OFFICIAL REPORT
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DRAFT

Net Zero, Energy and Transport Committee

Tuesday 2 December 2025

Session 6

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NET ZERO, ENERGY AND TRANSPORT COMMITTEE
23rd Meeting 2025, Session 6

CONVENER

Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

Michael Matheson (Falkirk West) (SNP)

COMMITTEE MEMBERS

Bob Doris (Glasgow Maryhill and Springburn) (SNP)
Monica Lennon (Central Scotland) (Lab)
Douglas Lumsden (North East Scotland) (Con)
Kevin Stewart (Aberdeen Central) (SNP)
Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Charles Stewart Roper (Scottish Government)
David Murdoch (Scottish Government)
Sarah Boyack (Lothian) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Jyoti Chandola

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 2 December 2025

[The Convener opened the meeting at 09:23]

Decisions on Taking Business in Private

The Convener (Edward Mountain): Good morning, everyone, and welcome to the 36th meeting in 2025 of the Net Zero, Energy and Transport Committee.

I welcome to the meeting Sarah Boyack, who is attending as a substitute member for Monica Lennon for agenda items 2 and 3, on the Ecocide (Scotland) Bill. Under rule 9.13A of our standing orders, Monica Lennon is not entitled to exercise the rights of a committee member in relation to those items because she is, of course, the member in charge of the bill. Monica will, however, be present for the evidence session on the bill and, like all members of the Scottish Parliament, she is entitled to ask questions, and she will be able to do so once committee members have asked their questions.

Agenda item 4 is consideration of our work programme, and we will not discuss the Ecocide (Scotland) Bill under that item, so Monica Lennon, rather than Sarah Boyack, is entitled to take part. I mention all that purely in the interests of transparency, given that the committee might agree to take items 3 and 4 in private.

09:24

The Convener: Agenda item 1 is a decision on whether to take items 3 and 4 in private. As I have just stated, item 3 is consideration of today's evidence on the Ecocide (Scotland) Bill, and item 4 is consideration of our work programme. I will split the question into two parts to make sure that I do not break any of the Parliament's standing orders.

First, I will ask whether members agree to take item 3 in private, noting that Monica Lennon may not participate in that decision while Sarah Boyack may. I will then ask whether members agree to take item 4 in private; Monica Lennon may take part in that decision but Sarah Boyack may not.

Do members agree to take item 3 in private?

Members *indicated agreement*.

The Convener: Do members agree to take item 4 in private?

Members *indicated agreement*.

Ecocide (Scotland) Bill: Stage 1

09:25

The Convener: Agenda item 2 is an evidence session with the Scottish Government on the Ecocide (Scotland) Bill. This will be our penultimate evidence session before we hear from Monica Lennon, the member in charge of the bill, next week.

I welcome to the meeting Gillian Martin, the Cabinet Secretary for Climate Action and Energy, and her supporting officials: Charles Stewart Roper is the head of the environment strategy and governance unit, and David Murdoch is a Scottish Government solicitor.

Thank you for attending, cabinet secretary. I believe that you want to make some brief opening remarks.

The Cabinet Secretary for Climate Action and Energy (Gillian Martin): Yes, I do. I want to acknowledge the role that Monica Lennon has played in raising the profile of the importance of preventing serious damage to the environment. Her consultation on the bill showed that environmental crimes are extremely important to the public, and it is absolutely right that we analyse whether we have provision in law to reflect the seriousness of those crimes.

I have had useful discussions with Ms Lennon as she has developed her thinking on ecocide-level offences, which are, thankfully, very rare. Scotland has the opportunity to be among the first nations to have an offence of ecocide in criminal law, and I am supportive of the general principles of Monica Lennon's bill. Obviously, I will consider the committee's stage 1 report, but, today, I will outline some areas of the bill that the Government would like to amend.

The Convener: You have said that you support the general principles of the bill. Will you explain briefly why you support its general principles and why you feel that there is a gap in Scots law?

Gillian Martin: I am supportive of the proposal to introduce an offence of ecocide, as it is properly understood to cover the most extreme, wilful and reckless cases of harm. I was satisfied that the provisions in the Regulatory Reform (Scotland) Act 2014 were appropriate, and the suggestion that an amendment to the 2014 act would have the same outcome formed part of my initial discussion with Monica Lennon.

However, I was particularly seized of the international campaign for the adoption of ecocide as an offence. The outcome might be similar to or the same as reform of the 2014 act, but would an amendment have the same deterrent impact as a bespoke bill? I want to make sure that Scotland is always in line with European Union law, and Ms Lennon and I had a good discussion about that. Being one of the first nations to introduce a bespoke offence would provide a deterrent.

Given that the bill has advanced to stage 1 and Ms Lennon has done all the work that she has, I am keen to support the general principles, albeit with some caveats. I do not know whether you want me to mention some of those.

The Convener: I do not want to tread on the toes of my fellow committee members, who might want to delve into those, so I will leave that for the moment. Is there anything else that you want to say?

Gillian Martin: Yes. There are some areas of the bill that I want to point to. One of those is the burden of proof that it would place on the defence to prove the defence of the accused. Given that the usual burden of proof for all offences is on the prosecution to prove guilt, I think that that needs to be looked at. I will propose an amendment to the bill in that regard, because we do not think that it is currently in line with the European convention on human rights and article 40 of the United Nations Convention on the Rights of the Child. We intend to amend that part of the bill at stage 2 to ensure that it is compliant, as everyone has a right to a fair trial, and the burden of proof must be on the prosecution to prove guilt.

09:30

I also feel that the reporting requirement is unnecessary, given that ecocide is—thankfully—a very rare occurrence. The financial memorandum identifies that ecocide will happen

"once every 10 to 20 years",

yet there is a requirement to report every five years, which I do not think is proportionate. Those are two of the areas in which I have concerns.

I want to float an idea with the committee on the dovetailing of the bill with the Regulatory Reform (Scotland) Act 2014 and any prosecutions that may be undertaken in that connection, which is perhaps an issue that has been mentioned in evidence. I would like to ensure that, if a case of ecocide was not provable, the offences contained in the 2014 act would also be a component of any such trial. As the bill is drafted, there is a very high bar for ecocide. That is rightly the case, but we do not want people who have not reached that high bar to feel that they have got away with an offence that is covered in the 2014 act.

Those are a couple of the areas that I have concerns about.

The Convener: We heard in evidence that the bar for a prosecution under section 40 of the Regulatory Reform (Scotland) Act 2014 would be easier to achieve than the bar for a prosecution under the Ecocide (Scotland) Bill, if it is passed. There is an option to ensure a conviction, using the section 40 route. I am sure that somebody will delve into that.

There is an issue that I want to push you on. In its memorandum on the bill, the Scottish Government said that there was quite a big overlap between the bill and section 40 of the 2014 act. Could you highlight in which areas there is an overlap, whether you feel that section 40 is deficient and whether we need another string to that bow through the Ecocide (Scotland) Bill?

Gillian Martin: I had discussions with Ms Lennon about that. It is important to ensure that the offence of ecocide is additional to—a step up from—what is already there. We need to consider the definition of "significant environmental harm" in section 40 of the Regulatory Reform (Scotland) Act 2014, the definition of "severe environmental harm" in the bill and the difference between those two things. It is certainly the case that enough work has been done by the campaign to define what ecocide is.

Could we have gone down the route of reforming and making amendments to the 2014 act? Yes, we could have done that, but we are where we are. Ms Lennon has progressed her bill, which is an alternative vehicle for introducing the offence of ecocide. The phrase "six and a half a dozen" comes to mind. We could reform the Regulatory Reform (Scotland) Act 2014 to include the offence of ecocide and to make it strong, but Ms Lennon has progressed her bill, and we have an opportunity to establish a bespoke offence of ecocide. I want to ensure that that dovetails with the 2014 act provisions and provides additionality.

The Convener: I am sure that we will see, during the evidence session, if that is how the bill is perceived.

Mark Ruskell (Mid Scotland and Fife) (Green): Can that dovetailing be undertaken in the context of the bill, or is there a need to go back and look again at the Regulatory Reform (Scotland) Act 2014—if not under the bill, then in future? Is it possible for the 2014 act to simply sit there and seamlessly link in with the provisions in the bill?

