



OFFICIAL REPORT
AITHISG OIFIGEIL

Rural Economy and Connectivity Committee

Wednesday 15 January 2020

Session 5



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RURAL ECONOMY AND CONNECTIVITY COMMITTEE
2nd Meeting 2020, Session 5

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

COMMITTEE MEMBERS

*Peter Chapman (North East Scotland) (Con)

*John Finnie (Highlands and Islands) (Green)

*Jamie Greene (West Scotland) (Con)

*Emma Harper (South Scotland) (SNP)

*Richard Lyle (Uddingston and Bellshill) (SNP)

*Angus MacDonald (Falkirk East) (SNP)

*Mike Rumbles (North East Scotland) (LD)

*Colin Smyth (South Scotland) (Lab)

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

George Burgess (Scottish Government)

Vicky Dunlop (Scottish Government)

Fergus Ewing (Cabinet Secretary for the Rural Economy)

John Kerr (Scottish Government)

David MacLennan (Scottish Government)

Ally McAlpine (Scottish Government)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Rural Economy and Connectivity Committee

Wednesday 15 January 2020

[The Convener opened the meeting at 10:01]

Direct Payments to Farmers (Legislative Continuity) Bill

The Convener (Edward Mountain): Good morning, everyone, and welcome to the Rural Economy and Connectivity Committee's second meeting in 2020. I ask everyone to make sure that their mobile phones are on silent, please.

The first item on the agenda is the United Kingdom Direct Payments to Farmers (Legislative Continuity) Bill. Before we go any further, do members have interests to declare? I will start by declaring that I have an interest in a family farming partnership.

Peter Chapman (North East Scotland) (Con): Likewise, convener, I declare an interest as a member of a farming partnership.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I own, with my spouse, a very small registered agricultural holding.

The Convener: The committee will consider a legislative consent memorandum that was lodged by the Cabinet Secretary for the Rural Economy, Fergus Ewing. The LCM relates to the Direct Payments to Farmers (Legislative Continuity) Bill, which is currently being considered in the House of Commons. As the lead committee in the Scottish Parliament for the bill, we are required to reflect on the memorandum and consider whether we are content with its terms. We will then report our findings to the Scottish Parliament.

The Delegated Powers and Law Reform Committee considered the LCM at its meeting yesterday and, although that committee had no points to make on the terms of the LCM, it agreed to write to both the Scottish Government and the UK Government on the issue of the process.

I welcome to the meeting from the Scottish Government the Cabinet Secretary for the Rural Economy, Fergus Ewing; Alan Fraser, who is the common agricultural policy scheme manager; and David MacLennan, who is a solicitor. Cabinet secretary, would you like to make a short opening statement of two minutes, please?

The Cabinet Secretary for the Rural Economy (Fergus Ewing): Thank you, convener.

I thank everybody for finding the time to provide me with the opportunity to give evidence on the LCM that was lodged by the Scottish Government in relation to the UK Direct Payments to Farmers (Legislative Continuity) Bill.

I will be crystal clear: without the UK Direct Payments to Farmers (Legislative Continuity) Bill, we will not be able to make payments to farmers and crofters through the direct payment schemes for the 2020 claim year. I will explain why.

The compressed timetable to which we are collectively working is a direct result of the need to pass the legislation in advance of the UK withdrawing from the European Union on 31 January and the UK Government's timescales for achieving that withdrawal. Although the Scottish Government believes that the best option for the UK as a whole and for Scotland is to remain in the EU, as voted for by the people of Scotland, we accept the need to make preparations for the exceptional circumstances that arise as a result of withdrawal from the EU under the terms of the withdrawal agreement negotiated by the UK Government. Given that, the Scottish Government recognises how critical the direct payment schemes are to Scottish farmers and crofters and how critical it is to make all necessary preparations to ensure that support payments to farmers and crofters in Scotland can continue to be legislated for and made.

The legislative continuity bill is needed as a direct result of the withdrawal agreement, which provides, in article 137, that the EU direct payments regulation will not apply in the UK for the 2020 claim year. We therefore need primary legislation in place to ensure that there is a legal basis for the direct payment schemes in 2020.

I raised that issue with the Secretary of State for Environment, Food and Rural Affairs in July last year and have pursued a resolution since then. With respect, it is a problem that the UK Government has created, that has been identified to it, and that it needed to fix. Notice of that was given by me in writing last July.

The Direct Payments to Farmers (Legislative Continuity) Bill finally intends to solve the problem, albeit late in the day. I therefore lodged the LCM that we are discussing today. In that memorandum, I set out to reflect the exceptional circumstances that we find ourselves in. I also intend to lodge a legislative consent motion that seeks the Scottish Parliament's formal legislative consent to the bill.

Without the bill, we would not be able to make any payments under the direct payment scheme for the 2020 claim year. That would cause severe financial hardship to Scotland's farmers and crofters and to the wider agricultural sector, and

none of us can thole or accept that. Such a situation could, in turn, result in many businesses folding and lead to land abandonment. For that reason, the Scottish Government recommends that the Scottish Parliament approve the motion.

The bill will be implemented using secondary legislation that is made under it. The Scottish ministers will make a Scottish statutory instrument under the powers in the bill, and it is anticipated that the UK Government will make a number of SIs that will extend to Scotland. Although time limits will be exceedingly tight, those instruments will be subject to the affirmative procedure, so the committee will have a chance to provide a degree of scrutiny.

I hope that that gives the committee an understanding of why, in these exceptional circumstances, the Scottish Government is recommending that the Parliament give legislative consent to the Direct Payments to Farmers (Legislative Continuity) Bill. David MacLennan, Alan Fraser and I are happy to take any questions that committee members have.

The Convener: Thank you, cabinet secretary. There are some questions. I will start by asking a question for clarity. I remind you of the evidence that you gave to the Rural Economy and Connectivity Committee on Wednesday 31 October 2018, when you were asked a clear question by Maureen Watt, who is now the deputy convener of the committee. She said:

“The cabinet secretary will be aware that NFU Scotland is concerned that there may not be a legal vehicle for delivering payments beyond 29 March 2019. For the record, can you give your thinking on that?”

You went on to say, with regard to being able to make the payments:

“I am absolutely satisfied of that, for very good legal reasons and, as I have indicated, we will provide the committee with the legal advice in copperplate and in detail.”—[*Official Report, Rural Economy and Connectivity Committee*, 31 October 2018; c 20-21.]

What has changed?

Fergus Ewing: As I have said, it is perfectly possible to ensure that payments are made, and we identified what the UK needed to do last July. I can provide the committee with the correspondence, if it so wishes. I wrote to the Secretary of State for Environment, Food and Rural Affairs on 9 July to request confirmation that the UK Government would take steps to ensure that, subject to the Scottish Parliament’s view on consent, there would be legislation in place for the direct payment scheme in the 2020 claim year.

That is something that is reserved to Westminster. Those at Westminster need to do their job. We are doing our job, and they need to do their job. When I gave the committee

assurances that payments could be continued, I did so, of course, on the basis of good faith in working with DEFRA, as I do regularly, to ensure that they would do their job. They have acknowledged that they need to do their job. However, they did not start doing the job until this month.

The Convener: Cabinet secretary, that was the evidence that you gave to the committee. If the situation has changed, it might have been helpful to warn the committee of that. You also—

Fergus Ewing: It has not changed.

The Convener: Cabinet secretary, I did not interrupt you and, with the greatest respect, perhaps you will let me finish my question. I will make sure that every committee member has a chance to finish their questions.

At that stage, you said that you were confident for good legal reasons that were beyond doubt, which you said that you would provide to the committee—although you have never done so. I am not convinced that I have heard anything today that would change that position. You say that it is someone else’s fault whereas, at that stage, you were convinced that you were right. In fact, in the evidence session, David Barnes, who was your adviser at that stage, also corrected the questioning, and he said that there was no chance that the payments could not be paid post-2019. The situation has obviously changed, and I have not heard the reason why. Can you explain that to me?

Fergus Ewing: I think that we are going to have to agree to disagree. It was always on that basis. I made it absolutely clear that we would do our part of the job, and we are doing that. We will come on to discuss that under the next item on the agenda. It has always been the case that the UK Government needs to deal with its part of the job—and it accepts that. What I am saying today is that, in a letter to DEFRA last summer, we identified that it needed to do its part as well, because of article 137 of the withdrawal agreement. DEFRA agreed with that in the correspondence that I have.

If you do not accept that, convener, you will have to take it up with DEFRA. That is the situation, and there is nothing remarkable about it. It is perfectly reasonable for the Scottish Government to assume a reasonable level of competence in the UK Government. If you take a different view, that is entirely up to you.

The Convener: We may have to agree to differ. I am disappointed that the evidence that you gave to the committee in 2018 appears to have changed substantially and this is the first time that we have heard about it.

Fergus Ewing: With respect, I do not accept that, convener.

The Convener: Thank you, cabinet secretary.

Stewart Stevenson: I do not know whether the cabinet secretary has seen the letter from the Delegated Powers and Law Reform Committee that went out late last night or early this morning and was copied to the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell, and to Theresa Villiers at DEFRA, on its views on the delegated powers and the timescale. In particular, I want to pick up on the fourth bullet point, which is on the follow-on UK SIs, which also have to become law before 31 January, as the cabinet secretary mentioned in his opening remarks. Given that they are affirmative instruments, they are of relevance to us.

I understand that the bill that we are talking about granting an LCM for will go to the House of Lords on Monday 27 January, which is substantially later than had previously been thought. That leaves us with a single week in which to consider the SIs. Our meeting is on 29 January, so we have only one scheduled occasion on which to consider them. That is the preamble.

To what extent are we aware of the content of the SIs? I accept that SIs will be necessary—we cannot do everything in primary legislation, so we need a system of secondary legislation, particularly in such complex, moving situations. Do we have any insight into what might be in the SIs that the committee will find itself considering on 29 January on behalf of the Parliament? Is there any sense that we will have the SIs by that date? Given that the House of Lords is completing its part in the process of the bill only on the Monday, I feel a little discomfort about whether we will get them in time to consider them at all. What does the Government know about that?

Fergus Ewing: The existence of the DPLRC letter was drawn to my attention just before I came into the meeting. Your clerk kindly provided me with a copy, and that is the first that I saw of it. I gather that it was made available to the Scottish Government last night. We have not had an opportunity to study it, but we shall do that in the course of the day.

I note that, in the first bullet point, the letter states:

“The time available for the Committee to scrutinise the LCM ... is wholly inadequate.”

I entirely agree with that, but that is a direct result of the UK Government having failed to act, since last July, on an issue on which it admitted that something had to be done. That is why we are having this last-minute scramble.

10:15

I turn to the technical questions, which are not simply technical but are very important. I said in my opening statement that the bill will be implemented using secondary legislation. The Scottish ministers will make a Scottish statutory instrument, and it is anticipated that the UK Government will make a number of SIs. There is quite a lot of work to be done and, with the convener's permission, it might be helpful if my legal adviser on the matter, Mr MacLennan, could give a bit more information about what that will entail.

David MacLennan (Scottish Government): First, I would like to clarify which procedure the instruments will be subject to. Under the provisions of the bill, they will be subject to the made affirmative procedure rather than the usual affirmative procedure. That means that it will be possible for them to come into force very quickly but still be subject to a degree of scrutiny.

As regards the likely content of the instruments, the operative provisions of the bill, which set out how the powers may be exercised, are very similar to the powers that were available under the European Union (Withdrawal) Act 2018. It is essentially a deficiency-correcting exercise. Therefore, we expect that the SIs and the SSIs will look and feel very similar to, and that they will play a similar role to, the deficiency-correcting instruments that the committee has already scrutinised as part of the no-deal preparation process.

