OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 1 December 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
28th Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Sarah Boyack (Lothian) (Lab)
*Maurice Golden (North East Scotland) (Con)
*Jenni Minto (Argyll and Bute) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)
David Bowles (Trade and Animal Welfare Coalition)
David MacKenzie (Society of Chief Officers of Trading Standards in Scotland)
David McKay (Soil Association)
Isobel Mercer (RSPB Scotland)
Professor Colin Reid (UK Environmental Law Association)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 1 December 2022

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning and welcome to the 28th meeting in 2022 of the Constitution, Europe, External Affairs and Culture Committee.

Our first item of business is to decide whether to take an agenda item in private. Do members agree to take item 3 in private?

Members *indicated agreement.*

Retained EU Law (Revocation and Reform) Bill

09:00

The Convener: Under item 2, the committee will continue to take evidence on a legislative consent memorandum for the Retained EU Law (Revocation and Reform) Bill. We are joined by: Isobel Mercer, senior policy officer at RSPB Scotland; David McKay, head of policy, Scotland, at the Soil Association; Professor Colin Reid of the United Kingdom Environmental Law Association; Lloyd Austin, convener of the governance group at Scottish Environment LINK; David Bowles, chair of the Trade and Animal Welfare Coalition; and David MacKenzie, chair of the Society of Chief Officers of Trading Standards in Scotland. I give a warm welcome to you all—and my apologies, as I am not on the best form today because I have a cold.

We have three general themes to cover, which we hope to stick to, although round-table meetings can be a bit more free-flowing. Please indicate to me or the clerk if you want to come in on a particular question, and I hope that we will have enough time to cover everything.

I will start with a general opening question. Thank you for all your written submissions. Will you provide, without going into too much detail, an overview of your impact assessment of the bill, particularly in relation to the regulatory environment in which it operates and its potential impact on relevant standards and protections in devolved areas, and how that will affect trade and business?

I will go round the table from my left and bring in Professor Reid first.

Professor Colin Reid (UK Environmental Law Association): Good morning, and thank you for the invitation to be here today. It is obvious to everybody that, if it comes into force, the bill will have a huge effect because so much of our regulatory law in so many areas depends on European Union measures. To add to that, we have the uncertainty about what will be affected, partly because we do not know what the United Kingdom Government wants to maintain, continue and keep going, and partly because of the complexity of the legislation. The regulatory framework in Scotland has delegated legislation that was made under the powers of the European Communities Act 1972 and under domestic legislation, so trying to work out which bits will be effective will be a problem.

In the environmental area in which I work, much of our law of the past 40 years has been shaped

by EU law, and it is a hugely complicated and integrated patchwork of domestic and EU legislation. The two have worked together and, until last summer, measures were still being made in London that rely on retained law and new law working together. That will all go.

The timescale for sorting out what will happen is incredibly short. It goes against the decision that was taken when Brexit was decided on: that the only sensible way was to have continuity and then, at leisure, as and when needed, we could review different areas and decide what is right for Britain in the new world.

The one thing that is perhaps underplayed in the written submissions is the impact of losing the certainty of European case law. The decisions of the European courts are so important in making certain framework laws work, so even if the text of the legislation stays the same, the fact that the interpretations could—not necessarily would—change adds an extra layer of uncertainty. Uncertainty is therefore the big message that should be in capital letters. If we knew exactly what will be affected and the policy direction that will be taken on various things, that would help, but we do not even know that.

Isobel Mercer (RSPB Scotland): Good morning, everyone. Thank you for the opportunity to provide evidence today. As set out in our written submission, RSPB Scotland is deeply concerned about the bill, which has major implications for a whole range of environmental laws and protections for nature in Scotland, as well as for many of the other areas that have already been spoken about to the committee.

We see the bill as creating a legislative cliff edge for thousands of laws, including key laws that protect nature. I would like to kick off my remarks by stating that the RSPB's position is that the approach in the bill is so unworkable and undeliverable in the timescale that it sets out that we would like the UK Government to withdraw it and come forward with a different, more consultative and sensible approach to reviewing, amending and improving environmental laws.

It is important to state that, as Greener UK, a coalition of environmental organisations that are engaging strongly with the bill at Westminster level, has often said, we are not opposed to improving, reviewing and updating environmental laws. However, as Professor Reid has set out, the approach in the bill presents such a high level of risk and uncertainty, particularly given the sunset provisions and the deadline, that we feel that a new approach to retained EU law is needed at this stage. I will finish there for now, but I can come back with further details throughout the meeting.

David Bowles (Trade and Animal Welfare Coalition): Thank you for inviting me, convener. I was fortunate, if that is the right word, to give evidence to the Westminster Public Bill Committee, at which the Royal Society for the Prevention of Cruelty to Animals, Greener UK and Wildlife and Countryside Link were clear that our best option is to scrap the bill and, if that does not happen, either to pause it or to look at the deadlines because they present a huge cliff edge. If you are looking for certainty from the UK Government, I am afraid that you will not get it.

The Scottish Government should be looking at two major issues. The first is what is devolved and what is not devolved. The RSPCA and the Trade and Animal Welfare Coalition—TAWC—have gone through the 44 different pieces of EU legislation and we have put in our written submission what we think is devolved. I am not a lawyer; that is my subjective opinion. You will not get any guidance from the UK Government on that. The difficulty for the Scottish Government is that the deadline is next December, so you only have 13 months to do this, then your right to have retained EU law will disappear and the UK Government will act for you. It was very clear in last week's Public Bill Committee that the UK Government will not change that deadline, but it will act for the Scottish Government, which is a dangerous precedent not just for animal welfare legislation but for devolution itself. The UK Government is trampling all over the Sewel convention.

Finally, I will give you a few examples of where the bill could interact not just with animal welfare legislation but with the trade and co-operation agreement with the EU. For example, will the UK Government retain the beef hormone ban? It has said that that is set in law, but it might not be if it falls under the sunset deadline. The EU has a ban on the importation of beef with hormones and if the UK Government does trade agreements with the USA, Mexico and Canada, all of which produce beef treated with hormones, that will rip up the TCA.

Another issue that is possibly more relevant to Scotland is the ban on battery eggs. I was involved in bringing in that ban at the EU level in 1999. The deadline for introducing that was 2012, so there have been 10 years in which we have had a ban on the use of the barren battery cage. The ban was brought in because of public demand, but we could see that slip because the UK Government is so intent on doing something political to regain sovereignty by moving away from EU legislation, and that really worries us.

David MacKenzie (Society of Chief Officers of Trading Standards in Scotland): Thank you for inviting me along today. I am here to speak for

trading standards, which is the general regulator of fairness and safety in buying and selling. We are a local authority function of more than 30 teams across Scotland. My organisation, SCOTSS, tries to bring that together, and to co-ordinate, support and take a coherent approach to the work, and I think that we do that quite well.

As other witnesses have said today and at previous meetings, our main fear is the sunset clause. That risks the loss of vital protections and there is simply nowhere near enough time to go through everything between now and next December. From our position of doing work on the ground in local communities daily, we emphasise that there is a real threat to those communities, consumers and reputable business, which might also lose out under the bill.

Again, as other witnesses have said, the concept and processes seem to be problematic. For example, significant changes could be made to the law without any real impact assessment or scrutiny of any kind. However, I will leave those issues to other people today.

What I can do today is bring a flavour of the variety and widespread impact of the bill in our local communities by describing the range of topics that are covered. Briefly, in the devolved sphere, it is mostly the interrelated issues of animal feed and of animal health and welfare, particularly the farm-to-fork process. That includes the keeping of animals in holdings and their transportation and slaughter, as well as issues of safety and quality in relation to animal feed. There is a great big interrelated series of laws that our guys work on daily in our local areas.

There are also one or two other areas to consider such as animal disease control, and one or two areas around both human health and environmental protection.

Although I appreciate that we need to concentrate on devolved matters today, for obvious reasons, it is important that I make the point that most trading standards law is reserved and many of the fundamental impacts of the legislation on our localities in Scotland could result from the loss of some reserved laws. You can see that in our written submission. We are talking about weights and measures, general fair trading, online buying rights, and intellectual property, which is really important for protecting businesses as well as consumers. We are certainly talking about everything that underpins the consumer world and beyond, including industrial areas. The bill could have a widespread impact with the sunset clause coming in so soon.

As a final point for now, I want to bring out something that Professor Reid touched on, which is the interrelatedness of all the legislation. Although a minority of the things—important things—that we do are devolved, they are affected by reserved matters and also by non-retained EU legislation. All that law works together. I will take single-use vapes as a very quick example. Those products took us by surprise in the past year or so and there are some real problems with them. Some of them are unsafe; and they are certainly not suitable for children, but they are being sold to children. Our guys up and down the country are doing a lot of work on them and they are using reserved law, devolved law, retained EU law and non-retained EU law to be effective in that space.