Gillian Martin: Let me come to some of the provisions. I will explain this properly.

Mark Ruskell: I think that you are saying that there is no need for amendment of the 2014 act as it stands at the moment.

Gillian Martin: In providing the additional offence of ecocide, as defined, Ms Lennon's bill is offering additionality to what is already in the 2014 act.

Initially, I was concerned that there was a degree of overlap between the proposed new offence and the existing offence. That was covered in the policy memorandum, which sets out a summary of the existing environmental law and includes a full discussion of the existing offence of causing "significant environmental harm" under section 40. Of course, there is already a range of offences that cover activities that damage the natural environment; the committee will be well aware of those.

The committee has raised various concerns about having both the existing section 40 offence and the new ecocide offence on the statute book. Prosecutors might be inclined to bring a prosecution for a section 40 offence in most circumstances, as it is a strict liability offence, which is easier to prove. Bringing a prosecution for an ecocide offence might be seen as a riskier option.

That is why I am keen, if the bill gets to stage 2, to work, at that point, on something that would genuinely provide for taking section 40 into account. If something comes to court and has not met the bar for ecocide, it could meet the bar for a section 40 offence, and that possibility should be included. I would not want "significant" and "severe" to be the enemy of prosecuting serious environmental harm.

My point is that a formal connection between the two offences through an alternative conviction provision is worthy of further consideration. It would enable courts and juries to consider a specified lesser offence, should they not be convinced that a conviction is merited under the greater offence. That could be done, and I think that it would address any overlap. If there is a prosecution under the ecocide offence and the case is not able to be proven, the bar could be met for an offence under section 40.

Mark Ruskell: As the convener said, we had evidence from the Crown Office and Procurator Fiscal Service that said, in effect, that, if it has to make a decision, it may go down the 2014 act route because the bar is lower and the chances of conviction are, on the face of it, much higher. It is a question of ensuring that options are available at any stage in the process, and that nobody is able to drive a coach and horses through the provisions.

Gillian Martin: That was my initial concern when Monica Lennon brought to me the proposed offence of ecocide. I had discussions with my officials, who obviously know the existing law intricately. I was initially concerned, because I thought, "We already have offences in place. Will

the proposed ecocide offence be additional, or will the burden of proof be so high that, while people or organisations might be accused of it, we will not able to meet that bar?" Now that Monica Lennon has introduced the bill, I come back to the point that it must provide additionality, but it also cannot cancel out the existing law under which people could be prosecuted, if that makes sense.

We in Government are working on ways to address that concern. I do not want the bar for ecocide to be set so high that, while terrible offences could be committed, they might not meet that bar and would therefore not be sufficient for prosecution.

Mark Ruskell: We have also heard that, where an ecocide offence has been introduced in other countries, it is very much seen as a stand-alone offence the drives a culture change throughout the whole regulatory system. It makes a strong statement about the country's values and the need to protect the environment. You mentioned that a little in your introductory comments. Do you want to expand on that? What, in reality, do you see as the value of such an offence, given that it is likely that prosecution will be pretty rare?

Gillian Martin: I hope that it will be extremely rare.

Mark Ruskell: I hope that it will never happen.

Gillian Martin: We must hope that that is the case.

I was seized of the evidence that the committee heard from academic colleagues on 4 November. They were all asked what events would have been prosecutable in the past under such an offence, and the answer was, "Very few." That is great, because, in effect, it means that there has not been a seismic event.

We would hope that, if the bill was passed, we would never have to use its provisions, because it would have to be such a severe event. However, the fact that we would not want to ever have to use the legislation does not mean to say that we should not have it in place, because the deterrent effect is important.

The case has to be made that there is a level of harm for which the existing legislation does not adequately provide. A new offence of ecocide needs to address the most extreme, wilful and reckless cases of harm. The new offence should not impinge on the range of activity that is already covered by legislative provisions, but nor should it knock those provisions out. Making a decision on prosecution should not involve having to say, "If we go for ecocide, does that mean we can't go for a section 40 offence under the 2014 act?"

I and my officials are wrestling with how we can dovetail the offence of ecocide with the existing provisions. We need to ensure that there is clarity on what the bill intends to achieve and on the purpose and nature of the new offence. The proposed new offence is not designed to address the lower levels of environmental harm, but the existing law already covers "significant" events—that is the wording in the 2014 act. It also includes—this is important, too—damage that arises from permitted activities. That is another area of Ms Lennon's bill that needs to dovetail better with the existing law, because I would suggest that permitted activities must be reflected in the bill as well.

Mark Ruskell: I think that other colleagues will want to come in on where some of the lines sit between the existing regime and a potential future regime.

Finally, I want to ask about alignment with EU law, in particular the environmental crime directive. In the past, has the Government considered using the keeping-pace power to align more closely with that? On the face of it, the bill would bring closer alignment with EU law, but the Government could have considered other options for bringing the law in line with that important EU directive, in particular on sentencing.

Gillian Martin: We were already considering the revised EU environmental crime directive under our alignment policy, and the section 40 offence already goes beyond what the previous version of the directive required.

However, the bill, if it were passed, would be a stronger response to the directive's provisions for qualified offences. We must recognise that what Ms Lennon proposes would make us one of the first countries to have an ecocide offence in law, so we would be going further. However, we might look at how many other countries in the EU and around the world are considering introducing such an offence. There is a considerable movement, and a campaign, in that regard.

We want to maintain our policy alignment wherever possible. One aspect of the directive is that it requires the introduction of higher potential punishments for qualified offences, covering a wide range of existing offences, and an enhanced level of punishment for more serious environmental damage. We have the existing legislation—the 2014 act—which, again, sets a very high bar in section 40, but Ms Lennon is proposing an even higher bar for the most serious ecocide events.

The proposed penalties in the bill go further than the existing penalties. We are already looking at alignment—in fact, we are already broadly aligned—but the bill would take us beyond

alignment, and that is no bad thing. We could go further.

The Convener: The deputy convener wants to come in with a few points.

Michael Matheson (Falkirk West) (SNP): Good morning, cabinet secretary. I want to pick up on a couple of points that have been made in response to Mark Ruskell. With any form of criminal legislation of this nature, the lead agency responsible for its implementation, in seeking to pursue prosecutions, will be the Crown Office and Procurator Fiscal Service.

09:45

The Crown Office, in its evidence to the committee, said that it

"struggled to identify a scenario where the existing legislative framework would not be sufficient … most notably"

given the availability of the offence under section 40 of the 2014 act. However, it went on to say:

"If you are wanting to find a gap, I think that the gap relates to massive incidents where we would be limited in sentencing",

because penalties are limited to sentences of five years under the 2014 act.

We then heard evidence from the legal expert Murdo MacLeod QC, who said:

"if Parliament thought that the sentence was lagging behind what it should be to mark the gravity of the offence, that five-year penalty could be amended",—[*Official Report*, *Net Zero, Energy and Transport Committee*, 11 November 2025; c 7-8.]

which would obviously be done by amending the 2014 act.

In your earlier response, you mentioned that if the Crown Office was to try to pursue a prosecution under the bill—if it is passed and implemented—and was not successful in doing so, it could then use the 2014 act. However, my understanding is that the Crown Office, in its evidence, was saying that, because of the thresholds in the bill, it would actually be much more likely to prosecute under the 2014 act in order to secure a prosecution. Given the expertise of the Crown Office and the need to implement the bill, if it is passed, that raises a question as to the purpose of having a stand-alone offence.

Gillian Martin: You raise some important points, and you have gone through some of the issues that I discussed with Ms Lennon when she brought forward the bill around the purpose of having a stand-alone offence for the most severe incidents.

There is also a general point about the sentences that are associated with the 2014 act, and that aspect may also need to be looked at. If the bar for ecocide is—rightly—very high and ecocide is not provable at that stage, the 2014 act becomes the vehicle by which to secure a prosecution for a significant event. If the sentences under the 2014 act are indeed "lagging behind", the existing law may not give a judge the leeway to impose penalties that are commensurate with the gravity of the offence. That may be an issue.

