



OFFICIAL REPORT
AITHISG OIFIGEIL

Net Zero, Energy and Transport Committee

Tuesday 16 January 2024

Session 6



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NET ZERO, ENERGY AND TRANSPORT COMMITTEE

2nd Meeting 2024, Session 6

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

COMMITTEE MEMBERS

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

*Jackie Dunbar (Aberdeen Donside) (SNP)

Monica Lennon (Central Scotland) (Lab)

*Douglas Lumsden (North East Scotland) (Con)

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)

Sarah Boyack (Lothian) (Lab) (Committee Substitute)

Dr Shivali Fifiield (Environmental Rights Centre for Scotland)

Professor Sarah Hendry (University of Dundee)

Fiona Hyslop (Minister for Transport)

Bridget Marshall (Scottish Environment Protection Agency)

Professor Simon Parsons (Scottish Water)

Bettina Sizeland (Transport Scotland)

Jamie Whittle (Law Society of Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament
Net Zero, Energy and Transport
Committee

Tuesday 16 January 2024

[The Convener opened the meeting at 09:17]

Interests

The Convener (Edward Mountain): Good morning, and welcome to the second meeting in 2024 of the Net Zero, Energy and Transport Committee. We have received formal apologies from Monica Lennon, and I am pleased to welcome Sarah Boyack, who is attending the meeting as the Scottish Labour substitute.

Under our first agenda item, I invite Sarah Boyack to declare any relevant interests in relation to the committee and the evidence session.

Sarah Boyack (Lothian) (Lab): Thank you, convener. If you look at my entry in the register of members' interests, you will find that I am a member of a number of organisations, which I have declared. The main declaration to make is that I was the cabinet secretary who introduced the Transport (Scotland) Act 2001. I say that just for peoples' interest.

The Convener: That is interesting.

The deputy convener, Ben Macpherson, is on his way, but he is struggling slightly to get here, given the conditions, and might miss the first part of the meeting.

Decision on Taking Business in
Private

09:18

The Convener: Under agenda item 2, we must decide whether to take in private item 7, which is consideration of the evidence that we will hear today on environmental governance in Scotland. Do we agree to take that item in private?

Members *indicated agreement.*

Subordinate Legislation

Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024 [Draft]

09:19

The Convener: Agenda item 3 is consideration of a draft statutory instrument: the Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024. I am pleased to welcome Fiona Hyslop, the Minister for Transport. The minister is joined by Liana Waclawski, a lawyer for the Scottish Government; Orsolya Keri—I might not have got the pronunciations right; I always struggle a wee bit, and I apologise, so if I have been clumsy, forgive me—the bus regulatory policy manager for Transport Scotland; and Bettina Sizeland, the director of bus, accessibility and active travel for Transport Scotland. Thank you very much for joining us today.

Following the evidence session, the committee will be invited, under the next agenda item, to consider a motion calling for the committee to recommend approval of the draft instrument. I remind everyone that the officials can speak during this item but not in the debate that follows.

I invite the minister to make a brief opening statement.

The Minister for Transport (Fiona Hyslop): Good morning, committee members. Thank you for inviting me to discuss the draft Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024.

The Transport (Scotland) Act 2019 was designed to make Scotland's transport network cleaner, smarter and more accessible than ever before. For bus services specifically, it provides an enhanced suite of flexible options for local transport authorities to improve bus services according to local needs. The 2019 act offers wider powers for local transport authorities to run their own services, and it provides viable options for partnership working and franchising. Bus services improvement partnerships—or BSIPs, as they are known—provide a formal form of partnership working between local transport authorities and bus operators, with both sides working together to develop a partnership plan and related schemes to improve services in their area, and with both taking joint responsibility for delivery.

Once a bus services improvement partnership is in place, all operators in the area are required to meet the service standards that it sets out, regardless of whether they supported its development. As such, the objection process is

key to ensuring that bus operators in an area are able to meaningfully engage with the BSIP, as it provides a mechanism for them to object to proposals. That ensures that the final partnership is based on mutual agreement and buy-in from both the transport authorities and operators so that they can serve the needs of local communities.

The regulations that are under consideration today prescribe who can object to a BSIP when it is being made, varied or revoked, and the minimum number of objections that are needed to pause or halt the proposals. A local transport authority can progress with a proposal only if a sufficient number of operators do not object. The regulations are intended to balance the right of a local transport authority to bring forward a BSIP against the right of operators to object to what is proposed.

In developing the regulations, we have sought to account for the significant variations in local bus markets across Scotland and have considered the wide range of possible scenarios in which a BSIP may be developed. We have also sought to ensure that no single operator is able to have undue influence in a BSIP. We have engaged closely with key stakeholders such as local authority transport officers and operators. Their involvement in the development of the mechanism and the regulations has been crucial in creating a practical approach that is designed to address local needs flexibly. The regulations are a key part of creating successful partnerships between local transport authorities and operators in order to improve services for passengers.

I am happy to answer any questions that members have.

The Convener: Thank you very much, minister. I seem to remember that, when we were considering the bill that became the 2019 act, there was quite a lot of support for local transport authorities establishing local bus companies. If I remember rightly, Lothian Buses was an anomaly as a result of the law not having been complied with in relation to its disbandment and privatisation.

There is encouragement for the establishment of such companies, but there is no money for it in the budget this year. If you are not going to give local transport authorities any money, how will they be able to do that, given the huge costs involved?

Fiona Hyslop: That is not quite the case. You referred to Lothian Buses, which is a municipal bus company that is owned by the local authority. These regulations are not anything to do with that—

The Convener: I accept that. I am asking how other local transport authorities will be able to take

the plan forward if you are not giving them any money.

