

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 23 November 2005

Session 2

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ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

30th Meeting 2005, Session 2

CONVENER

*Sarah Boyack (Edinburgh Central) (Lab)

DEPUTY CONVENER

*Mr Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

*Rob Gibson (Highlands and Islands) (SNP)

*Richard Lochhead (North East Scotland) (SNP)

*Maureen Macmillan (Highlands and Islands) (Lab)

*Mr Alasdair Morrison (Western Isles) (Lab)

*Nora Radcliffe (Gordon) (LD)

*Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Alex Fergusson (Galloway and Upper Nithsdale) (Con)

Trish Godman (West Renfrewshire) (Lab)

Jim Mather (Highlands and Islands) (SNP)

Jeremy Purvis (Tweeddale, Etrick and Lauderdale) (LD)

Eleanor Scott (Highlands and Islands) (Green)

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor Julie Fitzpatrick (Moredun Research Institute)

Brian Hosie (Scottish Agricultural College)

Derick McIntosh (Scottish Executive Environment and Rural Affairs Department)

Mike Radford (University of Aberdeen)

Neil Ritchie (Scottish Executive Environment and Rural Affairs Department)

CLERK TO THE COMMITTEE

Mark Brough

SENIOR ASSISTANT CLERK

Katherine Wright

ASSISTANT CLERK

Christine Lambourne

LOCATION

Committee Room 1

Scottish Parliament

Environment and Rural Development Committee

Wednesday 23 November 2005

[THE CONVENER *opened the meeting at 10:39*]

Animal Health and Welfare (Scotland) Bill: Stage 1

The Convener (Sarah Boyack): Welcome to the meeting. I remind everyone to switch their mobile phones to silent. We have not received any apologies this morning.

Item 1 is the first of our six planned evidence sessions at stage 1 of the Animal Health and Welfare (Scotland) Bill, which was introduced on 5 October. The committee's role at stage 1 is to consider the provisions in the bill and to report to the Parliament whether we recommend that the general principles of the bill be agreed to.

In our evidence sessions, we will hear from a series of witnesses on their areas of expertise and interest relating to the bill. We have issued an open call for evidence and have had quite a number of submissions, which members will have started to receive. The submissions will be put on the committee's web page, so any members of the public who are interested in following our evidence can do so.

As members have no relevant interests to declare before we begin to take evidence, we can move on to welcome our first panel this morning, which is, unusually, a panel of one—I hope that our witness does not feel too alone. Mike Radford is a reader in animal welfare law at the University of Aberdeen school of law. We have asked him to give us an objective overview of the bill to help us to kick off our evidence sessions. We will not hear an opening statement from him, but we have received his helpful written submission, which has been circulated to members.

Richard Lochhead (North East Scotland) (SNP): Thank you for your submission, which I read last night. You say that a fundamental reason for the introduction of the bill is to reflect “changing ethical considerations”. What are those considerations in the context of animal welfare?

Mike Radford (University of Aberdeen): The ethical considerations are associated closely with a greater scientific understanding. Over the past 30 years or so, largely as a result of European legislation, questions of animals' capacities, both physical and mental, have arisen. That has led to

increased scientific research, which in turn has led to a much greater understanding and appreciation of different animals' capacities.

The more we know and understand, the greater our responsibility. All sorts of things were done to animals in the past that we would find totally unacceptable now. Our forefathers and foremothers did not have the degree of knowledge and understanding of the impact of human treatment of and relationships with other species. The science has opened up a whole new world of understanding of the capacity of animals and the effect of how we treat them. The more we know, the greater our responsibility to ensure that we prevent unnecessary suffering and provide animals with, at the very least, an adequate quality of life and, ideally, a high quality of life.

Nora Radcliffe (Gordon) (LD): I was interested in the care order and the idea that we should have some sort of intermediate stage when we are considering how people treat animals. Will you say a bit more about that?

Mike Radford: Yes. Part 2 of the bill does a number of things. First, it restates what I will call the offence of cruelty, which is contained in the Protection of Animals (Scotland) Act 1912. It is rather unfortunate that, in the bill, the term “cruelty” has been lost, because it is a concept that the man and woman in the street and the courts understand. However, the legal concept of cruelty is retained in the notion of causing unnecessary suffering. That will still be an offence for which people can be prosecuted in the courts.

The problem has always been that, under the offence of cruelty, no offence is committed unless suffering can be shown. An awful lot of offences involve neglect of animals. In such situations, animals deteriorate over time and it is difficult for enforcement authorities to see precisely where the threshold was crossed. There is no means of preventing suffering, so the idea of the duty of care is that a duty would be imposed on those responsible for animals to take reasonable steps to ensure the animals' welfare; if they failed to do so, they would have committed an offence.

The problem is that relying entirely on prosecution to enforce that offence will not be effective. There are three reasons for that. First, few welfare offences will reach the courts because they will be seen as relatively low down the list of offences with which procurators fiscal must deal—I suspect that procurators fiscal will say that there has not been cruelty and that the offence will not be regarded as too important. Secondly, the courts may have difficulty in distinguishing between cruelty, with which they are familiar, and a less precise welfare offence.

The third reason is far and away the most important. If we have to rely on the courts to enforce the welfare offence, the measure will have failed. The intention is not that the state should be Big Brother who comes along and tells people how to look after their animals or that it should use a hammer to crack a nut if people fail to do so, although, in the most serious cases, the state should take that approach. In most cases, however, education and advice will be needed. It seems to me that we need a mechanism by which people who do not properly look after their animals can be advised and have their minds focused on doing something to deal with the problem. That would go a long way towards making the provisions effective.

10:45

Nora Radcliffe: Thank you.

Mike Radford: If I may say so, it is important for the committee to appreciate that the animals on which part 2 of the bill will impact most are companion animals, as there are already welfare provisions—although we might say that they do not go far enough—covering most other circumstances in which animals are used, including circuses and some types of trade. The real lacuna in the law is with respect to companion animals.