Initially, I was keen to discuss with Ms Lennon whether we could amend the 2014 act to include such an offence and to make the penalties more commensurate with the severity of the offence. Regardless of whether the bill is passed, I think that we need to look at that. We do not want prosecution of an offence under the 2014 act to be seen as having a much lesser penalty associated with it. We may be looking at an event, or a series of events, that has caused huge, long-term environmental damage, with huge associated costs, which may not be reflected in the sentence. You make a very good point in that regard.

Michael Matheson: Of course, we could just amend the 2014 act to increase the sentencing powers to include the imposition of sentences of 20 years. Why would we not do that?

Gillian Martin: That is a good question. Again, I wrestled with that and spoke to Ms Lennon about it, and we made an offer to work on something like that. However, things are moving quite fast with regard to the international campaign to put ecocide into law, and I did not want there to be any sense that we were lagging behind when other countries were putting it into law.

I spoke to Ms Lennon about whether it was necessary to go ahead with a bespoke bill. My reason for supporting the bill is that it provides additionality, in that it sets a much higher bar than the 2014 act does, although the latter is still in place. I wanted—and I still want—to ensure that if something is not prosecutable or provable under ecocide legislation, that would not prevent the 2014 route from being considered.

Michael Matheson: Yes, I understand that point.

You mentioned that a bespoke bill could have a deterrent effect. I am always interested in the idea that new criminal law acts as a deterrent. What is the evidence to support the argument that a bespoke bill delivers a deterrent effect?

Gillian Martin: I am not avoiding the question, but I wonder whether that is less a question for me and more a question for the member in charge of the bill. Obviously, Ms Lennon has said that there is a reason for introducing the bill. I also point to the views of Professor Hendry, who gave evidence on 4 November. She said that there was merit in a

bespoke bill of this type in the sense that there is a deterrent effect with higher penalties being associated with ecocide. Ecocide would be discussed out there in relation to Scotland going first in acting on ecocide. I cannot find the exact quotation, but it is obviously in the *Official Report*.

Michael Matheson: I have it here. I can read it, if that would be helpful. She said:

"It is difficult to have an evidence base for a deterrent effect but, instead of changing section 40, with its high penalties, the passage of a specific bill would probably attract some regulatory attention, press attention and corporate attention, which might strengthen the potential for a deterrent effect."—[*Official Report*, *Net Zero, Energy and Transport Committee*, 4 November; c 8.]

Beyond the public relations aspects, I think that it is fair to say that there is not much evidence of a deterrent effect. My understanding of the deterrent effect of criminal legislation is that, broadly, the evidence says that, when people are committing criminal offences, the last thing that they are thinking about is the actual criminal penalty that would be applied to them.

Gillian Martin: That is a fair point. Again, when Ms Lennon came to us about a bespoke ecocide bill, these were points that we put to her. The Government felt that section 40 of the 2014 act already made provision in relation to ecocide. Of course, we also have to reflect on how often—or not—that provision has been used. In the evidence to the committee, there was a difference of opinion on whether there were certain things that that provision should have been used for, but the Government felt that, on balance, reforming the provision would not have put the spotlight on the offence of ecocide in the same way that a bespoke bill would. I am keen to see what Ms Lennon says in response to your question.

As it stands, I am keen to support the bill's progression to stage 2. There are elements of the bill that I would like to amend so that it is compatible with the ECHR and so that it provides additionality, which is important. I understand your general point in that regard.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Cabinet secretary, I think that I am wrestling with the same thing that the Government has been wresting with in relation to whether to create a stand-alone offence or to reform the 2014 act. If the Regulatory Reform (Scotland) Act 2014 were to be reformed, with the addition of sentencing powers to impose sentences of up to 20 years, guidance would have to be issued in relation to that, and the word "ecocide" could be used in any legislation that reformed the 2014 act. In effect, my question is whether we can create provisions for an ecocide offence by reforming the 2014 act. Does it have to be either/or?

Gillian Martin: Yes, we could do both. We could have a stand-alone bill, as Monica Lennon is proposing, or we could reform the 2014 act.

Bob Doris: I am just checking—could we still say that we had created an ecocide offence, because we could put that in the bill that amended the 2014 act—

Gillian Martin: Charles Stewart Roper is indicating that he wants to come in on that, so may I bring him in now?

Bob Doris: Yes, of course.

Charles Stewart Roper (Scottish Government): It is clearly more straightforward and visible to have a new bill if you are creating a whole new offence with a new name. If you are amending existing legislation, there is a limit to how far you can go. You could create an enhanced level of offence for the existing offence. Whether you could then call that offence a different name would be a technical question for the drafting process, but that would be less visible than a full stand-alone bill.

Bob Doris: So it is possible, but it would perhaps not be as visible as the member in charge of the bill would like it to be. I just wanted to check that.

When we are wrestling with the difference between an ecocide offence and reform of the 2014 act, we need to look at the definition of "ecocide" in relation to there being "serious adverse effects" that are either "widespread" or "long-term". The committee's notes referred to that as a bespoke definition; I think that you also used that term earlier, cabinet secretary. Is that definition necessary, and is it appropriate to define "severe environmental harm" in the way that is done in the bill for the purpose of an ecocide offence?

Gillian Martin: The definition of "ecocide" has been developed for international law purposes, and it has been adapted to the domestic legal system, so I am of the view that the definition of "ecocide", as drafted, is workable. If members were to lodge amendments on the definition of the offence, I would consider them, and Ms Lennon, as the member in charge of the bill, would have a view, too.

The definition of "environmental harm" in the bill is the same as the definition in the 2014 act. The definitions of "significant" and "severe" environmental harm both include reference to "serious adverse effects". The new offence specifies that the harm must be either "widespread" or "long-term".

Officials have been discussing this, and we are not sure whether there is any benefit in seeking to

add further conditions to the definition of "significant environmental harm" for a proposed ecocide offence, because, ultimately, it would be up to the prosecutors and the courts to determine whether an offence had been committed of a level of seriousness that justified the charge of ecocide. We hope that there will be none, but we do not know what future events would fit that definition. However, we need something that can cover the most serious and, potentially unforeseen, events.

Bob Doris: The reason why I asked the question was to establish whether the Scottish Government thinks that the offence is clear and distinct from the current legislation—that this offence is different from the current definitions.

Gillian Martin: Yes. I keep going back to the definition of "environmental harm". The definition in the bill is the same as the definition in the 2014 act. Obviously, that is a point that committee members will want to speak to Ms Lennon about.

Bob Doris: Yes, of course.

I want to look at how the bill applies some other definitions in relation to the harm caused by a course of conduct or consequential impact over time. Is the bill sufficiently clear on that aspect? In earlier evidence sessions, we have talked about the fact that an organisation could believe that it had a clean bill of health each year because it was meeting all the regulatory requirements—it was respecting and considering those requirements. However, if someone were to look at the impact over a significant amount of time, the organisation could find that its activities fell within the definition of ecocide. Is the way that the bill would apply in relation to the harm caused by a course of conduct or consequential impact over time appropriate?

Gillian Martin: Whether serious or severe harm is caused over time or as a one-off event, the issue is the severity of the harm. My understanding of the bill is that the issue is the threshold for the harm, not whether the harm occurred over a period of time or was a one-off event. It is about the impact, regardless of whether there was a series of events with a long-term effect or a one-off event.

10:00

Bob Doris: I appreciate that these are quite difficult matters to navigate around. The committee is thinking—or at least I am thinking—about the fact that an environmental impact from 2024 to 2025 might be relatively minor but that an environmental impact from 1985 to 2025 might be quite significant and profound. You could see that the impact might not look that significant in one year, but that, incrementally—

Gillian Martin: Yes, and it would be up to the prosecution to prove that.

Bob Doris: People say that you should not ask a question that you do not know the answer to, cabinet secretary, but I am going to do it anyway. How does section 40 of the 2014 act deal with such long-term impacts? Does the 2014 act have appropriate provisions in that regard?

