our best to provide a comprehensive guidance document, rather than lots of bits of guidance.

Sandra White: Part 2 allows ministers to make regulations in connection with the creation of offences under the Water Environment and Water Services (Scotland) Act 2003. Those provisions were consulted on as part of the WEWS bill in 2001 but were omitted from the 2003 act. Minister, you were not in government at the time. Will there be further consultation on the proposed regulations? What is the timescale for bringing them forward?

Roseanna Cunningham: Next autumn.

Sandra White: Okay. Thank you.

The Convener: I think that we have exhausted our questions, so I thank the witnesses for their attendance and ask them to forward any information that they agreed to provide to the clerks as soon as they can.

I suspend the meeting to allow for a changeover of witnesses and a comfort break.

11:25

Meeting suspended.

11:33

On resuming—

Wildlife and Natural Environment (Scotland) Bill: Stage 2

The Convener: We come to our next item of business, which is consideration of amendments at stage 2 of the Wildlife and Natural Environment (Scotland) Bill. Members should have with them their copies of the bill, the marshalled list of amendments and the groupings.

The Minister for Environment and Climate Change will remain with us for this item, and I welcome the officials who have joined her for this part of the meeting. I remind members that officials cannot participate in the debate.

Sections 1 and 2 agreed to.

Section 3—Protection of game birds etc and prevention of poaching

The Convener: The first group concerns causing or permitting certain offences under the Wildlife and Countryside Act 1981. Amendment 45, in the name of Peter Peacock, is grouped with amendments 51 and 57.

Peter Peacock: Amendment 45 arises from concerns that the police expressed in evidence that there is a gap in the provisions that would help to secure convictions against people who persecute raptors. The amendment is an attempt to help to secure such convictions even if those concerned do not actually handle poisons, traps or guns but sit behind the people who do the dirty work and give tacit approval to it. It is designed in part to create a pressure in the estate management system to ensure that it is explicit that persecution of birds is unacceptable, and to communicate that fact to the people who work on the ground.

One such person is the gamekeeper who was convicted in Karen Gillon's constituency last month. He made it clear that he persecuted birds because he thought that he was pleasing the landowner or manager concerned. Amendment 45 would help to put pressure on the system to make it clear to such people that that was not the case and that those above the gamekeeper—as it was in that instance—could be held liable in certain circumstances.

In thinking through amendment 45, it has become clear to me that the vicarious liability amendment that the minister intends to bring forward might cover the same ground; I hope that the minister can clarify that. I also understand that the Government might believe that the terms of my amendment are already covered in other enactments. If that is the case, it would be good to have that on the record, to ensure that that is understood by a wider audience.

Amendment 51 is consequential on amendment 45. I am more than happy to support amendment 57, in the name of Liam McArthur, which covers a separate point.

I move amendment 45.

Liam McArthur: Before I speak to amendment 57, I want to register a little disappointment about the late publication of the Government's response to our stage 1 report. In the stage 1 debate, I welcomed the approach that ministers and officials have taken with regard to the bill, but the delay in publication of the response to the report was a little unhelpful when we were lodging amendments.

Peter Peacock has set out the background to the amendments in the group. I believe that he has correctly anticipated the minister's response to his amendments but not, perhaps, to mine.

Amendment 57 would extend the offence of knowingly causing or permitting certain offences to the offences in sections 6, 15A and 18 of the Wildlife and Countryside Act 1981. As members might be aware, those sections do not have such a provision attached, and my amendment seeks to address that inconsistency to the approach to different offences.

I am aware that the Game and Wildlife Conservation Trust has concerns about the potential impact of the sale of dead wild game birds that are taken outside the season, and it might be that amendment 57 needs some refinement. However, there seems to be a case for ensuring that there is consistency and that, as Peter Peacock said, all appropriate deterrents are in place.

Roseanna Cunningham: I will deal with Peter Peacock's amendments 45 and 51 first. I am not sure that they would add to the current provisions in the 1981 act, because the sections to which Peter Peacock is proposing to add already contain offences of knowingly causing or permitting certain offences. The mention of the landowner or the land manager, and the requirement for the offence to have happened on the land that is owned by that owner or managed by that manager, might send the message that Peter Peacock is seeking to convey, but I do not believe that it will do anything to increase prosecutions or improve clarity in this area of law.

The effect of leaving out "knowingly" from the cause and permit offences is hard to understand, because it suggests some kind of strict liability, which is a specific legal notion. However, how that

would work is not clear enough for this to be the right way forward. Perhaps the aim was to create something similar to the vicarious liability proposal.

However, there are important differences between the two concepts. Even unknowingly causing or permitting certain offences suggests that there must be some evidence of an act or an omission on the part of the accused. Vicarious liability does not need that. It is based on the proposition that employers and managers must take responsibility for the actions of their employers and contractors. Our proposals for vicarious liability will also give the person who is accused a chance to show that he was unaware of the offence and had carried out all reasonable steps to prevent it from happening. There is no such defence in Mr Peacock's amendments 45 and 51, which is another important difference. A similar problem arises when the offences are compared with the more usual "knowingly" cause and permit offence.

The offences in Liam McArthur's amendment 57 are comparable with other offences in the 1981 act. I would therefore be happy to discuss his proposals with him in more detail—we have to be sure about all new offences that we create. For example, the offence that is proposed for section 18 of the 1981 act might be wider than we would agree is fair. We therefore have some issues with amendment 57 in its current form. However, in principle, it merits discussion for stage 3.

I oppose all three amendments in the group but, as I have indicated, I would consider working with Liam McArthur at stage 3. Peter Peacock may be content with what I have said about vicarious liability.

Peter Peacock: I think that everybody knows the intention here: it is to get at the informal pressures that may exist. They certainly do exist on certain estates, and they are causing problems. I accept the difficulty over the word "knowingly"—if one knowingly does something, one is obviously committing an offence. Managers may officially say, "I don't want you to do this," but they may also create an informal pressure to do it. In my opening remarks, I referred to a situation involving a gamekeeper, and that situation represents a problem that actually exists.

I take the point that the provisions on vicarious liability are probably stronger. I will therefore seek to withdraw amendment 45, and I will wait and see what the provisions on vicarious liability actually say before we get to stage 3. I am grateful for what the minister said about other provisions in other acts, which has helped to clarify matters.

Amendment 45, by agreement, withdrawn.

The Convener: We move to a group of amendments on catching up for breeding purposes: species covered and period allowed. Amendment 1, in the name of the minister, is grouped with amendments 2, 19, 3, 22, 49 and 50.