I am sorry; I have one further final point. As others have said, we are absolutely not against change. We think that some retained EU laws could be improved, and we will participate in that work, but 12 to 13 months is not long enough for us to go through however many thousands of pieces of legislation it is.

David McKay (Soil Association): I thank the committee for giving me the opportunity to put forward the views of the Soil Association today. To give a wee bit of context for my opening remarks, it is worth pointing out that the Soil Association is a membership charity. It was founded in 1946 and—this is among our founding principles—we are all about the production of good nutritious food for all that is produced with care for the natural world. That mission is as true today as it was more than 75 years ago. In the intervening decades, we have worked with others to campaign for more sustainable methods of food production, including, where appropriate, in legislation and regulation. For example, we helped to develop the first standards for organic production, which are underpinned in what was EU law but has now been taken over as retained EU law.

We share the concerns of the others who have already given evidence today, particularly the environmental organisations. I will not repeat what has been said so far, but I will emphasise that we have no objection to a sensible process of examining, updating or improving existing law. However, we do not think that the bill as drafted delivers that.

09:15

Our written submission pulls out specific examples, and there are many hundreds of examples that we could point to. We have grouped them around pesticides, animal welfare, organic production, genetically modified organisms and consumer protection. To take the example of organic production, we are in regular contact with the Department for Environment, Food and Rural Affairs and our understanding is that DEFRA's organic unit is looking at 200 of the 576 pieces of

legislation that have already been identified. It is important to note that that might not be all of them.

Despite DEFRA's assurances that the organic regulations will be maintained, we are still concerned about the implications for resources and capacity of looking at such an enormous volume of legislation in a relatively short period of time. Also, it is not just about the organic regulations; all sorts of horizontal regulations cross-cut and are referred to in the organic regulations. They cover a range of areas, including water quality, animal welfare and payments for sustainable systems. When we start thinking about pulling individual threads, it is important to think about all the other areas that are interconnected.

I will leave it at that for now.

Lloyd Austin (Scottish Environment LINK): Thank you for the opportunity to talk with the committee today. Scottish Environment LINK is a forum for Scotland's voluntary environment movement. We have more than 40 member bodies and a governance group, of which I am the convener, that tends to focus on the roles of public institutions, legislation and environmental law in addressing environmental issues. That group of non-governmental organisations has commented on and sought to influence the Brexit process as well as other institutional and governance matters. That is why the bill falls within LINK's remit.

Like the other witnesses, we are very concerned about the bill. It poses a high risk to our environmental standards because it is, in a sense, deregulatory by design but not in a thought-out manner. It is deregulatory in an indiscriminate manner, if I might put it that way, in as much as everything is lost unless it is retained rather than the other way around.

That is a very big risk, and it is particularly contrary to the Scottish Government's policy of keeping pace with environmental standards. We are therefore concerned that that commitment could be undermined.

I endorse what everybody else has said about the uncertainty and complexity of the challenge that the UK, Scottish, Welsh and Northern Ireland Governments would face in dealing with the various reviews that they would need to do in the timescale that has been mentioned. The Secretary of State for Environment, Food and Rural Affairs said yesterday at a House of Lords committee that DEFRA has identified more than 1,000 pieces of environmental legislation to review. We know that, according to the Government's dashboard, its estimates are incomplete and that it does not assess which laws are reserved and which are devolved. Just the other week, the Government discovered another tranche of 1,000 laws across all areas of government, not just the environment.

There is clearly a lot of uncertainty and complexity in this area, so the scale of the task and the resources that would need to be devoted to it are immense. Devoting resources to that task would be a total distraction from the Governments' priorities of addressing the environment and the climate crisis in the way in which they are trying to.

I will end on two points. First, I highlight the interconnectedness that everybody else has commented on between reserved environmental law and other aspects of UK legislation. Like others, we are not opposed to a sensible process of review and improvement. When there have been reviews of environmental law, such as the EU-led fitness checks, or indeed UK and Scottish Government reviews, the processes were constructive, they involved stakeholders and so on, and they reached sensible conclusions. That is the way to go with reviewing and making revisions rather than using a blanket revocation and a panic process to determine which laws we keep and which we do not.

The Convener: Thank you. I am now going to open the meeting up to questions from members. Members might direct questions to specific people, but if anyone wants to come in on a topic, they should indicate as much and we will try to include everybody.

I invite Ms Boyack to ask her questions first.

Sarah Boyack (Lothian) (Lab): I thank the witnesses for all the written evidence that we have in front of us today. It has been really helpful, and I would just like to explore some of the issues raised in it.

Over the past couple of weeks, we have heard about the lack of clarity, the uncertainty and the complexity around the cliff edge for the legislation and its impact on producers and businesses. Everybody has mentioned the environment, but I wonder whether you can give us some examples in that respect. I know that David MacKenzie has talked about the impact on communities, but I would like to go to Isobel Mercer and the RSPB first for some examples; its submission talks about the habitats directive, air quality and water quality, while others have talked about chemicals. How will the bill impact on those areas and what legislation is potentially at risk?

Isobel Mercer: Just for some context—and to start off—I would remind everyone that we already know that we are in a nature and climate emergency and that we are at a critical juncture for nature, so it is deeply frustrating to be talking about fighting to keep some of our existing effective protections when we should be looking to build on them and restore nature at scale.

As for the bill's impacts on Scotland's ability to do that and deliver on its ambitions to restore

nature, which are welcome, I would make two key points. As has been mentioned, there are implications for resources, and there will be a knock-on effect on the planned legislative timetable for key pieces of legislation such as the natural environment bill, which is due to be introduced at the end of 2023 or the beginning of 2024 and will contain crucial nature recovery targets that will be the equivalent of Scotland's net zero targets, but for nature. The implications for resources and capacity and the knock-on effects are huge.

We are also concerned about certain specific areas of legislation. The habitats regulations, which are basically the best protections that we have for our best wildlife sites and our vulnerable species, also include the environmental assessment of plans and projects that could affect those important wildlife sites. Perhaps I can give the committee a flavour of some of the complexity around this issue. Three sets of habitats regulations apply here. First, there are the Conservation (Natural Habitats, &c) Regulations 1994, as amended, which are devolved Scottish regulations that cover Scotland's terrestrial environment. Secondly, there are the Conservation of Habitats and Species Regulations 2017, which are UK regulations that apply in Scotland under certain circumstances such as energy consents and energy generating stations over 50MW, and their potential impacts on wildlife sites on land. Thirdly, there are the offshore habitats regulations, which look at the potential impacts of marine activities, plans and projects on important wildlife sites in the marine area.

That will give the committee a flavour of the situation. Even if the Scottish Government were to choose to restate the Scottish habitats regulations and move them on to the statute book as assimilated law—which is what we assume would happen, given the Scottish Government's welcome commitment to maintaining or exceeding EU environmental standards—there could still be a gap if the UK Government did not choose to restate the UK habitats regulations. That is just one of the areas in which we are particularly concerned about impacts.

Sarah Boyack: We have heard that the Soil Association has concerns, too. David, can you say a bit more about the impact of losing some of the regulatory or legal environment on water quality and pesticides?

David McKay: As we have said in our written submission, many of the most fundamental laws on pesticides are derived from the EU. For example, the legislation on maximum residue levels, which establishes the maximum concentration of pesticide residues that can be permitted in food for both human and animal consumption, is vital to ensure food safety.

We also have rules, such as the Plant Protection Products Regulations 2011, which set out requirements for the safe use, storage and handling of pesticides. Incidentally, those regulations also include a requirement for the UK Government to produce a national action plan on pesticides, with the aim of achieving sustainable use of pesticides.

It is also worth pointing out that organisations such as ours quite often ask Governments to go further; in our view, many of the regulations that we have do not go far enough. For example, the Scottish Government is currently consulting on a new agriculture bill; in our response to that, we argued for an enhanced regulatory baseline, and we are also making the case for targets for reducing pesticide usage to be included in the bill. At this stage, we are unsure and unclear as to what that bill will mean for the environmental ambitions of the Scottish or Welsh Governments.

As others have already pointed out, there is a question whether bills of that type could create a regulatory ceiling for devolved Administrations. Professor Reid might be able to elaborate on that—indeed, I think that he did so in a recent blog that we have cited in our evidence—but it is another concern that we have.