Fiona Hyslop: We are, as I will set out if you let me continue, convener. The 2019 act provides for local authorities to run their own bus companies, like Lothian Buses, and bus partnerships, which are the subject of the regulations. It also provides for them to develop franchises. The funding that supports the development of policies relating to those aspects of the 2019 act, to which you referred, is still in the budget. It comes under the community bus fund, and £1 million in revenue funding and £5 million in capital funding have been set aside for that for 2024-25. Your question was whether the budget supports the work of the 2019 act? Yes, it does, and that is the mechanism by which it does so.

There continues to be funding for buses through the network support grant, which primarily goes to supporting the operation of bus services. There is also the concessionary scheme, which has been given a small uplift in funding. Funding to support the operation of bus services is still being provided. That is still being fully funded, as it was in 2023-24.

The Convener: Okay. I was not going to get into concessionary funding, because that funds only a proportion of the actual costs. I am asking whether local transport partnerships have the money to create their own bus companies. I do not think that there is much money available. You said that £5 million in capital funding has been provided. I cannot remember the cost of a bus, but that would not even cover 15 buses, would it?

Fiona Hyslop: Buses would be bought through a capital fund. It is not necessarily our responsibility to fund local authorities to buy buses, but we have funded and supported them significantly to transfer buses within their local areas. As has been indicated, the operating model for Lothian Buses is different from that of others in relation to the transfer from diesel buses to electric ones. In the case of Aberdeen, the transfer is to hydrogen. That has happened through bids for capital funding.

I think that you are talking about the operation of buses. Local authorities have a responsibility to help when there is a problem. For example, some operators have pulled out of some areas. About £55 million has been spent by local authorities in that regard. That is part of the local government settlement.

On the development of the powers in the 2019 act, local authorities are interested in different models and are trying to take forward that work, which is primarily policy work. If they come up with their own solutions, they will have to take them to their own committees and so on. However, funding

for the development and policy work is available, as it was previously.

With regard to your question about the 2024-25 budget and whether all the local authorities will do everything overnight and set up everything next year, I am not aware of the pace of the work being such that there would be major demands on the 2024-25 budget.

The Convener: I am sure that local authorities will have a view on where they will struggle to find the money from.

Mark Ruskell (Mid Scotland and Fife) (Green): I was interested in the minister's comments about the community bus fund. A modest amount of money has been allocated to it. Which local authorities are taking up the opportunity, particularly on the revenue side, to work on a business case and look at the options for franchising and municipalisation? Are they predominantly rural local authorities or urban local authorities? It would be useful to get a sense of how local authorities are responding to the money that is available and what work they are doing.

Fiona Hyslop: This discussion does not relate to the regulations that are in front of us; I think that everybody will acknowledge that your question is about wider issues.

I might ask Bettina Sizeland whether she can give more information on the developments. My understanding from my discussions with different transport authorities is that it is important, as the convener referred to, that a lot of the issues are driven by local authorities themselves. The South West of Scotland Transport Partnership has interests, and I had a meeting with it two weeks ago about its different models. It is still working on them. I do not want to speak for it, because it is an autonomous body, but, in the summer, it gave an indication that it has been considering the type of scheme that it would want to have. In the Highlands, people are also interested in different models. It is quite interesting that rural areas in particular are taking forward work in that area.

In Glasgow, the transport authority is interested in wider issues that also affect other local authorities. I do not know the details of the talks that have taken place, because the issue is not my direct responsibility, but we provided enabling powers in the 2019 act so that people could take that work forward. There is strong lobbying in different areas for a franchise model in Glasgow.

All that work is at an early stage, as all the local authorities would acknowledge. That might address the initial question about the funding that is available for the next financial year.

Would Bettina Sizeland like to add anything?

09:30

Bettina Sizeland (Transport Scotland): We received a number of bids from local authorities and regional transport partners to explore the powers in the 2019 act. I do not have the list of bidders in front of me, so we will write to the committee to provide that information.

The Convener: Have Transport Scotland officials engaged with their United Kingdom counterparts, especially those in Greater Manchester, to learn about the development of bus franchising in major metropolitan areas in England?

Bettina Sizeland: Yes, we have. We are in contact with Department for Transport colleagues and colleagues in Manchester so that we understand their experiences of developing franchising arrangements.

The Convener: Thank you for confirming that. What has it proven? What has come of it?

Bettina Sizeland: It is still early days for them. We are still learning with them.

The Convener: Okay. It appears that I am not going to get much further on the issue of money or on that issue, so I will bring in Jackie Dunbar to ask the next question.

Jackie Dunbar (Aberdeen Donside) (SNP): Part of my question has already been answered by the transport minister.

Good morning to you all—sorry, I was being a bit rude.

Regarding the powers allowing local authorities to establish bus companies, you said that some have already started discussions. Why do you think that some have not? Is there a reason for that? What can or will the Scottish Government do to help those that are keen to establish a bus company?

Fiona Hyslop: There are three different models: the bus company, the partnership—the regulations that you have before you are about objections to setting partnerships up in a more formal way—and franchising. We expect to provide—this might help in relation to the previous question—more guidance and help, including by sharing best practice that will have been learned from elsewhere in relation to the different models. It is early doors when it comes to local authorities setting up their own bus companies. It is up to them; it is not up to us. We would keep a watching brief, as would the committee, but this is an issue that you might want to raise with the transport officers, the Convention of Scottish Local Authorities or the councils themselves.

There are different bus markets in different areas, and some are stronger than others. The

patronage of buses has not recovered to its previous level. The vast majority of local authorities, apart from in Lothian, rely on private operators. There is a tension if councils want to set up their own bus company, which would then be in competition with those operators; there are also competition law issues in relation to bus operators. At the same time, although they are dependent just now on all the different operators and companies for the sustainability of bus services, some local authorities may want to take that step of setting up their own companies. The Transport (Scotland) Act 2019 allows them to do that, but they have to take the step themselves and have confidence that they are in a position to do that. That is for them; it is not for us.