Stewart Stevenson: But is it not correct that the made SIs that will be brought forward at Westminster will touch on devolved areas and will therefore be of specific interest to us? Is there anything that gives us comfort that we will have an opportunity to consider those instruments, albeit that I suspect that we might be able to do that only in arrears, once they have come into effect? Do you have any sense of when they might be available to the committee and to other interested parties in the Parliament, such as the Delegated Powers and Law Reform Committee? The fact that it must meet on a Tuesday means that it will meet one day after the House of Lords has carried out its final consideration of the bill.

The Convener: Cabinet secretary, do you want to answer that, or are you happy for David MacLennan to answer it? I suspect that it is difficult for you to put a date on it.

Fergus Ewing: All these difficulties arise from the way in which the matter has been dealt with by the UK Government, which I have described. All along, my argument has been that we are dealing with mechanisms. We are not dealing with substantive policy on what the money should be

used for; we are simply providing mechanisms that will allow existing moneys under existing schemes to be paid. In my view, that should not be a matter of party politics; it is a matter of housekeeping.

The problem is that we can have good housekeeping or bad housekeeping, and there is no doubt that the UK Government has been caught napping on the housekeeping front. It has created a situation in which Scottish farmers will be severely disadvantaged if the necessary legislation is not put in place. The UK Government's failure to do that has deleterious consequences for this Parliament and is disrespectful to the Parliament and the Scottish Government, but that does not alter the fact that, if we do not act to allow the Direct Payments to Farmers (Legislative Continuity) Bill to be passed by enabling the LCM to be approved by the Parliament, we will put our farmers and crofters at a tremendous financial disadvantage. I hope that we are all agreed that we cannot permit that to happen.

Mike Rumbles (North East Scotland) (LD): I am all in favour of good housekeeping, and this is a housekeeping question. I am genuinely confused about the process. Under the next agenda item, we will deal with the Agriculture (Retained EU Law and Data) (Scotland) Bill, section 3 of which proposes that the provisions of the CAP legislation on payments will

"continue to operate in relation to Scotland for one or more years beyond 2020."

I assume that, when that bill was drafted, you were of the view that it did not need to be introduced any earlier, because the payments process up to 2020 was covered, and the bill deals with payments after 2020.

As we all know, Scottish agriculture is entirely devolved; the very fact that we have an LCM and we are asking the UK Parliament to legislate shows that it is a devolved issue. However, we have the Scottish bill. Should the measures we are considering have been introduced earlier and dealt with through the proper process, as we could have done? Can we solve the problem simply by lodging an amendment to that Scottish bill to cover 2020? That second question is an important one, because the first one is about past history, but the important thing is to get it right. Given that I want to make sure that payments go to farmers this year, is the reason why lodging an amendment might not be a good idea that it would be too late to do so in order to give effect to the payments this year? After all, I think that we are all agreed that we want to ensure that the payments are made.

Fergus Ewing: Thank you for that question. I appreciate that the process is not straightforward, which causes all of us here to question aspects of

it. As far as the procedural matters are concerned, it might be helpful if Mr MacLennan were to answer the questions about process.

David MacLennan: I will flag one of the slight difficulties that we have had with the UK bill; namely, that the date by which it was needed has been a moving target. In essence, it is about payments during the transition period and, as such, it has to be in force by the time that the withdrawal agreement comes into force. At one point, we thought that that would be on 31 October; obviously, it will now be on 31 January—

Mike Rumbles: I am sorry to interrupt but, to get to the point, when are the payments due in 2020? Basically, you are saying that, if we do not have legislation, we cannot make the payments, so we need to have legislation. When are the payments due?

Fergus Ewing: I think that I am right in saying that, under the payment schedule that we recently published, the basic payments will commence in February, and the target is to meet 95 per cent of those by June. The payment schedule that we published requires us to meet the pillar 2 payments by June this year as well. That means that, by the end of June, forestry and agri-environment climate scheme payments have to be completed to the extent of, I think, 95.24 per cent of the value. The Direct Payments to Farmers (Legislative Continuity) Bill deals with those payments, if you see what I mean, Mr Rumbles. The Agriculture (Retained EU Law and Data) (Scotland) Bill deals with changes to schemes after the end of the transition period; as such, they are two distinct processes.

Mike Rumbles: So an amendment to our agriculture bill—

The Convener: For clarity, cabinet secretary, the payment that has to be made by June—the balancing payment—is not made in 2020; it is made in 2021. Given that there is dubiety on the years, I note that my understanding is that, under the current scheme, depending on the processing of claims, the single farm payment is usually made in the period from October through to Christmas, with 95 per cent of the balancing payments being made by June the following year. That is my understanding of what you are saying, but is that what you are saying?

Fergus Ewing: No. The payments that were made in October were loan payments, so they were not regarded as advance payments of the basic payment scheme.

The Convener: But those were 2019 payments and not 2020 payments.

Fergus Ewing: To the extent that those are technical questions, it would probably be appropriate for Mr MacLennan to answer.

David MacLennan: As the committee is probably aware, the basic payment is made in arrears. As such, when we talk about the claim year 2020, we are talking about money that is applied for this year and paid next year.

The Convener: The window for filling in claims usually opens on 15 May. The claims will be completed and a proportion of the payment for 2020—90 per cent—will be made in October. Under EU regulations, the balance of the payments, or 95 per cent of it, has to be made by June the following year. Claim forms for 2020 will be submitted shortly—they have to be submitted by a set date, which is usually in May—and the payments will start to be made in October. Therefore, the payments that are outstanding at the moment are last year's payments, as they are paid in arrears.

David MacLennan: There is sufficient legislative cover for those.

The Convener: There is. We are talking about the payments that will be made for this year, which will be made at the end of this year and in next year. I am sorry to interrupt, Mike, but I wanted to clarify that.

Mike Rumbles: I am glad that you intervened, because that has clarified the issue for me. There has been a bit of confusion. I am genuinely trying to get to the point and I am not making any political point. The committee is responsible for dealing with agriculture, which is entirely devolved under the devolved settlement and the Scotland Act 1998. The Scottish bill that the cabinet secretary has rightly introduced and which we will deal with under the next agenda item will give us, if passed, the legal power to make payments post 2020. Therefore, is the LCM completely irrelevant? Mr MacLennan has just said that the 2019 payments, which are paid this year, are already covered, and the Scottish bill is covering the payments from 2020.

I am not convinced that we need the LCM, so please convince me.

Fergus Ewing: Mr MacLennan will answer that question, for the purposes of clarity.

David MacLennan: The two bills are distinct. The UK bill is simply a mechanism for creating a legal basis to continue what we are doing now and to fix the hole created by the withdrawal agreement. The purpose of the Scottish bill is to make changes going forward. I hope that that answers Mr Rumbles's question.

Mike Rumbles: No, it does not. Correct me if I am wrong, but you have just told the committee

that the legal payments—the actual payments—to farmers this year, which are for 2019, are already covered in law. The Agriculture (Retained EU Law and Data) (Scotland) Bill, if we pass it, will cover all future payments post 2020. Is that correct?

David MacLennan: It creates a legal basis for making—

Mike Rumbles: So we have the legal basis if we pass the Scottish bill. The UK bill covers England and Wales, and the Scottish Government is asking the Scottish Parliament to ask the UK Parliament to legislate on our behalf for something that we are already legislating for.

Stewart Stevenson: If I heard the opening remarks correctly—I accept that I may not have done—the issue derives from section 158 of the European Union (Withdrawal) Act 2018, which in effect withdraws our permission to do what we have been doing and requires it to be replaced by the Direct Payments to Farmers (Legislative Continuity) Bill. Is that a correct understanding?

David MacLennan: It is article 137 of the withdrawal agreement. The withdrawal agreement continues the effect of all European law for the transition period, with the exception of the direct payments regulation.

Stewart Stevenson: In essence, article 137 removes our ability to make the direct payments, and the bill—

The Convener: We need clarity. I am not sure that that is what Mr MacLennan just said. Is it what you just said, Mr MacLennan?

David MacLennan: The answer is yes, essentially. The payments that are going out of the door this year, which were applied for last year, are covered in European law. We come out of the European Union at the end of this month, and come into the terms of the withdrawal agreement. European law is carried over, with the exception of the direct payments regulation, so we require fresh legislation for anyone who is making applications this year. After the transition period finishes, we come into the new post-European world, where our Scottish bill, on which you are about to hear evidence, becomes relevant.

The Convener: I understand exactly what you are saying, but Mike Rumbles is asking whether the Scottish bill, which we will consider later in the meeting, already makes allowances for 2020 payments. Mike, have I got that wrong?

Mike Rumbles: I am now confused because of what Mr MacLennan said in answer to my question and what he said in answer to Stewart Stevenson's question, so I ask for clarity. I have no political point—this is purely a process question. I cannot see the point of legislating twice. The question on which I am seeking clarity

is this: if we did not pass the LCM but relied on the Scottish bill and it was passed, would there be any disruption to the farmers' payments?

David MacLennan: Yes.

Mike Rumbles: What disruption would that be?

David MacLennan: Because the withdrawal agreement carves out the direct payments regulation, there would be no basis in law for direct payments after the end of this month. That is what the UK bill rectifies.

Mike Rumbles: How does that square with your point to me that direct payments would continue this year because they are 2019 payments?

David MacLennan: The legislation that governs payments that were claimed for in 2019 and are paid this year is part of European law. There will still be a legal basis for those payments to be made, because they were claimed under European law. It might be easier if we put that in writing for you. I appreciate that it is a difficult timeframe.

Mike Rumbles: That would be helpful.

10:30

The Convener: The problem is timing. My understanding from what we have been told is that the claims that result from applications that were made in 2019 will be paid in 2019 and 2020. Any applications for 2020, which will be made by May this year, are not covered by legislation, which is why we need the legislative consent memorandum, and the Scottish agriculture bill that is in front of us does not cover them. That is my understanding, but I see that Stewart Stevenson disagrees. I have been in the industry for 15 years, but maybe I am confused.

Stewart Stevenson: Maybe I am confused, convener, and I am quite content to be told so if that is the case. My understanding is that our ability to make payments on the basis of claims that have already been submitted and are in the system expires on 31 January because of article 137 in the withdrawal agreement, which takes away our ability to make the payments. It does not take away the existence of the claims—that is clear—but it takes away our ability to make the payments, even if we had the money, although that is a different issue for another discussion.

It is simply the technical point that the withdrawal agreement has taken forward everything except the power to make the payments, and that is why we need the Direct Payments to Farmers (Legislative Continuity) Bill—it is to recreate that power for us. To do that is, of course, a reserved power and is not something that we can legislate for.

I have expressed my understanding and I now want to be criticised and corrected.

The Convener: I ask Mike Rumbles briefly to say whether he is clear about the explanations that have been given.

Mike Rumbles: I will make one final attempt, if I may—just a yes or a no from Mr MacLennan would be helpful. I do not want to do anything that will stop payments to farmers—that is absolutely clear. I want to get this right, but I do not want duplication, and if the issue is entirely devolved, we should deal with it. If I have got this right, just say yes when I have finished, please. We need the LCM because leaving the European Union on 31 January takes away the legal basis for paying the farmers, so we do not have any legislation, and it is too late to include that in the Scottish agriculture bill because we will not have finished stage 3 and have royal assent before the payments need to start. Have I understood that correctly?

David MacLennan: The first half of your statement is correct. The second half, about why we are suggesting an LCM, is not really a question for a lawyer.

Mike Rumbles: Surely the question is whether we are legally covered. That is a question for the lawyers, is it not?

The Convener: Cabinet secretary, it appears that we are slightly stuck. The point is that the Scottish bill has some time still to go through the Scottish Parliament and it appears that the UK bill is a way of ensuring that payments are made. Do you want to comment on that?

Fergus Ewing: I appreciate that these are complex legal matters. I absolutely understand the committee's frustration, and I agree with it. The situation we are in is not great, but sometimes we have to act on the basis of what we need to do even if we do not agree with it, and this is one of those times.