I have one other example that relates to GMOs. If we go through the UK Government dashboard—which, as others have pointed out, is incomplete, making it difficult to form a clear view—it can immediately be seen that there is a lot of legislation that relates to GMOs. Again, it is mostly EU derived. Some of the regulations—for example, regulation (EC) 1830/2003—provide a traceability framework for products that "contain or consist of" genetically modified organisms, as well as "food or feed" that is produced from GMOs. We are very concerned about what will happen in that respect, because traceability is vital. It applies where products might have to be withdrawn, because we need to know what is out there in the food chain, and it is also vital for the monitoring of potential impacts or effects of those products on animals and the environment. It also applies to labelling, because accurate labelling that allows consumers to exercise freedom of choice is important.

Those are only two examples relating to pesticides and GMOs, but there are all sorts of other areas that would be at risk if some of the legislation was removed.

Sarah Boyack: Lloyd, do you want to come in here? I have been hearing a lot of talk about water quality regulations not being enforced. The fact is

that we take water and air quality for granted. Does the legislation put that quality at risk?

Lloyd Austin: I have already highlighted a few such issues. I agree with everything that Isobel Mercer has said about the habitats regulations**,** and with what David McKay has said about pesticides. However, there is other well-known EU retained law that affects the environment; I would highlight, for example, the implementation of the EU water framework directive that the member mentioned, which is all about water quality and water resource management. Obviously, the quality of bathing water relates to what were previously EU standards.

I would also highlight the marine strategy framework directive, which is implemented through regulations in Scotland, the EU and the UK. The whole system of environmental impact and strategic impact assessments obviously originated as—and is now retained as—EU law, and all the examples that have been highlighted are implemented through a mixture of primary and secondary legislation. Although the primary legislation itself might not be affected, all the secondary legislation, particularly legislation implemented under the European Communities Act 1972, would be.

09:30

Another element of retained EU law is described in the European Union (Withdrawal) Act 2018 as saved EU

"rights, powers, liabilities, obligations, restrictions, remedies and procedures".

That catch-all provision relates to EU law that had direct effect on the UK on withdrawal day, and it also captures the provisions of the EU treaties that have been recognised in case law as having a direct effect.

From our point of view, one of the key aspects in that respect is the EU environmental principles. In the UK and Scotland, those principles have been put into domestic legislation—the Environment Act 2021 in the UK, and the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 in Scotland—but the provisions have not yet been brought into force. Neither the UK Government nor the Scottish Government have finalised the policy statements about their implementation; they have neither published a final version nor had it approved by the respective Parliaments. We do not know, therefore, how those principles are now going to apply. In effect, revoking the direct effect of the principles as part of EU law in the absence of a proper arrangement for implementing them represents a cliff edge in itself.

The application of those principles to the way in which all the other measures such as the habitats, water and marine regulations work is another indirect impact that we face. It would be possible for the UK and Scottish Governments to cut and paste some of the regulations into new regulations—although such a task would, as we have said, be onerous—but they cannot cut and paste those retained case law rights, if that makes sense, or the interpretation of retained EU law that is available in bits of case law. That will be a void that we cannot avoid.

Sarah Boyack: Professor Reid, do you want to come in on that point? Your evidence about the sheer scale of the legislation on the environment alone is really quite powerful.

Professor Reid: I will pick up some of the complexities arising from the examples that have already been given.

In relation to water, the Water Environment (Controlled Activities) (Scotland) Regulations 2011, which provide the detailed framework, were made under the Water Environment and Water Services (Scotland) Act 2003 and the European Communities Act 1972. Presumably any bits of those regulations that were made only under the authority of the 1972 act will disappear, while those made under the WEWS act will survive. At some stage, therefore, somebody will have to go through the entire set of regulations to work out whether a provision was authorised by both pieces of legislation or by only one, and what happens as a consequence.

We have talked about environmental impact assessment. At project level, environmental impact assessment is set out in delegated legislation, which means that it will be affected by the sunset clause. However, because the Scottish Parliament decided to legislate separately on it, strategic environmental assessment will survive in primary legislation in Scotland, but not in the rest of the UK. Environmental information is another area that will go, but that is a requirement under the Aarhus convention to which the UK is a party as well as a requirement under the trade and co-operation agreement between the UK and EU. We therefore have that extra layer of the international side to think about, as well as the internal and devolved aspects.

If some of us seem a bit vague about the implications of all of this, it is because of the sheer scale of trying to work out the different layers.

Sarah Boyack: What will be the intended process for actually retaining law? We have talked about the scale of all this, but what does that actually mean? What is the process for saving a piece of legislation as currently construed by the bill?

Professor Reid: It appears that it is available to the relevant authority—whether it be the UK Government or Scottish ministers—to make regulations, saying that those measures will survive. Presumably, then, it is possible for Scottish ministers to have a one-page order with a 50-page schedule that lists absolutely everything. The problem, though, is that, because of the legislation going on at the reserved level in the rest of the UK, trying to keep everything that the Scottish Government has the power to keep would create almost as big a mess as getting rid of everything. These things are interconnected, but they do not work together.

Sarah Boyack: We have been told that the dashboard is not up to date. Do you have any comment on that from a legal perspective?

Professor Reid: I totally believe everyone who is saying that the dashboard is not up to date. I have had a couple of discussions with people on the issue of measures made jointly under the European Communities Act 1972 and domestic legislation, and they are in the same position as I am. They, too, are thinking, "There might be a problem here", but nobody has a clear answer.

Sarah Boyack: But if all that is going to be implemented on the ground, what will be the reality check?

David MacKenzie: We have less involvement in the environmental sphere than the rest of my colleagues here—most of what we do relates to physical safety, fairness and so on—but there are some elements of environmental law that we enforce locally.

I had planned to make an additional point today, which I might as well make now. In our submission, I cited a specific example of a set of regulations on volatile compounds in paints that, although very obscure, nevertheless includes an important environmental protection. Unlike the other stuff that I have been talking about, that is not the sort of thing that my colleagues deal with day to day, but when evidence comes to light that somebody is breaching those regulations and is therefore harming the environment in order to get an unfair competitive advantage over their competitors, the provisions are there and our guys can deal with the matter.

I know that we are talking about the water framework directive and other big stuff—and, of course, that is what we should be focusing on—but my fear is that all those other obscure, specific and detailed bits and pieces of law will get ignored and lost almost by accident when the sunset clause comes in. I do not know what the answer is, but my appeal to the UK Government, the Scottish Government and whoever else is involved in this is that they do everything they can not to forget about the full list of legislation.

Sarah Boyack: That was very helpful.

Maurice Golden (North East Scotland) (Con): Professor Reid, in your submission, you state:

> "The UK government has previously expressed a desire to drive improved environmental outcomes, and has taken powers to achieve this through the Environment Act 2021 which were expressly intended to build upon retained EU environmental law".

In the context of the REUL bill, what changes could be made to attain that desired impact? Are there other legal mechanisms that could be employed to do that?

Professor Reid: As others have said, the issue is that, in order to reform and improve a complex area of law, there needs to be a proper review of it. It is interesting that the Treasury has managed to get financial services in a separate bill, so that area will not be affected by the measures here. The financial services area will be reviewed thoroughly on its own timescale and will have a complete set of measures.

The difficulty lies in producing such a blunt instrument to create a cliff edge at the same time as other bits of legislation are pointing off in different directions. The UK Levelling-up and Regeneration Bill includes proposals for environmental impact assessment, but we do not know how that is all meant to fit together in the timescale. By the time the environmental impact assessment rules are changed under that measure, the sunset might have cut in, so it is not clear what would happen.

The problem for outside observers is that it is not clear what the UK Government is thinking. Some elements point towards the policy of greater environmental protection, which some steps are being taken to pursue. However, at the same time, measures such as the bill seem to cut across that approach without giving a clear sense of how the dramatic powers to save or preserve laws will be exercised. There is also very little time for stakeholders, including the devolved Administrations, to make sense of what is going on.

Maurice Golden: Would any of the other witnesses like to come in on that?

Isobel Mercer: I want to come in on the question of improving environmental law. Understandably, much of the tension around the bill has been to do with the sunset provisions. However, I want to highlight some of its other clauses that are problematic from an environmental perspective. Clause 15 states that, when replacing retained EU law, ministers—

whether they be UK Government ministers or ministers of the devolved Administrations—must

"not increase the regulatory burden",

which is defined as

"a financial cost ... an administrative inconvenience"

or

"an obstacle to trade or innovation ... efficiency, productivity or profitability".

Our reading of that is that it means that if, for example, the Scottish ministers wanted to use the bill's powers to improve and strengthen environmental regulations, they might be unable to do so. Potentially, they might be able only to restate or amend regulations so that they remain at the same standard or lower. That is why we feel that the overall direction of the bill is deregulatory in nature. I wanted to raise that point about clause 15.

Maurice Golden: I would suggest that burden and standard cannot be completely equated.

I invite David Bowles to comment.