Gillian Martin: May I turn to Charles Stuart Roper on that? I believe that the issue is the extent of the harm—its significance—but my officials will correct me if I am wrong.

Charles Stewart Roper: There is a key difference in that the section 40 offence has a specific defence of carrying out a licensed activity, whereas the bill does not have that defence. In your scenario, Mr Doris, if the operator was carrying out a licensed activity and, over time, that built up to something that caused damage, the operator would still not be liable for a section 40 offence, because the activity was licensed. The bill does not include that defence. I think that that is the concern that the committee heard about from the Scottish Fishermen's Federation and the National Farmers Union Scotland. Their concern was that the cumulative effect of doing a perfectly legal licensed activity over time could ultimately be seen to fall under the provisions of the bill.

Bob Doris: I know that my colleagues want to explore that aspect in much more detail later, so I will not explore it further, tempting as it is.

A number of witnesses have suggested to the committee that an ecocide offence should explicitly cover omissions or failures to act as well as acts themselves, as with section 40 of the 2014 act, given that a failure to act could also cause environmental harm. Does the Scottish Government have a view on that?

Gillian Martin: I have seen some of the evidence from people who want the bill to cover omissions and failures to act. We do not believe that there is a case to expand the bill's scope to cover omissions, beyond the extent to which they are already covered. We believe that omissions are already covered by the offence of ecocide as it is set out. The offence is of causing severe environmental harm intentionally or recklessly, so harm can be caused by omission already. We do not see that there is a case for including a further provision in relation to omissions.

Bob Doris: You do not believe that the bill needs to be more explicit than it is.

Gillian Martin: Yes.

Mark Ruskell: I want to ask whether the Government will look to amend some of the definitions, should the bill reach stage 2. The bill defines "long-term" as 12 months, but the committee received evidence that it is hard to see how an ecosystem could recover within 12

months, so there were questions about that definition. I do not know whether there are any aspects of the definition of ecocide that you have a firm view on at this time or whether you would be able to say that you will want to put a different figure on something or frame something differently.

Gillian Martin: There is a question of whether a figure is appropriate at all. You have just pointed to some of the difficulties in this regard: we do not know what the nature of the offence is, so we do not know how long it would take to recover from a particular event or how you could measure it. Members might have ideas for amendments at stage 2 or questions for Ms Lennon, but you have pointed out a particular difficulty. For the Government, it is about the impact and the severity of the harm, not the duration of the event.

Sarah Boyack (Lothian) (Lab): I want to ask about vicarious liability and focus particularly on companies. The threshold for liability in the bill requires intent or recklessness for the main offence, and some of the evidence that the committee got suggested that that was too high a threshold, because of the difficulty of proving intent or recklessness and because, in reality, such offences, especially when committed by big companies, might be more likely to result from negligence or poor governance. I am thinking about work carried out by a company or a subcontracted company. What is the Scottish Government's view on the appropriate threshold of liability for the main offence in the bill? Would a lower threshold be appropriate?

Gillian Martin: This comes back to the point about dovetailing with existing legislation, because ecocide is meant to have a high threshold. If I understand your question correctly, you have just proposed bringing the threshold for the offence below the threshold for ecocide as currently defined. Is that the question that you are putting to me?

Sarah Boyack: There is a concern that ecocide could have been committed but that it would be hard to hold anyone to account for it, because of the threshold.

Gillian Martin: Vicarious liability and holding the organisation responsible has precedent in Scots law. First of all, in a "I was just doing what I was told to do" case, a tremendous penalty could be put on an individual, while the organisation was left to continue without any penalty at all, so it is entirely appropriate that there are provisions in the bill for vicarious liability.

Sarah Boyack: I was focusing on the actual organisation that would be held to account and on accountability.

Gillian Martin: The seriousness of the crime puts it above negligence. Again, if it is ecocide, it is not negligent; it is wilful. I come back to the definition in the bill that it has to be wilful or reckless. That is what has to be proved. A wilful act, on the part of an organisation, would suggest telling an employee to do something that would cause severe harm to the environment, but that is the thing that must be proved—that it was wilful or reckless. However, reducing the threshold for what constitutes ecocide is problematic, because, as I have said, we already have law that would deal with that. My understanding is that, as the law stands, it includes vicarious liability. Is that correct?

Charles Stewart Roper: Yes.

Sarah Boyack: We have been talking about the section 40 offence in the 2014 act. You would prefer this legislation to amending the section 40 offence in the 2014 act—

Gillian Martin: I do not prefer either. As I said, the vehicle to amend the existing legislation existed, and that could be done, but, when Ms Lennon presented the bill and the consultation responses, I thought that this vehicle could have the same effect and potentially shine a light on ecocide as an offence. Not everyone will agree with that, but I was prepared to see what the committee and those who gave evidence thought. However, I go back to the point that the bill must provide additionality to the existing law and to my previous comment that, if the bill gets to stage 2, we must ensure that, if the threshold of ecocide is not met in court, the organisation could still be prosecuted for the offence under section 40 of the 2014 act.

The Convener: I think that Douglas Lumsden has some questions.

Douglas Lumsden (North East Scotland) (Con): Yes, I have. I want to pick up on your last point, cabinet secretary. Were you suggesting that, if ecocide could not be proved in court, a prosecution could be achieved using the 2014 act?

Gillian Martin: I am suggesting that there may be ways to address the concern that people have raised about the fact that there is such a high a bar for proving ecocide. A formal connection could be made between the two offences—for example, through an alternative conviction provision. I am just putting it out there that that is worthy of further consideration. I have not yet decided what we might propose at stage 2, but that is one idea. An alternative conviction provision provides for courts and juries to consider a specified lesser offence if they are not convinced that a conviction is merited under a greater offence. I am not making that up—such a provision could be made.

Therefore, there could be merit in the bill establishing the section 40 offence as an alternative to the new ecocide offence. I am giving consideration to that as a way of addressing the issue that members have mentioned, which was already a concern for the Government. Ecocide must provide additionality to the existing law, but, given that it involves a very high threshold or bar, we could lodge an amendment at stage 2 that would establish a formal connection between the two offences.

I would like other amendments to be made to the bill to make it more in line with the 2014 act, because there are areas in which it is not in line with the 2014 act. I have mentioned a few of those in the past half hour.

Douglas Lumsden: I am trying to think how such a provision would work. The Crown Office and Procurator Fiscal Service might decide to go down the ecocide route to take a case to court, but, during the trial, it might think, "We're not going to meet the high bar for ecocide," and decide to switch to a section 40 prosecution. Is that what you are saying? In other words, are you talking about making it possible for someone to be found not guilty of ecocide but then to be retried under section 40 of the 2014 act?

Gillian Martin: I am giving consideration to that. I will not use the phraseology of "switching". I have been very careful in what I have said, because we have not yet arrived at a decision about what we might do at stage 2. Of course, other members might want to do something similar, and we could work with them on that.

An alternative conviction provision would provide for courts and juries to consider a specified lesser offence at the same time as ecocide. I presume, therefore, that a verdict could be reached that it was not possible to convict someone of ecocide but they have been found guilty of the offence in section 40 of the 2014 act.

The Convener: I am sorry for coming in like this, which I do not normally do, but I am slightly confused. I thought that I had heard it said in evidence that, if there were two offences—one on a lower shelf and one on a higher shelf—you would always go for the offence on the lower shelf first, because there would be more chance of getting a conviction.

Gillian Martin: Can I bring in the lawyer?

The Convener: Yes. I would be delighted if you wanted to argue with the Crown Office and Procurator Fiscal Service; I think that it would be an interesting debate.

Gillian Martin: Bear in mind that, at the moment, we are simply airing the idea. We have not decided what our approach will be.

The Convener: That is why I am trying to get some clarification.

David Murdoch (Scottish Government): What the minister said is right—we are just considering the idea.

It should be borne in mind that there are higher penalties for the ecocide offence. It might be the case that the gravity of the crime justifies those higher penalties, so the Crown Office and Procurator Fiscal Service might charge someone with ecocide. Obviously, with ecocide, it is necessary to prove mens rea—intent or recklessness—whereas, with the section 40 offence, it is not necessary to do that.