The deadline of 31 January was imposed by the UK Government—not by us—for a policy that we wholly oppose. However, given that that policy is now going ahead, I have a duty to ensure that people are not prejudiced. I see it as very straightforward. I do not want to make any political capital or to score political points; I just want to ensure that farmers continue to be paid. That is the situation that I find myself in. I absolutely share people's frustrations, but all along my intent has been to create mechanisms to allow payments to continue.

On the wider debate, Brexit and post-Brexit are vital issues, but they are separate. This discussion perhaps illustrates the grave difficulty of having a clear legal discussion in a committee. I fully

appreciate that, and I make no criticism of any member, because I think that we all want to get to the same place.

We have given this a lot of thought, and I think that I set out clearly in my opening statement the basis of the legal advice that I have, and have had for a long time. We did not just come at this at the last minute. We tried to co-operate with the UK Government last July on a policy that we did not agree with, in order to get this done, and we have been working in good faith with the UK Government ever since. The UK Government has taken a bit of time, but that is not the end of the world. In a few weeks' time, everybody will have forgotten about this. The key thing is that farmers and crofters continue to be paid and that the people out there watching are not prejudiced by what happens in here.

I regret the fact that we are having these complex legal discussions. To try to have such discussions in a committee is extremely difficult. It is difficult for a legal adviser to be quizzed in this way. I give an undertaking that, after this session, at my behest, we will study the *Official Report* at Scottish Government legal department level and, if there is anything else that we need to come back and clarify to help you in your future deliberations, we will do that.

The Convener: The timescale is so tight that I fear that we will have to make a decision today. Like you, I am frustrated by the timescale.

Richard Lyle (Uddingston and Bellshill) (SNP): I do not see how members do not get this. We have known for months that everything will change after 31 January and we will be out of EU law. In its letter on the Direct Payments to Farmers (Legislative Continuity) Bill, the Delegated Powers and Law Reform Committee said:

“The time available for the Committee to scrutinise the LCM for this Bill is wholly inadequate. The Bill was introduced in the UK Parliament on Thursday 9 January”.

The LCM was lodged on 13 January. The committee appreciates that the timetable for the bill is outwith the control of the Scottish Government. Cabinet secretary, am I correct in suggesting that your previous comments were based on DEFRA doing its job, and that its failure has brought about this issue? To my mind, it is not your fault. You are trying to make it right. Any complaint that legislation has been changed or rushed should be laid at the door of the UK Government. Am I correct?

The Convener: Cabinet secretary, I am sure that you will be delighted to answer that and that you could wax eloquently on it. Could I ask you to do so quickly, because I have a heap of questions coming up on this—

Richard Lyle: Well, I would like an answer. Am I correct?

Fergus Ewing: I think that things could have been dealt with more swiftly by the UK Government, but what concerns me more is the need to ensure that we continue, with reasonable efficiency, to make the payments that are due to farmers and crofters. That is what gets me up in the morning and that is why I had a discussion with the officials this morning—as I do every Wednesday morning—about the nitty-gritty, not of this, but of getting the money out to less favoured area support scheme recipients, and to recipients of basic payment schemes and pillar 2 schemes.

Richard Lyle: Thank you for doing your job.

Jamie Greene (West Scotland) (Con): Good morning, gentlemen. I do not want to drag this out, but I have a technical question—it might be a legal one. The bill that we are going to discuss later—the Agriculture (Retained EU Law and Data) (Scotland) Bill—would be due to commence on 1 January 2021. In other words, it would commence after the period for the bill that the LCM relates to. If—and it is just an if, as it is in all of this—there was an extension to the transition period beyond 31 December 2020, would the bill that the LCM relates to be extended to cover the transition? What effect would that have on the implementation of the bill that we are looking at next?

Fergus Ewing: My understanding is that the UK bill will cover an extended transition period. That is right, is it not?

David MacLennan: Yes.

Fergus Ewing: So if the transition period is extended beyond the end of this year, just as the bill covers the period from now to the end of the year, the bill would cover from now until the expiry of the extended transition period.

Jamie Greene: Okay. Do you therefore anticipate that future payments would be made under an extended UK bill or under the new legislation that we might pass in Scotland alone?

Fergus Ewing: If the transition period is extended, the bill would give us the powers to make the payments for the claim year 2020; and, in theory, if the extension were for a long period, the bill would give us the legal power—the legal competence and mechanism—to make the payments for that extended period. I do not think that it makes a difference whether the period goes beyond a particular financial year or not, but I will check that with Mr MacLennan.

David MacLennan: That is right. The fundamental power is under the regulation, whether it is in our law by virtue of European law, the bill or future legislation.

Jamie Greene: That is very helpful. Thank you.

John Finnie (Highlands and Islands) (Green): Reference was made earlier to a moving target in relation to Brexit day. Frankly, crofters and farmers will be astonished by this debate this morning. They would have thought that everyone would have got their act together. Any neutral political observer would say that, because of the way in which the UK Government has treated the Scottish Government, the Scottish Parliament, our local authorities and, indeed, our citizens in regard to the budget, they would not be surprised that there have been difficulties in relation to the payments to farmers and crofters. It is worth repeating, convener, that it is your colleague, Mr Simpson, who says that the current situation is “wholly inadequate”, and I absolutely agree with him.

In relation to your representations to the UK Government, cabinet secretary, was there any meaningful engagement at any point after July on what is a hugely important issue for our crofters and farmers?

Fergus Ewing: Yes. As I said, I wrote to the Secretary of State for Environment, Food and Rural Affairs on 9 July requesting confirmation that the UK Government would take steps to ensure that, subject to the Scottish Parliament’s views and consent, there would be legislation in place for the direct payments in the 2020 scheme year. The secretary of state responded to me on 29 August and stated that she was confident that, if it proved to be necessary, the legislation could be in place and that the UK Government would seek the legislative consent of the Scottish Parliament. Unless there is any material in those letters of a confidential nature—I do not think that there is—it is my intention to share that correspondence with the committee so that the full picture is available to members.

I should say also in response to Mr Finnie that my officials have worked and sought to work with DEFRA officials on all the matters concerned. They are technical matters and not matters that ministers spend their time dealing with, nor should they. They are dealt with by officials and rightly so. The co-operation between officials has been reasonably good. In other words, there has been co-operation on what needs to be done to ensure the objective of continuing to be able to make payments in all circumstances. Because of the legal complexities involved, they were challenging circumstances.

The point that I am making, however, is that we are not just coming at this issue in January. To be fair to ourselves, we identified a potential problem and a potential solution last July. We wrote to the UK Government and, as I understand it, the Government agreed with us that the situation that we identified was a problem and that the solution

that we postulated was a solution that could be deployed. Perhaps because of the election and everything else, things have just slipped. However, I absolutely share Mr Finnie’s view that very few of the crofters and farmers witnessing this discussion will be impressed.

The Convener: I want to make an observation on a comment that Mr Finnie made. Graham Simpson, the convener of the DPLR Committee, wrote on behalf of the committee to the UK and Scottish Governments about the timing. Members will not be surprised to hear that I agree with him about the timing being “wholly inadequate”. I hope that Mr Finnie was not, by implication, suggesting that I would not agree with him.

John Finnie: No.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Good morning, folks. We are discussing this matter right up to the wire, which is 31 January, and you said, cabinet secretary, that there will be more SSIs. As the letter from Graham Simpson, the convener of the DPLR Committee said, it is totally unacceptable that we are not getting the time to scrutinise. Why are we in this position, given that the date of leaving the EU has been delayed twice or three times? Does that mean that we were never ready to leave at those former dates for leaving and that, far from getting Brexit done, this is only the beginning of a very long process?

10:45

Fergus Ewing: That is partly a political question and partly a legal question. I think that I have answered the legal stuff. On the political side, I do not think that the UK is ready at all for Brexit. We will come on to discuss that in the next evidence session. An arbitrary deadline of 31 January imposes extraordinary pressures on the democratic procedures of this Parliament and the Westminster Parliament, but that is a direct result of decisions taken by the UK Government.

The Convener: All committee members have now had a chance to ask their questions. Because of the short timescale for dealing with the LCM, I propose that we approve at this stage of the meeting the draft motion set out in the LCM and that, to allow us to continue with questions, we briefly work out later in the meeting a form of wording for the report. I hope that the committee is satisfied with that way of dealing with matters. I do not see any shaking of heads. So, are members content to recommend in the committee’s report that the Parliament agrees to the draft motion set out in the LCM?

Members indicated agreement.

The Convener: We will sort out later the wording of the report, which will have to be sent out today for consideration in Parliament tomorrow.

Cabinet secretary, I thank you and your officials for giving evidence.

I will briefly suspend the meeting so that committee members and witnesses can change their positions as quickly as possible and I ask committee members to stay in the room so that we can move straight on.

10:46

Meeting suspended.

10:50

On resuming—

Agriculture (Retained EU Law and Data) (Scotland) Bill: Stage 1

The Convener: We move to agenda item 2. I remind people that three members of the committee made declarations of interest at the beginning of the meeting, which remain extant.

This is the committee's final evidence panel on the bill. Today, we will take evidence from the cabinet secretary and Scottish Government officials. I welcome Fergus Ewing, Cabinet Secretary for the Rural Economy; John Kerr, head of the agricultural policy division; George Burgess, deputy director, food and drink; Ally McAlpine, senior statistician, rural and environment science and analytical services; Vicky Dunlop, bill team leader; and David MacLennan, legal directorate. The cabinet secretary will make a brief opening statement.

Fergus Ewing: Thank you for the opportunity to give evidence on the Agriculture (Retained EU Law and Data) (Scotland) Bill. There is lots to say on the bill, and I will cover as much as possible.

The context of the bill is the UK's decision to withdraw from the European Union. That decision does not have the support of the people of Scotland; nonetheless, as a responsible Government, we must prepare to take the necessary powers to continue to support our farmers and crofters. For that reason, we are bringing forward this bill at this time.

The Scottish Government could have opted to take powers for Scotland through the UK Agriculture Bill. However, agriculture is devolved, and the Scottish Government believes that legislation for devolved policy is a matter for this Parliament. I note from previous evidence sessions the discussion about future long-term agriculture policy. However, in our view, that is not the purpose of this bill or a relevant part of the discussion today. A lot of work is being done on future policy, which will obviously form part of future discussions, but officials are preparing for the immediate future. The committee will be aware of the "Report of the Simplification Taskforce", which was published yesterday. I have a copy here.

Previous evidence sessions considered whether the powers in part 1 of the bill could be used to completely replace or radically change the retained CAP legislation if the Government saw fit. That is not the case. It is clear that the scope limits changes to simplification or improvements. Let me be clear: the Scottish Government's intention is to use the powers in part 1 to ensure that the CAP

can continue after 2020; to make the CAP easier to understand and use by simplifying and improving CAP rules; and to adapt marketing and classification rules as required. That is all set out in the bill. In addition, ministers are already, rightly, bound by the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 and the Nature Conservation (Scotland) Act 2004. In short, ministers could not use the bill to legislate in a way that circumvented or that was incompatible with key legislation that protects the environment.

Part 2 includes powers that relate to the collection and processing of data, which are important and necessary in regulating and developing policy for the agricultural sector. Those powers will ensure that everything that we do is consistent with the principles of the general data protection regulation and the Data Protection Act 2018.

I will stop there, as I believe that the committee has a lot of questions for me.

The Convener: Thank you very much, cabinet secretary. The first questions will come from John Finnie.

John Finnie: Cabinet secretary, will you please outline the simplifications and improvements that the Scottish Government is planning to make as a result of section 2 of the bill?

Fergus Ewing: I refer to the report that was published yesterday. I appreciate that members are unlikely to have had an opportunity to study it, but it sets out a number of areas in which there is a relative consensus among the wider rural community that there is potential for simplification and improvement. I will outline some of those areas and then go back to questions, if that is appropriate. They are: improved mapping; mapping stability during the single application form process; penalties—the issue of penalties is absolutely key to making the system more proportionate and less unduly onerous; an inspections charter; the standardisation of capital grant rates; the improvement of EU, or post-EU, appeals processing performance; and the improvement of understanding, communication and education. The task force set out its initial thoughts on those seven areas, and they are the basis for further policy work and development—they point us in the right direction.