David Bowles: Looking at the impact on animal welfare, as I mentioned, there are 44 different pieces of animal welfare law, 18 of which are on farm animals. I will give examples of measures that might fall away. I mentioned the barren battery hen ban, but we also had the sow stall ban, the ban on veal crates and provisions on the use of animals in research laboratories, all of which came under EU law. People tend to forget that around 80 per cent of animal welfare legislation is inherited from the EU. The first law was passed in 1974, a year after we joined. In the subsequent 47 years of our membership another 43 pieces of legislation were passed. There is real concern about that aspect being allowed to slip away.

Another example is that companion animals are not covered by many EU-derived laws, but the law on how we take our pets abroad on holiday is an EU-derived law. If that slips away, will people be able to take their dogs away on holiday? Will the proposed legislation on the importation of puppies from Europe, which the Scottish Government is considering at the moment, immediately fall? There are lots of challenges in those areas.

The genesis of the bill was under the Johnson Government. It is interesting that, when it was originally written, there was a deadline of 2028, which was taken out under the Truss Government and put back in as 2023. There is therefore no reason why the Government cannot say, "Let's go back to the original deadline." To us, a deadline of 2028 seems to be much more sensible. As others have said, it would provide continuity and would enable us to look at all the legislation in detail. Let us look at the parts that could be improved, see what is possible and have a sensible, long-range discussion about how to do that, rather than rushing it.

Maurice Golden: Thank you. That is very helpful.

The Convener: Mr Austin wants to come in.

Lloyd Austin: I want to build on Professor Reid's comment in response to Mr Golden's question about the Environment Act 2021. It seems to me that, across the UK Government's various acts and bill proposals, there is a bit of incoherence in as much as there are good measures in the 2021 act, but they are contradicted or made incoherent by other legislative proposals. Other pieces of legislation that have been passed or are going through Westminster appear to have linkages between them that are not clear.

The other examples that I would mention include the United Kingdom Internal Market Act 2020, which poses challenges with regard to the extent to which environmental regulations in different places do or do not affect the market principles that are set out in that act. I highlight, in particular, the point that Professor Reid made about the UK Levelling-up and Regeneration Bill and its proposal on environmental outcomes reports. That would enable ministers—UK ministers in that case—to, in effect, amend the environmental assessment regulations and create a new form of environmental assessment.

09:45

That process might or might not be positive for the environment and might or might not be consistent with the ambitions in the Environment Act 2021, but it appears that the proposals in the Levelling-up and Regeneration Bill could be completely undermined if the environmental assessment regulations that one bill is seeking to improve are removed by the impact of the sunset clause in the Retained EU Law (Revocation and Reform) Bill.

Therefore, there are two bills at Westminster—I gave evidence to the Scottish Parliament on the legislative consent memorandum on the Levelling-up and Regeneration Bill—that appear to be incoherent or to contradict each other, if you see what I mean. Taken together, they appear to contradict the ambitions of the Environment Act 2021. The interrelatedness between all the proposals seems to create an added level of complexity that makes it even more unmanageable.

Maurice Golden: Professor Reid, on that specific point about contradictory legislation, from

a legal perspective, which would have supremacy, and who would decide?

Professor Reid: The way to resolve that is to extend the environmental assessment regulations until the full deadline, which would allow time for the other bill measures to take place, or to continue the regulations on the basis that that would be only a temporary continuation. However, that would require it to be thought about and done quickly, and given everything that is happening and everything that has to be done, there is no certainty, at this stage, that that sensible legal route would be identified and done in time.

David McKay: I will pick up quickly on a point that Mr Bowles made about the sunset clause. Although we absolutely agree that a 2028 cut-off would be preferable to 2023 or even 2026, I think that that risks our overlooking the fundamental point that that clause should not be in the bill. We have yet to hear any convincing argument for why there should be an arbitrary deadline—a cliff edge, if you like—at all.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to pick up on a point that Professor Reid raised at the beginning of the meeting—it would be good to get others' reflections on it as well—about EU case law and its status, which has been built up over many decades. There is a phrase in the bill about EU case law restricting

"the proper development of domestic law."

The committee has been struggling to understand what constitutes "proper development", so I wonder whether Professor Reid could offer some thoughts on that. It would be useful to hear whether others have concerns or questions about how they think that that might play out with regard to the habitats regulations or other EU case law.

Professor Reid: My answer is that you are not alone in struggling to work out what is meant by the term

"the proper development of domestic law."

There are a few areas—not so much on the environment—in which a body of domestic law had been built up, but where the EU was working on a slightly different approach and with slightly different ideas, so there was a conflict. Therefore, in those cases, we could see restoration to the more domestic flow. However, in many areas—the environment is one of them—domestic and EU law have been so intertwined for so long that it is very hard to see what

"the proper development of domestic law"

means or whether it has any particular meaning. There are areas where that term might make more sense, such as areas of employment law and so on, where EU concepts did not exactly match the traditional UK way of thinking about things. However, I certainly do not know, and nobody who I have spoken to has a clear idea of, what is meant by

"the proper development of domestic law."

Isobel Mercer: First, I am relieved to hear from Professor Reid that there is a lot of confusion about the clause that Mr Ruskell mentioned. As he said, it further highlights the huge uncertainty and complexity around the issue and the interplay between the different pieces of regulation, legislation and case law.

I come back to the example of the habitats regulations. There is a huge body of case law and European guidance, which has been critical for the effective interpretation and application of the birds and habitats directives and, subsequently, the habitats regulations in the UK and Scotland. That has been fundamental for ensuring that some of our most important wildlife sites and species are properly protected from plans and projects that could potentially affect them. There is huge uncertainty about the implications for some of those areas. At this stage, we do not fully understand what the implications would be.

David MacKenzie: From our perspective, consumer protection and trading laws have been intertwined with EU case law for many years, which is similar to the position on environmental law. We like the EU's approach to designing consumer protection laws in a principles-based way, rather than providing a list of specific provisions, because it allows reasonable and fair interpretation to fit a wide range of circumstances. However, in some areas, we are dependent to a significant degree on case law to further define what those things mean in specific situations. The Germans do a lot of the heavy lifting on that in terms of the cases that come through.

I am completely confused as to where we are with the future on that. The REUL bill will make interpretation much more difficult for us. The potential exists for a sudden serious downgrading of the influence that that body of interpretation has on what we do, which will cause problems not only for us, but for businesses—they need to have certainty about what these things mean when they are designing their work plans for the next couple of years. It is not just consumers who are affected.

Mark Ruskell: I was also interested in the interrelationship with the environmental principles. Lloyd Austin said that the environmental principles are not yet embedded, although they have been stated. Do the principles run through case law? For example, is the precautionary principle embedded in case law, but not embedded enough

in legislation to ensure that it would remain in place?

Lloyd Austin: As Isobel Mercer has said, the implementation and interpretation of a lot of EU law is very reliant on past EU cases. She mentioned the birds and habitats directives, and the same applies to the water framework directive, the bathing waters directive and the environmental assessment directives. Many cases relating to those directives have gone to the European Court of Justice and those cases have influenced the way in which public authorities in all member states implement various domestic interpretations of those directives.

As has been mentioned, the key thing is that, when the European Court of Justice determines such cases, it does so in a principles-based way. Therefore, the principles that are in the treaty often inform the way in which the court reaches its decision—that is set out in the way in which the case is reported and so on. That is what I described as the third area of retained EU law that the European Union (Withdrawal) Act 2018 specifies. It specifies three categories of retained EU law: EU-derived domestic legislation, direct EU legislation and saved EU rights. The case law forms part of the saved EU rights. Those are the aspects that would be very difficult to cut and paste into new regulations.

That means that, even if you saved all the regulations, either in the way that Colin Reid described earlier or by making hundreds of new regulations—that would need to be done at UK and Scottish levels because of the interconnectedness—the interpretations that are available through case law might disappear. You cannot cut and paste those into new legislation.

Therefore, on the environmental principles, I think that the REUL bill raises another question about what should be in the policy statement from the Scottish Government and the equivalent statement from the UK Government about whether aspects of the implementation of those principles in the past should be included. That might be one reason why the policy statements have not appeared. It is a question that I do not know the answer to, but I think that it underlines the importance of those saved EU rights in case law, as you mentioned.

Professor Reid: Under the continuity act, the principles apply only to public authorities in making policy; they do not apply to the courts. Therefore, the reservation in the continuity act does not actually help the courts—I think. Some of you will have seen that legislation at more stages than I have, but I think that it affects only public authorities in making policy.

The Convener: I do not think that any of us—

Professor Reid: We can check.