Roseanna Cunningham: I will deal first with Government amendments 1, 2 and 3. Gamekeepers are currently permitted to catch up game birds for breeding purposes in the open season. We are aware that the practice is useful and that, at times, an extension to the period in which it is allowed would be helpful. We therefore propose that catching up be legal for the first 14 days of the close season. Following the committee's recommendation, I have lodged an amendment to add black grouse to the list of birds that may be caught up and, following the proposed repeal of the game acts, I have also lodged a minor amendment to ensure that cages, traps and nets can continue to be used to catch up grouse, mallard, partridge and pheasant.

I am not in favour of the amendments that have been lodged by Karen Gillon and supported by John Scott—amendments 19, 22, 49 and 50. I acknowledge that the impetus is to ensure flexibility and practicality for sporting management, and that the catching-up period is a busy time for gamekeepers. However, we are already proposing to extend the period by 14 days to provide greater opportunity. I think that that is a reasonable extension for what is the first change in law to allow such a practice outwith the open season.

I move amendment 1.

The Convener: Karen Gillon will speak to amendment 19 and the other amendments in the group.

Karen Gillon (Clydesdale) (Lab): Members will be aware that this issue was raised with us when we undertook a visit to Langholm. The fear was expressed to us that 14 days was unnecessarily restrictive in relation to catching up. I feel that 28 days—as specified in my four amendments—would allow the necessary flexibility, and I am disappointed that the minister is not prepared to accept that.

On the minister's amendments, RSPB Scotland has raised concerns over the inclusion of mallards in the provisions. Mallards begin breeding in February, and their inclusion in the provisions may lead to their being caught up within the breeding season. RSPB Scotland has expressed similar concerns about the inclusion of black grouse, which is a red-listed species. The minister could perhaps come back to that in her summing up.

11:45

John Scott: I support Karen Gillon's amendment 19, which seeks to extend the catching-up period from 14 days to 28 days. Given

that the minister has graciously accepted the concept of an extension, I suggest that for practicality, a longer period would help. Just as the current weather is unseasonal, we can have snow in the close season too, which makes it virtually impossible in early spring to operate many of the traps for catching-up purposes. There is no hidden agenda; the amendment simply seeks to facilitate the process. The minister might even consider extending the period to 21 days as a compromise at stage 3.

Liam McArthur: As Karen Gillon and John Scott have indicated, the committee heard evidence at stage 1 to suggest that although the 14-day period appears to address a degree of ambiguity in the current circumstances, it is perhaps not sufficient. The committee felt that 28 days was a fairer compromise.

Latterly, RSPB Scotland has raised concerns with us that the period would in some sense be an informal extension of the hunting season. There is a principle that must be addressed. Any period that we set is likely to be arbitrary, but there is a concern that an extension to 14 days may not go far enough.

John Scott has indicated a potential compromise, and I hope that we can return to the issue between now and stage 3 to reach some sort of agreement.

Roseanna Cunningham: My reaction is simply that the period is currently zero, and we are talking about the number of days by which to extend it. We thought that 14 days was a sufficient extension from what is effectively no days at present, as that would allow some leeway with regard to the current situation.

We can certainly have a look at how many days it might be useful to have, although I caution members against getting into a situation in which they are upping the ante. If we extend the period to 28 days, people may come back and say that it should be even longer. We have to decide clearly on the most appropriate period, rather than any of us just plucking numbers out of the air. Perhaps we need to discuss what is realistic set against the current position, which is effectively zero.

On black grouse, our amendment follows the committee's recommendation; we were doing what we understood the committee wanted us to do. It would be useful to know whether that recommendation is changing or has changed, and what is behind it. I am not clear about whether there is a specific issue that needs to be re-examined that changes the committee's recommendation.

Karen Gillon: Very late yesterday we received more information from RSPB Scotland, in which it raised concerns. It would be useful if we could come back to the issue at stage 3. I would be happy to discuss the matter with the minister ahead of stage 3.

Roseanna Cunningham: Right. I have not seen that information.

Karen Gillon: No—I got it very late yesterday as, I think, Liam McArthur did.

Roseanna Cunningham: At present the amendment on black grouse complies with the committee's recommendation.

Amendment 1 agreed to.

Amendment 2 moved—[Roseanna Cunningham]—and agreed to.

Amendment 19 not moved.

Amendment 3 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Scott, John (Ayr) (Con)
Watt, Maureen (North East Scotland) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)

Abstentions

Murray, Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Amendment 3 agreed to.

The Convener: The next group is on removal of game birds from list of birds allowed to be killed or taken outside close season: consultation and procedure. Amendment 4, in the name of the minister, is grouped with amendment 20.

Roseanna Cunningham: Amendment 1 seeks to follow the committee's recommendation in its stage 1 report and change from negative to affirmative the procedure for orders to remove game birds from schedule 2 of the 1981 act. Although I accept the intention behind John Scott's amendment 20—the Government would, of course, consult before removing a game bird from schedule 2—I have to point out that the 1981 act contains a similar provision relating to such a removal. Section 26(4) of the 1981 act already provides for

"any ... person affected"

to be given

"an opportunity to submit objections or representations".

That seems to me to cover everything that is needed; indeed, it is, if anything, wider than John Scott's proposal. Given that there are also provisions for consulting advisory bodies and causing a public inquiry to be held, I do not think that amendment 20 is required.

I move amendment 4.

John Scott: I thank the minister for considering my amendment and accepting the intention behind it.

I suppose that I am raising concerns that have been expressed by the shooting industry, which would also wish to be consulted. I am not saying that a sin of omission has necessarily been committed but, if it has, it could be rectified by ensuring that the industry is consulted before game birds are taken out of schedule 2.

Roseanna Cunningham: I see no difficulty with that. After all, as relevant persons, the shooting bodies would be caught by the provisions in the 1981 act and would therefore be consulted.

Amendment 4 agreed to.

Amendment 20 not moved.

The Convener: The next group is on the point at which game birds cease to be livestock. Amendment 46, in the name of Peter Peacock, is the only amendment in the group.

Peter Peacock: I have lodged amendment 46 to clarify the circumstances in which a licence to kill, for example, a buzzard might or might not be granted. I have been concerned by the growing pressure in some quarters to grant licences to kill protected species on the basis of a potential ambiguity surrounding what can happen in the vicinity of a containment pen when a bird is not contained but is still regarded as livestock. It is argued that such a move is to protect birds that are raised in their thousands for shooting. Although that is perfectly legitimate, I do not find it legitimate to argue that raptors that are, quite naturally, attracted to the new feed source should be killed. Indeed, I find the arguments for killing protected species in order to protect unprotected species faintly ridiculous, and amendment 46 seeks to exclude from the definition of livestock the reared species that are mentioned in the amendment once they are no longer in secure pens.