That raises sensitive and difficult issues. It is clear that companion animals are kept for purposes that are different from those for which commercially kept animals are kept and that there is a much greater range not only of species of companion animals, but of breeds within species. The welfare requirements of an 18-month-old Border collie, for example, will significantly differ from those of a 17-year-old Yorkshire terrier. Furthermore, those animals are by and large kept in people's houses. A range of sensitive political and legal issues is therefore involved.

That is not to say that people who keep animals as companions should not look after them properly. Indeed, one can argue that there is a greater responsibility to do so—for better or worse, commercial considerations may qualify the level of welfare that can be provided for commercially kept animals, but there is no excuse for the inadequate welfare of companion animals, as no commercial considerations are involved.

Elaine Smith (Coatbridge and Chryston) (Lab): Paragraph 6 of your written submission states:

“there is an argument that the policy presently to restrict the reach of the Bill to vertebrates is inconsistent with other legislation.”

Did you mean legislation in other countries?

Mike Radford: No. I was referring to the Animals (Scientific Procedures) Act 1986, which governs the regulation of the use of animals in scientific procedures. It is significant that the word “animal” has a similar meaning in that act and in the bill—it essentially means vertebrates. As in the bill, there is an enabling provision in the act that allows ministers to extend the meaning to invertebrates on a case-by-case basis. Some time ago, the legislation was extended to cover octopus vulgaris—the common octopus—because the Home Secretary was persuaded that there was an argument that the octopus's degree of sentience merited that.

My view is that the evidential burden in the bill is too high. The wording of the bill suggests that there has to be conclusive evidence that an invertebrate is sentient. However, there is a body of scientific opinion that says that it is impossible to prove conclusively that lots of vertebrates are sentient. One could argue that the wording should be along the lines of “if there is a reasonable body of scientific opinion”. The definition should still turn on scientific opinion, but the animal should be given the benefit of the doubt. If there is a body of respectable scientific opinion that says that it is likely that an animal has the capacity to suffer, the animal should be given the benefit of the doubt.

Elaine Smith: It is not clear to me what you are suggesting for the bill.

Mike Radford: I am suggesting that the definition of “animal” in section 14 should be amended. At present, section 14(4) states:

“Regulations under subsection (3) may be made only if the Scottish Ministers are satisfied, on the basis of scientific evidence, that creatures of the kind concerned are capable of experiencing pain or suffering.”

I suggest that it should read “are likely to be capable of experiencing pain or suffering”.

Elaine Smith: Thanks. That is helpful. Would that include other creatures, such as insects?

Mike Radford: Potentially, but the scientific view is that insects are probably not sentient. However, I am not a scientist, so I will not go down that road.

Each type of animal would still be considered on a case-by-case basis. If the wording that I suggest were adopted, it would not open the floodgates; the minister would still have to be satisfied and, because the section is an enabling provision, the Parliament would have a say, as the definition would be extended in regulations. The change would simply lower the evidential threshold. Instead of there having to be conclusive evidence or evidence to a high degree, the animals under consideration would be given the benefit of the doubt if there was a body of scientific opinion that was of the view that those animals may have the capacity to suffer.

Elaine Smith: We would have to consider animals such as tarantulas or stick insects that were kept as pets as particular cases.

Mike Radford: If the scientific evidence existed. I am not a scientist, but I am not aware of a body of scientific evidence that would suggest that tarantulas and stick insects are sentient. However, that is for the scientists to argue.

Elaine Smith: Okay, thanks. Let us consider section 15(b). In your written submission, you state:

"In particular, it would be helpful if the meaning of 'under the control of man' in 15(b) could be further defined."

You want to explore the meaning of "protected animal" and which animals would fall within the definition. Can you explain that? How do you suggest the definition should be further defined?

Mike Radford: It is absolutely essential that the meaning of "protected animal" is clear. If it is not, those to whom the bill is addressed, the enforcement authorities and the courts will have difficulty. We have already seen that there is a difficulty with imprecise language, concerning the notion in the 1912 act of animals in captivity or captive animals.

The phrase "protected animal", which is exactly the same in the English legislation, has caused considerable confusion. After all, as with the phrase

"under the control of man",

it will in most cases be self-evident whether an animal falls within or outwith the definition of "protected animals". That said, in a whole range of circumstances, particularly with regard to wild animals that man comes into contact with, the boundary is imprecise.

What is meant by the notion of "control" in the phrase

"under the control of man"?

That is a rhetorical question, because in the majority of cases it will be self-evident. However, it is not clear what the phrase might mean in cases that are on the periphery, which is where difficulties will arise. For example, if an animal is caught in a trap, is it in the control of man? Does a person have to be physically present? Does the animal have to rely on shelter and food that man provides? It is difficult to be precise about the notion of control, because it can mean different things to different people.

It is desperately important that those words and phrases are clarified at this stage, partly to ensure that everyone to whom the legislation is addressed knows what it means. However, as a matter of constitutional principle in dealing with criminal law, we should be as precise as possible at the outset

if we are to avoid dragging people through the courts to find out what the legislation means.

Elaine Smith: Do you have any suggestions in that respect?

Mike Radford: It all depends on what the Executive means by "control". It is important to define the concept and then find the words to fit it. I feel that the definition should be as wide as possible, as that will provide the greatest protection. Equally, I understand that the legislation is not meant by and large to impinge on animals that live in a wild state.

However, what is an animal that lives in a wild state? Again, in the vast majority of cases, that will be self-evident. However, is a trapped animal under man's control or is it an animal that lives in a wild state that happens to be caught in a trap? If it escapes the trap, it will be back in a wild state. It is important to define the exact boundaries. You asked me where the boundaries should be marked; I feel that the definition should be as wide as possible, but the boundaries, wherever they are, should be clear.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): In your submission, you say in paragraph 12, which deals with mutilation, that the proposal to prohibit tail docking

"for cosmetic and breed standard reasons is ... warmly welcomed".

Do you also welcome certain exclusions from the legislation, such as dogs that are proved to be working dogs?

Mike Radford: My view on the matter is based on secondary evidence because, as I have said, I am not a scientist. However, after speaking to a large number of veterinary surgeons who have wide experience of working dogs from their practices, I am not persuaded that there is a widespread problem of undocked dogs damaging their tails while they work. I must repeat that I am not a scientist and do not have that first-hand knowledge. I am well aware that there is a contrary view on the matter but, on the balance of evidence that I have received from veterinary surgeons, I am not persuaded by it.