Mark Ruskell: Okay, but the main point here is that we have not adopted the acquis that the principles are part of, so we are no longer part of that. The principles might be in the treaty of Lisbon or whatever, but we are no longer part of that—we are not in that context any more—so where they get put is important.

Donald Cameron (Highlands and Islands) (Con): I would like to ask about regulatory divergence. I think that we all appreciate that the bill has to be read in conjunction with the Scottish Government's stated policy of aligning with EU law. Last week, we heard from some witnesses—principally those in the farming, agricultural and fisheries space—that opportunities were potentially presented in the ability to diverge. I have heard very clearly what people have said about wanting to align with environmental law in the EU, but are there any areas in which the witnesses believe that it would be beneficial for Scotland to do its own thing? I have heard people talk about not being resistant to change. Are there any areas in which you think that Scotland could go its own way?

David Bowles: As Lloyd Austin mentioned earlier, there is real complexity in how the REUL bill works with not just the trade and co-operation agreement but the common framework agreements and the United Kingdom Internal Market Act 2020. To be honest, nobody understands how all of those interplay.

The common framework agreements include a specific agreement on animal welfare, but that is done essentially by consensus. To be brutally honest, different Governments having different opinions on that has never really been tested.

The United Kingdom Internal Market Act 2020 is essentially a UK Government act that tells the Scottish Government what it needs to do with regard to the free movement of produce within Great Britain. That is a problem, as well.

Earlier, I mentioned issues with beef hormones. For instance, as the UK Government has reserved powers on trade, it can make trade agreements with Canada and Mexico, both of which have cattle that are injected with hormones. Obviously, that is illegal in the EU, and it is illegal in the UK under EU legislation that has been transposed. If the UK Government has a trade agreement with those countries that allows that beef in and, under the REUL bill, the beef hormone legislation drops, that will be a big problem for not just animal welfare but the free movement of beef within Great Britain and the export of beef to the EU. The first thing that the EU would do would be to ask how that trail can be audited and how it can be ensured that no illegal beef that has been treated with

hormones comes into the EU. That cannot be done.

There are huge complexities that the UK Government has not yet grappled with, which essentially concern the interplay with the common frameworks, the United Kingdom Internal Market Act 2020 and the Retained EU Law (Revocation and Reform) Bill.

As other witnesses have said, there are, obviously, areas in which we want Scotland to go further. We want Scotland to improve its agriculture under the proposed agriculture bill, and there are huge opportunities to do that. However, you must be mindful of how that interplays with the TCA and other pieces of legislation.

10:00

Donald Cameron: I am grateful for that answer, as one of the criticisms that is made of the United Kingdom Internal Market Act 2020 is that it does not allow for regulatory divergence. I am interested in exploring whether there are areas in which divergence from EU law or from UK law could potentially be beneficial for Scotland's interests.

Lloyd Austin: We would make the criticism that the United Kingdom Internal Market Act 2020 prevents regulatory divergence, if that were a good idea. There is one example of that happening. For its proposal relating to single-use plastics, the Scottish Government effectively had to apply to the UK Government for an exemption under the 2020 act. That was granted, which was good, but I think that the 2020 act would be improved if that sort of process was not necessary.

On the comments about keeping pace, we very much welcome the Scottish Government's approach to seeking to align with, maintain or exceed EU environmental standards. That is a good ambition, although it needs to be delivered, as there are examples of that not taking place. Fisheries stakeholders have been mentioned. I can see why they welcome the not keeping pace that is currently being proposed in relation to discards. The EU law on discards currently applies, and it appears that the Scottish Government wants not to keep pace with that provision and therefore to allow greater discards. That is an example of where the Scottish Government is not keeping pace where we think that it should be.

On divergence and being different, one aspect that is possible relates to EU law in the environment field always being a floor and never a ceiling. Member states were always able to be better. The Scottish Government—the Scottish Executive at the time—chose to do that with strategic environmental assessments, for example. The provisions for that were in the Environmental Assessment (Scotland) Act 2005, which is primary legislation, rather than being contained in regulations under the European Communities Act 1972, because the Scottish Executive at the time, with the support of others in the Parliament, chose to go further, so that SEAs are now required for Government strategies, as well as in relation to the narrow definition of plans that was contained in the relevant directive. That is one area in which you can diverge by being better.

Another area in which you could diverge by being better is the field of agriculture. In organic agriculture, for instance, or in supporting environmentally friendly farmers and crofters, the Scottish Government could do a lot better than the common agricultural policy used to do. The on-going consultation on the proposed agriculture bill is enabling that conversation to happen. That is one area in which, in supporting what I would call nature-friendly farmers and crofters to continue being nature friendly or to contribute to the restoration of nature, the Scottish Government could be different from the EU or from the rest of the UK to the benefit of Scotland's environment.

David Bowles: One small example is labelling. There is one piece of retained EU law on labelling, for eggs, which has been in place since 2004. It has had an enormous impact on improving egg production in Scotland and in giving consumers the information that they need in order to make their choices when they go into a supermarket. There is an opportunity for Scotland to expand that to labelling for other products, such as pigs, chickens and other farm products.

The EU is not yet moving on labelling, and the UK Government has said that it is minded to do that. That is a reserved issue. That is a perfect opportunity for Scotland to showcase its food, give consumers the information that they need, and help its farmers.

David McKay: Generally speaking, we see opportunities for improving existing legislation rather than going in the other direction.

I think that Mr Bowles talked about the trade and co-operation agreement. Come the end of next year, there needs to be a review of, and agreement on, equivalence in that.

To go back to points that I made earlier about regulations on organic production, the UK is currently operating with the previous EU regulation, but there is now a new regulation in the EU, which has been adopted in Northern Ireland as a result of the Northern Ireland protocol, but has not yet been adopted in the rest of the UK.

Various things are happening, not least the Genetic Technology (Precision Breeding) Bill going through the UK Parliament, and we are

concerned that it will potentially be quite difficult to come to an agreement on equivalence with the EU if the UK has diverged. We need to be mindful of how that interacts with some of the other agreements that are in place.

Donald Cameron: I have a specific question for Professor Reid. I was very taken by your description in your evidence. In Scotland, there is some primary legislation that is not caught by the bill, whereas things are caught in England, because they were made under regulation. You have touched on that this morning. You have given the examples of strategic environmental assessments and the water framework directive. Can you think of any other examples in which that strange tension exists?

Professor Reid: I am sure that there are other examples, but I have not done a full survey of the database to see what there is.

Before the Scottish Parliament existed, the position on many aspects was that Scotland-only legislation was not updated as quickly or as frequently as that of England and Wales. Therefore, when changes had to be made to comply with EU law, it often made sense to make wider changes. Small changes that could be made in England and Wales required more change here. The Scottish Parliament took the opportunity to make proper, wider considerations, such as on water framework materials. Trying to identify exactly where the differences are is one of the problems or one of the tasks that has to be done.

A further complication is that the European Communities Act 1972 has been the go-to. People used that because they knew that there was power to do stuff under it. In many cases, there probably was existing domestic legislation that could have given the authority to do most of that. However, because there was the European Communities Act 1972, why would people bother to search and, if necessary, tweak the primary legislation to give the power to do exactly what they wanted? I do not know whether there are records or accounts of the exact thinking behind the legislative process 30 to 40 years ago.

Donald Cameron: Maurice Golden touched on the difference between burden and standards. Do you have any observation on that from a legal perspective?

Professor Reid: My only observation is that the test in the bill in very vague. I think that the phrase "administrative inconvenience" is used. I cannot remember exactly what is included and exactly what that means. To whom is it "administrative inconvenience"? It could be said that any process that the Government has to operate is an administrative inconvenience for businesses. Equally, any form or report will be a burden of some sort.

Donald Cameron: I am sorry, convener—I should have referred to my entry in the register of interests. I am a member of the Faculty of Advocates.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): My question is mainly for those of you who work in devolved areas, but others should feel free to join in. A couple of you have touched on how the bill would impact on the wider nature of devolution and how, in turn, that would impact on you. A couple of references have been made—by Colin Reid and David Bowles, I think—to how the bill might relate to other pieces of legislation such as the United Kingdom Internal Market Act 2020 and the declining meaning of the Sewel convention, which the committee has looked at. I am keen to open up a discussion about the wider impact on the devolution settlement, if such a thing now exists.

David Bowles: The honest answer is that there could be huge ramifications for devolution, particularly with regard to what Scotland is permitted to do. Frankly, the UK Government does not have a clear idea about which pieces of the REUL bill are devolved and which are not. I have given the same message to the Welsh Government, which, obviously, like the Scottish Government, is minded to have an LCM that recommends rejection of the bill. I have said to them that the best approach is for each of the devolved Governments to do their own impact assessment to work out what is devolved and, if they are in doubt, to say that it is devolved and see how the UK Government reacts. That is the best way to do it.