I know that the Government is considering guidance to tighten up or make clearer the circumstances in which licences may or may not be granted. Although I have been concerned that as a result of the pressure to relax the current rules such a relaxation was being signalled, I have been somewhat reassured by the minister's acknowledgement in evidence of the need to retain a very high hurdle with regard to the issuing of such licences.

However, amendment 46 would put it beyond doubt that a licence would never be granted in certain circumstances. If people who are rearing birds want to protect them fully, the option of getting a licence to kill a raptor in the circumstances that I have described would not be open to them. I guess that the implication of that is that pens would have to be enclosed to protect reared birds because no licence would be available to kill a raptor. Alternatively, some losses among the thousands of reared birds would have to be accepted.

I move amendment 46.

John Scott: I regret to say that I fundamentally disagree with Peter Peacock; I do not think that he is right. The Wildlife and Countryside Act 1981 neatly deals with the problem in that after game birds leave rearing pens, they become livestock on a particular date: for example, pheasants become livestock on 1 October. Prior to that they are obviously utterly dependent on the same environment, and whether they are on one side of the wire or the other is irrelevant. They are dependent and therefore should not be treated in the way that Peter Peacock suggests until the appropriate date, which is currently dealt with under the 1981 act.

Elaine Murray: I disagree with John Scott but agree with Peter Peacock. If someone is going to introduce large numbers of a prey species into an environment, predators will come—that is just part of how things work. It is therefore not acceptable to be prepared to slaughter protected species because they happen to be predators. Unfortunately, the shooting industry will have to accept that there will be losses associated with large numbers of prey species being released at certain times—that is just how it is. Obviously, it would be different if we got to the stage at which millions of buzzards were around, but that is not the case. The buzzard population of Scotland is only beginning to recover after the slaughter of those animals over many decades. I am certainly of the opinion that they should continue to be protected and that there should not be the possibility of allowing them to be killed because they are behaving as predators behave.

Liam McArthur: I certainly sympathise with the sentiment behind amendment 46. As Peter Peacock indicated, the committee thought long and hard about whether the hurdle needs to be raised further. I think that we gained reassurance on that from what the minister said in her evidence. I am bound to say that I can see the wording of amendment 46 creating more serious difficulties in trying to address a very legitimate

concern. However, Peter Peacock may well have lodged the amendment in order to get on record the sort of assurances that the committee has sought throughout, and to give a further airing to the issue.

Karen Gillon: I have always come at this issue with a fairly open mind. However, having seen photos that have been sent to me by constituents in recent weeks of some of the activities that have been taking place in my constituency, I am simply appalled. People have no right just to go about poisoning birds because they do not fit with their business. That is not acceptable and it cannot be allowed to continue. If, as part of your business, you release small birds into the bird population and other big birds come and kill them, then that is life—that is what big birds such as buzzards do. You just have to accept that and manage your business accordingly, but that does not give you the right to poison, shoot or otherwise destroy other birds.

We as a Parliament have said that that is unacceptable. If we have evidence that that is continuing to happen and that the legislation that is in place is not working, we must do something about it; otherwise, we just have to say, "It's okay. Just continue to kill these birds. We don't really care." However, right now the laws that we have are not working; people are simply ignoring them or the police are unable to enforce them. The current situation is not acceptable. It is not acceptable to me, and I am not one of the most hard-line animal-rights members of this committee. If I have come round to this position, things are really in a bad way. We need to get things moving quickly because the current situation is not acceptable.

12:00

Bill Wilson: The arguments have been laid out fairly clearly, so I will not rehash them. I simply put on record my sympathy for Peter Peacock's argument, although I accept Liam McArthur's point that the wording may require some alteration.

Roseanna Cunningham: The whole issue arises because the provision in the 1981 act was simply a provision to issue a licence. There was no subsequent guidance or subordinate legislation on the issue—nothing went along with the power to issue a licence.

On the one hand, there are groups of people who say, "You can issue licences. What are the criteria?", and on the other, there are groups of people who do not want any licence to be issued, even though their issuing is statutorily provided for. We are in a situation in which such debate takes place.

Although poisoning, to which Karen Gillon referred, is not central to consideration of amendment 46, it provides the background to why the debate takes the turn that it does. Many will see the issuing of licences before poisoning has been dealt with as a reward for bad behaviour. Others will argue that the issuing of licences will end the poisoning of birds. The two discussions intermingle but, arguably, the present debate is not about poisoning. It is about a request for a legitimate licence—it is legitimate in that its issuing is provided for by legislation that is on the statute book.

Amendment 46 addresses a highly controversial and difficult issue. As yet, the Government has not issued any licences for that purpose, nor did any previous Scottish Government. I am not conscious that any Westminster Government has issued such a licence either, notwithstanding the fact that such provision remains on the statute book.

A number of discussions have been held with interested parties on both sides of the argument, and it is clear that there are strongly held views on both sides. On the one hand, the shooting sector points to the huge input to the economy that its work makes. According to that sector, predation is a cost burden that is similar to the burden on any farmer who loses stock. Poults are not worth a great deal, but poults that reach maturity are worth quite a lot of money—£30 to £40 each. Given the number of people who go out shooting and the size of the bags, it is evident how much income is derived from that. Some groups argue that they can lose 50 per cent or more of their stock through repeated attacks. A little more work needs to be done, because we are not talking about the loss of just one or two birds. That is one side of the argument.

The other side of the argument, as most people recognise, is that the shooting industry is not doing enough in the way of deterrence and protection measures, and that it is simply not right to contemplate killing native species to protect a non-native species, hundreds of thousands of which are reared and released into the environment. Those arguments have been rehearsed by the committee.

The difficulty with amendment 46 is that, in attempting to find a way through those arguments, it risks creating a bigger problem, because it has some flaws in it. Liam McArthur identified that. Most keepers would argue than an open-topped pen is an absolute necessity for encouraging the young birds to fly while still giving them the safety of a place to return to.

Another point that needs to be kept on board is that a lot of pheasant release pens are pretty big—they might be half an acre or more in size. It is clear that there will be practical difficulties in

covering pens of that size. Many of the pens contain trees, because that provides cover and roosts. It is hard to see how such an area could be roofed. It is also impractical to require mallards to be in some form of secure housing because, as might be expected, they are reared in ponds.