11:00

Mr Brocklebank: We will obviously hear further evidence on that. You say that you hope that England and Wales will adopt a similar policy in the United Kingdom bill and you state:

"If they fail to do so, further consideration would have to be given to the means of securing in Scotland effective compliance with the prohibition."

I understand that to mean that, if England and Wales do not adopt a similar policy, people could

sell dogs with docked tails over the border into Scotland and there would be a difficulty with enforcement. Is that what you are saying?

Mike Radford: People could certainly sell such dogs over the border. More particularly, dogs from Scotland might be taken over the border to have their tails docked and then be brought back.

There is no requirement for tail docking in breed standards for the showing of dogs. The Kennel Club, which is the regulatory body for dog shows, changed the breed standards so that a person could not be penalised for having an undocked dog. There are breed standards for docked dogs and undocked dogs. The problem is that a number of breeders prefer docked dogs. There is certainly a perception that several judges take a traditional view and prefer docked dogs.

The law on tail docking used to be that anyone could dock the tail of a puppy before its eyes were open. That was changed in the early 1990s, so that now only veterinary surgeons can dock a dog's tail. In law, there is no limit on their discretion, but the advisory code of professional ethics of the Royal College of Veterinary Surgeons, which is the regulatory body for veterinary surgeons, advises vets that cosmetic tail docking is unethical and that the practice is acceptable only for therapeutic reasons.

You asked how docking can be policed. There could be a requirement that any dog that has its tail docked should be microchipped. The microchip record would identify the veterinary surgeon who carried out the procedure. That would allow traceability back to the vet, who could be held to account for their decision.

There are also complications because provisions would have to be made for stray dogs and those that are taken into sanctuaries and rehomed. If someone has left their dog or allowed it to stray, they might not have complied with the law in other ways. You would have to think of those things, but they could be provided for.

Mr Brocklebank: Do you doubt that the same provisions will be enacted by the UK bill?

Mike Radford: The UK bill will say much the same as the Scottish bill. The issue is the way in which ministers choose to exercise their powers under the primary legislation. At the moment, the minister in England seems to be taking a more cautious approach, if I can put it that way.

Maureen Macmillan (Highlands and Islands) (Lab): I want to retrace our steps and look at enforcement. I was interested in what you said about procurators fiscal not giving a high priority to cases involving the neglect of animals. I am beginning to wonder whether the bill will make any difference to people keeping their domestic pets. If

the procurators fiscal are not going to take seriously the lower threshold of behaviour that will constitute committing an offence, people committing those offences may not find themselves in court. Vets spend time working on farms and kennels, but who will report people who keep pets when there is a lack of duty of care? People report the cruel treatment of animals, but I wonder whether there will be a huge gap—the legislation may not be enforced because people do not report that rather nebulous lack of duty of care.

Mike Radford: In the fullness of time, the committee will no doubt take evidence from the Scottish Society for the Prevention of Cruelty to Animals. I cannot speak for that organisation, but my impression is that the public do not hold back from reporting unacceptable situations. I think that I am right in saying that the SPCA is largely—if not totally—dependent on the public taking the initiative, particularly in relation to companion animals. The public may report to the SSPCA a situation that amounts to cruelty, but in many cases they are reporting a welfare offence. In other words, the animal's care is inadequate but does not cause suffering.

I would think that the SSPCA inspectorate has already been notified of a large number of such situations. The problem is not in being unaware of the situation; it is in not being able to do anything about it if the person who is responsible for the animal does not want to listen. The enforcement authorities will already have been made well aware of the situation. However, if it cannot be shown beyond reasonable doubt that the animal has suffered, no offence has been committed, even though it is obvious that the animal will suffer if the situation is allowed to continue. When the enforcement agencies are confronted with such situations, they do not have the power to do anything about them. Do you see what I mean?

Maureen Macmillan: Yes. It might be interesting to speak to the Crown Office and Procurator Fiscal Service about that to see what it thinks.

The Convener: The partnership for action against wildlife crime has discussed prosecuting cases involving offences against wild animals. Presumably, there will be a follow-on from the bill once we have finished with it.

Mike Radford: It is important to appreciate that there are examples of deliberate cruelty, where people get pleasure out of causing pain and suffering to animals. However, the majority of cruelty cases, regardless of whether they come to court, are founded not on deliberate cruelty, but on a combination of ignorance, negligence and people having all sorts of other problems in their lives. The inadequate care of their animal is not their only problem.

Maureen Macmillan: However, as you point out, a person's ignorance or incapacity is not a mitigating circumstance.

Mike Radford: No, but if they can be put back on the straight and narrow without having to go to court, so much the better. The committee will appreciate that companion animals play an extremely important role in many people's lives. The state is not saying to people left, right and centre, "You cannot have this animal," so if it is possible to put the situation right by keeping the animal with the owner while ensuring that the animal benefits from an adequate standard of care, so much the better. The issue is not only the procurator fiscal workload. For the bill to be effective, the welfare offence in particular needs to work at street level; we should not rely all the time on the courts.

Richard Lochhead: You suggest that there could be a loophole whereby, if tail docking is not illegal south of the border, someone could take their dog down there to have the procedure done. I would have thought that, if the person lived in Scotland and kept their dog in Scotland, the matter would still come under the law here.

Mike Radford: It all depends on how the law is worded. The issue comes down to whether the offence is possession of a docked dog in Scotland or the carrying out of the docking in Scotland. The offence of possessing a docked dog in Scotland would give rise to difficulties. In practice, it would be easy to enforce, because the issue is simply whether the dog has been docked, but politically and socially there would be a lot of opposition. It is likely that the offence would be the act of docking rather than possession of a docked dog. If the offence is the act of docking, the loophole or problem to which I drew the committee's attention clearly applies. I could take my dog to England, get it docked by a vet who was prepared to carry out the procedure and bring it back. I would not have committed an offence in Scotland, because while the dog was in England I would be subject to English law rather than Scots law.