The penalties might justify charging someone with ecocide, but it might become apparent through a trial—[*Interruption*.]

The Convener: I apologise. I do not know why that happens, but apparently, if my phone is on and there is an alarm at home, which is—[*Interruption*.] I am just going to stop this. It overrides everything, because it is a home security alarm that the police put in. I apologise profusely. I do not know why it has gone off. I hope that my wife is fine. If she is not, I guess that she has called the police. I apologise profusely to the committee. David, back to you. I am embarrassed.

David Murdoch: No, that is fine. Where was I?

The Convener: I apologise again. If you want to gather your thoughts—

10:15

David Murdoch: It might become apparent halfway through a trial that there is not enough evidence to convict for ecocide but that there seems to be enough evidence for the section 40 offence. If it was libelled on the same indictment, the switch could be made to the section 40 offence, or the jury could convict for the section 40 offence.

The possible provision would therefore be that, if the jury could not convict for the ecocide offence because it did not meet the threshold, it could convict for the lesser section 40 offence. That could be how such a provision would work. The jury could automatically consider the lesser section 40 offence.

At the beginning of a trial, the prosecution could libel two charges—ecocide or section 40—but an automatic alternative conviction provision would allow a jury to consider the lesser charge at the end of the trial if it has not been libelled at the beginning of a trial. A provision such as that would essentially allow the jury to convict for the lesser charge if it thinks that the ecocide offence has not been made out during the trial.

There are examples of such provision in other pieces of criminal legislation. That is how an alternative conviction provision would work.

The Convener: Cabinet secretary, I think that Charles Stewart Roper wants to come in, but it is up to you whether you let him.

Charles Stewart Roper: If I may, I would like to clarify that we are not in any way disagreeing with the evidence that the Crown Office presented. We are suggesting a possible way that the bill could be amended to deal with the problem that it identified.

Gillian Martin: We are just suggesting it. We do not know whether we will go down that route or whether someone else will, but we thought that it was worth airing it.

The Convener: Douglas Lumsden, I will hand back to you, and I will ask Michael Matheson to convene the meeting while I step out to make sure that my wife is all right. She will be cross if I do not.

Douglas Lumsden: The threshold of liability for senior responsible officials of an organisation is consent or connivance. The committee has heard that "consent, connivance or neglect" would be more in keeping with comparable provisions. Does the Government have a view on that? Should neglect be added?

Gillian Martin: Negligence was mentioned there. Am I right?

Douglas Lumsden: No. I mentioned consent or connivance.

Gillian Martin: Consent.

Douglas Lumsden: Yes, and I suggested that neglect should be added.

Gillian Martin: Right. It goes above negligence, does it not? That goes back to some of the terminology. Ecocide means

"unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage".

That is the definition that is set out by the expert panel on the definition of ecocide. The definition also says:

"'Wanton' means with reckless disregard for damage, clearly in excess in relation to social and economic benefits anticipated. 'Severe' means damage which involves very serious adverse changes".

I do not know how negligence fits into that. How would you prove that negligence was wanton? That is the issue here. Negligence can be wanton and reckless, but does it suggest a knowledge that what you are doing is causing harm?

Douglas Lumsden: I would say that the word "negligence" suggests that you do not know what you are doing, and that is a problem.

Gillian Martin: It is about proving it. If I may, I will bring the lawyer in on that.

David Murdoch: With regard to negligence, the way that the offence is framed is aimed at serious harm, committed with intent or with reckless disregard for the consequences of your actions. Attributing liability to an individual must be framed in the light of intent and recklessness, so negligence does not quite cut it. If you want to commit the section 1 offence, you have to be more than negligent. Omitting negligence from individual liability provision fits with the purpose of the offence.

Douglas Lumsden: The committee has heard concerns that defining the responsibility of individuals in relation to the corresponding type of organisation could leave scope for non-senior staff—middle managers, for example—to be prosecuted. Do you think that that is right?

Gillian Martin: No. I think that vicarious liability is important, for the reasons that I set out to Sarah Boyack, so there must be provision to ensure that the scenario that you have just outlined, where, in effect, you have a fall guy, cannot happen. It cannot be the case that a junior member of an organisation would be prosecuted for something that was actually the intent of the organisation, so there must be vicarious liability provision.

Douglas Lumsden: With regard to vicarious liability, what is your view of contractors that do work for the main company, for example?

Gillian Martin: They would be working under the direction of the organisation, so I would not see any difference in that regard. Again, David Murdoch has the letter of the law, but an individual could be contracted to do something that causes wilful, wanton harm. The bill provides for the case where someone is

"acting as the employee or agent of another".

Douglas Lumsden: However, if a contracting company was acting in a way that was—I will stay away from the word "negligent"—

Gillian Martin: Wilful.

Douglas Lumsden: If a contracting company was not following proper procedures and then caused an incident, where would the buck stop?

Gillian Martin: I think that you would have to prove that that company went rogue, so to speak, which I suppose is what you are describing. You would have to prove that a contractor was doing that off its own bat, without the instruction of the contracting company. Who is responsible for the offence needs to be provable.

Douglas Lumsden: Therefore, you think that, if a company is following a proper process, it is the contracting company that—

Gillian Martin: You say "proper", by which you mean that the company is following the direction of the contracting company.

Douglas Lumsden: Yes. Therefore, the responsibility would rest with the contracting company. Maybe, if the contractor had gone a bit rogue, the contractor would be responsible.

Gillian Martin: Yes, that would be the case if a contractor came in and cut corners without the express direction or knowledge of the contracting organisation. In that case, it would not just be ecocide that it was taken to court for; it would properly also be taken to court by the company that contracted it.

Douglas Lumsden: Is that explicit enough in the bill so that people understand that, or are changes needed?

Gillian Martin: It is covered by the vicarious liability provision, whereby someone

"commits the offence of ecocide, acting as the employee or agent of another".

Douglas Lumsden: So you think that that is covered.

Gillian Martin: We feel satisfied that that is covered in the bill.

Douglas Lumsden: Could the bill have any unintended consequences? For example, is there any danger of companies moving their headquarters away from Scotland because there is an ecocide law in place?

Gillian Martin: If I may just give a personal opinion, if anyone did not come to work in Scotland because we had an offence of ecocide, what would that say about the company? We want all companies to act responsibly. If environmental law exists to prevent serious harm to the environment, whether under the 2014 act or an ecocide act, what would it say about a company that it would not come to do business somewhere because of that law?

Douglas Lumsden: If there was no ecocide law in the rest of the United Kingdom, companies might feel that coming to Scotland would bring an added risk. Do you think that that would not be the case?

Gillian Martin: There would be such a high bar. The big debate that we are having is whether the bill's provisions are sufficiently additional to those that already exist in Scotland. I would be very wary of a company that said that it would not work in Scotland because we had an ecocide law.

Douglas Lumsden: Could there be any other unintended consequences?

Gillian Martin: There could be a couple. It is important that the bill includes provision for permitted activities, so I will probably lodge stage 2 amendments to ensure that we allow for such activities. As it stands, the burden of proof is on the defence, which is not in line with the ECHR. I do not think that anyone meant that to be the case, but that could be an unintended consequence. Those are serious deficiencies in the bill as introduced, so I would want to rectify them at stage 2, and I suggest that others might want to do so, too.

I will leave it there. In my response to Ms Lennon, I have set out in a memorandum some of the unintended consequences that there could be as a result of the bill's current drafting. In my mind, the ones that I have mentioned are the main ones.

Douglas Lumsden: Thank you.

Mark Ruskell: I have been reflecting on the conversation this morning, and I will play devil's advocate. If, under the 2014 act, the courts were able to give, say, an eight-year prison sentence as a result of action by somebody or a company that had led to severe and wanton environmental damage, with clear intent—the action was shown to be clearly wilful—would that, in effect, be ecocide? In our evidence, we have heard that there are lots of ways in which to implement an ecocide law. Monica Lennon has brought forward a clear proposal, but I am thinking about other options, including those under the 2014 act. If a responsible officer was imprisoned for eight years, with there being clear and wilful intent, would that, for all intents and purposes, be an ecocide conviction under the 2014 act?