There are practical difficulties with what is being proposed, but I will be interested in hearing the committee's views on the subject. I am not sure that amendment 46 would help because, if it is agreed to, it would not be possible for licensing authorities to take any balanced view of different interests in the future if people felt that the existing statute should remain. The amendment is also wider than necessary if the aim is to give birds more protection when a licence is being considered. It would also affect animal licence and bird and animal offences.

On those grounds, I oppose amendment 46, but I acknowledge that we need to have a wider debate, which might be better held in the chamber.

John Scott: My understanding is that discussions have taken place between the Government and the RSPB about defining when animals, particularly birds, are livestock, and that an agreement has been reached.

Roseanna Cunningham: Those discussions were not specifically with the RSPB. We consult and discuss with all stakeholders.

John Scott: Yes; the RSPB and others.

Roseanna Cunningham: No final conclusion or definition has arisen from those discussions. I am not quite sure what you have heard.

I oppose amendment 46 on the specific ground that it contains some flaws, but I acknowledge that there is a wider discussion to be had. A statutory provision exists that allows us to grant licences and, in those circumstances, it is not unreasonable for people to ask in what other circumstances a licence would be granted. That is why we have the discussions that we have.

Peter Peacock: The discussion has been useful and I am grateful for the support that colleagues have expressed. I disagree with John Scott in principle, so we will just have to take a different view about it.

I accept that there are limitations with the amendment's wording and that it could have unintended consequences. I am happy to withdraw the amendment, with the committee's leave, and I will consider it and have further discussion and communication with the minister and her office before stage 3.

Amendment 46, by agreement, withdrawn

Section 3, as amended, agreed to.

After section 3

The Convener: The next group is on the recording of information about the number of wild birds that are lawfully killed or taken. Amendment 21, in the name of Liam McArthur, is grouped with amendment 47.

Liam McArthur: I am happy to speak to amendment 21, but I confess that amendment 47, in Bill Wilson's name, is perhaps more a reflection of what I wanted to achieve, not least in that it acknowledges the fact that wild birds might be taken or killed and not simply shot.

The amendments are a response to the stage 1 evidence that suggested that better record keeping was necessary to establish what is happening with various wild bird species and to provide a rebuttal to some of the wilder claims about practices on shooting estates. I am aware that the Game and Wildlife Conservation Trust has expressed concerns about the amendments, but they seem to be based on the fact that accurate records are already kept, that any figures would need to be set in the context of the overall populations of respective wild birds, and that compulsory record keeping would be costly. I have no problem with the case for contextualising any figures, but I cannot see how the first and last of those arguments are compatible. I will therefore listen with interest to what the minister says, but the principle of what Bill Wilson and I seek to achieve is sound and should be pursued.

I move amendment 21.

Bill Wilson: It seems to me to be good conservation practice to know the size of a yield that is taken from a population. I do not imagine that any of our species will go the way of the passenger-pigeon, but we should nonetheless know the yield. That is ultimately to the benefit of estates. If we want to keep a sustainable yield and secure the economic future of estates, we need to know what size of the population has been shot and whether it can maintain that level of shooting.

I find it hard to imagine that keeping records would be difficult. I am sure that all estates keep game bag records. Surely that is how they convince people to come to them to shoot—they can say how many birds people will have a chance of shooting. Gathering the data cannot be too difficult, albeit that we should have the data anonymised so that individual estates cannot be identified.

John Scott: When we discussed the matter previously in the committee, I supported in principle what has been proposed but I am now rather more taken with the GWCT's position. It has pointed out that what has been proposed would add an extra burden on Scottish Natural Heritage and estates. If I am in favour of one principle, it is

that of not increasing the burden of regulation through the bill, given the burdens of regulation that already exist on almost all estates and landowners. Therefore, I think that the proposals are unnecessary.

In addition, under the voluntary wildlife estates scheme that was launched by the estates management group and others, what has been proposed will be done voluntarily. My position is that legislating in the area is not necessary. We should avoid further regulation.

Karen Gillon: I find it bizarre that we are arguing against something that is, it has been argued, already happening. If it is already happening, what is the problem with its being regulated? It does not seem to me that there would be a huge burden, and we would have records to prove what was happening. We could then monitor. Therefore, I would be happy to support either amendment. Bill Wilson's amendment 47 is probably more comprehensive, so I urge members to support it.

Roseanna Cunningham: There are two issues: the principle and the amendments. I think that I said during stage 1 that, in principle, we support the idea of developing a bag return system to gather data on mortality rates for quarry species. However, the amendments apply to more than just game or quarry species, although they may do so inadvertently. Therefore, they go further than is desirable.

Data relating to quarry species are an important element in developing adaptive management arrangements, particularly for birds such as geese—I think that Bill Wilson made that point. There are concerns about the conservation status of some species, such as the Greenland white-fronted goose, although other goose species such as greylags are present in growing numbers and can be a real problem for farmers in some areas. Liam McArthur probably has direct experience of that.

The concern about monitoring geese points to one of the main defects in both amendments. The approach of placing a duty on landowners, lessees or occupiers of land would not capture the significant numbers of wildfowl, including geese, that are shot on the foreshore, in which the Crown has an interest. It would not fall within the scope of the amendments. If we consider the principle, we will realise that the amendments would not quite do what was intended.

Both amendments are a bit vague about whom a duty would be placed on. It is not entirely clear whether the owner, the lessee, the occupier or all three would be required to submit a return. That lack of clarity is a bigger concern with respect to Bill Wilson's amendment 47, which would create a new criminal offence. If we are talking about potential prosecutions, we must be absolutely clear about what is required of people. It is not clear how people could find out about the system that it appears is being proposed. The normal way in which to do such things is for the details to be set out in subordinate legislation. I appreciate that there may have been an unwitting omission in the drafting of the amendment, but I am advised that there would be problems in prosecuting any such offence under amendment 47 as drafted.

12:15

I note that the offence is set out as a strict liability offence. I am not sure whether that is what was intended. I would have expected a reasonable excuse defence; that is the appropriate defence for this kind of offence, given the due diligence or reasonable justification aspects of imposing such a criminal offence.

Our preferred approach would be to look for a scheme that places some sort of obligation on individual shooters to submit a bag return for birds that they take throughout the season. We would plan to open discussions with organisations such as the British Association for Shooting and Conservation and the Scottish Association of Country Sports with a view to developing a scheme. For example, with their co-operation, we could perhaps develop a non-statutory scheme.

The amendments in the group pursue a worthwhile cause, but they are the wrong approach at the wrong time. We oppose them.