You are looking at me as if I am not making sense.

Nora Radcliffe: The other committee of which I am a member dealt with the Prohibition of Female Genital Mutilation (Scotland) Bill, which makes it an offence to take a child out of the country to have a procedure done. Could that be used as a precedent for this bill?

Mike Radford: In principle, yes. However, in practice, traceability is somewhat more difficult with animals. In most cases, a child will clearly be associated with the parents, who can be held responsible for what has happened to the child throughout his or her life, but the ownership of

dogs does not involve the same kind of traceability. All that someone has to say is that they bought or were given the dog in England, or that it was given to them by somebody in a pub in Edinburgh and it happened to have a docked tail. The principle is fine, but the practicalities are more difficult.

The Convener: It sounds as though we will have to come back to the issue with subsequent witnesses to address that point.

Mike Radford: I am sure that you will.

Rob Gibson (Highlands and Islands) (SNP): My question concerns the meaning of "protected animal" in section 15 of the bill. You say in your submission that it

"would be helpful if the meaning of 'under the control of man' in 15(b) could be further defined."

I will give the example of deer, which are putatively wild but on many estates are fed in winter. How would you reflect that example in the definition for which you call?

11:15

Mike Radford: I give the standard lawyer's answer that it all depends on the circumstances. There would be two questions. First, does the deer live in the wild? Secondly, what does "in the wild" mean? Does living in the wild mean that the animal is entirely free and independent of man? For example, is an animal that lives in a sanctuary living in a wild state? It would be a question of fact and the courts would have to determine the matter.

You ask about feeding. I suggest that the issue would turn on the degree of dependence. Let us consider wild birds, for example. No doubt many of us feed wild birds in our gardens. Those birds expect that food to be there and therefore depend on it to an extent, but no one would suggest that they are not living in the wild. They come to our gardens for seed or peanuts and their interaction with man makes life easier for them than it would otherwise be, but they are essentially wild birds and are not under man's control.

One can think of examples at the other extreme. A hedgehog that lives in the wild, for example, may come for food, but if it is prevented from escaping—if there is a rabbit-proof fence, for example, that is also hedgehog proof—would it be under the control of man? The answer to that question would depend on such things as the size of the garden. You can see how difficult the problem becomes.

We should consider the problems that have arisen over the notion of captivity in the 1912 act. The cases are by and large English ones, but the wording in the bill is the same. A beached whale

that clearly could not escape until the tide came in and which youths hacked with knives has been held not to be an animal in captivity but a wild animal that was simply stranded. There was a case involving a deer that a vehicle knocked down on a road. The vehicle's occupants got out of the vehicle and hacked the deer with knives. The deer was held not to be a captive animal, although it is clear that it could not escape; it was held to be a wild animal that happened to be injured. There was also a case in which youths threw a coat over a wild rabbit and beat it with sticks. The courts held that the rabbit was not captive, although it is clear that it could not have escaped.

We must be careful about the meaning of everyday words. We all have an idea about what they mean, but it is important that people to whom the law is addressed and those who must enforce the law are, as far as possible, absolutely clear about where the boundaries are and the limits of the criminal law. Given the nature of the subject matter, being absolutely precise may be difficult—and there will always be the difficult case—but the current wording is simply too wide. All sorts of situations may arise in which it is not clear on which side of the fence—literally in some cases—animals fall and whether they will be covered by the legislation. Now is the time to put things right.

Rob Gibson: I have other questions, but I suspect that we could discuss the issues all morning, so I will let other members in.

The Convener: Perhaps the other witnesses can answer your questions. I am conscious that we have slightly run over the time that we expected to take, but Nora Radcliffe may ask a brief question.

Nora Radcliffe: In the further comments section of your written submission, you suggest:

“there should be in relation to enforcement authorities some form of reporting and recording of their activities.”

Is there a precedent for that?

Mike Radford: In England, it has been suggested that the Department for Environment, Food and Rural Affairs should keep a database, but I think that there should be somewhat more rigorous measures. Some form of accountability is important, particularly if the effectiveness of the legislation cannot be demonstrated simply by the number of prosecutions that there have been under it.

In that context, local authorities are an important factor. Some local authorities are good, some are indifferent and some are bad at enforcing animal protection legislation. One problem is that the issue is complicated, so expertise, knowledge and judgment are required. With the best will in the world, most local authorities do not have the

workload to make enforcement any one person's full-time job, so it is largely fitted in as a minor issue in a range of other responsibilities. That is why I suggest in my submission that the bill should contain an enabling power to allow local authorities to do the work of other local authorities. The idea is that authorities would form clusters—particularly in the central belt, although it would be more difficult in rural areas—in which one authority took the lead. That would give a sufficient volume of work for staff to build up expertise.

Nora Radcliffe: That is one point. The other was about maintaining a register. Is that done in other circumstances?

Mike Radford: That would be new in relation to animal protection legislation, but monitoring is undertaken in other areas, such as social services.

Nora Radcliffe: I just wanted to know what the model would be.

The Convener: We will move on to animal fights. You say in your submission that you are concerned that the bill could give animals that are used in fights less protection than existing legislation does, because it covers only the taking place of a fight and not the preparation for a fight. How would you remedy that?

Mike Radford: Section 21 is open to interpretation, but I read it as open to the interpretation that a fight must take place. That turns on the definition of a fight. It is also suggested that, to pursue prosecution for the offence, the prosecution would have to be able to point to a particular fight as opposed to fighting in general. If it is the Parliament's intention that fighting generally should be an offence and that preparatory acts to fighting should be an offence, the bill could easily be amended to make the meaning clear and unambiguous.

The Convener: In what way?

Mike Radford: Simply by changing the definition of a fight. Section 21(5) says:

“In this section, an ‘animal fight’ is an occasion on which a protected animal is placed with an animal”.

One could simply add words along the lines of “or it is intended”. When a fight has not taken place, the protection is needed that the prosecution would be able to show that animals were intended to be used for fighting.

The Convener: We have exhausted our questions to you. Thank you for providing written evidence and acting as a witness.