Gillian Martin: No. They would be prosecuted under the 2014 act, which does not mention ecocide.

Mark Ruskell: Would that not be, in effect, ecocide?

Gillian Martin: Significant environmental harm would have been done, but it could not officially be said that they had been accused of and prosecuted for ecocide. If Ms Lennon's bill were passed, people could be prosecuted for ecocide, because there would be an offence of ecocide.

Mark Ruskell: If there had been a severe environmental impact and clear intent, and if the court had to decide whether to impose a five-year penalty or an eight-year penalty, would an eight-year penalty not feel more like the result of an ecocide offence?

Gillian Martin: I will bring in David Murdoch, because he is a lawyer.

David Murdoch: Are you talking about amending section 40 of the 2014 act to include a higher—

Mark Ruskell: I am not proposing anything at the moment; I am just exploring the territory. If that provision was available under the 2014 act, would the courts, when deciding whether to impose an eight-year sentence, be able to consider whether there had been a severe environmental impact and whether there had been clear intent? I am just exploring, from your perspective, the argument for a stand-alone offence.

10:30

David Murdoch: I suppose that our position is that the offence covers serious conduct that requires intent or recklessness, which is required because of the severity of the punishment that you will receive. It is right to have quite a high threshold for the commission of a 20-year prison sentence, because you would be jailed for a long time. The prosecution would have to work out what they were charging you with before a trial starts. If you were charged with an offence under section 40 of the 2014 act, the prison sentence that you could get would be limited to five years. You would have to be prosecuted under the ecocide offence in order for there to be the option of getting a prison sentence of more than five years—perhaps up to 20 years. You would have to be tried for that offence before the judge could consider what penalty you get.

Mark Ruskell: My point is that, if an eight-year prison sentence penalty were available under the 2014 act, would that lead to an equivalent ecocide provision? Are we thinking about something quite distinct by having ecocide at the apex of the legal system—

Gillian Martin: It is distinct.

Mark Ruskell: —or is it actually possible to create an ecocide offence under the 2014 act?

David Murdoch: I think that that point was covered earlier. It is possible to amend section 40 of the 2014 act in order to get something equivalent to ecocide. The benefits of the ecocide offence are that it is more public, it draws people's attention to the matter, it covers serious conduct and it has an appropriate serious penalty attached to it.

Gillian Martin: That is why we may want to link the two provisions.

Mark Ruskell: Okay, I understand.

Michael Matheson: In your policy memorandum, you have suggested that section 2(3), on defence provisions, is incompatible with the ECHR on the basis that it requires the accused to establish a defence of necessity on the "balance of probabilities", whereas the ECHR operates on the basis of a presumption of innocence. Will you elaborate further on the Government's view? Is the bill as drafted incompatible with the ECHR and existing case law?

Gillian Martin: Section 2(3) departs from the common position and effectively reverses the burden of proof by placing the burden of proving the defence of necessity on an accused person. Careful consideration must be given to whether that reversed burden is compatible with the ECHR article 6 right. We do not think that it is and that is a flaw in the bill.

Under article 6 of the ECHR, to be "presumed innocent" is an aspect of a person's right to a fair trial. Section 2(3) reverses that, which we feel quite strongly about. Should the bill reach stage 2, we will look to change that.

Michael Matheson: Okay. To push you a bit further on that, will you clarify whether that incompatibility is based on existing case law rather than just an interpretation of ECHR?

Gillian Martin: I might bring in the lawyer to answer that. Scots law adheres to the ECHR. The presumption of innocence means that it is up to the prosecution to prove a person's guilt, not the other way round.

David Murdoch: It is unusual to reverse the burden and have the accused person establish that they have the defence. Usually, an accused person does not have to prove anything in a trial; it is up to the prosecution to prove their case beyond reasonable doubt. There are some instances of the burden being reversed, but there is no rule of thumb as to whether a reversed burden is compatible with article 6 of the ECHR. You have to consider the facts and circumstances of each case in order to decide whether a reversed burden is compatible with the right to a fair trial.

There are a few issues with the reversed burden that is set out in the bill. The problem is not that the accused person would have the defence; the problem is the legal standard of having to prove their defence on the balance of probabilities. The accused person must prove that it is more likely than not that they have the defence.

When you are considering whether the reverse burden is compatible with article 6 of the ECHR, you must understand whether that measure is proportionate to the aim that you are trying to achieve, and we do not think that it is proportionate for a few reasons. The main issue is the way in which the defence is structured: you must prove that there was a greater harm that you were trying to prevent, and you also must prove that your action was "necessary, and … reasonable." We

think that that would allow a jury to convict someone even if it had some reasonable doubt about the guilt of the person in the light of that defence.

For example, if the accused person managed to prove that there was, more likely than not, a greater harm that they needed to avoid, but they failed in proving that their actions were necessary and reasonable to a standard, on the balance of probabilities, our view is that the jury would have some reasonable doubt about a person's guilt, in the light of the fact that the person had been able to partially establish the defence of necessity, on the balance of probabilities, but not the rest of it. The jury would not be able to take that into account, and it would have to convict, if the prosecution had proved the main elements of the section 1 offence. Therefore, the structure of the defence poses a risk of unfairness to the accused.

There are a couple of other matters. First, sometimes, you have a reverse burden whereby it would be easier for the accused to prove their defence than it would be for the prosecution or there would be an unworkable burden on the prosecution to disprove any defence. In this case, we do not think that the prosecution would have too difficult a task in disproving this defence. Secondly, with regard to the case law on this, there is a kind of theme, whereby the more serious the offence and the greater the social stigma that is attached to it, the more severe the punishment. That goes against a reverse burden. You must be able to really justify a reverse burden, where there are really severe consequences for the accused if they are convicted of the offence.

Sometimes, you see reverse burdens in relation to regulatory offences, but ecocide is a very serious offence with a very serious punishment. A reverse legal burden that requires you to prove, on the balance of probabilities, that you have the defence is not appropriate for such a serious offence, because someone could be convicted when there is doubt about their guilt, and then they would be sentenced to 20 years in prison. That is why we do not think that this is appropriate or a proportionate measure in relation to this offence.

You could consider replacing it with an evidential burden, which is not a legal burden. An evidential burden would require an accused person to lead at least some evidence that they have the defence without the need to reach such a legal test. That is a possibility.

Kevin Stewart (Aberdeen Central) (SNP): Good morning. Cabinet secretary, you said that the bill has serious deficiencies, and a number of the witnesses who have given evidence to the committee are of the same opinion. Section 40 of the 2014 act has a defence for licensed, permitted and consented activities. The bill has no defence for those activities, which is a concern to industries, such as farming, fishing and renewables. Am I right in thinking that you indicated that the Government is looking to amend that aspect of the bill? If so, how does the Government intend to proceed in that regard?

Gillian Martin: Yes, you are absolutely right, Mr Stewart. Even ahead of the submissions by local authorities and permitting authorities, I favoured an amendment to introduce a defence of acting under permit or other authorisation, as exists in relation to the offence that is set out in section 40 of the 2014 act. It would make the bill and the 2014 act compatible, and it would provide that defence.

You are right that NFU Scotland, the Scottish Fishermen's Federation and a lot of local authorities have mentioned it.

Kevin Stewart: I will come to local authorities in a second, cabinet secretary.

Gillian Martin: It is important that we recognise that a defence of carrying out a permitted activity is not a licence to commit ecocide. However, acting outwith the terms of the authority could expose someone to prosecution for ecocide.

If the activity is permitted, there are already provisions in the application for the permit and in the decision to give the permit that a person must meet. If someone acts outwith the permit, they are acting outwith the permit. They could be wilfully committing severe environmental damage.

Kevin Stewart: But if they are conforming with the consent—

Gillian Martin: That has to be a defence.

Kevin Stewart: —the permit or the licence, that is a defence, and you intend to lodge amendments to ensure that there is a defence, as there is in section 40 of the 2014 act.

Gillian Martin: Yes, we do.