Liam McArthur: I welcome the comments of colleagues and of the minister in accepting the principle. The recent conversion of John Scott apart, the committee felt the provision to be a commonsense one. I accept that there may be a need to broaden the scope of Bill Wilson's amendment and mine to tighten up on where responsibility lies and to address other shortcomings. I hope that that can be done ahead of stage 3. The importance of keeping records and having the available data kept are essential to the adaptive management to which the minister referred. As I said, the data are also necessary for rebutting some of the wilder claims that are bandied about on what happens on shooting estates and elsewhere. I have some misgivings about the notion of a non-statutory scheme. Perhaps we can pick up on the idea between now and stage 3.

I seek leave to withdraw amendment 21.

Amendment 21, by agreement, withdrawn

Amendment 47 not moved.

Section 4 agreed to.

After section 4

The Convener: The next group is on protection of wild birds: intervention by the Scottish ministers. Amendment 48, in the name of Peter Peacock, is the only amendment in the group.

Peter Peacock: I promise not to read out the amendment in its entirety—[*Laughter*.]

Roseanna Cunningham: It would take ages.

Peter Peacock: Indeed.

My commitment and that of many other committee members throughout the passage of the bill has been to try to find provisions to bear down on and eliminate as far as possible the unacceptable practice of bird persecution—Karen Gillon referred to that—and in that regard I welcome the moves that the Government has offered to make on vicarious liability. It is a major step in the right direction. However, I am under no illusion about the difficulty of securing convictions—even with the new law. I hope that the new provision adds considerably to the system and thereby ensures that the practice that we all deplore comes to an end, but if we invest all our future hopes in it—I repeat that I welcome it—and attempts at prosecution show that conviction is difficult to secure, the new bit of the armoury that we have been trying to design will have gone from us. That is why I think there is a need for further provisions, which have the potential to affect the economic interests of those who may, in a pretty real way, be behind some of the practices that we all deplore.

I lodged amendment 48 to advance the debate on these policy issues and to set out a possible way forward. I want to make it clear that I do not regard amendment 48 as the final word on the matter. I have already noted a number of technical flaws in the drafting; I intended to delete two of them, but they remain. Members understand the time pressures at stage 2. Thankfully, Christmas will provide more opportunity to think and refine the amendment.

There is plenty of room in the drafting for the negotiation and refinement of what I am proposing today. My thinking on the matter has moved forward quite a lot over the past few weeks. I have listened carefully to what has been said about the concerns that I expressed a few weeks ago. I started with a belief that all estates should come under a licensing system, but I have heard arguments that that would be unnecessary and disproportionate as it would capture everybody—even those who are behaving in an exemplary fashion. Furthermore, it would inevitably imply more bureaucracy than might be necessary.

I have listened to concerns about the new scheme that the Scottish Rural Property and Business Association has been promoting with regard to estate management. I warmly welcome that scheme—it represents a significant step in the right direction—although there was concern that the potential to use it as a statutory code of practice might bring about the opposite effect to that which was desired. I have listened to those concerns, too.

Amendment 48 seeks to avoid the issues and concerns and tries to focus on where there might be a problem rather than propose a general licensing system. It is a lengthy and complex amendment, but the principles behind it seem entirely straightforward. It provides for a form of staged intervention. In essence, when a minister has reasonable cause to believe that the practices that are set out in the amendment are inimical to the intentions of the bill and of previous acts of Parliaments, and if those practices continue to occur—the minister having perhaps set out guidance as to how they might come to such a judgment—they will have to notify those who are involved with the management of the land of their concerns. The minister would have to set out the activity that they may potentially regulate and invite those concerned with the management of the land to say what actions they propose to take to satisfy the minister that their concerns can be addressed. If the minister is satisfied that the proposed actions are satisfactory, the matter could end there and no further action need necessarily be taken; if the minister is not convinced about the proposed actions, they can make a regulation of activity order, which would require a management plan for how the landowners are to respond.

I propose that SNH be given responsibility for monitoring the implementation of the management plan. If the management plan is implemented satisfactorily and in such a way as to remove the original issues that ministers had reasonable cause to be concerned about, the order could be revoked and no further action would ensue. However, if the monitoring of the management plan resulted in the concerns continuing and in the sought outcomes not being achieved, the minister could revoke the rights of owners in certain respects. That, to all intents and purposes, would mean sporting rights on the land. I envisage that an appeal regarding any such decision, which would be significant, could be made to the Scottish Land Court.

Amendment 48 is not about creating another offence—we are coming close to having enough of those. The approach is different from one that would end up with a criminal offence. In principle, it mirrors the provisions relating to deer management, in the sense that there is a staged intervention in deer management involving SNH, albeit in a different way from what I envisage under amendment 48.

I believe that the approach that I have set out could provide a way forward. I do not think that any landowner or estate that is behaving entirely properly would have anything to fear from the proposals, which seek to isolate those cases where we understand that there could be a continuing problem and to set in place safeguards to ensure that there is a staged process that allows matters to be addressed satisfactorily.

I will listen carefully to what the minister has to say about the amendment. In view of its flaws, which I have spotted myself, I do not intend to push it to a vote today; I seek to refine it in the light of the debate and discussion that I hope the committee will now have.

I move amendment 48.

Liam McArthur: I had concerns about the notion of a licensing scheme—that is partly in keeping with evidence that we received from SNH at stage 1. More crucial was the scheme's appearing not to distinguish between estates, whatever their track record, principally in relation to wildlife crime. This lengthy amendment heeds some of those concerns and seeks to adopt a different approach. Although the wording needs modifying—I can testify to Peter Peacock's attempts to amend the wording at the 11th hour—I hope that the minister will acknowledge that amendment 48 anticipates the concerns that were expressed in the Government's response, which I shared, and seeks to find a more workable and proportionate approach to introducing a further sanction, which will help to drive down the raptor persecution that we all abhor and find all too common.

Bill Wilson: It is probably fair to say that an overwhelming majority of estates behave responsibly, but it is clear that some estates consistently break the law. My worry about a voluntary code is that estates that behave well will obey it because they would behave well anyway and estates that act illegally will continue to do so. I therefore have much sympathy for the principle behind amendment 48, albeit that it has wording problems. I look forward to hearing what the minister says. It is clear that action such as the proposed amendment on vicarious liability will move things forward, but an approach such as Peter Peacock suggests will be helpful, if it is practicable.

John Scott: I declare an interest as a farmer and landowner. Members will not be surprised to hear that I am not in favour of amendment 48, which would introduce a further unnecessary burden of regulation.

I categorically share the view of Liam McArthur and other members that raptor persecution should be brought to an end. We are in no dispute about that. I understand that the minister intends to lodge an amendment on vicarious liability. Estate licensing such as is proposed is not necessary, given the voluntary scheme that we have. I accept Bill Wilson's point about honest men being honest anyway and the need to deal with the people whom we want to stop misbehaving. Perhaps—although I will not be in favour of it—the minister's amendment will address that.