We can keep a watching brief, and that is what we would do. When I visit local authorities—I have visited a number of them—they can share with me the state that they have got to and the steps that they are taking but, again, that is for them. It is not for me to account for them in this committee, because I do not want to misrepresent them in any way.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Apologies, minister, for rewinding the clock slightly to talk about franchising. There is a little bit of mission drift in some of the questions, but this is for my own clarity. Clearly, we have to learn lessons on franchising from elsewhere, but my experience in Glasgow is that there are some very profitable routes. I think of the 61 bus in my constituency, where you can pack them in, the bus is always full and there is a high frequency of service. However, after a certain time at night, you cannot get the 8 or the 90; there are connectivity issues in my constituency. Quite often, routes are subsidised—I think that the minister mentioned £55 million-worth of subsidies. If franchising were to roll out in a meaningful way and routes were bundled as part of the franchising process, should we expect to see that public subsidy in other areas, where bus companies withdraw from a service because they have no compulsion to continue to offer a commercial service and require a public subsidy? Could we see a shift in that relationship with franchising? Has there been modelling work done in that regard? You do not need to answer today necessarily, but I am keen to better understand that relationship, because it is central to a lot of it.

Fiona Hyslop: I am not familiar with the different local buses and the numbers that you referred to, but the principles—

Bob Doris: I was not grilling you on that, minister.

Fiona Hyslop: The principles of it are probably achieved by formal bus partnerships and franchising, because we are trying to set out

something that is more sustainable just now in the financing of the bus market. A huge amount of money is going into concessionary travel, but it was set up in the previous legislation so that operators would be no worse off but no better off. It helps patronage and, hopefully, as we discussed previously, younger people, for example, will become fare-paying passengers. I have heard that and have had that discussion about franchising with councils in Glasgow. Bundling can enable the geographical coverage of an area to be complete.

As we all know, there are certain times of the day when buses are more popular. You can understand the position of operators. Remember that we are in a market that has been deregulated for a long time. Obviously, private operators need to ensure that they are making some kind of profit so that their services are viable, and it is therefore more attractive to do certain routes rather than others. That has led to local authorities having to pick up the pieces in areas where buses have been withdrawn in particular ways.

The whole point of the Transport (Scotland) Act 2019 and, I hope, the fair fares review is to try to provide more sustainability in the system. I have written to the committee to say that we are expecting that review imminently. That is what we need for bus services. If we are going to get more people back on to the bus, they need to know that they have sustainable, reliable services and services at different times of the day, because we know that people are working on different shift patterns. In answer to your question on whether this will help to address the problems that you have, my answer is yes. It will not necessarily just be through franchising. It would also be possible to build it into the bus partnership, for example, and the schemes that come as a result of that.

Bob Doris: In future, when the commercial sector withdraws and services are tendered and replaced at a subsidised level, would it be worth tracking those subsidies over time? If the partnerships and the franchises are successful, a sustainable model would not see subsidising done in that way. It would be done in a more proactive, strategic way.

Fiona Hyslop: Ideally, yes, but the pressures in the bus market, particularly coming through the pandemic with the reduced number of people using the bus service, are challenging that. That is why it is more important than ever that our local authorities look at models that can help to provide a reliable, sustainable service in their area that is less reliant on subsidy because, over the piece, there is enough income. That also includes trying to increase patronage.

Douglas Lumsden (North East Scotland) (Con): Good morning, minister. What is the Scottish Government doing to support the roll-out

of bus priority measures, especially on the trunk road network, over which the Scottish ministers have direct control?

Fiona Hyslop: That is a good and important question. We have supported bus priority measures in the past number of years. You will be familiar with the Aberdeen system, and it is my understanding that the bus gates are operational there. I also understand that the local authority, with the local bus company, is looking to provide free bus services at the weekend. Again, that is a proactive measure. I think that that is part of a more complete area.

The convener, who I see is in conversation, asked about funding in the budget. The bus priority fund, which helps to address some of the congestion issues and the capital issues, is the area that we will not be able to fund next year. It has been paused. We know the consequences of the severe capital budget reduction that the Scottish Government has received. We will have 10 per cent less capital funding over the next five years. The Scottish Fiscal Commission has reported to Parliament that it expects that that reduction will be to the value of 20 per cent over the next 10 years. Therefore, decisions have had to be taken on our capital budget in transport, and that is the one area that will see a marked change for next year. It is a longer-term commitment that we want to try to restore, but the bus priority fund, which funds, for example, bus lanes and bus gates, has been paused for next year, and there is no funding for that. All the plans that are in place and have been agreed will continue to be funded in 2023-24.

Douglas Lumsden: Part of the question was to ask about the fact that there is no money in the bus partnership fund for the coming financial year. Given the Government's commitment to getting more people on to public transport, why was that part of the budget and not something else chosen to be not just cut but zeroed?

Fiona Hyslop: Again, that is an important question for the committee to consider in its wider budget scrutiny. I know that, appropriately, you have the cabinet secretary coming in to discuss wider bus issues. On this one, thinking about the wider budget, we have to keep road and rail safety paramount. That makes up the bulk of the funding for our operations. It is similar for ferries; we have lifeline ferries and we have to make sure that they continue to be supported to provide a service.

The fund is about additionality and improvement, as you are right to identify, and I hope that you are expressing support for the work in Aberdeen that has introduced those bus gates and that change in the city centre to try to encourage more people in. That was a good scheme that came forward quite promptly. Other

schemes that have been ready to be invested in have probably come in a bit more slowly than we might have anticipated. These are additional projects; they are not legally or financially contracted. They are highly desirable but, in a tight budget settlement, with a 10 per cent cut in overall capital for Government, tough choices have had to be made.