Kevin Stewart: I am keen to go over how much work the Government has carried out in its consideration of unintended consequences and the fact that there is apparently no defence in the bill that would prevent a regulator or a consenting body from being held liable for ecocide. I imagine that you will lodge amendments to change that. If you do not, I would certainly consider doing so.

In the past few weeks, the committee has written to local authorities at my behest. We have had a number of responses, which are somewhat concerning—in some cases, they are very concerning. Fife, for example, has a very experienced head of planning, Pam Ewen, who says:

"We support the intent of the Bill but strongly urge that:

Explicit defences for consented/licensed activities are included.

Enforcement responsibility remains with specialist agencies, not local authorities.

Definitions and thresholds are clarified and aligned with existing legislation.

Adequate resources and guidance are provided before implementation.

Without these changes, the Bill risks creating legal uncertainty, unrealistic expectations, and significant operational and financial burdens on local authorities."

Renfrewshire Council has also responded, and it talks about the possibility of criminal prosecution influencing the approach of the planning authority, which could put the plan-led system at risk. The letter goes on to say that, if some of those impacts are not dealt with,

"Officers may be more inclined to decline to use delegated authority where there is a fear of a future criminal charge"

and that

"Elected Members on the board/committee may be more inclined to refuse applications".

It goes even further by saying that

"Elected Members may not be willing to serve on the planning board/committee for fear of being involved any a decision which may later be the subject to criminal charge."

That could lead to a huge amount of bureaucratic clog in the planning system. It could lead to huge amounts of, in some cases, quite small applications landing on the desk of the planning minister, for example, who might well think to themselves, "What do I do here? Is there a chance of me facing prosecution at a later date?"

I imagine that you will seek to amend the bill to prevent a regulator or consenting body from being held liable for ecocide, but have you looked at the issue in enough depth to be confident that we could deal with it through amendments, which would have to be lodged quite quickly if the bill proceeds any further in the very short period that remains of the parliamentary session?

10:45

Gillian Martin: As I said, we already intended to lodge an amendment on a defence of acting under permit. We received the letters from which you read only last night, and we will look at them thoroughly. I would be happy to work with any member who thinks that we can lodge amendments to the bill that would protect against the scenarios that Mr Stewart has just outlined.

I got the submissions from the local authorities last night, and we are looking at the issue in case there are any other unintended consequences. I am happy to work with any members to test their amendments on the matter.

Kevin Stewart: I understand that you are willing to co-operate on all of this, and that is grand. I managed to read through the submissions from local authorities only yesterday; I think that they were received only yesterday. They give rise to a huge number of questions. The questions that I had have only increased by the responses from local authorities alone, and we have not yet heard from some of the other public bodies that will be taking decisions.

I understand that you will consider amendments, as will we, but what I am asking is whether there is enough time left in the parliamentary session to go through what is proposed in the bill in the amount of depth that is required to come up with the right amendments to get rid of all the possible unintended consequences.

I recognise that some people want to get the bill through, but we have heard today that that is the case largely because of a desire to give ecocide greater publicity and visibility. I get that. I am not averse to that, but I want us to have legislation that works and that does not have huge unintended consequences that could, for example, clog up our planning system and cause great grief. Do you think that we have the time to do all that?

Gillian Martin: I do not know when stage 2 will be. Is it not the convener who decides that? You asked me whether I think that we have time to deal with all the unintended consequences. I do not know whether I can answer that.

The Convener: I think that the Parliamentary Bureau decides when stage 2 will be, taking advice from the committee.

Gillian Martin: It is not up to me to decide that. I will be here at stage 2, no matter what, with all my amendments, and I will work with any members who want to work with me on amendments to deal with unintended consequences.

Kevin Stewart: Have you had any discussions with the planning minister—I suspect that you will not have done, given that you received the local government submissions only yesterday—about the implications for the planning system if the bill were to go through unamended, or if it went through without the right amendments being lodged to get it right?

Gillian Martin: As I said, we already wanted to include in the bill a defence of acting under permit, and we also wanted to make sure that any of the regulatory bodies would be protected when working under licence or permit.

You make a very good point. The committee has received a significant volume of responses, which are comprehensive. We will look at those, and the planning minister will take a view, too.

Kevin Stewart: I understand that the committee has received more correspondence this morning, which I have not yet seen, and I think that more will come in. The bill requires very serious scrutiny so that we can get rid of any unintended consequences, some of which you gave an indication of earlier.

Are there any other unintended consequences that we have not discussed this morning that need to be dealt with by amendment? Do you agree that, if the bill proceeds, for us to get it right, we should also look to amend aspects of section 40 of the Regulatory Reform (Scotland) Act 2014?

Gillian Martin: The committee has a copy of our policy memorandum, which outlines our main concerns and where we would like the bill to be amended at stage 2. If we become aware of any additional unintended consequences between now and stage 2—perhaps as a result of evidence and submissions that come in—we would want to address those as well.

Kevin Stewart: Thank you.

The Convener: In fairness, to back up what Kevin Stewart has just said, I should say that we got a further response at 8.48 this morning, just before we came into the meeting.

I would also say, in answer to the cabinet secretary's question, that she knows fine well that the committee also has other business to deal with before the end of this session, including the climate change plan, which she is driving forward. There are incredible pressures, and it would be unfair of me, as convener, not to say that time is of the essence—

Gillian Martin: Of course, this is not my bill. I am giving evidence on someone else's bill.

The Convener: I know, but I just wanted to put on the record—to confirm what Mr Stewart said—that this is not the only thing that we are dealing with.

We have two short questions, one from Sarah Boyack and one from Mark Ruskell.

Sarah Boyack: Organisations have flagged the issue of the costs of implementing the bill. The Scottish Environment Protection Agency raised concerns that the financial memorandum underestimates the costs that it might have to bear, and NatureScot questioned whether it would need enforcement powers extended to it so that it could work with SEPA in relation to protected sites or ecosystems. We also received evidence from West Lothian Council that it lacks resources in relation to monitoring issues, breaches of planning conditions and situations where local authorities are the first responder to a local event.

Do you have any comment on the need to ensure that there is further investment in public sector organisations so that they can implement the legislation?

Gillian Martin: Do you mean so that they can implement the legislation or so that they can respond to environmental events?

Sarah Boyack: SEPA questioned the costs that are in the financial memorandum on leading on investigating an ecocide event. Other organisations, such as NatureScot, have key environmental protection roles. Section 9 will expand enforcement powers. Do we need to enable other authorities to have enforcement powers?

Gillian Martin: Decisions on financing public bodies are taken during the budget process, and I am not going to talk about a budget that has not happened yet. A lot of bodies deal with environmental issues. An investigation of an ecocide event could involve Police Scotland, SEPA, NatureScot or the coastguard. The event could be marine, on land or whatever. It depends on the location and nature of the crime. In the case of a spill at sea, UK bodies could be involved. With an oil spill, non-Government spill response organisations could be involved. It is impossible for me to say what additional resource would be needed for an event that has not happened.

The Convener: It is fair to say that we heard from SEPA that it feels that it has enough resource to do what it is asked to do at the moment. However, we might be asking it to do something else through the introduction of the legislation. The fear is that it does not have enough resources to do that, and the financial memorandum does not allow it extra resource. Is that a concern for you?

Gillian Martin: If it has been raised by the bodies that they do not have the resources associated with what is proposed in the bill, we will need to look at that but, again, I say that it is not my bill.

Sarah Boyack: A response from the Government on that is important, because different organisations have raised that concern. The other issue that has been mentioned by several organisations is that they are concerned that stronger enforcement of existing law would be as important as creating an ecocide law on top of existing law. There are also concerns about having the legal tools and the resources. Cabinet secretary, you just said that this is a new piece of legislation so it is not for you to address, but concerns have been raised that are not—

Gillian Martin: With every piece of legislation that asks more of our public bodies, we need to take into account what resources they would need

to carry that out. That is a normal part of government, and it is done through budget negotiations. Every portfolio that has responsibility for public bodies will put those arguments forward to the finance secretary.