Mike Radford: Thank you for inviting me. Given the nature of the submission, I have not addressed several technical issues. I would be happy to submit further, more technical, written evidence, if that would assist the committee.

The Convener: Thank you for that offer. If we find issues on which we want another view, we will take it up.

We will have a couple of minutes' suspension to swap witnesses.

11:23

Meeting suspended.

11:25

On resuming—

The Convener: I welcome panel 2. The witnesses are: Brian Hosie, who is group services manager at the Scottish Agricultural College's veterinary service; Professor Julie Fitzpatrick, who is scientific director and chief executive of the Moredun Research Institute; and Derick McIntosh, who is head of veterinary services Scotland with the state veterinary service. We will examine the animal health parts of the bill in more detail. We asked the witnesses to give us their broad views on those issues in their written submissions. I thank them in advance for doing that.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): During the foot-and-mouth outbreak of 2001 we saw horrendous scenes of mass slaughter and incineration of cattle across Scotland and the United Kingdom. Has the thinking on how we deal with such outbreaks moved on since 2001?

Derick McIntosh (Scottish Executive Environment and Rural Affairs Department): Thinking certainly has moved forward. It is clear to us that stakeholder engagement is important, so we have attempted to tackle that. We intend to refine our plans and to make them more public, and we are developing a regular programme of exercises to test them. Also of help in moving on our thinking has been the publication of the Scottish Executive's Scotland plan. It is in the public domain and will be kept under review; it is to be revised shortly.

Professor Julie Fitzpatrick (Moredun Research Institute): Thinking has moved on. We need to consider different options, should there be another outbreak of foot-and-mouth disease. One of the reasons why vaccination was not possible was that there was no means of differentiating between naturally infected animals and those that had been vaccinated. As science progresses, we hope to produce vaccines for which such differentiation is possible. That is very important.

Another aspect that needs to be examined carefully is the appropriateness of modelling: sometimes it is very useful, but sometimes it is less so. In such cases, it might be better to use existing data.

Brian Hosie (Scottish Agricultural College): I echo those points. We should also look at other risks. In the current climate, avian influenza is on the agenda. However, other diseases could make an appearance: rabies, for example, could come into Britain again. We have to take opportunities to review the situation and move forward.

During the outbreak of foot-and-mouth disease there was an issue in respect of who was driving forward the control measures and there was a move towards greater reliance on modellers to direct the handling of the outbreak. Being wise after the event, we now find that perhaps the degree and extent of the cull was excessive. There is a possibility that, since that cull was driven by the modellers, we did damage by killing animals unnecessarily and by diverting manpower and expertise away from the focus of the problem—where the infection was—to dealing with animals within a 3km cull and with contiguous premises.

Mr Ruskell: Is the bill balanced in its approach to vaccination and culling? It seems that we have ministerial powers being introduced on vaccination and culling. Is there a presumption of one over the other?

11:30

Derick McIntosh: It is clear that there is a commitment on the parts of the Executive and the UK Government that, faced with a major outbreak of foot-and-mouth disease, vaccination would be considered from day one. There are practical and logistical reasons why vaccination cannot be instituted on day one, including the wide variety of antigenic types and the types of foot-and-mouth virus in which cross-protection cannot be counted on. You need to know which type of virus you are dealing with and then produce commercial quantities of the vaccine. There are strategic reserves, but in a limited range of antigenic types.

There is great difficulty in considering how and when to deploy vaccination. Some people's view is that by the time it is known whether deployment is needed, it is almost too late. No matter what you do, foot-and-mouth disease will always follow the same pattern of increasing incidence of disease, then containment, then a tail of recovery. Even where vaccination is deployed, it is still necessary to slaughter infected animals and herds and there is no way of avoiding that. Vaccination of an infected herd will not achieve anything.

As I said, where and how vaccination is deployed must be considered. Ring vaccination in 2001 would have been completely useless. The primary outbreak was found in an abattoir in the south-east of England, so had a ring vaccination programme been deployed, it would have been a

waste of time, resources and public money, because the epicentre was later found to be in Cumbria and Dumfries and Galloway. Had a programme been deployed there, it would already have been too late, because the disease had spread from Longtown market to Wales and the south-west of England. Knowing exactly how to deploy vaccination can be a significant problem, but I agree that it would, in an ideal world, be preferable to vaccinate animals than to slaughter them. It would be good to find a useful way of reducing the spread of infection by deploying vaccine.

Mr Ruskell: The bill leaves us in the hands of ministers. For example, with culling we could have an infinite zone around contiguous farms. It is pretty much left to ministers to decide that under the bill. What is your view of ministers' wide discretionary vaccination and culling powers under the bill?

Professor Fitzpatrick: Those powers are appropriate. It is difficult to give a specific answer to your first question about where the correct balance lies; the balance depends on the type of outbreak, the strain and where the outbreak originates. There have been huge differences in the types of outbreaks in the United Kingdom over the past 100 years. We had the very widespread outbreak of recent years, but there was also a very restricted outbreak in the Isle of Wight a number of years ago. Whether culling is appropriate depends very much on where and how an outbreak occurs. It is appropriate that decisions on whether to cull or vaccinate or to do a combination of both are taken for individual incidents. It is difficult to come up with a single answer.

Mr Ruskell: It appears that under the bill it will be impossible to challenge a decision to cull. Should such a decision be open to legal challenge?

Professor Fitzpatrick: I am not experienced in the legal aspects. It is difficult to come up with a single appropriate answer.

Brian Hosie: I can answer. I have given a great deal of consideration to the points that Mark Ruskell raises. It is important that we decide on whether the proposals are appropriate or proportionate. On balance, you have to come down on the side of giving powers to ministers to take appropriate action, but they must then be held to account if, for example, they go too far too fast, such as happened with the cull in 2001. Lessons should be learned from that experience and applied to the next situation.

Mr Ruskell: How can you hold ministers to account if you cannot legally challenge them in the courts? I am trying to understand how you would hold ministers to account for particular decisions.

Brian Hosie: I imagine that it would be done by politics in action, but I am not an expert in that field.

Mr Brocklebank: I take you back to the tail-docking argument, and Mike Radford's evidence that anti-docking legislation should be extended to all dogs, including working dogs, which are excluded at the moment. What are your views on that?