Although the bus partnership fund is paused for next year, we want to continue it because—you are quite right—in trying to encourage more people to use buses, freeing up lanes to ensure that we have more reliable buses, so that people can then start to use them and increase their patronage, is desirable. I have been an MSP for a long time and remember all the budgets when people had additional funds. The questions were then about why you were giving more additional funding to some areas and less to others. It was all about additional funding. I am afraid that we cannot have additional funds in the financial climate that we have just now. It is regrettable, but I think that it is understandable in the circumstances.

Douglas Lumsden: Can I just clarify whether it is the case that there was not really the demand for the bus partnership fund from local authorities, or whether projects were coming forward but the Government has just chosen not to spend that money in that area next year?

Fiona Hyslop: I suspect that there is a range of different factors. When I came into the Government, I was struck by the fact that there were fewer worked-up, ready schemes; it was not that there was a lack of demand. You will know from the experience in Aberdeen that, obviously, a lot of work has to go into preparation, because it is not just a case of designating a lane; there are a lot of planning issues and there is a lot of engineering work involved. There is a lot of preparatory work to be done. It is not as though there is a lack of desire for such schemes. I know that a number of local authorities will want to do them. We are actually honouring all the schemes that have come in. People will want to do it, but the issue is the pace of implementation. They may have other priorities. There are challenges in particular areas. There will be a number of different factors for different local authorities. Again, Bettina Sizeland might have better insight into the types of schemes that have been coming in and the pace at which they are coming in.

09:45

Bettina Sizeland: As the minister says, there were not as many construction-ready projects or quick wins as we anticipated, so we have had to take time with the 11 informal partnerships to develop those schemes, go through the appraisal

work and carry out the public consultation, because most of those are being, if you like, retrofitted into existing road space, so there needs to be quite a lot of local conversation as well as technical appraisal work before they can be ready to be delivered. That has taken some time.

Douglas Lumsden: Is that £500 million commitment on-going, minister? What was the timescale for that commitment when it was made?

Fiona Hyslop: I think that it was set out initially in 2019-20. Obviously, the pandemic overtook a lot of issues, so a lot of things were not progressed. It is a longer-term commitment. I am not in the position to be able to tell you for how long and when that will be. We cannot, because of the financial situation that we are in. I think that everybody recognises that, for a variety of reasons, the financial position of the UK and, subsequently, the Scottish Government is not nearly as strong as it was prior to a number of incidents, which I will not relay just now, even since 2019-20.

What I can reassure you about is that increasing and improving bus patronage is important for a variety of reasons. One is because people need it for their jobs but another is climate change. We have to make that shift. I assure you that I will continue to make sure that we can reinvest in that area—the answer is yes—but I cannot do it next year.

Douglas Lumsden: Thank you, minister.

I will move on from capital to revenue for my next question. With regard to the budget for next year, the network support grant is 11 per cent less than it was for 2023-24, and the rate per kilometre travelled is not being increased either. How do you justify reducing support for the provision of bus services when, as we all agree, increased bus travel is vital for us to meet our climate change targets?

Fiona Hyslop: That is a very good question. I can answer it by assuring you that the network support grant has been fully funded. That means that we have worked with the bus operators to identify what they have experienced in the past year and what they anticipate experiencing this year—that is done by a kilometre rate—and, relative to that, it is continuing to be funded at a similar rate. Last year, the network support grant did not get drawn down as much as anticipated because of the reduced patronage numbers and, as we know, bus services in a number of our local authority areas were cut, so the funding for them was not needed.

I reassure you that the funding in the current year has been reinvested in bus services but, for 2024-25, the network support grant is fully funded, albeit at a reduced rate, because the demand and

need for it is not as much as anticipated. That is because, unfortunately, some bus companies have reduced their routes, which means that, on the formula basis that is used, they will not need as much. That is the explanation. It is still fully funded and it is stable; it is just at a different level than we anticipated because of the reduced patronage on routes in some areas.

Douglas Lumsden: Just to clarify for my understanding, the money is being reduced for the network support grant because we have fewer buses and fewer routes. Is that a fair comment?

Fiona Hyslop: Yes, that is fair, and that is why we need to—this is the critical question facing bus services—find means by which we can have greater sustainability in the bus service. It has been weakened because of the pandemic. The numbers of passengers have not returned to what they were and, with private operators in a deregulated market, that makes some services more vulnerable.

Douglas Lumsden: Just briefly, has analysis been done of that? Why are there fewer routes? Is it because people are using trains, for example, or are they staying in their cars or working from home? Has any analysis at all been done?

Fiona Hyslop: It has, and we can identify how we can share that with you. The Confederation of Passenger Transport has also done work. That relates to the age profile: over-60s in particular have not returned to the services. We also know that, for some people, working patterns and transport patterns have changed completely. The busiest day for transport by rail, for example, is Saturday. When I visited Lothian Buses, I was told that Sunday is becoming more of a travel day because people want to visit family, and weekends are busier. That may be a consequence of more people working from home during the week, so they want to get out and about at the weekend. There is quite a variability in behaviour in the bus system that everybody is looking to analyse, but the consequences, particularly the reduction, are seen in the older age group. That is anecdotal, but I know that the bus academics and researchers are looking into questions such as whether people of that age profile are more reluctant to be out and about after having had the very serious experience of a pandemic when they were used to not going out as much, and how that has affected them.