All those things are adjective, not substantive; they are about procedure, not substance. They are about how we implement policies—they are not about the substance of the policies themselves—and are, therefore, germane to the powers in the bill, which are substantially not about what we do and what the policies are for the environment but about how we make sure that the policies are implemented effectively; that they do what they

are supposed to do; and that there are checks and balances to make sure that people do not abuse the system but are treated fairly, so that, if they make a mistake, they are not treated as though they are some kind of criminal.

John Finnie: Thank you very much indeed for that, cabinet secretary. As you say, the report is a very recent publication and I have not yet had the opportunity to digest it.

Do you think that the interpretation of the terms “simplification” and “improvement” might be subjective? On whose determination and on what basis would you use those terms?

Fergus Ewing: I think that we all understand the term “simplification”. However, although I am a lawyer, I am not here as a lawyer, so I have the luxury of passing that question to a lawyer to help us out. The words that are used in the legislation are a question of legal draftsmanship. Perhaps Mr MacLennan can add to what I have said.

David MacLennan: I will say only that I agree that those are subjective terms. It is a case of ministerial judgment.

John Finnie: Thank you very much.

The Convener: On the question of simplification and improvement, I was quite taken with the idea of auditing, starting off with self-audit, to make sure that people comply with schemes.

Jamie Greene: I have a supplementary question to John Finnie’s questions.

In his evidence, Jonnie Hall from NFU Scotland made quite an interesting statement about the interpretation of “simplification” and “improvement”. He said that the move from “simplification” to “improvement” is “a slightly grey area”. He agrees that

“the interpretation of ‘improvement’ involves looking at policy rather than operation”,

that

“Simplification is all about the operation of existing schemes”

and that

“that is what we are talking about when we talk about simplification.”—[*Official Report, Rural Economy and Connectivity Committee*, 18 December 2019; c 7].

There is concern that inclusion of the language of improvement strays into the area of alternative policies, which the cabinet secretary said is not the point of the bill. How will he address that when the bill comes back to the committee?

Fergus Ewing: As Mr MacLennan has said, those terms are subjective—people can see and interpret them differently. That is undoubtedly correct. Then again, it is pretty clear that most

people would see liberalising the penalty regime as both a simplification and an improvement. That is my own postulation. However, I seek some legal advice from Mr MacLennan about the use of the word “improvement” in the bill.

David MacLennan: Again, those are drafting points about what the bill is intended to do. The word “improvement” is, we hope, narrow enough to explain the policy intention behind the bill.

11:00

Jamie Greene: That is clearly not the case, because the legal language that the lawyers have afforded the bill represents the policy intention that the ministers have directed, but the ministers have said that that is not the policy intention of the bill. The legal language therefore does not reflect the policy intention in this instance.

David MacLennan: It might be easier if one of the policy officials spoke to the policy intention behind the bill. I am happy to pass the question over to Mr Kerr.

John Kerr (Scottish Government): The question of the policy intent is a fair one. The clear intent of the policy, which is set out in the consultation paper “Stability and Simplicity: proposals for a rural funding transition period”, is to have a period in which farmers and crofters in Scotland will have some certainty around what support they will get through continuing with a system that is very much based on the system as they understand it today. Where possible, we will seek to improve that system, in order that the process is conducted as smoothly as possible and to make it as fit for purpose as it can be while we prepare for a future policy.

Mr Hall’s representation to the committee is therefore not quite correct, as we do not intend to introduce any new policy substance but do intend to improve the process. That is particularly the case given that the current legislation is quite broad in scope in terms of the objectives that we seek to achieve. We are therefore providing income support to farmers and, at the same time, trying to derive environmental benefits. We will continue to enact those principles in how we use the legislation that we bring forward under the bill.

Fergus Ewing: I might be able to help Mr Greene out by looking at sections 2 and 6 of the bill. Those are the sections that refer to powers

“to simplify or improve CAP legislation”.

The wording that is deployed in section 2(2)—the section 6 wording is similar—states:

“The Scottish Ministers may only make modifications ... that they consider would simplify or improve the operation of the provisions of the legislation.”

The words “simplify or improve” must be read in the light of the fact that they are qualified by what they are designed to simplify or improve. In this case, it is

“the operation of the provisions of the legislation.”

I placed deliberate emphasis on the word “operation”.

We can discuss the matter at stage 2, if Parliament so wishes, through amendments, which would be right and proper. Perhaps we are starting to move on to a stage 2-type debate—I do not know. However, my reading of the bill’s wording is that Mr Hall’s concerns do not apply, because the particular mode of drafting makes it clear that “improvement” refers to improving how the process works, not what it does.

Moreover, there might be a sub-argument that “simplify” implies “improve”. Some people would say that, if we simplify something that is complex, there is inherently an improvement—I would certainly say that. However, the feeling was that, for the avoidance of doubt, we needed to use both “simplify” and “improve” to signify what we are seeking to do. If there has been any infelicitous draftsmanship, Parliament’s processes allow us to correct that at stage 2—that is what that stage is for. I am very happy to come back to the matter, but I do not think that Mr Hall’s criticism is quite apt in that regard.

Colin Smyth (South Scotland) (Lab): I want to follow that up. Mr MacLennan has made it clear that whatever term we use—“simplify” or “improve”—will ultimately be subject to ministerial interpretation. Even the smallest changes to operational issues can have a significant impact on farmers. Is the Government satisfied that the bill provides sufficient procedures to allow effective consultation to take place on any simplifications or improvements, however you decide to interpret those words?

Fergus Ewing: Do you have an example in mind?

Colin Smyth: Apart from the document that was published yesterday, there have not been any proposals. Given that we have the bill, I assume that the Government will ultimately put forward proposals for simplifications and improvements, but we do not know what they will be. I am sure that people have questions about the lack of direction so far, but the fundamental question is whether the bill provides for sufficient consultation on whatever proposals you will make for either simplifications or improvements.

Fergus Ewing: We will take steps to make sure that there is sufficient consultation of those who are closely involved. With respect, we have already done that. If you look at annex 1 of the

“Report of the Simplification Task Force”, you will see that the members of the task force, which was chaired by Douglas Petrie, who is the head of area offices and the head of agricultural profession at the Scottish Government, included Scotland’s Rural College, NFU Scotland, various solicitors with experience in agricultural law, the Scottish Crofting Federation, Scottish Natural Heritage, monitor farmers and forestry experts. We sought to reach out to rural communities and experts to inform the useful work that has been done in the report.

We will obviously proceed by consultation, including in discussions and debates in Parliament, both in committee and in plenary session. That is something that we do routinely as is appropriate. I do not know that we are really here to discuss the Government’s overall policy on consultation, but basically it is that we work in tandem with stakeholders. Of course, it makes sense to consult properly where that is appropriate.

Colin Smyth: The question was really just about whether the bill contains a legal underpinning to ensure that that happens. I will move on to the direction of potential changes.

A number of stakeholders have said in their evidence that the inclusion in the bill of a statement of purpose section would help to clarify the limit of the powers that it confers, particularly in relation to the powers in section 2 to simplify and improve retained CAP legislation. Will you consider amending the bill along those lines? If not, what reasons do you have for not doing so?

Fergus Ewing: It would be imprudent of me to say whether I approve of an amendment that I have not seen, and I am not going to do that. What I will say is that it is my absolute belief that there is an overwhelming desire among farmers, crofters and the wider rural community for us to simplify and improve the operation of the provisions of the schemes.

I will keep this short, but, in my 20 years as an MSP, some of the penalties that have been imposed on farmers and crofters have been, to me, utterly disproportionate. In some cases, there has been no discretion as to whether to impose penalties under the regime that has been in place. We need to put that right, and I hope that members agree that it is necessary for the Scottish Government to be able to do that as swiftly and simply as possible.

Colin Smyth: I think that the stakeholders’ point is that, if the Government was to set out a purpose for the grants that it provides, that would provide reassurance and direction as to the ultimate policy aims of the bill.

I will move on to another issue that stakeholders have raised in their evidence. I think that you touched on this in your opening statement, cabinet secretary, when you talked about the environment, but it probably goes wider than that. The committee has heard from some stakeholders that adding a no-regression clause to the bill would ensure that any simplification or improvement that is introduced using the powers in section 2 will not have a regressive effect—for example, in relation to the environment or animal welfare. Did the Government consider including a no-regression clause when it developed the bill? If not, will you consider doing that when we look to amend the bill?

Fergus Ewing: In my opening statement, I addressed the fact that Parliament has passed legislation in respect of climate change and the environment, that we are bound by that legislation and that, therefore, nothing in the bill can regress from that. We have to comply with it.

If we get to stage 2, as I hope we will, I will carefully consider the matter further. It is primarily an issue that we might want to take up with the UK Government, because the particular concern at the moment is that, following Brexit, we will depart from the high standards of animal hygiene and welfare that have been in place thanks to the EU law on those matters. We lack an absolute commitment from the UK Government that there will be a sort of equivalence undertaking.

Along with Roseanna Cunningham and Mairi Gougeon, I quizzed Theresa Villiers on the issue on Monday, and Roseanna Cunningham asked whether there will be a specific legislative undertaking that there will be no regression. According to the UK Government’s plans, there will not be; there will simply be a requirement to lay a report before the UK Parliament. Therefore, with respect, the biggest threat of regression is the one that I have outlined.

Colin Smyth: I do not disagree with you, cabinet secretary, that that should be implemented by the UK Government. However, in the absence of that, surely it falls on the Scottish Government to have a no-regression policy on issues such as animal welfare and not to make changes to our payments that in any way adversely impact animal welfare, for example. Surely, there is a debate and discussion to be had on whether that would be helped by having a legal underpinning.

Fergus Ewing: This is a framework bill with a very specific purpose: to allow us to change the operation of current CAP schemes. That will not and does not involve changing the Scottish Government’s policy on environmental or animal welfare standards. Those policies are clear and have been enunciated very clearly by members of the Scottish Government.

There is a risk of conflating the bill, which deals with procedural issues, with the substantive policy issues. I do not accept that the bill carries a risk that there will be any diminution in those standards; nor do I believe that that is the intention of any of my colleagues who have other portfolio responsibilities.

Mike Rumbles: I am fully supportive of the policy intention of the bill. My focus is on the drafting of section 3. I understand why civil servants draft legislation in a way that gives ministers flexibility in implementing policy, but the committee's role is to look at the possible unintended consequences of legislation. Governments are not here in perpetuity—Governments change—and the policy intention of a future cabinet secretary of a different, or even the same, political persuasion might be different from that of the current cabinet secretary.

Section 3 says:

"The Scottish Ministers may by regulations modify the main CAP legislation for the purpose of securing that the provisions of the legislation continue to operate in relation to Scotland for one or more years beyond 2020."

I know that the cabinet secretary's policy intention is to lodge a new bill that will provide a new policy for the future of Scotland's rural economy post-2024, but the majority of our witnesses have identified a concern about the intention to give ministers a power to use regulations to change things that will last

"for one or more years beyond 2020."

That power will enable the current cabinet secretary or a future cabinet secretary to not implement a new scheme by 2024. It allows them to continue to use regulations to simplify and modify legislation. Most of our witnesses have suggested that the provision could easily be changed to fit the purposes and intention of the bill by saying that the power could not be used beyond, say, 2024. That would give plenty of time—up to four years—for the transition to take place. A future cabinet secretary might be tempted not to implement a new bespoke policy for Scotland by that date.

Are you with me, cabinet secretary? Do you understand my question?

11:15

Fergus Ewing: I am trying to understand it, but I am not entirely sure that I do. Maybe that is my fault.

Mike Rumbles: I will rephrase it.

The Convener: Maybe you could reduce the length of it, Mr Rumbles.