Brian Hosie: The British Veterinary Association, of which I am a member, advises that there is no case for docking dogs' tails. I do not have any specific expertise on that, although I have studied docking of lambs' tails; I imagine that there are parallels. The advice of the BVA and the Royal College of Veterinary Surgeons is that we do not need to dock dogs' tails and should not do so.

Mr Brocklebank: Do you reject the evidence that suggests that working gun dogs can suffer serious injuries to their tails and that dogs do not recover easily from those injuries?

Brian Hosie: If an animal was injured, docking would be done for a therapeutic purpose.

Mr Brocklebank: You would only dock its tail if the animal was injured—you would not do that as a matter of course.

Brian Hosie: Exactly.

Mr Brocklebank: Are you concerned that our legislation seems to be getting out of kilter with legislation south of the border, where that stance is not being taken?

Brian Hosie: Absolutely. It is undesirable for puppies to be transported for the purposes of tail docking. They would go through a lot of stress and distress during transportation across the border for a surgical operation and the transport might be unregulated.

Mr Brocklebank: Do your veterinary colleagues have any comments on that?

Professor Fitzpatrick: I strongly support the prevention of cosmetic docking, which is a huge step forward. I echo Mike Radford's words. It is important that the Administrations in England, Scotland and other parts of the United Kingdom do not take different approaches, because the transportation of animals for docking is a real worry.

I am less certain in respect of working dogs. They present a problem; because they work, they get more injuries to all parts of their bodies, including their legs, ears and tails—should they have them. I am not aware of a sufficient body of evidence to say yes or no to docking of working dogs' tails. My concern is that, if working dogs are excluded, we will find that there are a lot of working dogs around and a lot of working breeds.

If a breed is defined as a working breed, puppies of that breed are likely to be defined as working dogs even if they never work. That is a difficult problem. I do not know enough about the scientific evidence to defend the situation, but to me that is different from cosmetic docking.

Derick McIntosh: I do not have anything to add.

Elaine Smith: Professor Fitzpatrick said that the legislation should be the same throughout the UK because of fears about transportation of puppies. However, if the English legislation is not going to be robust, does that mean that the Scottish legislation should not be robust either? I am not quite sure what you are saying.

Professor Fitzpatrick: I suppose that we are just pointing out what might happen if there were differences between Scotland and England. I still support the bill that has been written for Scotland. We cannot influence what the other Parliament does.

Elaine Smith: Thank you—it was important to clarify that.

The Convener: We might want to think about the matter when we consider enforcement, which arose during our questions to Mike Radford.

Nora Radcliffe: Will the panel say a little about the definition of “animal”, which is restricted to vertebrates? I wonder what the scientific evidence is for including invertebrates because of their ability to experience suffering.

Brian Hosie: As Mike Radford said, it is a question of setting a threshold. I remember a case of cruelty to a lobster, but one has to recognise which animals are sentient. We must set a threshold that allows us to take on board new evidence as it emerges. In my submission, I give tarantulas as an example. They are kept as pets and are wholly dependant on their owners, who must care for them and provide appropriate food and an appropriate temperature. It would be anomalous if someone caused those animals pain and distress and no action was taken even though action would be taken if the animal was a lizard.

Nora Radcliffe: Is there is a case for widening the definition in the bill, or is the fact that ministers can alter it sufficient?

Brian Hosie: Ministers should have the opportunity to extend the provision in the light of emerging information, rather than that door being closed to them.

Professor Fitzpatrick: I support that view. There are two opportunities: one is to include the definition, as Mike Radford suggested, particularly for octopus; the other is to allow ministers to redefine the definition case by case, taking into account new evidence, particularly on pain perception in invertebrate species.

Nora Radcliffe: From your professional knowledge, would you say that there is quite a body of evidence that might bring invertebrates within the scope of the bill?

Professor Fitzpatrick: In my opinion, there is some evidence, but I am not an expert in those species. It would be best to consult a zoologist who has knowledge of pain perception in those species.

Nora Radcliffe: I apologise for asking a question that is slightly out of your field; it was not a fair question to ask.

Rob Gibson: I would like to hear the panel's views on protected animals. Mike Radford's view is that there is considerable uncertainty at the margins with regard to the phrase,

“under the control of man”.

Would any of the witnesses like to comment further on that?

Brian Hosie: I deal with farm animals in my day-to-day work, and it is quite clear that farm animals are under the care of man. They are enclosed to some extent and they are entirely dependent on man for food, water and veterinary care and attention. I sympathise fully with Mike Radford's point. As was mentioned, there is not the same degree of responsibility for wild deer and wild birds. The bill clearly aims to place a duty of care on animal keepers, and it is important that that duty can be discharged to somebody. I would have thought that would be the basis on which you would take forward the legislation.

Rob Gibson: I would like to be more specific. The purpose of feeding deer in winter is to maintain the size of the stock and not to allow the natural process of wastage that takes place, so the question of being under the control of man becomes more important.

Professor Fitzpatrick: Mike Radford described the difficulties, not only about the concept of animals being under the care of man but also about captive animals. It is difficult to decide where to draw the line. Deer provide a reasonably good example of where there is intervention by man, but whether those animals are defined as being under the care of man is a legal question.

The Convener: I would like to move on to biosecurity, which is mentioned in some of the submissions. Should there be a statutory biosecurity code, and should it be an offence not to comply with such a code?

Derick McIntosh: A biosecurity code would clearly be useful. It would give the livestock industry the opportunity to follow best practice and to do the things that will help people to avoid disease transmission and the introduction of

disease on to their premises. That is clearly a good thing.

You could go a little beyond that and give the code a bit of beef by giving it some statutory backing. You could make it understood that if people do not behave responsibly they put their own livestock, their neighbours' livestock and the industry at risk, and that sanctions can follow that. In fact, one of the provisions of the bill relates to withholding of compensation where disease is deliberately introduced, which is an indication of the backstop. That mirrors the animal welfare codes that have a statutory backing to an extent under the Agriculture (Miscellaneous Provisions) Act 1968, in that failure to comply with the code is not an offence, but such failure might be used in supporting evidence to demonstrate that an offence has been committed. That is a useful balance.