There are a number of different reasons for that. Again, it comes back to the sustainability of the market. Remember that there were fuel price increases as well, and those will have hit a number of transport authorities, not least bus operators, in the profitability of routes. There is a knock-on impact on reliability and sustainability, which is why I, as minister, am very keen to address the issue. I hope that, when I come back

to the committee with the fair fares review, we can discuss how we can try openly—the matter is not just for this Government but for any Government in the future—to address how we ensure the sustainability of our bus system.

The Convener: Bob, I think that you have a further question, and then I will bring in Sarah Boyack. Sarah, if you want to bring up any points that you have heard in the session, this will be your chance to do it.

Bob Doris: Minister, on the funding going into bus services in Scotland, I see a significant financial commitment of £429.7 million, but I am also conscious that £370 million of that is for concessionary travel, be that for under-22s, the over-60s or other groups. Will any unintended consequences arise from such a significant split of investment between concessionary travel and the wider funding of bus services? What is the Government's rationale for doing that? Is there a relationship between that and what we all see from time to time in our constituencies, namely certain routes being less commercially viable and the withdrawal of certain services? Is there a relationship between increasing that concessionary scheme—with the massive public investment that has gone into it—and some services being less commercially viable?

Fiona Hyslop: Perhaps I can give you my overview as minister rather than any concrete correlation or evidence.

There is a relationship in that respect, I think. The more funding that you have for concessionary travel, the more that you limit the market for what you might call full-fare-paying passengers. If your concessionary fare scheme is based on a system in which bus operators are no better and no worse off and there are 2 million people getting concessionary fares, obviously there is less scope for operators to rely on full-fare-paying passengers to fund their services.

You are right, though; internationally speaking, we are perhaps disproportionate in the amount that we fund concessionary fares and free bus travel. I do not want to pre-empt the fair fares review, but I can tell you that the amount is considerable. As I have said to the committee, free bus travel for the under-22s is an extremely popular measure that is helping families address the cost of living. That is good in and of itself, as is the concessionary fare for older people; it is good for social reasons as well as for economic reasons in families.

However, there is a challenge. A considerable amount of public funding is being used—when you add in the other bus funding that we are providing, you are talking about half a billion pounds—so the question is: can we use that money better to

provide more sustainable bus services? It is great to have a free bus pass when you are under 22, but if you live in certain parts of the country where there are no bus services to go on, the benefit is not as great as it might be in, say, Glasgow or other parts of the country.

As for whether there will be any unintended consequences, I think that, over the piece, there have been, and that is why, working with the committee, I am keen to look at the overall sustainability and reliability of the bus market to ensure that we can make better use of public funding to support it.

That was just a general overview. I think that the fair fares review, once it is published, will provide the evidence that you want in a more concrete way.

Bob Doris: Thanks, minister. I have a slight reflection and then want to ask a follow-up question.

You are right. I cannot, as an urban MSP, deny that there will be unintended consequences for some remote and rural areas. However, I would point out that, in densely populated urban areas, there are large volumes of young people at school and children who use certain travel routes. Within cities, there can be unintended consequences, too; it is not simply a remote and rural issue. As a city MSP, I think that that is worth putting on the record.

Are you effectively saying, minister, that, in a few years' time, we could be nudging towards half a billion pounds of public investment in bus services? While keeping that rock-solid commitment to concessionary travel, we must be able to find a better way of using that half a billion pounds so that, in a few years' time, we have a more sustainable and affordable bus service. That level of investment is a pretty good start for bus companies. Is that a reasonable picture to paint?

Fiona Hyslop: It is something that every MSP should be thinking about.

Bob Doris: Okay. Thank you.

Sarah Boyack: It is fascinating to come in on the back of those questions, because, although I have not declared this, I actually introduced the first free bus travel scheme for the over-60s in Scotland. It is interesting to see the extent to which members of the public are now using concessionary bus passes, whether they be over 60 or under 22.

I just wanted to follow up on that by asking about the Scottish Government's strategy and funding streams to ensure that we get more people using buses. As colleagues have pointed out, we have lost a lot of bus services over the last few years. For the piece of work that we are

looking at today on bus services improvement partnerships, what analysis have you done of the benefits of such partnerships versus bus franchising and the costs and benefits of the different options? One thing that feels clear is the resource issue so that local authorities can choose what to do, whether it be BSIPs, as you have mentioned, or bus franchising. After all, there will be start-up as well as on-going costs. Do you have a cost benefit analysis that you can share with us about the choices to increase modal shift?

Fiona Hyslop: You will understand that I was not the transport minister who took the 2019 act through Parliament and, as the committee has pointed out, there have been a number of things since then, too. The choices that local authorities face with regard to the different models are exactly as the member has said. Some will, for example, want to take on full bus ownership in all its aspects and implementations; indeed, many look enviously at the Lothian Buses system. Some will want to look at franchising, while others will want to consider bus services improvement partnerships, as they might better reflect some of the informal bus partnerships that currently exist and might therefore require less resource funding.

I think that Sarah Boyack is referring not only to the capital resource—in these operations, you are still dealing primarily with buses that are owned or leased—but to the people resource that local authorities will need to run partnerships. You should remember that local authorities are already local transport authorities, with significant departments that run their transport work, and these are decisions that they will make.

I ask Bettina Sizeland to look back at the different models and the work that has been done. Obviously, part of that will involve sharing best practice and looking at other parts of the country and the rest of the UK to consider different models and the cost benefit aspects. That is why people are interested in Manchester, although there are negatives to that system, too. Indeed, people will tell you about the amount of resource and time that it took to set it up.

So it is not all easy sailing—there are challenges to face. However, that is the sort of information that we want to share and, as I have said, the guidance that will come out later this year will address some of those issues, too.

10:00

Bettina Sizeland: The work to date has focused on the regulations and the legislation required to give local authorities the powers to look at the different arrangements that might be appropriate in their local areas. These are very much tools for local authorities to use. As the minister has said,

the community bus fund provides a bit of resource for local authorities to look at the costs and benefits of using the different powers in their particular area. That is the level at which we would expect the cost benefit analysis to be taken up.