Mike Rumbles: I will try to make it shorter. The policy intention of the bill is absolutely correct, but most of our witnesses have expressed concern—and I agree with them—that section 3 is not tight enough on the regulations that it provides for the cabinet secretary and the Scottish Government. There is concern that it will give a get-out clause to any future cabinet secretary—not this one, I am certain—to use the regulations to make changes rather than implement a new policy. The bill gives ministers the power in question for ever. The solution would be to limit it, perhaps to 2024.

Fergus Ewing: I appreciate Mr Rumbles's support for the bill in principle and his kind remarks about me. I will make a few general remarks before addressing the specific point about a time limit, sunset clause or restriction.

We will not make major changes without appropriate consultation and engagement. We always do that. We come to Parliament and we are constantly held to account by this committee. The Parliament will continue to play a significant role, and that is correct. Section 3 will allow changes to be made to retained EU law by regulations. That would require secondary legislation to be laid before Parliament, which would give MSPs an opportunity to scrutinise and probe the changes and to hold the Scottish Government to account. We are also required to consider a range of impact assessments, including business and regulatory impact assessments, which require us to consult stakeholders about the impact on their business.

I ask members to bear in mind that this is a framework bill: it provides for the possibility of doing something, rather than legislating for change now.

My last point is that Governments must be able to act and respond swiftly. If primary legislation constrains that, we must come back to Parliament to amend that primary legislation. I will put a scenario to Mr Rumbles. Let us say that a future minister decides that they want to drag their feet on climate change. If such a minister had to seek primary legislation to make a change that would improve efforts to tackle climate change, they could say, "It might be difficult to find a slot—it'll take me three years to tackle this." If I were such a minister and I was bound by primary legislation instead of being able to make changes swiftly, I could say that.

The issue can be approached from different angles. It can be argued that the need to go back to get primary legislation could be used by a future Government as a pretext for not doing things that some members would like us to do. Such a scenario is not impossible.

I will give Mr Rumbles another example. Although this is not quite the same thing, we have acted swiftly to come up with a scheme for convergence payments. If there were all sorts of restrictions on how Governments could act, would we be in a position, as we now are, to say that the first payment will be made to crofters and farmers by the end of March? No, we would not be. If we developed a new scheme that contained flaws and defects and had unintended consequences—that happens all the time in government—I think that it would be inappropriate if we had to go back to primary legislation to correct it and make changes.

We are not attracted to the arguments that have been put forward. However, I am sure that we will consider the issue further if, as I hope it will, the bill proceeds to stage 2. I am sure that we will have a more focused and detailed debate at that stage. I would not be surprised if Mr Rumbles lodged some amendments. In a sense, I hope that he does, because that might give us an opportunity to consider these serious matters in a bit more detail than we can in the time available today.

Mike Rumbles: I am actually with the cabinet secretary on the points that he has made, but his argument does not address the question that I asked—it answers a different question.

Let me put it this way. I do not in any way doubt the cabinet secretary's personal integrity or his intentions—he is an honourable individual and his intention is to bring new primary legislation to Parliament by 2024. That is what he wants to do, and I am very supportive of that. However, if there were a change of Government at next year's election, the way that the bill is written means that it would allow any new Government that came in in 2021 to continue to modify and improve the CAP legislation by regulation, and not introduce a bespoke policy for post-2024. Regardless of whether members think that that is a realistic prospect, in a democracy, it is certainly a possibility. Our job is to make sure that the legislation that we produce is fit for purpose for any Government.

The cabinet secretary said that the bill would give a future Government an opportunity to drag its feet in implementing a new policy. That is the point that I am making. If we leave section 3 as it is, it will give any future Government—not this one—the opportunity to drag its feet on implementing a bespoke policy. That fear was expressed by many witnesses.

Perhaps we can have discussions about this, but I think that it would be helpful if the Government were to lodge amendments at stage 2 to address issues that we should be able to agree on.

Fergus Ewing: I certainly hope so; I want to be helpful in that respect.

With the convener's permission, Mr MacIannan would like to make a point about section 3 of the bill.

David MacIannan: I want to clarify the exact purpose of section 3. The CAP legislation, as it exists, does not function properly after 2020. There are some things that it was not intended to do after that time, so the power in section 3 simply allows us to make the modifications that we require to make to make the CAP legislation work after 2020.

I hope that that is a helpful addition.

Mike Rumbles: It is, but my point was that ministers could go on using the power for ever.

If we are to have a new, bespoke policy for the future of Scottish agriculture, we need a new bill, and if we put a limit on the power in question, we will get a new bill, because the Government—regardless of its persuasion—will have to come back to Parliament. That is the point that I was making.

Richard Lyle: Is it not good government to be able to act swiftly and do something rather than have to continually go back to Parliament and change primary legislation every couple of years? Surely it is better to make a piece of legislation that can be amended. People like me get frustrated by how long it takes to do something. As far as I am concerned, it is good government to have the ability to do things swiftly. Do you agree?

Fergus Ewing: I think that Governments need the flexibility to be able to act quickly in some circumstances but, in doing so, we are accountable to Parliament, and we are absolutely sure that we will be held to account.

The essential point is that such flexibility is essential for a Government to carry out its executive functions, but I am very open to having discussions about amendments at stage 2, and I have no doubt that such discussions will take place. We take account of views that are expressed by stakeholders, and we will take account of the evidence that they have given to the committee on those matters.

The Convener: I had intended to question you on the issue of a sunset clause later, but I make the observation that more than half the organisations that have responded to us on the bill, including Scottish Land & Estates, the Law Society of Scotland, WWF Scotland, RSPB Scotland, the Soil Association Scotland and the Scottish Wildlife Trust, said that they believed there was reason to consider a sunset clause.

We were copied in on a letter to you from the Delegated Powers and Law Reform Committee, in which you were asked to consider having a sunset clause. Rather than prolonging the discussion on the issue, I simply ask you to recognise that a significant number of people have made that recommendation to the committee. Will you give an assurance that you will consider it further during the passage of the bill, should it go beyond stage 1? Like you, I hope that it does.

Fergus Ewing: I have already said that we have regard to evidence that is provided, and we will take account of the written and oral evidence that has been provided to the committee.

However, there is considerable uncertainty regarding the post-Brexit landscape, for example in relation to what any future relationship with the EU might look like and the rules that we might have to follow, and that could impact on our ability to introduce a long-term policy and the timing of that.

As a matter of principle, we need to retain flexibility to address those uncertainties, subject to our being accountable to Parliament. That is the democratic system. If we constrain ministers' ability to act by preventing them from being able to respond swiftly, to act when they are required to or even to act routinely to correct the unintended consequences that arise from policy—new policy, in particular—we risk tying ourselves up in knots. We are trying to do new things, such as improve the way in which farming tackles climate change. I am sure that we will do a lot more in that area and that farmers want to do more. However, if we tie ourselves up in knots so that we have to go back to primary legislation to be able to do the detailed work, I feel instinctively that that would be a retrograde step.

However, I undertake to give such matters serious consideration at stage 2, assuming that members will wish to debate them, as is their right.

Richard Lyle: What modifications, if any, does the Scottish Government intend to make to the financial provisions in the bill?

Fergus Ewing: Again, that is a question about policy, and we are here to discuss process. The bill does not introduce proposals to alter the current financial support payments; rather, it gives us the power to make changes to the existing schemes.

Mr Lyle is right—those matters are extremely important. As mandated by Parliament in the motion on the subject that was amended by Mr Rumbles, the farming and food production advisory group is working hard, and is due to provide us with recommendations in due course. It is right that we should have regard to the work of

that group and others before we come forward with proposals.

However, I say with respect to Mr Lyle that that is not the primary purpose of the bill.

Richard Lyle: Therefore, I take it that it is wrong for people to suggest that you are considering proposals to transfer funds between pillars.

Fergus Ewing: That happens at the moment; I think that the transfer from pillar 1 to pillar 2 is 9.5 per cent. Different levels of degression—I think that that is the right word—from pillar 1 to pillar 2 are applicable throughout the UK. That is an area in which flexibility is an advantage, as it allows us to act swiftly.

Richard Lyle: Certain stakeholders have underlined the importance of giving the sector plenty of advance notice of changes that are introduced using the powers that are conferred by sections 3 and 4 of the bill. What level of preparatory consultation do you plan to undertake before exercising those powers?

Fergus Ewing: As a matter of practice, we always wish to have appropriate consultation, depending on how significant what we are proposing is. We always do that, and I undertake that that will continue to be the case.

Peter Chapman: As you know, cabinet secretary, the bill allows for pilot schemes to test new payment regimes. I am sure that you also know that the farming community is desperate for clarity on what is likely to happen. When will the Scottish Government be in a position to share more detail about the types of pilot schemes that it intends to introduce and their intended objectives?

11:30

Fergus Ewing: We set out our policy in “Stability and Simplicity”, which was published in June 2018. It was designed to provide just that. From my perspective at least, the primary thing that farmers wanted was an element of stability and certainty, particularly in relation to direct income payments.

I am pleased that, overall, we have been able to provide that. That is the pole position for farmers and crofters. There are so many uncertainties about Brexit that they wanted reasonable certainty about money continuing to come in, and I have rightly devoted a lot of effort to that. However, we think that pilots are a useful method of exploring how we can deliver policy changes and improvements in future.

I am sure that Mr Chapman is aware that a whole host of things are already going on—for example, in relation to agronomy and improved culture of grass; the better use of rotations for

better production of silage; the use of hydrogen to provide renewable energy on the farm; and different feedstuffs for cattle to reduce methane and improve digestive tracts.

I have spoken to many farmers and monitor farms throughout the country. Last Monday in Aberdeenshire, I visited two farms and ANM Group Ltd.

There are also improvements in electronic identification, and particularly in the opportunities to improve safety through the use of electronic identification and readers to reduce the incidence of injury or worse in close proximity handling of cattle.

I have listed some of the things that are already going on. We want to build on the good work that is being done.

We particularly want to tackle the increasing desire in society as a whole that good practice in farming for climate change be substantially improved. We need to focus on that area, which is ripe for developing potential pilot schemes in the future.

This is the last thing that I will say, convener; I appreciate that the answer is long. I appreciate that Mr Chapman is asking me for the answers but, for me, it is the other way round. I go around the country asking farmers what they think the answer is. I think that that is the best way to come up with policy, and that is how we approach the task of deciding which pilot schemes to pursue and how to spend the valuable time and resource of public officials and public money. That is the approach that we have taken thus far.

I appreciate that that is a general answer, but I hope that it is of some assistance. That was not about the purpose of the bill; those are all substantive policy questions.

Peter Chapman: I hear what the cabinet secretary says, but I believe that the farming industry is desperately looking for some clarity on what the thoughts are going forward. In taking evidence on the bill, the committee has heard a variety of stakeholders arguing for quite radical reform to the way in which farm payments are calculated and allocated—for instance, moving away from an area-based approach towards an activity-based approach. Is the Scottish Government sympathetic to that view? Does it have plans to begin trialling a new approach to the calculation and allocation of farm payments using the powers in the bill in the 2021-24 period? It is desperately important that we get some clarity.

We have a focus on a 75 per cent reduction in CO₂ emissions by 2030. If little changes between now and 2024, that will allow just six years for the industry to make pretty radical changes. I am

concerned that we are not moving quickly enough to find a way forward and to allow the industry to see how we plan to go forward or how the Government sees how the industry needs to go forward.

Fergus Ewing: I do not disagree with everything that Mr Chapman has said. Incidentally, the existing direct support payments are conditional on a certain minimum level of activity, so it is not as if the system says that people get the money for not doing anything—it is not as simple as that, as Mr Chapman well knows. However, there is a case for moving to a system in which there is a better linkage between the provision of direct financial support and outcomes.

I always like to defend farmers here, because I think that they already provide public goods. There is a narrative down south that we need to get out of the EU for farmers to do good things. No. Farmers already do good things. They already provide our food and look after the landscape, and they are pillars of rural communities. They already provide public goods. However, I agree that more can be done. In particular, we want to focus on how farming can adapt to meet the challenges of climate change. I assure Mr Chapman that we are looking very closely at that.