It is also appropriate to include in this bill the biosecurity codes provision that was made under the 1968 act. It is an important preventive measure that provides to people in the industry clear and easily understood guidance that is simply presented; there is no point expecting them to be mind readers. That provision is very useful.

11:45

Professor Fitzpatrick: I support the bill in general. I like the biosecurity codes because the provision puts the emphasis on prevention and controlling the spread of disease rather than on waiting for disease to occur and acting subsequently. The industry increasingly understands biosecurity: it no longer thinks that it relates just to foot-and-mouth disease, but knows that it relates to control of many of the endemic or production diseases throughout the UK. To include that provision in the bill will re-emphasise its importance.

I support the penalties for deliberate infection, which will make it absolutely clear where owners' responsibility lies. It is important that the codes be not written too prescriptively because biosecurity and understanding of disease move forward month by month and certainly year on year. So that it can be updated where appropriate, it is important that the legislation does not tie down biosecurity too specifically.

Brian Hosie: All I will add is that there should be a way of improving standards over many years. The codes could be revised and updated in the light of new knowledge and understanding.

The Convener: I will put biosecurity in the slightly wider context of animal health policy. Are enough resources and energy being put into preventing animal diseases from entering Scotland or the UK? Are we doing enough about that in the bill?

Derick McIntosh: How much is enough? It is a question of how one deploys resources to best effect. One of the key aspects of keeping disease out is policing our methods of introducing either animals or animal products, or other means of introducing disease.

The system that is briefly described in the SVS paper is deployed on a number of levels. First, there is a system of border inspection posts in all European Union countries through which all animal products and animals must pass. Their certification is checked, any necessary tests or examinations can be conducted and any animals or animal products that fail to meet the mark can be rejected before they enter the EU. Having entered the EU, they are then in the single market, but are nevertheless accompanied by health certificates.

When animals enter the UK from other member states, an electronic messaging system is used. For example, when a region in France exports cattle to Scotland, the equivalent office in Scotland receives a message through that messaging system. We in the UK can add a risk message. The species, the area that it comes from, and the disease status there and in the surrounding areas determine which checks will be carried out. The state veterinary service then carries out a number of targeted statistical checks based on the messaging system.

We also have to consider animal products that come in illegally. HM Customs and Revenue is responsible for that, so it might be better placed to answer questions on that. It faces an extraordinarily difficult task: some containerised ports are vast, so it would be impossible to go through every container systematically. Nevertheless, HM Customs and Revenue seizes regularly a number of illegal animal products—I stress that they seize animal products rather than animals.

The Convener: I suppose that the question is how we identify the priority risks and diseases.

Professor Fitzpatrick: I will respond briefly, to back up what has been said. There is a perception that insufficient is done to keep infected animal products out of the UK, although that is less apparent in relation to live animals. It is a problem for the primary producing industry that people think that biosecurity is not taken as seriously here as it is in countries such as Australia and New Zealand, which are in different situations and deal with different diseases. I am not sure whether that perception is correct, but the focus is on animal products—particularly illegal imports or unknown quantities—coming into the country.

The Convener: Are you talking about animal products that would be processed afterwards?

Professor Fitzpatrick: Yes.

Maureen Macmillan: What effect might the proposed regulations on scrapie have in different parts of the country? Concerns have been expressed that the older native breeds of sheep might be badly affected by the regulations and might even struggle to survive.

Brian Hosie: There are a few issues about the transmissible spongiform encephalopathies. The biggest concern is whether BSE from cattle has got into sheep. The concern is that the sheep react to the scrapie or BSE agent in a different way to cattle, such that the BSE agent is more widespread in the sheep carcass. With cattle that were infected with BSE but which were not showing symptoms, we could be confident that by removing the brain, spinal cord and some other tissues we were ensuring that we were not putting the human food chain at risk. The same does not apply to sheep and that is the core issue. Were BSE to get into sheep, we would have a great deal of concern about the risk to the food chain. Any consideration of animal husbandry has to be secondary to that.

We have an EU-wide programme of selecting animals that are genetically less susceptible to BSE. It started in 2001, with a voluntary national scrapie plan. Before that, individual farmers tested and selected animals for their innate resistance to BSE and other transmissible spongiform encephalopathies. In the coming year, a compulsory scheme will be developed whereby only rams that are going to pass on some degree of resistance to the diseases will be allowed to be used for breeding purposes.

There is scope to conduct a risk assessment of rare and vulnerable breeds that do not have the pool of animals that are genetically less susceptible to BSE. That might happen in the outer islands for example. It might well be that because of the way the sheep are managed, the chances of their having encountered BSE are infinitesimally small. If they are not fed compounded food stuff to any great extent, then their contact with that vehicle would be minimal. With highly intensive systems in former hotspots in the south-west of England, there could be a much higher risk of animals coming into contact with BSE. It is a matter of making a proportionate response and conducting an assessment.

There might be individuals who are not worried about being able to slaughter and eat their animals, because they are keeping them as pets. Exceptions might well be made for people who keep animals in that way, because those animals do not pose a risk to the human food chain. As long as we can identify that that is the case, there is no risk.

Maureen Macmillan: I was thinking not so much about pet sheep as about the small Shetland breeds and Soay sheep.

Brian Hosie: Shetland Islands Council has funded an ambitious programme of genetic testing and selection over at least 15 years. As a result, progress has been made and the breed is now less susceptible to such diseases. Farmers on the Shetland Islands have been open about the occurrence of disease in their flocks and action has been taken. The situation looks promising. In Shetland, the problem is scrapie, not BSE, but the situation is under control.

Maureen Macmillan: Thank you. That was helpful.

Mr Brocklebank: I have a brief supplementary question on the point that Rob Gibson raised about animals being within control. The following situation may be covered by the bill, but perhaps you can clarify that. Farmed fish come within the scope of the bill, but fish that are caught by rough fishing and by anglers are excluded. What about when people stock lochs for others to fish? The fish are not farmed for the table, so it could be argued that that is rough fishing because people are angling for them. How is that defined?