Sarah Boyack: Have you analysed the different costs of increasing modal shift? We have lost so many bus services. Part of the issue is how you stabilise and sustain those services, as the minister has said, but it also about creating new services that attract people, which could be a matter of timings or routes. The community bus fund is £1 million. Is there some issue with start-up costs in order to get this going? Is that the block? Having introduced the 2001 act, I know that there is a huge gap between having the powers available and actually using them.

Fiona Hyslop: There are two aspects to that question. Work will have been done on overall modal shift, and we can look at what we have on the costs and benefits in that respect.

As for individual areas, I would also say that, with regard to my conversation with SWestrans, that is exactly what it is looking at: the different models and the costs and benefits. That is its work. We must remember that, for buses, there is no one-size-fits-all solution in Scotland—that is the challenge. However, it is not necessarily up to me as minister to set that out; it is something for local authorities and the transport authorities, which have the legal responsibility in their local area, to look at, and it is really important that they have the ability to share their analyses.

For example, Highland might be different to Dumfries and Galloway, but there might also be similarities. Bob Doris used the phrase “remote and rural”, but I do not like to use the word “remote”—it all depends on where you are starting from. After all, a lot of people think that Glasgow is remote.

One of the biggest challenges is semi-rural areas. The issue is not just what might be called more dispersed communities when it comes to geography, land and availability of buses; some of the dynamics and how the market works in areas that are relatively close to cities can be more problematic than the situation in more rural areas.

Sarah Boyack: This will be my final question, as we have to move on. Have you done any analysis of how many routes will be saved or added through the bus priority fund partnerships? What analysis has been done on modal shift?

Fiona Hyslop: They are not bus priority partnerships. They are bus services improvement partnerships.

Sarah Boyack: I am sorry—I was using the fund.

Fiona Hyslop: Too many of the names are similar. The bus partnership fund is not for saving bus services. As we said in our discussion with Douglas Lumsden, it is actually about making things more convenient.

There might be a correlation in that respect; if you were to make more bus lanes that allow people in Aberdeenshire, for example, to get into Aberdeen more quickly and reliably, you could potentially save services in Aberdeen. That kind of analysis is really a job for local transport partnerships and authorities. They will say, “If we can get more people in Aberdeenshire coming into Aberdeen, using those bus gates, we can say it is becoming more reliable.” We know that the patronage in Aberdeen has gone up, which is good, but I am frustrated that, unfortunately, because the financial settlement, the 10 per cent cut in our capital budget and the escalation of inflation and construction costs are putting pressure on the transport budget, we are having to pause the bus priority fund that we discussed earlier. I do think that it will help.

As for your question whether the fund saves buses and routes, that is not necessarily its purpose. It might do that unintentionally and consequentially, because it is about the sustainability of buses, and the sustainability of the market will help save routes. Even from that, you will see that this is a very complex area. Every single part of Scotland will have a different experience and the cost benefit analysis will be different in different parts of the country.

The Convener: Mark Ruskell has the final question.

Mark Ruskell: It has been an interesting evidence session. I was just reflecting on the number of constituents who write to me every week with concerns about the quality of services. They write not just about whether the services are running but about whether they are running on time or whether buses are breaking down.

I want to ask you about the conditionality applied to public sector funding. Jenny Gilruth, as a previous Minister for Transport, announced a review of bus sector funding, part of which was going to be a consideration of what conditionality could be applied. Obviously, we have the Traffic Commissioner for Scotland, who is able to hold some of the bus companies to account, but I am interested in hearing about the work that the Government has done to make the substantial investment in the bus sector every year conditional on some basic standards of service and improvements going forward.

Fiona Hyslop: I remember being a member of this committee when this question was previously discussed. How do we use the considerable

amount of grant funding in this area to deliver the changes that we want in line with fair work first principles? We are working through all the different funding streams to ensure that we can maximise that.

The stream that we looked at most recently was the network support grant. Although it is not the same amount as it was last year, it is still fully funded for the kilometres that are being met. The expectation and requirement on those who are in receipt of the network support grant is that they look at and implement the fair work first approach. For example, one aspect of the fair work first principles relates to the real living wage, and only recently, I had a letter from First Bus to let me know about its commitment in that respect.

Work has been done as part of the network support grant. Perhaps following this session we can relay to the committee information on where we are with the review of the conditionality of the other funding and also our findings from the review that we started on the network support grant.

Mark Ruskell: Do you think that conditionality needs to go beyond fair work to actual quality of delivery of services?

Fiona Hyslop: Yes—sorry. With regard to the quality of delivery of services, I suppose that, in that respect, conditionality will come down to the expectations of customers. I will take that issue back and discuss with CPT and, indeed, the bus providers whether the conditions of a grant should include, say, buses having to be warm. However, I know that that will be a challenge in certain parts on a day such as this, and the buses might not be of that quality.

Interestingly, again, there can be a lot of variability across the country. I do not know to what extent we can enforce, within the conditions of a grant, a requirement to meet a certain level of service. As you have said, that is more for the traffic commissioner.

With your agreement, convener, I will take that issue away and think more about the conditions of service. My understanding is that conditionality has more to do with standards of operation in relation to the workforce and fair work first principles.

Mark Ruskell: Obviously, basic legal requirements are enforced by the commissioner. I get a steady stream of complaints about buses regularly failing to turn up, which, presumably, is something that the commissioner could enforce. However, now that we are in this space of how we improve bus services working in partnership and given the substantial amount of money that is going in, I am interested to hear more about how the Government can extend conditionality further

and beyond just basic legal compliance with a timetable.