Amendment 48 must be the longest probing amendment in history, and Peter Peacock's own demolition of its value precludes further comment in that regard. Suffice it to say that several interested bodies have put it to me that the proposed approach would significantly discourage investment in land, particularly sporting estates, in Scotland because the sheer burden of regulation would be so onerous. Trust me; I am a farmer and landowner and I am only too well aware of the burden of regulation. It is not sensible or necessary to introduce an additional burden.

Karen Gillon: When four of my constituents died in a gas explosion in Larkhall 10 years ago, people told me that we could not change the law on corporate culpable homicide because the burden of regulation would discourage companies from investing in Scotland. We changed the law on corporate manslaughter and companies still come to Scotland and invest here.

If we change the law on the protection of wild birds, as is proposed, companies will still want to invest in Scotland, because this is a good place in which to invest. Good companies will still want to bring their business to Scotland, to get the benefits of the Scottish landscape, climate and weather and of our grouse moors, shooting estates and gamekeepers. Only Scotland can bring those benefits. Good companies will want what we have, regardless of the regulation. People talk a lot of nonsense when they do not want us to do something. We need to have the courage to do the right thing.

12:30

Roseanna Cunningham: I will take a few moments to deal with some of the issues that have been raised, because they are important and I do not want to gloss over everything.

I acknowledge that Peter Peacock has attempted to address one of our principal objections to the proposal that was discussed during stage 1, in so far as amendment 48 would not impact on all shooting businesses and is more tightly focused on estates in relation to which there is suspicion of wrongdoing. We are, nevertheless, still of the view that the proposal does not represent the right approach, and we would prefer to go forward with the robust legal framework that

will be in place if our amendments on vicarious criminal liability are agreed to. Although some of those who have commented on our plans said that vicarious criminal liability is a novel concept, it is, in fact, well established in law. It has been in existence for quite a few years; it was reinstated in the Criminal Justice and Licensing (Scotland) Act 2010 earlier in the year and it is well understood, certainly in civil law. By contrast, Peter Peacock's proposal contains brand new concepts that might be made to work in due course, but only after a number of protracted legal challenges are overcome. In a sense, this is an example of how much care we have to take to get things right.

It is clear that, in some cases, the proposed scheme would lead to a serious interference with property rights. In effect, it is designed to do that. Serious interference in property rights can be justified—we do it all the time under planning law—but any interference must be proportionate and the necessary safeguards must be in place. Whether the proposed scheme represents such a proportionate response to the problem of raptor persecution is an open question. Ultimately, it would be one for the courts, and I am 100 per cent certain that that is where it would end up. I suspect that Peter Peacock agrees with that.

I also notice that, under the proposal, there is no right of appeal until the very end of the process. I do not know whether Peter Peacock has considered that. The scheme also proposes the revocation of rights as a sanction. Presumably that refers to the right to take game. I think he mentioned that it relates to the shooting rights as a whole, but I do not know whether it would have to be the whole of the shooting rights or whether it could be part of them. There is a lack of specification. Does the revocation apply to the area of land or to the landowner? Would it be possible for the rights to be taken back by a purchaser of the land or someone who inherited it? When such a big change in the law is proposed, we have to work hard to see how it would operate in practice.

We believe that vicarious liability will be more straightforward to prosecute than what is suggested in the amendment. An important difference is that at the centre of the vicarious liability concept will be the need for the Crown to prove beyond reasonable doubt that an offence has taken place. Under the scheme in the amendment, proceedings that might lead to a severe restriction could begin solely on the basis of concerns on the part of Government officials. I have scribbled on my notes that it would be a sort of sus law for estates. I am not sure whether that is what Peter Peacock intended, but, in effect, that is what the amendment delivers.

We can identify a number of other difficulties with the proposal. Landowners would claim that they are vulnerable to mischief making. A dead bird thrown on to their land could trigger the process. At present, under criminal prosecution, the investigation is rather more rigorous than that. They would also claim that activities for which they are not responsible on an area of their land could trigger the process—for example, if a paying guest misbehaves and shoots a protected species. That is a different relationship to the one that is envisaged under vicarious liability.

It is also likely to be difficult to identify everyone with an interest in any given area of land. Peter Peacock will acknowledge that, in some areas of Scotland, the sheer issue of land ownership can be a big question mark. Our experience suggests that, as well as the difficulties with identifying owners, there can be complex relationships of management and tenants, all of whom have an interest.

SNH told us that the role that is envisaged for it would place a difficult and heavy burden on the organisation when it is hard pressed. We are also dubious about subsection (9), which appears to compel ministers on the financing and resourcing of SNH. We could not accept that approach.

I have gone through a lot of detailed reasons why I oppose amendment 48 and I expect that Peter Peacock might have picked up some of them already, although he might not have thought about others. His suggestion is quite far reaching and would mean a significant change in how we do things at present. Both I and the Government think that if we are going to make such a far-reaching change, it deserves a different kind of scrutiny from that which we can give it as an amendment to another piece of legislation. That is why we prefer to proceed with the strong legal framework that is in place with the addition of vicarious liability and give initiatives such as the wildlife estate scheme a chance to succeed. That is not to say that we might not end up having this debate at some future point, but it would need to be undertaken in the full understanding of the complexity of what is proposed because of its far-reaching nature.

The Convener: I invite Peter Peacock to wind up and, although I suspect I know his answer, to say whether he will press or withdraw his amendment.

Peter Peacock: Amendment 48 was lodged in a spirit of setting out a new proposition and beginning to get a feel for where people believe they stand. As I said, I accept that it is not the final word on the matter. Indeed, I anticipated a number of the minister's points. It is helpful to get them on the record because I can now think about them a good deal more deeply—and I shall do so. It is my

intention to keep pursuing the point, although I accept that there are different points of view.

I will pick up on some of the points that have been made in the debate. I am grateful for the support in principle that Liam McArthur indicated in that the proposal is more proportionate than that which we have sought before. Bill Wilson made a good point about the voluntary code, which I welcome, as I know he does. By definition, it is only those who know that they can or want to comply with the code who will volunteer. Therefore, there are still issues that the code does not cover.

I understand that John Scott is not in favour of amendment 48. I do not accept his point about the burden of regulation because it would apply only to those whom SNH has strong reason to believe are not obeying either the spirit or the letter of the law. It seems entirely right to place a burden on those people at that time, and SNH would be the appropriate agency to do it.