Peter Chapman: Can you give me any timescale for when we are likely to see what the pilots might look like? I know that they will not be the end product, because pilots involve trial and error.

Fergus Ewing: I am happy to come back to the committee and discuss that matter when it is the topic for discussion. Frankly, that is not the topic for discussion today; the topic for discussion is a bill and a mechanism.

At the moment, it would be imprudent to come up with a series of finalised post-Brexit policies, because we do not know what Brexit will do. We do not know whether there will be 50 per cent tariffs on sheep meat. Some 88 per cent of our sheep meat exports go to the EU. What will we do if there are tariffs because there is no effective trade deal by the end of December? What support would we need to provide to our sheep farmers? We also do not know whether there will be equivalence for imported beef from the Americas, which, as we see it, is reared without any regard for animal welfare and proper regulation, never mind provenance.

With respect, until those big macro issues relating to trade, exports and economics are sorted, it would be imprudent for any Government to finalise a set of policies. We do not know the factual scenario that the policies would have to address, and we will not do so until the end of December. However, that is not stopping us doing

the work. We are carrying on the preparatory work, and I am delighted that the “Report of the Simplification Taskforce”, which is the relevant report for today, has already pointed us in the right direction on matters that are germane to the bill.

The Convener: Cabinet secretary, I may have misunderstood, but the bill is largely about process—you have made that entirely clear—and I think that committee members are trying to find out what the processes will be used for. Peter Chapman has another question; there will then be a few supplementaries.

Peter Chapman: I have one more question, which is about funding. My understanding is that the UK Government has guaranteed the same level of funding for the lifetime of the current Westminster Parliament—I assume that you accept that, too. Is the Scottish Government committed to co-financing at the same level that is currently provided? As you well know, pillar 2 schemes are co-financed by the EU and the Scottish Government. Is there a commitment from the Scottish Government to continue the co-financing of pillar 2 schemes at the same level that there is now?

Fergus Ewing: That is a complex area, on which I am happy to provide more detail to the committee. Recently, the Scottish Government received a letter from the Treasury—Mr Mackay received it—that says that funding will be provided at a certain specific level this year, but it does not, for example, confirm or make any reference to the convergence money. Therefore, we need to sort that out. The letter says that we must absorb and accept the fixing of the budget at a certain exchange rate. It is not clear to us whether that will result in a possible diminution of funds. We are not certain about that, and we are probing the matter with the UK Government. That raises other questions about the wording that is used in the letter.

Although I welcome any further clarity and accept that there has been some movement towards that, it would be wrong for me to give an unqualified acceptance to your proposition, because I cannot do so, and the facts do not support that at the moment. However, we want to get to that situation.

Moreover, the letter says that the assurances apply for this financial year, but expressly do not cover future financial years. I have heard that the intention is to do that, but that is different from an absolute assurance. We have to pursue the matter in a forensic way. That is the way to do it.

That said, there is probably nobody on the planet who has directly probed Michael Gove, who was secretary of state at DEFRA for most of the past three years, on exactly that question more

than I have. For the past three years since the Brexit referendum, I have asked him, face to face, whether he will match EU funds post-Brexit, as he promised before the referendum—yes or no. Frankly, for three years, we did not get an answer to that question in full. If the UK Government is now finally getting around to giving us that belated assurance, no one will be happier than me.

Peter Chapman: My specific question was about whether the Scottish Government is committed to co-financing pillar 2 schemes. That is a decision for the Scottish Government rather than for the Westminster Government.

Fergus Ewing: We have no intention at all of ceasing to co-finance Government schemes in general. I have had nothing but complete support from Mr Mackay. We should bear in mind that it is prudent for ministers to be careful about the demands that they make of a finance secretary in order that they act maturely and responsibly. I was delighted that Mr Mackay agreed that the convergence moneys should be used entirely for agriculture. In August, when I was at the Lochaber agricultural show, some crofters said that we would siphon off the money for the health service, but Mr Mackay did not do that. He gave me a copperplate assurance, and he is delivering on it. I have every faith in Mr Mackay and that he will continue to support rural communities in the future, as he has done in the past.

Stewart Stevenson: There are probably short answers to my two questions.

First, is it the intention—I presume that it is—that many, if not necessarily all, of the pilots are a necessary precursor to the development of a future agriculture bill that will start to change policy?

Secondly, are you able to tell the committee, as a matter of fact, how long it took to develop the current CAP scheme? That will give us some understanding of the scale of effort that is involved in producing new agricultural support schemes. It is pretty clear that we do not want to create a new scheme in a very short period only to find that we have not taken the time to think through the issues.

Fergus Ewing: How long has it taken to formulate the CAP? I think that we are talking about multiple decades. Without being frivolous, I think that there is a serious point to be made. One reason why it is sensible to proceed by way of pilots is that it allows us to try things out properly and carefully in a controlled fashion, to monitor their efficacy, and to do so on a relatively limited basis. Usually, those who are most enthusiastic about something try it out and see whether they can make it work. If they can make it work, that is all well and good; if they cannot, who can?

The second benefit of running a pilot as opposed to introducing a brand-new scheme is that, if you get something wrong, you have tried it but found that it does not work. If you introduce a brand-new scheme without trying it out first, you will have a much bigger problem.

The third benefit of pilots relates to the lead-in time for substantially changing a policy or for a brand-new policy being long. That is because one has to formulate the policy; consult stakeholders, as we have agreed to do; determine the policy, which is a difficult process; proof check it to ensure that it will work okay; and commission work on information technology so that the policy can operate on the CAP payment system. Frankly, all that has to be done before the policy can be implemented. Forms need to be designed and must be comprehensible, as simple as possible, and compatible with the computer system. In most cases, the policy would probably need to be compatible with the land parcel identification system.

All that means that one must devise new policy with great care. I think that we are talking about it taking a minimum of a year or so to bring in new policies. The risk is that, because of enthusiasm to do the right thing or stakeholder pressure to do the right thing, Governments are tempted to try to do the right thing but too quickly before being ready to implement the policy. I am not willing to expose the rural community to those risks. That is why, in my work as the cabinet secretary, particularly in relation to “Stability and Simplicity”, I have made it clear that we need to approach with care—in short, the approach is *festina lente*.

11:45

Mike Rumbles: I want to follow on from the point that Stewart Stevenson made, based on Peter Chapman’s point about pilot schemes, and the cabinet secretary’s response to it. I believe that it is important to manage expectations here. The cabinet secretary said that it would take “a year or so” to introduce new policies. However, if we think through the process, surely the future farm policy group will need to report on that to the cabinet secretary and the report will then surely need to be interrogated before anybody can start thinking of pilot schemes. A year or so is quite short term. Are we not working towards 2024 for the implementation of a new policy? If people expect a new policy to be implemented before that date, managing that expectation will be difficult.

Fergus Ewing: Spoken like a potential Government minister, I may say.

Mike Rumbles: I do not think that there is any chance of that.

Fergus Ewing: Who knows? To be serious, Mr Rumbles makes a perfectly valid point, but I believe that we are able to go ahead with some pilots to try things out. Indeed, it has just been brought to my attention that there are examples of pilot schemes that have been undertaken. For example, with POBAS—piloting an outcome-based approach in Scotland—Scottish Natural Heritage is exploring a payment-by-results approach to delivering agri-environment schemes with groups of farmers in Skye, Strathspey, Argyll and East Lothian.

It is probably possible for pilots to be done without having the farming and food production future policy group’s report. I agree that we cannot finalise policy until that group has opined, but it is not possible to finalise a policy anyway, given the tariff and trade issues that remain unresolved. If they are not resolved in an acceptable way, that might lead us to having to think radically about how we tackle an entirely different situation. The world has taken free trade and frictionless trade for granted for decades, but the USA, for example, now imposes a 25 per cent tax on imports of whisky, cashmere and shortbread, which are three iconic Scottish products. Given what might happen in respect of Brexit—I hope that it will not—we have to take tent.

The Convener: Before we move to the next question, I will make a plea to committee members and to the cabinet secretary. My job as convener is to try to ensure that everyone has a chance to ask all the questions that they want to ask and that the cabinet secretary can answer as fully as possible. Short questions and answers help me to ensure that no committee member has to come and complain to me at the end of the meeting that I have ignored them. I just make that plea and I am sure that you will all take it to heart.

Angus MacDonald (Falkirk East) (SNP): Cabinet secretary, you announced on 24 October last year that the agri-environment climate scheme would not be open to new applicants from 2020. We are interested to hear whether other schemes will also be affected. Does the Scottish Government intend to use the powers in the bill to ensure that funding is available beyond 2020 for the AEC scheme and all other current schemes?

Fergus Ewing: We have supported environmental schemes in a variety of ways. The fact is sometimes neglected that the greening element in the pillar 1 payment is designed to do that, as indeed are some of the rules that are applicable in respect of the direct payments schemes. My officials will cover the specific detail about the AEC scheme, but I do not know whether it is Mr Kerr or Mr Burgess who will do so.

John Kerr: We have an issue with that support because contracts that are issued under the AEC

scheme are multiannual and we have no certainty about the funding beyond 2020, as the cabinet secretary has said. Decisions about further AECS rounds will have to be taken once we have a clearer sense of the financial picture and support—the quantum of the sum that will be available and the means by which that support will be delivered—after we have left the European Union.

Angus MacDonald: What is the position with regard to any other current schemes?

John Kerr: As we discussed with the committee late last year, we have set out our plans for the pillar 2 elements of the funding for the remaining part of the programme. There are no other particular changes of the nature that you suggested.

Angus MacDonald: Is it still the Scottish Government's intention to use capping of individual payments as a mechanism for funding pilot schemes to be introduced using the powers in the bill? If so, how far has the Scottish Government developed its thinking in that area and when will it be able to reveal a finalised policy on capping?

Fergus Ewing: We are looking to cap payments; Mr MacDonald and other members will know that that was stated in the “Stability and Simplicity” consultation, and there is a reasonable amount of detail in that document thereanent. We confirmed it again in the programme for government by saying that we would develop substantive measures to be ready for implementation in 2021. That will include the level at which the largest direct payments to individual recipients will be capped in order to redistribute the funds within the CAP support.

By way of background, there are a large number of diverse views on capping and its pros and cons. It is a controversial topic—let us make no bones about that. There is a strong view that moneys that are freed up by capping should be directed to other positive schemes. I will not suggest schemes now, because that is policy not process. I think that the majority view is that there should be a cap in one form or another.

There is a cap in place for basic payments in pillar 1. It is at a pretty high level at the moment, and I think that the majority view is that it requires to be looked at. There are also technical issues about avoidance and anti-avoidance measures, such as whether a group of businesses are controlled by one business. Governments have to bear in mind such things when looking at an issue that is inherently complex and controversial but, nonetheless, we have given a clear direction of travel and an indication of when we hope we will be able to take a different approach.

Angus MacDonald: Do you have a timeline for the finalised policy?

Fergus Ewing: Our commitment in the programme for government is to develop substantive measures to be ready for implementation in 2021.

Maureen Watt: I will move on to section 5, which is about the power to modify CAP legislation on public intervention and private storage aid, and wrap two questions into one. Is the Scottish Government planning to make any changes to the ability of the Scottish Government to intervene in exceptional circumstances? How do you respond to the assertion from some stakeholders that the Brexit process in itself constitutes an “exceptional circumstance”, during which Governments may need to intervene? We have discussed possible tariffs that sheep farmers may face—would that be an exceptional circumstance?

Fergus Ewing: In response to the first question about whether we would intervene in exceptional circumstances, we are not planning to make any such changes. I am told that the purpose of section 5 is to prevent the Scottish ministers from being obliged to intervene in a market in Scotland when the secretary of state is not obliged to do so in England or elsewhere in the UK, so there is a somewhat technical reason behind the provision.