Fiona Hyslop: Experiences are different in different parts of the country. We know that the availability of bus drivers has a considerable impact on the reliability of services. If there are no bus drivers, that causes an issue. The situation seems to be improving slightly, but, again, it all depends on the wages and on operators' conditions of service—indeed, the operators that want to keep and retain drivers have worked on that issue—as well as on really important recruitment drives in different parts of the country to try to get more people to train as bus drivers.

The Convener: Mark, I said that you had the final question, and you have now had three. I have pushed it as far as I can with the timing, so I am afraid that I will have to move on to the next agenda item.

The next item is a debate on motion S6M-11609, which calls on the committee to recommend approval of the draft Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024. I remind everyone at the other end of the committee room that only the minister may speak in the debate.

Minister, do you want to speak to and move the motion?

Fiona Hyslop: I detect from the questions very little concern about these actual regulations on the objection system, so I simply refer the committee to my opening remarks, in which I set out the rationale for the legislation. From a technical point of view, this is about making sure that we have all the systems in place, and the regulations complete what is required for bus services improvement partnerships to ensure that, when they are developed, any plans that are put in place have co-operative agreement and buy-in from all concerned, and that, if operators have an objection, there is an understood mechanism and route by which they can raise it.

With that, convener, I am happy to move the motion.

Motion moved,

That the Net Zero, Energy and Transport Committee recommends that the Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024 [draft] be approved.—[*Fiona Hyslop*]

The Convener: Does anyone want to make any contributions at this stage? The minister will get a chance to sum up and answer questions at the end.

Sarah Boyack: Very briefly, there have been a lot of questions to the minister, because there is a degree of scepticism whether it will deliver big change. At the end of the day, the question is

whether bus users will get better and more reliable and sustainable services. I will let this piece of legislation go through today, but what I am really interested in is the report and the action that is taken afterwards.

Bob Doris: Just to give a slight balance to the debate, I have to say that I did not detect any scepticism. Instead, what I heard today from the questioning, including that from myself, was the fact that there are huge challenges in achieving that modal shift—that is, getting individuals and families out of cars and on to buses—as well as the fact that significant public investment is already sitting there and that the existing money can be used better. I suppose that the subordinate legislation is part of that, as it ensures that local authorities can use the new powers but that bus operators—who are the main, key and strategic partners—can object, as appropriate, to certain measures.

The statutory instrument appears to be quite balanced, so we did really not ask about that. Instead, we used the session more as an opportunity to take a strategic look again at how we take forward publicly funded buses in Scotland in a strategic manner and to have a wee bit of wider budget scrutiny. I did not detect any cynicism—I want to put that on the record—but I did detect significant challenges that not just Government but all of us together in Parliament have a responsibility to address.

I will leave it at that, convener.

Douglas Lumsden: I will be brief.

During the questioning, the bus lanes in Aberdeen city were mentioned. People, sometimes, think that I am against them, but I am not—I am against the way in which they were done. When we introduce, say, bus priority measures, it should happen after full consultation with businesses and residents in the area. In Aberdeen, those regulations came forward as experimental traffic orders. To be fair, it probably meant that the Scottish Government was spending a substantial amount of money on a scheme that had not got long-term approval and that the money could therefore have been wasted.

I want to put that on the record, because it is often mentioned that I am not in favour of these things. That is not the case—I just think that it was not done in the correct way.

The Convener: Having mentioned that, Douglas, do you want to make a declaration of interest to remind committee members of your previous role?

Douglas Lumsden: Thank you, convener, for reminding me. I remind everyone that, at the start

of the session, I was a councillor on Aberdeen City Council.

The Convener: I should say to the minister that I had been checking with the clerks whether Mr Lumsden needed to make a declaration when you pulled me up for talking while you were speaking. I can do two things at once, minister, as you will have noticed.

Before you respond to the comments, minister, I want to make one comment. I understand your comments about funding, but I would suggest that any significant changes to the way in which buses are operated and run will require significant funding.

On that note, minister, I hand back to you to sum up.

Fiona Hyslop: I want a strong, sustainable, reliable, affordable, accessible bus system, and that will rely on local authorities and bus operators being able to work in partnership. As Mr Doris, I think, pointed out, we face big challenges coming out of the pandemic, but we all need to work collectively to identify how to address them, given that, as we all know, bus services are frequently the issues that our constituents contact us about.

Motion agreed to,

That the Net Zero, Energy and Transport Committee recommends that the Bus Services Improvement Partnerships (Objections) (Scotland) Regulations 2024 [draft] be approved.

The Convener: The committee will report on the outcome of the instrument in due course, and I invite the committee to delegate authority to me, as convener, to finalise the report for publication. Is the committee happy with that?

Members indicated agreement.

The Convener: I thank the minister and her officials for attending and suspend the meeting until 10:25 to allow for a changeover of witnesses.

10:16

Meeting suspended.

10:25

On resuming—

Environmental Governance

The Convener: Welcome back. Our next item of business is an evidence session on environmental governance in Scotland. In June last year, the Scottish Government published its report on the effectiveness of environmental governance arrangements, as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The committee has since agreed to carry out a short assessment of the state of environmental governance in Scotland.

This morning, we will hear from a panel of environmental stakeholders and law practitioners on the Scottish Government's report and environmental governance in Scotland more broadly. I am pleased to welcome Lloyd Austin, convener of the governance group, Scottish Environment LINK; Dr Shivali Fifield, chief officer, Environmental Rights Centre for Scotland; Professor Sarah Hendry, Dundee law school, University of Dundee; Bridget Marshall, chief officer, Scottish Environment Protection Agency; Professor Simon Parsons, director of environment, planning and assurance, Scottish Water; and, joining us remotely, Jamie Whittle, convener of the environmental law sub-committee, Law Society of Scotland.