To go back to the professor's suggestion, going forward, we might well have a very simple bill with a huge long schedule—just stick as many as possible of the 2,500 pieces of legislation under it and see how the UK Government reacts. I say that because, frankly, if you leave it up to the UK Government, you will have a deadline in 13 months' time, and you hand over your power to the UK Government to make your decisions for you, which is not a good position to be in.

Lloyd Austin: In relation to devolution, throughout the conversation this morning, we have talked about there being some things that are reserved and some things that are devolved, and therefore there are responsibilities on UK and Scottish ministers to do the review and revisions and to retain what they wish. Under clause 2 of the bill, UK ministers have the option to extend the sunset clause so that the really awful cliff edge at the end of next year is a slightly better cliff edge in June 2026. However, with regard to devolved

matters, that option is not available to Scottish ministers. That seems to be an odd anomaly.

We and others are of the view that the uncertainty, the unmanageableness, the risks and everything else associated with the bill are so great that you cannot really make it better. We would support it being withdrawn or parked and a sensible and proactive way of reviewing law being put in place. However, one thing that would make the bill less bad in relation to devolution—although without reaching the point where it was acceptable—would be the extension to Scottish ministers, and of course to Welsh and Northern Ireland ministers, of the clause 2 power to extend the sunset clause. In that way, in relation to devolved matters, ministers could apply an extension to allow them greater time.

I would also suggest that, if you are going to make it less bad, the deadline should be far longer than 2026. David Bowles mentioned 2028, but you could pick 2030, 2035, 2045 or any date you liked—the longer the better—to give you the proper time to do a sensible review that involved consultation and to do the detailed analysis of all the interrelatedness and complexities that Professor Reid described.

Isobel Mercer: I agree with everything that Mr Austin just said, although I must say that I also agree with Mr McKay's earlier comment that the cliff edge provision should not be in the bill at all. However, I agree that, if we are considering how to make the bill less bad, at a minimum, giving devolved ministers the powers to extend the sunset provision will be absolutely critical to ensure that there are not immediate significant capacity and resourcing implications in Scotland.

10:15

I highlight the fact that the UK Government's independent better regulation watchdog, the Regulatory Policy Committee, found that the impact assessment of the bill was not fit for purpose, and red rated it due to the inadequate analysis of the impacts of the bill on business, innovation and trade and the implications for the devolved Administrations. That is quite telling in relation to the level of uncertainty and risk that we are talking about.

I underscore the comments that have been made about the fact that the dashboard is incomplete and does not highlight which pieces of regulation are devolved and which are reserved. That will be a huge undertaking and, as Mr Austin highlighted, DEFRA has now identified more than 1,000 pieces of legislation that potentially fall within its portfolio. We have no idea how many environmental regulations in Scotland will be affected.

Identifying which regulations are reserved and which are devolved is sometimes really complicated. I will highlight one example that has not been mentioned yet: invasive and alien species. As the committee may be aware, the issue of invasive non-native species is one of the top five drivers of biodiversity loss globally. It is a major issue, and it is critical to prevent the spread of INNS, because the cost of tackling them once they are established is absolutely enormous. Perhaps Professor Reid could shed more light on the issue, but my understanding is that the regulations for INNS are a mixture of reserved and devolved so, again, it will be really difficult to make sure that we have identified and captured all the regulations and ensured that there are no gaps left in that critical area.

David MacKenzie: We are resolutely apolitical, so I will not stray into the debate about devolution. In a technical sense, as I have said, we fear the potential negative effect that the sunset clause could have. I concur with a lot of the comments that colleagues have made, and I would add that, as I understand it, the potential extension of the sunset clause is on a case-by-case basis, rather than on any blanket or topic basis. To link in with my earlier points, that creates the danger that some of the less well-known stuff is even more likely to be overlooked, and some of that stuff is just as important as the stuff that is better known. I do not know what the answer to that is, but it strikes me as a real concern.

David McKay: I want to make one more point in response to Dr Allan's question. As was flagged earlier in the meeting, we recently submitted evidence on UK common frameworks and, in particular, the framework on organic production. We had a number of questions about and issues with the way that it had been set up but, generally, we thought that it was at least an agreed structure and process. For example, we have a four-nations working group, which is the decision-making body involving the UK Government and the devolved Administrations that considers any policy or regulatory divergence when it comes to organic production and what the implications of that might be. There is also an expert group on organic production, which acts in an advisory role.

There is also a dispute mechanism, and the framework acknowledges that there will be disputes—in fact, I think that it acknowledged that there was not yet agreement on what was reserved and what was devolved. Putting those shortcomings aside, at least there is an agreed system for trying to deal with the issues and respecting the role and responsibilities of the devolved Administrations. Again, we do not see that in the REUL bill, so a starting point may be to consider some of those issues.

Jenni Minto (Argyll and Bute) (SNP): This has been a really informative discussion, so thank you very much for that and for all the written evidence.

I turn to the practical impacts of the bill. It was interesting that David MacKenzie—I hope that I do not misquote him—talked about EU legislation being a principled creation. David McKay and David Bowles both talked about their experiences of being involved in the creation of EU legislation. I am interested from a practical perspective in how the bill will change the ability to feed into legislation and therefore impact on the scrutiny that the Scottish Parliament can do. We have talked a lot about the Executives making decisions, but how will we as the Scottish Parliament and organisations such as those that the witnesses represent be able to feed into the legislation?

David McKay: It is essential that relevant stakeholder organisations are able to contribute, hold the Government to account and analyse the issues.

One point that we made in our evidence on the common frameworks was that there was not adequate provision for that level of stakeholder engagement. Under the previous system, at EU level, there was something called a civil dialogue group, which allowed organisations to have a say. We made the case that there should be representation from the organic sector in the four nations working group, which was comprised of civil servants, as far as we could see. We would be concerned if, through the bill, any of that stakeholder engagement was lost.

Jenni Minto: I think that David Bowles said that more than 40 acts had been introduced on environmental matters over 47 years.

David Bowles: It was on animal welfare.

Jenni Minto: Animal welfare—my apologies. Clearly, if we were to undo that in such a short period, we could lose a lot of what we have gained.

David Bowles: Absolutely. To echo what David McKay said, some of those pieces of legislation, such as the battery hens ban, took three years from publication until final agreement in the European Parliament and by the Council of Ministers, and rightly so, because that allowed for expert opinion, consultation and improvement to the legislation. Now, it is possible that all that could be scrapped within months.

It is instructive that, although the Scottish Government was invited and gave evidence to the bill committee at Westminster, the Welsh Government was not and did not. I am not even clear as to how much the bill has been discussed at the common frameworks level. I do not believe that it has necessarily been discussed that much.

Let us be clear that the Scottish Parliament, like the UK Parliament and the Welsh Senedd, is in it to make good legislation that achieves an objective and lasts for a long time. The only way to do that is to get the evidence—as the committee is doing—and examine the facts. Sometimes, you have to strike balances and make difficult decisions, but you base those on evidence. The bill does the exact opposite. Because it applies the principle that everything goes under the sunset clause, it does the exact opposite of considering the evidence and applying the factual principles.

Isobel Mercer: I absolutely agree with everything that Mr Bowles just said. We have talked a lot about the capacity and resource constraints that the Scottish Government and the Scottish Parliament would be under in delivering the bill, but those constraints also apply to other stakeholders who want to engage in the process and ensure that any replacement laws or amendments are strong and implementable and will not have unintended adverse consequences.

For organisations such as the RSPB, Scottish Environment LINK and many other environmental non-governmental organisations, the core focus at the moment is ensuring that Scotland has an appropriate and ambitious response to the nature and climate emergency. That will involve improving many of our existing laws and protections, such as ensuring that the natural environment bill that will be introduced in a year's time is really ambitious and ensures that we can deliver ecosystem restoration at scale across Scotland. However, that will all become difficult if our organisations are distracted by ensuring that existing effective protections do not fall off the statute book.

Lloyd Austin: I agree with everything that David Bowles and Isobel Mercer said. Building on that, one aspect of the bill that gives us concern, partly due to the lack of time and partly due to its indiscriminate nature, is that it leads to an undue resource pressure on Governments—whether that is the UK Government, the Scottish Government, the Welsh Government or the Northern Irish Government—to review and make a decision about how to go forward. Even if they achieve that, will they have time to do it with any engagement with relevant stakeholders?

Obviously environmental non-governmental organisations would want to be involved in environmental issues, but we would agree that, equally, other stakeholders should be involved, whether they are farmers, crofters, fishermen or businesses. It will be almost impossible to have an engagement process in such a limited time.