Derick McIntosh: To be honest, I am not sure how that is defined. However, from the description that you gave, I would regard that as a release back into the wild because the fish would not be captive for long.

Mr Brocklebank: But the fish are fed; they do not live naturally in the loch. There are a number of such places where people go to fish for trout and various other fish. The fish are not farmed for the table, but they are caught by anglers. The fish are given food pellets to keep them in existence.

Derick McIntosh: That sounds like the right question to the wrong witnesses. Perhaps you should ask a lawyer.

The Convener: Okay, we will keep that question for another panel of witnesses. Nora Radcliffe has a brief question before we wrap this session up.

Nora Radcliffe: Who do you think should be appointed as the inspectors to implement the bill, and what sort of training should they get?

Derick McIntosh: I do not have a detailed view. Does your question relate to SSPCA inspectors?

Nora Radcliffe: What are your views on the amount of training that inspectors will require and how they will integrate with the existing systems?

Derick McIntosh: I have a view on that, but I am not sure whether I could pull it all together at the moment.

Nora Radcliffe: We could perhaps come back to it.

Derick McIntosh: Yes. It is important that the people who are involved in animal welfare are well trained, especially to ensure that their actions are proportionate and reasonable and that their judgment is astute. They need to be able to recognise signs and to know what to do.

The Convener: I presume that that issue cuts right across the bill. Whether in animal health or animal welfare, we need inspections to be carried out by people who are well trained and qualified. The nub of the question is this: who is responsible for ensuring that the inspectors will be in place to help us to implement the bill once it is passed?

Derick McIntosh: I am not sure that we are the right witnesses to answer that question.

Professor Fitzpatrick: I think that the group that would be responsible for deciding on the training requirements would be the state veterinary service. Even our discussions today have shown the complexity of the two different parts of the bill—the disease control part and the welfare part. They are similar but different. They will require different levels of training and, perhaps, different individuals. It will be quite an achievement to cover all the different species and situations.

One issue that we are concerned about is the inspectors' power, under the welfare provisions in the bill, to decide on euthanasia of animals, especially in emergencies. That is a considerable worry to us. Veterinary surgeons who have had five years' training sometimes find it difficult to know whether animals will recover. The limitations of the inspectorate will be important.

The Convener: That is useful. Some of the questions are complex, and there are two elements to the bill. We have captured some questions that we will pose to future panels—you need not worry that we think that you have given us the last word on everything. We have several more weeks in which to tease out answers to questions with other witnesses. Thank you for coming this morning to answer our questions and for giving us your written evidence in advance—it has been extremely helpful.

Subordinate Legislation

Avian Influenza (Preventive Measures) (Scotland) Regulations 2005 (SSI 2005/530)

Avian Influenza (Preventive Measures in Zoos) (Scotland) Regulations 2005 (SSI 2005/531)

12:01

The Convener: Agenda item 2 is subordinate legislation. We have two instruments to consider under the negative procedure. The Subordinate Legislation Committee has considered SSI 2005/530 and SSI 2005/531 and has made comments on both of them—an extract from the *Official Report* of the appropriate Subordinate Legislation Committee meeting has been circulated to colleagues. In view of the public interest in avian flu, and for members' benefit, Executive officials are in attendance to answer questions. I welcome Charles Milne, the chief veterinary officer for Scotland, and Neil Ritchie, the head of the Executive's animal health and welfare strategy branch.

Do members have any questions or points to raise on either instrument? It is not compulsory for members to ask questions, as we have had a ministerial statement on avian flu. However, we thought that, if members had issues to raise, they could do that today rather than put the item on a future agenda.

Mr Ruskell: According to the background notes that we have received, the Executive did not undertake any formal stakeholder consultation on the instruments. How will you involve stakeholders in the future? Although we have the Scottish statutory instruments in front of us, the issue is not going to go away. How will you work with stakeholders on the issue?

Neil Ritchie (Scottish Executive Environment and Rural Affairs Department): It is an on-going process. The regulations are the most quickly produced pieces of legislation that I have ever been involved with. Because of the timetable that the European Union gave us, we had less than a week in which to lay the instruments.

As part of the process, we are having discussions with key stakeholders to ensure that they are kept up to speed with the developing situation. We had a wide-ranging stakeholder meeting—largely with the wild bird interests—on Friday afternoon, and we will meet industry colleagues in the next week or so to discuss the issues. There is an extensive on-going programme of discussion.

Mr Ruskell: I cannot speak for other committee members, but I would find it useful to have some feedback. For reasons of timescale, the SSIs have been presented to the committee very rapidly and without consultation. I understand the reasons for that, but it would be useful to have a summary of the work that you are doing with stakeholders after the instruments are passed to enable our continued scrutiny of the issue.

Neil Ritchie: That will not be a problem. We can make available to the committee the minutes of our main meetings.

The Convener: Members do not have a huge number of questions today, but the background information will be useful to us in the future. It will enable us to scrutinise the effectiveness of what you have been doing. If there are any issues that you want to bring to the public's attention, putting them before the committee is an effective way of ensuring that people become aware of what is happening—even if it is happening quickly for the obvious reasons that you have set out in the papers that accompany the SSIs.

Neil Ritchie: On the basis of your last comment, I take the opportunity to plug one of the key ways in which we are raising awareness of the issues among a wide range of stakeholders. Last night, we issued a news release in which we announced that we have commissioned the Scottish Agricultural College to deliver a series of seminars throughout Scotland that are aimed at raising awareness of avian influenza issues. The first of those will be in Pathhead on Monday evening. The seminars will explain the practical biosecurity-related precautions that industry can take, as well as the statutory background.

The Convener: As there are no further questions, I thank you for attending the committee. Your attendance has been useful.

We must decide what we think about the instruments. Are members content with the instruments and happy to make no recommendation to Parliament?

Members indicated agreement.

The Convener: We now move into private session. It was agreed at our previous meeting that we would consider our draft report on the Environmental Levy on Plastic Bags (Scotland) Bill in private. I therefore invite the official report, broadcasting, members of the public and any visiting members to leave.

12:06

Meeting continued in private until 12:27.

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