John Scott: There are many honest people in Scotland—I include myself as one of them—who, notwithstanding that they are honest, are burdened by excessive regulation. Your proposal seems unnecessarily complicated and, as the minister said, the implications would be far reaching in this case.

Peter Peacock: With respect, it would become a burden on you only when you became dishonest, although I am not suggesting that you would.

John Scott: No, you miss the point, which is that it becomes a burden when you have to think about it and factor it into everything you do. All regulation comes at a cost.

Peter Peacock: Again, with respect, I know that amendment 48 is long but if John Scott had read it to its conclusion he would have realised that it does not propose to create a burden on anybody until such point that there is real concern in the public interest that a burden requires to be placed on that person to try to sort out a situation unacceptable to us all. I do not accept John Scott's point about the burden.

I explicitly reject the point about investment. Every time we talk about any regulation to protect the public interest, people say, "It will stop people investing in estates." Frankly, if you want to invest in an estate in order not to obey the law I would rather not have you in Scotland. If you do obey the law there is absolutely nothing to fear from my proposal. So I do not accept that point.

John Scott: I do not accept yours.

Peter Peacock: I understand that you do not accept it; we will just have to disagree. There is nothing new in that.

I listened carefully to what the minister said. I want to pursue my proposal and think about it a bit more. I had thought about her point about there being more appeals in the system. There is an old trick that old ministers used to perform—you create the perfect bill then you take things out so that you can put them back in when under pressure at a later stage. Members might detect that there is a similar approach to my amendment.

Given that the procedure would be used only in rare circumstances, I have thought about whether there may be a case for requiring parliamentary approval for some of the steps, to make the process clearer, more democratic and, therefore, more accountable in a variety of ways. The minister described how vicarious liability applies pressure to the system. By the same token, the very fact that a process exists means that no estate will want to get caught up in it. There will be strong incentives to avoid that. Indeed, the public opprobrium of getting to stage 1 of the process might be sufficient to deter people from many of the practices about which we are concerned.

Although I strongly support the concept of vicarious liability, I am under no illusions about how difficult it may be to secure prosecutions. It is worth having it on the statute book even if legal challenges occur, because the informal pressure that it applies will contribute to eliminating the problem that we face.

I will reflect seriously on the issue. However, for all the reasons that the minister and I have set out, I seek leave to withdraw the amendment.

Amendment 48, by agreement, withdrawn.

Section 5—Sale of live or dead wild birds, their eggs etc

Amendments 22, 49 and 50 not moved.

Section 5 agreed to.

After section 5

The Convener: The next group is on reports on illegal killing of wild birds and wildlife offences generally. Amendment 23, in the name of Liam McArthur, is grouped with amendment 58.

Liam McArthur: Given my earlier sin of omission, I will start by moving amendment 23.

As was the case with amendment 21, I find myself speaking to my amendment while being strangely attracted by the allure of the other amendment in the group, which may reflect more accurately what I am seeking to achieve.

At stage 1, the committee agreed that it would be helpful, not least to raise the profile of wildlife crime and to increase efforts to bear down on it, were ministers to report regularly to Parliament on

the extent of the problem and the measures that are being taken to combat it. Having read the Government's response, I am pleased that the minister has been able to accept the principle. I look forward to hearing her comments on how it may be made to work in practice. Depending on what is said, I may seek leave to withdraw my amendment in favour of amendment 58, in the name of Peter Peacock.

I move amendment 23.

Peter Peacock: Given that Liam McArthur and I did not talk about the issue before stage 2, there is a remarkable coincidence in drafting between the two amendments, with the exception of about three words. My amendment refers to wildlife crime more generally, whereas Liam McArthur's focuses on birds in particular. The amendments support the Government's policy intention. If the minister is able to accept one of them, I am happy to go with either formulation. If not, I hope that she will consider the matter and come back with an amendment at stage 3.

Bill Wilson: I want to make two points. First, if the minister does not report, perhaps SNH should. That may be a matter for discussion. Secondly, the committee heard evidence that there is some inconsistency in the statistics that are gathered on wildlife crime. I invite you to comment on that and on the suggestion that it may become a recordable offence.

Roseanna Cunningham: I am perfectly happy to provide an annual report on wildlife crime, if that is required. As a sidebar to the discussion, I note that questions may be raised about why wildlife crime, as opposed to many of the other aspects of criminal behaviour that could be subject to the same procedure, is being singled out for an annual report. Providing for an annual report suggests that more than just statistics are required, so there is a little uncertainty about what format the report would take. However, I am perfectly happy to go there if the committee wishes.

12:45

Amendment 23 is limited to the persecution of wild birds, which may give a clue as to who had a hand in drafting it. There is a flaw in it, however. If we are going to do this, it must be about more than just birds, so the amendment would need to be broader. I oppose amendment 23 on that ground if nothing else.

Both amendments appear to misunderstand the role of wildlife inspectors, who have certain functions that are limited to certain offences. They do not get involved in the investigation of unlawful killing of wild birds or any other protected species. It may be that the amendments were intended to refer to wildlife crime officers—I am not quite sure—but wildlife inspectors are slightly different.

If it is the committee's will that there should be an annual report I am prepared to come back with a new proposal at stage 3. The Association of Chief Police Officers in Scotland advises that wildlife crime is recordable, but that change has been made only in the past year or so, so it is probably not feeding through into the published statistics yet. That may deal with the point that Bill Wilson raised. We can discuss at stage 3 what the annual report might look like and what it should capture, if members are amenable to that.

Liam McArthur: I am grateful to the minister for her response. I recognise the flaws in amendment 23 and acknowledge her concerns about amendment 51. She questioned why wildlife crime is being singled out for a report. We regularly discuss other aspects of crime in Parliament; a report would reflect the importance that we attach to the issue and the attempts by the Parliament and successive Governments to bear down on it. It may well be that the reporting structure will change over time, if—as we all hope—we achieve some success, but wildlife crime is central at present and that is the sentiment behind both amendments.

I am happy with the minister's response and seek to withdraw my amendment on that basis.

Amendment 23, by agreement, withdrawn.

Amendment 51 not moved.

The Convener: I think that we should finish after section 6. The subsequent sections are quite hefty, so we will keep them for another day.

Section 6—Protection of wild hares etc

The Convener: The next group is on the protection of wild hares. Amendment 24, in the name of John Scott, is grouped with amendments 25, 5, 7 and 15 to 17.