If the Scottish Government wishes to retain laws in their exact form or amend them to have a revised version, it will have to lay statutory instruments under the bill. If there are hundreds or thousands of such laws, which seems likely, that will be a new pressure on the Parliament, which will be a distraction from things that the Scottish Government wants to do in any case.

As a consequence of the lack of time and the indiscriminate nature of the bill, the resource pressures on the Government, the Parliament and stakeholders will be immense. Ensuring that a sensible conclusion is reached will be a real challenge, and the risk of trying to do something simple and missing something is immense. That is the main reason why we want the bill to be dropped and the review to be done the other way round so that, as and when a Government wishes to do so in individual areas, it has a sensible process to carry out the review and make proposals on change. Although the phrase "retained EU law" has "EU" in it, it would be UK and/or devolved law, and we could change it as we wanted, and change would be done through the normal process of engagement and consultation with, as David Bowles said, evidence.

Mark Ruskell: I am struggling to think through how all this law can be retained in a fast-tracked way. Is there a competent way to fast-track retention of law? I think that David Bowles said earlier that we could put it all in an appendix and have thousands and thousands of laws.

Is there a danger that if laws were fast-tracked, that might be seen as being inadequate and could be legally challenged because proper impact assessments were not done for every single one of the thousands of laws? I am trying to understand what the complexities might be and whether there is a genuinely simple way, should ministers wish to use it, to retain that law.

Professor Reid: There is, with fast-tracking, always a danger that it has not been properly thought through and that the proper checks and scrutiny are not done. One would assume that preserving the status quo by keeping the current retained law going would be least likely to get you into trouble. However, the problem is that in respect of the bits of retained law that Scottish ministers, the Scottish Government and the Scottish Parliament have the power to keep, you might not identify everything correctly, and keeping those bits will not necessarily work due to their connections with reserved matters and other bits of domestic law.

I must admit that I quite like the idea of the Scottish Parliament passing a simple bill to keep everything, then throwing the challenge to the UK Government and UK Parliament by saying, "Right—tell us what we can't do", but that would end up in the courts and would go quite a long way through the court system. However, it might be a more interesting way of dealing with things. However, I know that "interesting" is not necessarily a good thing in real life.

The Convener: I think that there was consensus among our witnesses last week that it would be much more sensible for the UK Government to reverse the arrangements and make keeping the laws the default position then reviewing them as required.

Professor Reid: The position that was taken at the time of the European Union (Withdrawal) Act 2018 was that everything was being rolled over in the expectation that in the years to come, areas of law would be reviewed as and when necessary, and that where divergence was a good thing, we would do that. That is what is happening in relation to financial services; it is being set aside as an area that is subject to its own comprehensive review.

10:30

David Bowles: Under the withdrawal act, we took just over two and a half years to pull all that legislation across, although essentially all that we were doing was replacing the word "commission" with "UK Government" or "Scottish Parliament" or whatever. Even then, mistakes were made and some legislation went back two or three times before it was right. It is ironic that that took two and a half years, but the UK Government is asking you to do all this within 13 months.

The Convener: What are the dangers for enforcement of regulations? David MacKenzie might be looking to enforce regulations more than others around the table. Can you give us an example of a practical problem?

David MacKenzie: As a witness said at a previous meeting, the problem is that something that falls victim to the sunset clause will be replaced by nothing. That means that even the stuff that we think could be improved will be replaced by nothing, which would be worse than what we have at the moment.

Although we do not have to enforce particularly actively some of the law that we enforce, there is consensus among most in the industry that as soon as you take regulations away, businesses will rightly think, "Maybe I can get a competitive advantage by slightly changing what I do." I have mentioned weights and measures and product safety. Some of the really tight safety standards that have been produced through decades of scientific and practical experience might be a little onerous, so businesses might think, "Let's not do that one." That needs proper consideration.

If we are going to review a standard or regulation, as everyone has said, it needs to be discussed properly, and we need to look at all the pros and cons and take the opportunity to change it in a measured way over time. As I keep saying, what we are involved in—buying goods and services—is fundamental to the daily lives of communities, so as soon as you take such regulations away, some less well-minded businesses—of which we have a few, but not many, in Scotland—will certainly take advantage of that. Even good and reputable businesses will quite rightly, because they have shareholders to think about, review the situation, so we could be heading for a situation in which consumers and reputable businesses are less well protected in a very clear way.

David McKay: In relation to organic food production and organic farming or crofting, one of the strengths of the "organic" brand, and one of the reasons why consumers have confidence in it and are assured by it, is that there is a very robust scheme of inspection, and compliance with standards that are underpinned by law is needed. We mentioned some of those laws earlier in the evidence session.

We are a stand-alone subsidiary soil association with certification; we are one of six controlled bodies in the UK, and if we did not have that legal basis, there would be no basis on which to enforce compliance with standards. One could technically argue that there could be a private system whereby rules are adhered to on that basis. However, I am an organic farming licensee: there are many reasons why people decide to farm organically, one of which is that robustness and strength. Organic farming is often viewed as the gold standard, but I fear that that would be lost if the legislative underpinning was removed. That would impact not only on producers but on consumers.

Lloyd Austin: One difficulty is the level of uncertainty and lack of clarity about what could happen. Obviously, environmental laws are enforced by a range of bodies, including the police, local authorities, the Scottish Environment Protection Agency and NatureScot.

If a piece of law is clearly revoked or repealed and they know that that is the case, they will not try to enforce it. However, if they do not know whether it has been retained under the provisions, what will they do? Even if it is the intention of the Government—by which I mean either the UK Government or the Scottish Government—to retain laws, the level of uncertainty about which laws will and which will not exist, come January 2024, will have a real chilling effect on those bodies. They will not know whether a law exists, which will create a situation in which they are nervous about whether they should undertake enforcement action. An awful lot of administrative checks will have to be made to work out whether there is enforcement action that they could take before they would do so. That will create a situation in which the few businesses that might be trying to get away with something will feel more empowered to do so.

Sarah Boyack: I want to follow up on that point. RSPB Scotland made a point about uncertainty in its evidence, and about the fact that although ministers have given reassurances about the devolution settlement in various pieces of UK legislation, there is the chilling effect that you just talked about.

How can we have certainty? I will go to Isobel Mercer first. Reassurances have been given in the Levelling Up and Regeneration Bill and in the Environment Act 2021. However, if those are just words, what will be the legal impact, given the uncertainty and bodies not being prepared to push the envelope because they are worried about legal status?

Isobel Mercer: That comes back to all the points that have been made today about the level of uncertainty and the risk that is involved in the sunset provision. As you said, various reassurances have been given, but until we see a different approach being taken in the bill, we will not be reassured that the potentially huge issues relating to gaps in environmental law will not arise. We need reassurance through a change in the approach in the bill so that the sunset provision and the dates of 2023 or 2026 are changed.

Sarah Boyack: Professor Reid, do you want to come in on that? It is unusual to have a bill in front of us with other bits of legislation being used to say that we should not worry about the bill because these other bits of legislation might help. We do not have the detail of those bits of legislation, either. Is that approach unprecedented?

Professor Reid: It is unusual to have Government policies going in so many different directions at the same time and being reflected in bills. I am thinking of the Levelling Up and Regeneration Bill and the change that it will make to environmental impact assessment, in comparison with what is in this bill. In a sense, that goes back to what was said earlier; many of the provisions in the withdrawal act duplicate measures that already existed in sectoral legislation and so on. There is the withdrawal act on top of that legislation, then there is this bill on top of that, and so on. Trying to keep track of the various levels and dimensions is really hard. Overlapping powers are not necessarily a problem, but they will be a problem if they are used by different people in different ways. At

present, there does not seem to be a clear single policy or direction that gives anybody the confidence to say what is likely to happen in the next six to 12 months.

Sarah Boyack: Thank you. That was really helpful. It is very much what the Law Society of Scotland said when we discussed the matter a couple of weeks ago.

Donald Cameron: On practicalities, the committee keeps on hearing evidence about the scale of the task that is before agencies, businesses, sectors and so on. What engagement has the Scottish Government had with you? Is there anything that the Scottish Government could do to help in this endeavour? Has anyone had any interaction with the Scottish Government about that?

Isobel Mercer: We have had initial discussions with Scottish Government officials about the bill to sense check our initial assessment of it and some of the issues for Scotland, but I will reiterate many of the comments that we have made. We are looking for the UK Government to revisit the overall approach to the bill. The dashboard needs to be updated comprehensively so that we have clarity that the whole range of REUL has been identified, and so that there is clarity over which REUL is reserved and which is devolved. Until those fundamental questions have been answered, it will be difficult to determine exactly what action is needed in Scotland.