On the argument that Brexit in itself constitutes exceptional circumstances, I have alluded to the market dislocation that Brexit could lead to. We hope that that will not happen, but we agree that that could amount to exceptional circumstances. Most people would think that the examples that I have given, which I will not rehash, would be exceptional circumstances.

In our no-deal Brexit preparations, we looked at a compensation scheme for sheep meat in the event of tariffs at 40 or 50 per cent being imposed on lamb. The Scottish Government, the National Farmers Union and NFU Scotland have pressed the UK Government on such matters since the autumn of 2017. We had worked out in principle a scheme that would apply. That is an example of a response that would have been appropriate, albeit that many people think that compensation schemes have two facets—too little and too late.

Emma Harper (South Scotland) (SNP): I am almost able to say good afternoon to everybody.

I am interested in section 6, which gives the Scottish ministers powers, by regulations, to make modifications to the conditions for aid to fruit and vegetable producer organisations that they consider would simplify or improve the legislation. We need to give producers a strong voice; sometimes, they are at the bottom end of the supply chain when it comes to decisions. What is the Scottish Government's overall approach to

producer organisations? Will you confirm what changes the Scottish Government might be planning to make to the conditions for aid to fruit and vegetable producers?

Fergus Ewing: We support producer organisations, which do a good job for many sectors of the Scottish rural economy. I have had the opportunity to visit several POs and see at first hand the good work that they do in specialist areas. Three POs—Angus Growers Ltd, East of Scotland Growers Ltd and Scottish Borders Produce Ltd—receive funding through a funding scheme.

The EU's fruit and vegetables aid scheme, which was formed following an initiative by a group of growers to receive financial assistance, officially recognises POs and was designed to increase competitiveness in the supply chain. For example, Highland Grain Ltd, which I have visited, has developed a very efficient system for storing barley at the correct temperature to meet the needs of whisky consumers. It would probably have been beyond the financial capability of individual barley farmers to do that. We wish to support producers in clubbing together for a common purpose.

In the UK Agriculture Bill, the UK Government asserts that the fundamental recognition of POs is a reserved matter. However, as we set out in the legislative consent memorandum that the Scottish Government produced when the previous UK Agriculture Bill was introduced, we do not agree with that position. Despite repeatedly pressing Michael Gove, Theresa Villiers and George Eustice on the matter, we have not been able to resolve that fundamental difference between the Scottish and UK Governments. That is very unfortunate, because we think that we are better placed here to help POs to develop further and, possibly, to create new POs in areas of the rural sector in which there is not currently a service of POs.

Emma Harper: On that topic, we took evidence that supported the creation of a producer organisation for beef, for example. We already have dairy producer organisations and, as the cabinet secretary will be well aware, dairy farming is extremely important to the economy of the south-west of Scotland. Does the Government have plans to expand the producer organisation model into other areas and sectors?

Fergus Ewing: It is not for us to impose such organisations, but we are keen for them to be used when there is a desire and a demand among the grass roots for POs. The dairy sector is very important to the Scottish Government, the south of Scotland and other parts of Scotland. We are happy to work with the farming community and others to explore whether we should pursue such

a model. If so, we would start off with a favourable approach to that, and we would desire to be helpful as far as possible.

Jamie Greene: Good afternoon, everyone.

The Convener: It is not quite the afternoon yet.

12:00

Jamie Greene: It is now.

I have some fairly simple questions on marketing standards. Why would the Government like to include powers to amend marketing standards for products sold in Scotland? Why is the power for products that are sold in Scotland and not products that originate in Scotland?

Fergus Ewing: First, it is not our intention to make any radical changes to marketing standards, and maybe it is helpful if I start by saying that. The power that is being taken here is to make sure that we have the ability to replicate changes that are made elsewhere in the UK, in order to avoid barriers to the movement and sale of goods within the UK after EU exit. Such decisions regarding whether to follow any changes that are made by a UK bill or whether to retain alignment with EU standards can be taken on a case-by-case basis. Again, the provision in the bill was designed to ensure that there is an ability to do something, rather than to decide policy.

Jamie Greene: So you could not give us an example of a product that is currently sold in Scotland for which there may be a divergence in marketing standards between the rest of the UK and Scotland. Have any scenarios been worked up to illustrate why the power is needed?

That question is open to any of the panel.

The Convener: George is keen to come in.

George Burgess (Scottish Government): "Keen" might be an exaggeration, convener.

At the moment, of course, because the standards are determined at European level, and indeed, as we discussed previously, some of them are developed at an international level, there is no divergence. What we are doing here is taking the powers that will protect us against a situation where, under the UK Government's previous Agriculture Bill, which we expect to be reintroduced anytime now, powers to alter marketing standards are introduced that open the prospect of divergence within the UK, because changes might have been made in other parts of the UK that we were not able to replicate. The measures here are about avoiding unintended divergence within the UK.

To pick up on your initial question about why the provision is about products that are marketed

rather than produced in Scotland, obviously the marketing standards apply at the point of marketing. Any producer has to produce to the standards that are appropriate to the jurisdiction where their products are going to be sold. A Scottish producer selling to the United States markets and labels its products according to standards in the United States and not just to UK standards. The same approach can be seen in the UK Government's previous Agriculture Bill; the marketing standards apply in the jurisdiction where the products are being marketed.

Jamie Greene: I am struggling to understand the point. I was hoping to keep this brief but, in light of your answer, I have doubt in my mind as to why the intention is to avoid a divergence of standards, when actually all, or the majority of, the evidence that the committee has received expresses concern that the provision would create divergence. On a technical level, could you explain why this would avoid divergence across different parts of the UK when, in effect, if you have the power to regulate for the divergence of standards in Scotland versus other parts of the UK, you will create divergence?

George Burgess: If the UK bill, as previously proposed and as likely to be reintroduced, passes and becomes law, that will create the power for marketing standards to be changed in England, Wales and Northern Ireland. If there were no equivalent provision in Scotland, it would be possible for marketing standards in those other parts of the UK to be changed in a way that we could not replicate. Without any action on the part of the Scottish ministers, that would lead to a divergence. This allows us to play catch-up with other parts of the UK. Without these provisions, we get divergence; with them, we can avoid divergence. There is an opportunity for ministers in each jurisdiction to decide what to do.

You have seen the views from stakeholders about the importance of convergence and maintaining alignment. However, if other parts of the UK and DEFRA have signalled their intentions to change marketing standards, which might diverge from the European standards, that—not any action that we propose to take—will create the divergence.

Jamie Greene: The obvious solution would be Scotland being included in the UK Agriculture Bill, as opposed to having separate legislation.

George Burgess: Not necessarily. The previous UK Agriculture Bill was framed in such a way that there was not a single, unified marketing standards power, but three separate sets of standards, and we expect the same approach to reappear. For Wales and Northern Ireland, the UK Agriculture Bill recognises the devolved nature of the matter and seeks to enshrine that in

legislation. The approach that has been taken is that, because marketing standards are a devolved matter, it is appropriate for this Parliament to consider them, rather than that being delegated to Westminster.

Jamie Greene: I am sure that the matter will arise as the bill progresses, so I will not labour the point. As we approach the drafting of our stage 1 report, it is worth noting that stakeholders raised genuine concerns that there should be no inconsistency in standards, given that the UK is the largest market for the majority of Scottish products. However, that is being addressed.

I have a technical question about the Agriculture (Retained EU Law and Data) (Scotland) Bill. Will somebody on the panel explain why pig and sheep meat have been excluded from section 9? That was noted a few times in evidence sessions.

Fergus Ewing: I am told that the list in section 9(1) reflects what is currently in the EU common organisation of the markets regulation.

Now that George Burgess has broken his duck, as it were, does he want to come in again? *[Laughter.]*

The Convener: He certainly looks enthusiastic.

George Burgess: I do not think that duck is covered by the standards. Perhaps it is under poultry meat.

As the cabinet secretary said, the coverage for our provisions and indeed the similar provisions in the UK Agriculture Bill directly mirror the coverage of the existing EU standards. There is a power in section 9(2) for the list of sectors to be expanded. However, as per previous discussions, it would be a matter for consultation with stakeholders as to whether there was a desire for any other sector to come in under the marketing standards provisions.

Jamie Greene: That does not necessarily explain why they are omitted, but it explains their omission. Thank you.

Angus MacDonald: Certain stakeholders have suggested to us that the powers in section 10 offer a good opportunity to revise carcase classification following EU exit to better meet the specific needs of the Scottish and UK marketplace. Is the Scottish Government planning to make any changes to Scottish carcase classifications using the powers that are conferred in the bill? If so, what will the changes look like?

Fergus Ewing: The power will enable us to make changes to the scales for carcase classification after EU exit and, if we wish, to ensure that they are harmonised with those elsewhere in the UK. We ran a consultation in 2018 regarding mandatory sheep carcase classification. Further industry consultation is

needed but, if we decide to make a change, the power will enable us to do that.

Angus MacDonald: To clarify, are you saying that consultation has taken place but you plan further consultations?

Fergus Ewing: We have not specifically consulted on the provisions. They are really a response to the provisions that the UK Government has included in its Agriculture Bill. As we set out in the policy memorandum, the risk is that, if those provisions proceed for England, Wales and Northern Ireland, Scotland could be left adrift. It is better to take a matching set of powers here so that, if the need arises, we can make those changes.

Angus MacDonald: That also applies vice versa, of course. We have heard concerns in some of the evidence that we have taken that, if the classification was changed here, it would not be on a par with that in the rest of the UK.

Fergus Ewing: That would be a matter for internal discussion and deliberation. I do not know whether George Burgess has anything to add.

George Burgess: The point that I made in the previous discussion on wider marketing standards also applies here. Taking those powers will allow us to remain on all fours with the rest of the UK, if that is what is wanted. Otherwise, there would be a risk that we would not be able to follow changes that were made elsewhere in the UK.

I stress that we are not aware of any active plan by another part of the UK, including by DEFRA, for a specific change to the carcass classification standards. They are of pretty long standing in Europe and it is not immediately obvious that we need to change them.

Richard Lyle: The bill's policy memorandum mentions that the Scottish Government is already looking at reducing the existing burden through the use of new technology such as earth observation data from satellites. I will run my two questions together in order to cut down the time. Is the Scottish Government planning to make any practical changes to the way that data is collected and processed? Will you elaborate on the Scottish Government's plans to introduce new technology for data collection and processing, such as satellite mapping?

Fergus Ewing: The bill gives us a mechanism by which we can develop different routes. That does not have to mean new technologies or data collection methods; it could mean a change in data processing methods.

I emphasise that the general approach that we want to take is to be open and transparent in relation to data. That should be said as a matter of principle and for the avoidance of any doubt. I

think that I alluded to that in my opening statement.

The bill will, for example, enable data that is provided by the farmer to be reused, as long as the use is within the scope of the purposes that are listed in the bill, rather than our having to ask the farmer multiple times for the same piece of data. I think that, at a practical level, that entitlement is a matter of common sense and will be desirable for most farmers, who probably think that the Government asks them too many questions for too much of the time, anyway.

Richard Lyle: That is fine—thanks.

Peter Chapman: When I asked about the subject, the Scottish Government bill team outlined that the data collection avenues that the Scottish Government currently uses, including the June and December censuses and the farm business survey, will continue. Is the data that is currently collected sufficient? In response to the call for views on the bill, some stakeholders highlighted that there are gaps in the data that is collected and said that there might be a need to collect other data to address challenges such as climate change. Do we collect the right data, and enough data? Do we need other data streams to address the issues, and particularly climate change?

Fergus Ewing: The data that we collect at present is provided through Eurostat, but Mr Chapman raises a perfectly reasonable point. We need to ensure that, if our sustainable development goals change in future, we will have the power to require and compel the gathering of data that is germane to the pursuit of those objectives. As a general principle, I agree that that might require further attention in future. Although we do not intend to change the data that we collect at present, the powers that are set out in the bill are important because they will allow us to respond to and meet potential changes in international requirements. Without those powers, we might not be able to do that.