John Scott: The introduction of close seasons for mountain and brown hare, as proposed in the bill, creates a welfare and conservation measure where there was none before. I welcome it, but the close season dates need to balance concerns about the timings of practical measures to mitigate crop and tree damage and the control of diseases such as louping ill. The later starts to the close seasons that my amendment proposes would provide a short window to allow such work to be carried out in the early spring, after the winter months. Amendment 24 would mean that the close season for mountain—or blue—hare will run from 1 April to 31 July, and for brown hare from 1 March to 30 September. That would give a close period of four months for the mountain hare to allow for breeding, and seven months for the

brown hare. I hope that that will find support with the committee and the Government.

I move amendment 24.

Roseanna Cunningham: The Government amendments in this group are intended to ensure that a person who is authorised under other enactments to take or kill hares for specific purposes is not committing an offence. The amendments bring the new hare and rabbit offences into line with the existing bird and animal offences in the 1981 act.

We have introduced close seasons for hares to provide greater protection at times of greatest welfare concern. That will replace the current limited protection that focuses on the sale of hares at certain times of the year.

The committee heard evidence from SNH about the effect a change in the proposed close season dates would have on the welfare of hares. Nearly half of all females are pregnant in February, so the change to the close season dates that John Scott proposes would impact on the actively breeding population and harm dependent young.

I understand that land managers have raised concerns about flexibility in carrying out control. Research commissioned by SNH on mountain hares showed that on let, commercial and formal shooting areas, only around 10 per cent of hares were shot between March and August. For unlet and informal shooting areas, the figure drops to 2 per cent. I therefore do not think that the proposed close season dates will cause the predicted difficulty to land managers that John Scott envisages and that has led to his lodging amendment 24.

We should also remember that land managers will be able to apply for licences to take action during the close season, if that is required. For those reasons, I oppose amendment 24 and commend amendment 5 to the committee.

John Scott: I thank the minister for her statement. I am interested to hear that land managers can apply for licences, if they are required for control purposes. I hope that the burden of proof will be easier than it perhaps is for buzzards; I assume that in that regard it will be a different position. I therefore will not press amendment 24.

Amendment 24, by agreement, withdrawn.

Amendment 25 moved—[Karen Gillon].

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

Against

Gillon, Karen (Clydesdale) (Lab)
McArthur, Liam (Orkney) (LD)
Murray, Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Watt, Maureen (North East Scotland) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)

Abstentions

Scott, John (Ayr) (Con)

The Convener: The result of the division is: For 0, Against 7, Abstentions 1.

Amendment 25 disagreed to.

Amendment 5 moved—[Roseanna Cunningham]—and agreed to.

Section 6, as amended, agreed to.

The Convener: That ends today's consideration of the bill. We will continue our stage 2 consideration at our next meeting, on 12 January, when the target will be up to and including section 21, which is the end of part 2. I thank the minister, her officials and everyone else for their attendance. I wish you all a happy Christmas and a healthy and happy new year.

I suspend the meeting briefly to give members a comfort break.

12:54

Meeting suspended.

12:59

On resuming—

Petition

Tree Preservation Orders (PE1340)

The Convener: Item 5 is consideration of petition PE1340, which is brought by Mr John Scott—but not the one at the table here—on behalf of Neilston and district community council. It relates to increasing the protection of Scotland's trees from felling. The petitioner made a further submission to the committee on 20 December, which clarified that the main aim of the petition is to establish provision for tree conservation areas. Trees in those areas would have legal protection similar to that in conservation areas.

The clerks have circulated a background paper on the petition, which was referred to this committee because it was thought that we could take account of it at stage 1 of the Wildlife and Natural Environment (Scotland) Bill. Unfortunately, the referral came just as we concluded stage 1 consideration. The bill is now at stage 2, when amendments can be lodged.

As members can see from their papers, the Public Petitions Committee has already undertaken a fair amount of work on the petition. It has written to Scottish Government officials and other stakeholders. My suggestion is that we defer further consideration of the petition until the Wildlife and Natural Environment (Scotland) Bill completes its passage through the Parliament. However, I would welcome other views from committee members before I make such a proposal formally.

Bill Wilson: I wonder whether some of the aims and hopes of the petitioners might fit into the land use strategy. I refer to the protection of tree plantings and the 25 per cent target for forest cover. Those things might connect.

Elaine Murray: I understand that there is a possibility that the constituency member who represents the petitioner's area might be lodging an amendment to the WANE bill at stage 2, which would give us an opportunity to consider the matter in connection with other evidence.

Sandra White: How far can the committee go with the conservation of trees? I will give an example—and perhaps I could get some feedback from the clerks. There was a certain birch tree in Glasgow—I will not mention the area—that had a tree conservation order put on it by the city council. All the legislation was in place but the tree was mysteriously felled during the night. A development was going on at that location. Would the potential new legislation offer more protection? Would it give the council, or even the police, more powers in cases like that illegal felling in Glasgow? Lo and behold, the development is now going ahead—without the tree. Would the new provisions help in such cases? I want to know what the purpose of the proposals is.

The Convener: I cannot say. We would have to get back to you on that. All the stuff on this subject has come to us fairly late, and this is the first stab that we have had at it. Shall we go with Elaine Murray's suggestion, and wait until—

Elaine Murray: I do not think that the proposals would assist in the protection of individual trees; they are more to do with creating tree conservation areas, in which trees are given protected status.

Bill Wilson: More important, the point does not apply in the case that Sandra White describes, as the tree was illegally felled—we cannot provide protection to stop an illegal act.

Elaine Murray: I understand that the Woodland Trust is prevailing on Ken Macintosh to produce an amendment at stage 2.

The Convener: I would be concerned if a street full of trees had a protection order or conservation order on it. Sometimes, trees lift pavement slabs and cause great danger to pedestrians. Councils have to decide whether to remove the old tree, which might have become too big for the pavement, and plant another one. I wonder whether that would not be possible if such provisions were introduced.

Bill Wilson: I suspect, though, that—

Liam McArthur: My understanding—

The Convener: One at a time. Liam, please.

Liam McArthur: My understanding is that such an order would not prevent felling or other actions in the circumstances that have been cited. If Ken Macintosh is to lodge an amendment, that provides an opportunity to explore the issue in a bit more detail at stage 2.

Bill Wilson: If the aim was to ensure that an avenue of trees is maintained, replacing some of the trees over time would be accepted as necessary. Otherwise, if they all died at around the same time, the avenue would be gone. That covers the circumstance that has been described.

The Convener: Okay. We will wait and see what comes forward at the next stage of the Wildlife and Natural Environment (Scotland) Bill. We will defer consideration of the petition until after the passage of the WANE bill.

That concludes the public part of today's meeting. I thank everyone in the public gallery for their attendance and wish everyone a very happy Christmas.

13:04

Meeting continued in private until 13:32.

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