Sarah Boyack: You cut me off before the second half of the question. Yes, this is new legislation, but I put on the record that we have heard concerns from some organisations that they are challenged financially to implement the existing legislation. We heard in previous evidence that there has been a doubling of public complaints but the number of prosecutions has significantly declined. Is there an issue with existing law that needs attention as well as the consideration of ecocide? The two issues are linked. That has been suggested to us by different organisations.

Gillian Martin: If there are pressures on particular public bodies in dealing with existing laws, they can of course come to me and explain what that pressure is and what they need.

Sarah Boyack: That has come up in evidence.

Gillian Martin: Well, you have put it on the record.

The Convener: I think that we are in danger of stretching one question to four, but I think that you have gone as far as you can on that, Sarah.

Mark Ruskell: Cabinet secretary, you said at the beginning of the evidence session that you would seek to amend the bill to remove the reporting provision. We have heard evidence and views from stakeholders that they would like to see an alternative reporting provision, which would follow any conviction to assess how ecocide was allowed to happen and look at how such an incident could be prevented in future. Is that something that you would consider as an alternative to the straight reporting of the bill?

Gillian Martin: Obviously, I would listen to anybody who has a different proposal on reporting to see whether the Government would support that. I do not agree with the reporting requirement in section 10 as it is—I think that it is disproportionate. I do not think that it is in line with the financial memorandum, and I am not entirely sure what it adds.

I am always very aware of capacity and resources, which Sarah Boyack has just been talking about. That relates to the Government and the civil service. We are putting more burdens on the civil service to create reports that might not do anything or have much in them. That is capacity that I am taking away from something that does have a purpose. That would probably be my bar for that. What is it adding? What is the report doing? Is it necessary? Is it proportionate? What is it adding? Is it worth the time that it takes for the civil service to produce the report? That is something that we all have to think about whenever we ask for reporting provisions in any bill.

Mark Ruskell: I think that what is being put to us is more about incident reporting. If there was something like a Deepwater Horizon incident—God forbid—in Scotland, it would be about looking back and saying, "How did this occur, given that we have a permitting regime, and what could be learned?" rather than a wider assessment of whether the act is working.

Gillian Martin: If you want to put that in an amendment, I would be happy to look at it.

The Convener: Monica Lennon has been sitting very quietly waiting for her opportunity, and it has now come.

Monica Lennon: I thank committee members for all their robust questions. Before I ask the cabinet secretary a couple of questions, I thank the Scottish Government for its open-minded approach to ecocide law. It is an emerging area of international and domestic law, and it is good to hear that the Scottish Government wants to play its part in it in a serious way.

What I have heard today, cabinet secretary, is your desire for the law on ecocide to deal with the most severe offences and for the bill to provide additionality, and you have mentioned many times the need for clearer synergy between existing regulations and the law on ecocide, if the bill is passed.

11:00

I have looked at some of the responses from planning authorities and other stakeholders that were received in recent days. It strikes me that there is a lot of support for the general principles of the bill but that there is a need for clarity, reassurance and, as some have said, statutory guidance. Do you believe that, perhaps in your discussions with the planning minister, there is a need to consider what additional guidance could sit with the bill to give reassurance to decision makers that ecocide law is not about being anti-business or anti-development but about taking a pro-responsibility approach and ensuring that we are protecting nature in Scotland, reducing pollution and protecting the people of Scotland in the process?

Gillian Martin: I think that you are asking me a direct question about whether I would want to put guidance in the bill. The nature of guidance is that it must be responsive and adaptable, so I would not want to put anything in the bill of that nature that would require primary legislation to change it. Also, I cannot comment on conversations that I

have had with the planning minister until I have had them.

However, I think that you are right. You have heard my concerns about some parts of the bill, which I would seek to change, and I have already written to you about them. We must ensure that there is a need for the offence—that the bill provides additionality beyond what is already covered. One area that provides additionality is the penalties that are associated with ecocide. They are severe and extensive. They allow the courts to make a judgment on the severity of the incident or the event, the cost to the environment—if one can ever quantify such a thing—and the clean-up cost or the cost to the public purse in dealing with the impact of that. Of course, when it comes to something such as ecocide, you can never fully recover the loss. One of the strengths of the bill is the penalties that it seeks to introduce.

I hope that that is enough. The main things that I would want you to think about as we leave here are some of the unintended consequences that have been raised by people around this table; the need for additionality; the need for the measures to dovetail with existing legislation; the need for provisions to allow for fair trial and compatibility with the ECHR; and the need for the bill to set a high bar, going beyond the requirements of existing legislation.

Monica Lennon: That is helpful and clear. That response shows that our committees are very effective in doing their scrutiny. I will be able to address many of those points next week.

On penalties, you will be aware that there is provision in the bill for orders for compensation, which may include costs of remediation or mitigation. We know that public bodies have raised concerns about resources, as have communities. On the polluter-pays principle, a strong thread is coming through the consultation that, if an accused is convicted of ecocide, there should be a mechanism for them to compensate the victims of ecocide. Do you think that that is a positive part of the bill? Is there anything that you would want to change in that regard?

Gillian Martin: I would not want to do anything that constrains the discretion of the courts when they are deciding on the fines. However, you are asking a specific question about a mechanism for compensation, and I will need to take that away.

My official has just pointed me to something about that part of the bill. Can you leave that with me? I need to speak to my officials about the consequences of that.

Monica Lennon: Thank you. I just thought that I would mention it.

Gillian Martin: I am sorry that I do not have a direct answer for you. If it is not covered in my letter, I will make sure that I will respond to you on that point.

I want to ensure that the nature of the penalties that you are associating with the provisions are not constraining the courts on what those penalties might be. As far as the mechanism is concerned, I will need to look into what mechanisms already exist.

Monica Lennon: Lastly, a number of the points that have been raised today are—rightly—legal and technical. We know that Scotland does not sit in a vacuum and that ecocide law is moving quite quickly. EU member states must have in place the environmental crime directive by May next year. Who knows which of us, around this table, will still be in the Scottish Parliament then.

We will see quite a shift in the EU and in many other countries around the world. There are also the cases that are being brought before the International Criminal Court for consideration. What message would it send if Scotland passed the bill? Equally, if we did not pass the bill at stage 1, what would that say not just to the people of Scotland but to people around the world who look to us for leadership?

Gillian Martin: I think that you are talking about emotion here, not legislation. I understand why you put that question to me. However, if a Government bill or a member's bill does not progress beyond stage 1, the committee and the Parliament will have their reasons why that is the case. If the bill progresses, it must be fit for purpose and address a lot of the issues that have been mentioned. It is not enough simply to say, "Oh, that sounds like a good idea." The proposal must be workable in law and not have unintended consequences.

Let me take the emotion out of that. If Scotland is able to pass a bill that we are confident does not have unintended consequences, is workable and has the support of all the bodies and people that it affects, we will have a good bill. It is important to pass a good bill rather than simply signal support for something that has flaws in it. I hope that everyone agrees with me on that.

The Convener: Thank you very much, Monica. You will get your time next week, I think.

I have a brief final question. If the bill had been passed 10 years ago, how many prosecutions on ecocide would there have been?

Gillian Martin: I do not think that we can quantify that yet. You asked that question of academic legal experts—

The Convener: I did.

Gillian Martin: —and some of them said 11 and some of them said fewer than that. I do not have an answer to that, convener. I am not an academic legal expert. I do not have an encyclopaedic knowledge of every environmental crime that has happened in the past 20 years, so you would have to go to someone who does for that information.

The Convener: In fairness, I do not think that anyone said 11. I think that they might have suggested one, if any.

Gillian Martin: Maybe I read the wrong bit.

The Convener: It was just a question of need—to my mind, Parliament should only pass laws that are needed. That is what I am trying to get to.

Before I close, I again apologise to the committee and to the cabinet secretary for my phone doing what it did. It cut you in mid-flow, David Murdoch—but it did not stop you coming back with a second bite of the cherry. I am disappointed to know that my wife now has a means of automatically getting my attention, whatever I am doing.

On that note, I will leave it before I get into trouble. My thanks to you, cabinet secretary, and to your team.

11:08

Meeting continued in private until 12:36.

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