I believe that Mr McAlpine is keen to add to that.

Ally McAlpine (Scottish Government): When we spoke about part 2 of the bill previously, we said that it is about personal data, which is where we go out with surveys. Some of the data streams that Peter Chapman asked about would not necessarily include personal data, so they do not need to be covered by part 2 of the bill.

In the unit that I manage in the Scottish Government, there are some teams that work specifically on the survey, and this part of the bill will help them. Other people look at things such as earth observation and other sources of data provision that we will have to look at to address some of the issues that have been highlighted,

such as climate change and environmental concerns.

To be clear, I note that part 2 of the bill will enable us to go and ask farmers for their data. Things such as soil and earth observation are outwith the scope of the bill. We can do that through other routes.

Peter Chapman: Okay—thank you.

12:15

Colin Smyth: A number of stakeholders have pointed out that the bill does not have an overarching policy direction. That view has been reinforced today by the comment that any changes that are made by it are likely to be quite limited. Stakeholders clearly feel that changes need to be made to our rural policy—for example, to achieve a reduction in our carbon emissions and significant growth in our food and drink sectors. However, that will not happen through the bill, which is clearly an interim measure. What are your thoughts on the likely timetable for future legislation that will set out our wider rural policy for the longer term?

Fergus Ewing: We have broadly covered that already, but I am happy to answer the question, as you have asked it. The bill is not intended to set out future policy. As I have said on numerous occasions, its function is to set out our ability to make changes to our existing policy and thereby develop our future policy. Without it, we would not be able to do that.

If I might correct you, Mr Smyth, I have not said that any changes that we make will necessarily be limited. I have not said what the changes will be because, as I have argued hitherto, we have not yet reached the point where it would be appropriate for me to do so. The farming and food production future policy group is working on our future direction. It consists of external stakeholders, is well supported by an academic advisory panel and has been properly resourced—it has shown respect for Parliament in asking that it be provided with that resource. It is due to report this summer.

Our present focus is on continuing wider engagement with stakeholders, which might lead us to do further work if that is required—especially to ensure that we will be in a position promptly to meet the climate change challenge. We are looking at that issue in relation to any additional work that we might require to do, as stakeholders have expressed the desire that we should. We therefore need, perhaps, to consider supplementing the work of the farming and food production future policy group.

As a matter of fact and practice, and as it is right for me to do so, I constantly and regularly engage with stakeholders throughout the country, including individual farmers, crofters and businesses in rural Scotland—as I did at the excellent reception for Quality Meat Scotland that was held here yesterday evening, which I and other members attended.

Colin Smyth: It is not entirely clear, though, what your preferred timetable would be for introducing any future legislation. Do you have one? We must also bear in mind that we will leave the EU on 31 January and will enter a post-exit transition period that will finish at the end of the year. If you have a timetable in mind, will you be able to reduce it should the 2021 to 2024 transition period for agriculture be shortened?

Fergus Ewing: On timetabling for the bill, we have to take things sequentially. I am reminded that our aim is that it should come into force in the summer. At that point, we will possess the powers that we require to move forward to the next stage. For the reasons of Brexit uncertainty that I mentioned earlier, it would be imprudent and wrong for us to seek to implement sets of new policies when we do not know what the facts are. However, our preparatory work continues, and it will inform the timetable for any future legislative measures that are necessary, be they in primary or secondary legislation or an admixture of the two.

The Convener: Cabinet secretary, I mentioned earlier that the DPLR Committee has written to you, and one of the subjects that it has raised is periodic reporting to Parliament. The bill is a process bill, but it will allow things to change. Are there appropriate reporting provisions or will we work on the principle that, when something happens, the Government will get back to us?

Fergus Ewing: I do not know whether any of my officials wants to answer that in relation to the provisions of the bill. In general, we try to update the committee on matters of importance, and I hope that I stick to that. As I wait for my officials to find the answer to your question, I note that, with regard to the performance of the CAP payment system, we provide regular reports but we have not actually heard much back from the committee as to how well the system is going. Maybe the letter is in the post—I do not know.

To be serious, I note that, as a matter of general practice, we are happy to continue to provide the committee with regular reports on all matters of importance as they develop. When something important happens, after deciding how to tackle the matter, one of our first questions is, “Should we inform the REC Committee out of respect for Parliament and, if so, when and how?” That is a

general duty and we take it very seriously. Maybe that is the answer.

I think that my officials have looked in vain for a specific answer in relation to the bill.

The Convener: I am conscious of your answers on that matter, cabinet secretary. The bill will probably last beyond the next election and my comment is about ensuring that the bill allows for a correct reporting procedure.

Vicky Dunlop (Scottish Government): I can confirm that there is no such provision in the bill. I think that we responded on that matter in writing in our evidence to this committee or in our response to the Delegated Powers and Law Reform Committee—I am trying to find the letter.

The Convener: I do not think that you responded to this committee. Maybe you responded to the DPLR Committee.

Cabinet secretary, given the time, it would be extremely helpful if you could provide a written response on that reporting.

Fergus Ewing: I have just checked and, as far as I know, we are under no legal obligation to do much of the reporting that we currently do. The committee should be aware of what it seeks. If it wants to have statutory provisions for reporting on everything then, by definition, a future minister might take the view that, on certain areas, they will not be statutorily obliged to report the information that I currently provide to the committee gratis, out of the goodness of my heart, in a desire to show respect to Parliament. It is a two-edged sword. However, if you wish me to write to the committee, I will do so.

The Convener: In fairness, I know that you provide a lot of things out of the goodness of your heart, cabinet secretary, but it is the committee's responsibility to look at legislation and hold the Government to account, and that is why we ask you to answer questions. As you will, no doubt, respond in detail to the DPLR Committee's letter with regard to the points that it has raised about procedural issues, sunset clauses and periodical reporting to Parliament, perhaps it is sufficient for me to ask you to copy us in on your response.

John Finnie: I will indulge that big heart of yours again, cabinet secretary. I have a question about another letter. We understand that the Environment, Climate Change and Land Reform Committee has written to you and Ms Cunningham to request clarification on a number of points, including on the impact of the bill on environmental policy. I am conscious of what you said about future policy, but what is the Scottish Government's position on the impact that the bill should have on the environment?

Fergus Ewing: The bill will not have any impact on the environment per se. I tried to make it clear in my opening statement that we are—rightly—bound by existing environmental legislation, and I think that you have taken that point. That is the legal framework. The bill allows us to make changes, but there is no way that such changes would be used to diminish the environmental standards that apply. That is our general approach, and I thought that I had already made that clear. If I am missing something, Mr Finnie should ask me to deal with it now.

John Finnie: I will mention a selection of the matters that we understand that the ECCLR Committee has raised in its letter. They include

“Whether the bill will enable the continuation of environmental incentives”;

“The impact of a 5-year transition period on environmental policy, and whether the Scottish Government have considered a more ambitious approach”;

and

“Whether powers exercised under the Bill could have a negative impact on environmental policy.”

Fergus Ewing: It is difficult to answer the question, as those are perhaps more policy questions. We have the ability to exercise all the powers in the bill, but the reality of the Brexit situation is that the legal backdrop—at the UK and international levels—against which we will operate remains unclear. I made that point earlier. There is also still some uncertainty about what future funding we will receive. We require clarity on the grey areas that we alluded to earlier, which I will not repeat. I assure Mr Finnie that the bill is in no way intended to downgrade our commitment to high environmental standards—quite the opposite.

John Finnie: I do not know the protocol for this, cabinet secretary, but given that that committee has asked you the question—I think that the letter is to both you and Ms Cunningham—would it be possible for any reply to be copied to this committee?

Fergus Ewing: Yes, of course. I think that that is something that we can agree to.

John Finnie: Thank you. The ECCLR Committee has also questioned the limitations on exercising the powers in the bill as a result of future arrangements with the UK Government on funding, trade and post-Brexit arrangements, and intra-UK common frameworks. Is the ability to exercise powers under the bill uncertain? What is the Scottish Government's position on those constraints?

Fergus Ewing: I do not think that there is uncertainty about the powers that will be conferred on the Scottish Government should the bill be passed. I think that that is pretty clear. Where

there is uncertainty, it is, I am afraid, about future funding post-Brexit. Even if, as Mr Chapman says, it turns out that the UK Government maintains funding at EU levels until 2024, EU policy was on a seven-year basis and it is currently deliberating on the policy that will apply to 2027. My understanding is that, in the previous session of the UK Parliament, the UK Treasury said that all direct payments would cease by 2027.

My point is that, even if there is some assurance about funding from the UK to 2024 and we assume for the purposes of this discussion that that funding will continue—for farming, food production, the environment, forestry and so on—to 2024, a question still lingers about what will happen between 2024 and 2027, because the previous Chancellor of the Exchequer said that there would be no more direct payments from 2027, and, indeed, direct payments are reducing fairly sharply in England in accordance with the plans of Theresa Villiers. I think that the NFU has challenged that.

With respect, I think that the uncertainty therefore arises from questions about funding from the UK, rather than from the EU—which, for all the frustrating nature of its stipulations, regulations and rules, and penalties, was a fairly good financial friend to rural Scotland and, I would say, to rural Britain.

John Finnie: Thank you.

The Convener: Cabinet secretary, a couple of members have kindly given me the nod that they are happy to have their questions asked by letter given the time constraints that we are facing, so there will be a follow-up letter on a couple of matters.

That only leaves me to thank the cabinet secretary and the other witnesses for coming to the meeting.

That concludes the committee's evidence-taking sessions on the bill. We will consider our draft stage 1 report in the coming weeks.

Fergus Ewing: Convener, may I make a small point of clarification regarding a previous answer that I gave?

The Convener: Yes, but please be brief.

Fergus Ewing: You asked me to write to the committee about reportage on use of the powers and periodic reporting to Parliament. I have since been shown a copy of the letter that Vicky Dunlop sent to the clerk of the DPLR Committee on 19 December, in which that question is answered. I will provide a copy of that letter to you, because the question has already been answered—the answer is given in the letter. I thought that I should clarify that. We all want to be as co-operative as we can be.

The Convener: Thank you, cabinet secretary. We look forward to receiving that letter.

European Union (Withdrawal) Act 2018

Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)

12:30

The Convener: Item 3 is the sift of SSI 2019/415, which is an EU exit instrument. The Scottish Government has allocated the negative procedure to the instrument. As members have no comments to make about that, does the committee agree that it is content with the parliamentary procedure that the Scottish Government has allocated to the instrument?

Members *indicated agreement.*

Subordinate Legislation

Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)

Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 (SSI 2019/421)

12:30

The Convener: Item 4 is consideration of two negative instruments, as detailed on the agenda. No motions to annul or representations have been received in relation to the instruments. Do members have comments on either instrument?

Stewart Stevenson: It might be worth writing to the Government to ask for clarity in relation to the Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019. Paragraph 1 of schedule 1 uses the phrase

“another part of the Union territory”.

That is used elsewhere, too. Paradoxically, in the Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019, a great part of the substance is precisely replacing that phrase, so that it does not refer to

“another part of the Union”.

There is not another part of the union, because we are no longer part of the union. It is just a construction thing. I would like to know about that.

Paragraph 1(3)(a) of schedule 5 of the plant health regulations replaces a specific reference to “Council Directive 2000/29/EC” with the more general reference

“the EU Plant Health Regulation”.

In other words, it is no longer specific. I welcome that, because it is a keeping-pace provision that says that, whatever the EU plant health regulation is at any time, we are tracking it. I seek confirmation from the Government that that is the intention of that change, which I would welcome.

The Convener: As nobody else has any comments, and because those are questions rather than recommendations, is the committee happy that the clerks write on its behalf to raise those points with the Government?

Members *indicated agreement.*

The Convener: We are agreed that we have no recommendations to make.

12:33

Meeting continued in private until 12:42.

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