David MacKenzie: We have had brief discussions with the Scottish Government, but not an awful lot. That reflects the fact that we speak to the Scottish Government about a wide range of things because we do so many different bits and pieces of work.

Broadly, our position is that we would like the devolved law that affects what we do to be largely retained and we should then have a conversation about the situation, in light of what we have said. Therefore, we are feeding a lot of our interaction on the bill with the UK Government through colleagues in England and Wales, with a particular focus on trying to retain the laws that need to be retained, but we are also interacting positively on the stuff that can be improved. There is stuff within the body of reserved law that affects us that we think can be improved in a clear way.

The point about interrelatedness keeps coming up. I stress how important it is for the practicalities of what we do. Even if the Scottish Government and Parliament do everything that we think they should do, that will be affected by what happens in England, at Westminster. Therefore, we would welcome any communication between Scotland and England, on that basis.

Donald Cameron: I appreciate that. The bill gives the Scottish Government the ability to restate EU law, as we all know.

Lloyd Austin: I have had little contact with the Scottish Government about that, although I am aware of the legislative consent memorandum. We have had some brief discussions with officials, which are obviously informal in nature at the moment.

I do not think that the Government has stated this, but the impression that I received was that there is a significant degree of concern about not only the scale of the task but the uncertainty. The officials told us of their concerns about the dashboard being incomplete, as well as us telling them our concerns about it being incomplete and the lack of clarity on it about which aspects are reserved and which are devolved.

There is a fundamental concern. The Scottish Government has a number of good environmental ambitions and ambitions on things that affect the environment, such as the forthcoming agriculture bill, the natural environment bill to which Isobel Mercer referred and the climate change plan. The biggest concern is that, to do a review and even a restating of all the legislation in 12 months—which is what it will be in a couple of weeks' time—would distract the officials who are doing all those good things and trying to advance those positive ambitions. In effect, they would have to put all that on hold to do a restatement. That seems to me not to be the right way to address a climate and nature emergency.

Isobel Mercer: I will add a brief comment to what I said earlier.

I agree with what Mr Austin said. We have not mentioned the fact that the Scottish Government has made a number of public comments in writing and in the chamber about the fact that it plans to maintain or exceed EU environmental standards. That is hugely welcome. We assume that that means that, as Mr Austin outlined, it plans to restate the majority of REUL and move it over on to Scotland's statute book as assimilated law.

However, to come back to the point about uncertainty, that does not address all our concerns. As I outlined in relation to the example of the habitats regulations, unless both the UK and Scottish habitats regulations were restated, there would potentially still be quite a large gap that could cause harm to some of Scotland's most important species and habitats.

10:45

David Bowles: I know that it will be of little comfort, but the RSPCA and Greener UK have had very little contact in relation to the bill with the

UK Government, which, obviously, is leading on it. We have not met with the bill team of the UK Government, which is almost unprecedented in relation to any piece of legislation that we work with.

As the committee will know, during the committee stages, which finished this week, the Government did not take any amendments—and, indeed, seemed to be oblivious and deaf to any concerns about the timetable, the impact on business, or the impact on animal welfare and environmental legislation.

The RSPCA and the Scottish Society for the Prevention of Cruelty to Animals stand by to help the Scottish Government with anything that it needs, particularly in relation to what we believe is devolved and non-devolved, as well as some options. However, the ball lies in the UK Government's court and, at the moment, it is not talking to people.

Donald Cameron: To be clear, have you had contact with the Scottish Government?

David Bowles: No, but as the RSPCA works in England and Wales, I would not expect to. However, I am happy to talk to the Scottish Government and look through our evidence and recommendations.

The Convener: I would like to ask a possibly final question—I never want to say "final question" at this committee, because it quite often is not.

We have talked a lot about the resource issues in relation to Government capacity and the civil service being distracted. However, have any of you assessed the impact on your organisations in terms of how much cost and time has had to be diverted to work on REUL, particularly given that many of the organisations that you represent are charitable?

David Bowles: I think that Isobel Mercer mentioned earlier that it is a huge distraction from the work that we are already doing. At the moment, the RSPCA is working on probably 10 bills within the Senedd and Westminster to improve animal welfare and, obviously, we are now directing our resources to defend the 44 pieces of animal welfare legislation that have been brought over from the EU.

It is instructive that, as far as we are aware, there are only three civil servants working in DEFRA on the 570 pieces of environmental and animal welfare legislation—actually, there might be more than 1,000, because they seem to have discovered some more. That is a real concern.

I know that the Welsh Government is also concerned about resources. Do not forget that, like the Scottish Government, it has an agriculture bill going through, which will bring about the biggest change to agriculture since 1947. It should be concentrating on improving the standards in agriculture and should not be being distracted by work on REUL.

Of course, work on REUL has also been a distraction for the RSPCA. We have had to put resources into trying to work out what the legal ramifications are and what is devolved and what is non-devolved, which is taking a lot of time. As others have said, frankly, we should be focused on making improvements and not on trying to retain what we have at the moment.

David McKay: I agree with everything that Mr Bowles said. The Soil Association is a small charity and we have limited resource. We have already been discussing how we can best manage this process internally and it will require us to set aside staff time and resource over the duration of next year at least, which will distract us from what we consider to be our priorities. In Scotland, those priorities are about working with the Scottish Government in relation to the proposed agriculture bill, making the case for a transition to agroecological and nature-friendly farming, and pushing for more action on issues such as targets for the reduction in the use of pesticides, which we mentioned earlier. We also want to see a big drop in the use of artificial fertiliser on the farm, with more people farming organically.

Our organisation has all sorts of priorities. We would not consider this bill to be a priority, but now it has to be. Over the coming months, we will therefore definitely be committing more resource to it, as will—as has been said—the UK, Scottish and Welsh Governments.

Lloyd Austin: I will answer from Scottish Environment LINK's point of view. We are an umbrella organisation for more than 40 environmental non-governmental organisations that range in size from very large to very small. LINK has a small secretariat, but we and all our member bodies would prefer that that charitable resource to be devoted to things such as working with the Scottish Government and the Scottish Parliament on a good agriculture bill, on the natural environment bill, on the grouse moor management bill, on implementing the climate change plan successfully. However, we are having to devote resources to dealing with the REUL bill—even a number of us being here today to give evidence on the bill, represents a use of our resource that we consider to be unnecessary, which underlines the fact that the bill is the wrong way to go about addressing any issues. We very much think that the best way forward would be to withdraw the bill and to do reviews on a topic-by-topic basis in a logical way, which is the way that reviews have been done in the past and which was the intent in the European Union (Withdrawal)

Act 2018, which was only a short number of years ago.

Isobel Mercer: I totally agree with all the comments that have been made, and I do not want to repeat too many of the things that I said earlier, but the constraints on RSPB staff time are also considerable. We have staff working on this at our UK headquarters as well as in each of the devolved countries, and that is quite a substantial resource.

A lot of the legislation that Mr Austin just outlined and that I mentioned earlier—the natural environment bill, the agriculture bill and legislation on grouse moors—the new Scottish biodiversity strategy, which is in development, and plans to deliver on the target to protect at least 30 per cent of Scotland's land for nature by 2030 are the things that we would like to dedicate our time and resource to, in order to influence them and ensure that they can be as much of a success as possible for Scotland.

However, I also highlight that all those processes are actually opportunities to improve and strengthen existing regulations and rules, where the Scottish Government and the Scottish Parliament see fit to do that through those processes. Therefore, I highlight that we are not averse to improving and strengthening the laws that we have, but we just do not feel that this process will deliver that.

David MacKenzie: I risk repeating what others have said, but I will speak specifically from my point of view and that of our organisation. We are a voluntary organisation—we all have day jobs—so this is a massive distraction, and it is really challenging even to identify all the pieces of legislation that are relevant in terms of our wide remit. There is a lot going on in our world just now. There is a lot of really good interaction with the Scottish Government and the Parliament about the new fireworks legislation, which will come in fully this year, as well as all the cost of living crisis stuff. Some of the very basic work that we do of measuring, counting and pricing things, for example, has become suddenly important. People are complaining about those things now, because they are struggling financially and because there is the perception that they will continue to struggle financially. Therefore, there is a lot for us to think about.

On Brexit-related things, there is a lot of work for us because a lot more of the products that are coming into the country are now deemed to be imports—previously, they were not—and there is a different regime for the people who are doing that importation. We need to tackle that stuff, and the REUL bill is a distraction, as others have said. At the same time, this is happening—it is real—so we need to deal with it. We are available to contribute to the on-going conversation—absolutely.

The Convener: I thank all our witnesses for attending and for their written submissions. It has been very important to have deliberations on this matter, and I wish you all well with the rest of the day.

On that note, we will move into private session.

10:54

Meeting continued in private until 11:18.

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