Thank you for joining us today. We have an hour and a bit for this session. Before we move to questions from committee members, for fear of upsetting you all, I point out that, because it is quite a large panel, you might not get to answer every question. I invite committee members to target their questions at the people from whom they want answers.

However, I will give everyone a chance to answer the first question, because it is my question. Please do not overegg the response, but it is fair to say that concerns have been raised by stakeholders about how the Scottish Government approached the 2023 environmental governance review, which was a requirement of the 2021 act. Has the Scottish Government provided enough detail in the review? If not, what has it not provided detail on?

Lloyd, I will start with you and will come to Jamie Whittle last. By the way, if Lloyd gives all the answers on the points that you want to raise, you can just say, "Lloyd is correct."

Lloyd Austin (Scottish Environment LINK): I cannot say that, though, can I? I cannot say, "Lloyd is correct." [*Laughter.*]

Thank you for the opportunity to give evidence on this topic. Scottish Environment LINK warmly welcomes the fact that the committee is looking at this important topic, which deserves more attention and debate. I hope that what we say today will be useful to you.

You are right that, across stakeholders, there was general disappointment with the Government's report, which was to do not purely with its outcomes but with the quality of its assessment; our biggest concern was probably about the lack of firm proposals. Although we welcomed the publication of the additional briefing paper during the consultation phase, it did not provide much more substance.

The Government has not yet published all the responses to the consultation, but, from the various responses that are publicly available and have been supplied to the committee or have been published by the respondents, it is clear that the concerns are widespread and that, essentially, those concerns relate to the very narrow interpretation of the questions, the depth of the assessment and the lack of any real analysis of the pros and cons of different measures.

I will talk about specific parts of the consultation in answer to specific questions, but, in general, the most important thing is that the Government should be encouraged to respond to the concern that was expressed by the respondees and that some form of fuller, more detailed analysis is carried out or commissioned that can lead to further debate and, we would hope, action so that it does not lead to the whole thing in effect being closed down, with no response being provided to the issues that have been raised.

10:30

Dr Shivali Fifield (Environmental Rights Centre for Scotland): Lloyd is correct. [*Laughter.*] In addition, on the detail of what was not provided, I will read out the quick summary that we put in our submission to you on 6 October:

"The Report failed to consider whether the establishment of an environmental court can enhance environmental governance arrangements."

We will say a bit more about that in answer to follow-up questions.

As far as its scope is concerned, the report did not contain any analysis of the entrenched environmental governance problems that exist today, the lack of enforcement of environmental laws and the lack of access to justice. Scotland is still in breach of article 9.4 of the Aarhus convention on access to justice requirements. There was no clear indication of how that will be remedied by the deadline of 1 October 2024.

There did not seem to be any overall analysis of the problems of environmental governance and the issues that we clearly face with environmental degradation, the climate crisis, the biodiversity crisis, the link between those in Scotland and what we could do better in environmental governance.

The report spent a long time talking about Environmental Standards Scotland. We welcome Environmental Standards Scotland, but it cannot resolve everything. Most importantly, ESS does not address the issues of individual complaints. I will say a bit more about that when you ask about the 250 inquiries that we have received in our free legal advice service. What do those individuals do when they want to access justice?

Those are the clear headlines for us, which I am sure that I will be able to detail as we progress.

Professor Sarah Hendry (University of Dundee): I do not disagree with much of what Lloyd Austin and Shivali Fifield have said. The report was narrow, perhaps disappointingly so. I would have liked to see a bit more on the linkages with other policy areas. A lot is going on in that space; a lot of proposals are emerging at the moment.

I thought that the report was quite thin. The biodiversity crisis is mentioned, but there is not really any sense of how this piece of work will link in with all the others. There is a lot to be said—this came across in the submissions from the Law Society and ESS—around data and monitoring. That helps enormously with looking at enforcement for the benefit of individuals and communities. There was nothing very definite to suggest what would happen next. The report very much had the air of something where, at least as a starting point, the decisions had been made and people were content with where things were in relation to the narrow scope of the act. There was not much about where we might go in the medium term, as a country, on environmental governance.

Bridget Marshall (Scottish Environment Protection Agency): I agree with the statements that have been made so far about the narrowness of the report. However, in many ways, maybe that is not surprising. I think that the Government took a relatively narrow approach to governance. It was concerned with protecting Scotland's environment post-European Union exit. As others—Sarah Hendry, in particular—have said, it did not think about what was not working particularly well in governance terms in the existing system, which is quite complex. It also did not think about taking a step back and taking a broader view of governance.

A number of things that are referenced in the report are to come before this Parliament, including the proposed human rights bill and the

proposed wellbeing and sustainable development bill. There is an argument, which SEPA made in 2019 in its original response to the Government's consultation on setting up post-EU exit governance arrangements, that we need to have a governance system that is able to tackle the complex environmental issues that we face today, which are largely systemic, and that is multifaceted and multigenerational.

It is maybe not surprising that the report took a narrow approach, but it is disappointing that the Government did not take the opportunity to build on the narrow approach that has been taken so far. There is still much to be done in this space.

Professor Simon Parsons (Scottish Water): Good morning, everybody. Our perspective, as one of Scotland's most regulated organisations across water, soils and the air, is that we welcome the five principles that have been put forward in the guidance, but the key for us will be getting the detail behind those. Information on the practical application of that guidance is lacking at the moment. That will be key for us in how we make decisions, including investment decisions, and how we prioritise our activities across Scotland. We really welcome the principles, but, more than anything else, the issue is about the practical application of how those principles will be used and implemented.

The Convener: Jamie Whittle, are you going to break ranks and say that the Government's review is brilliant?

Jamie Whittle (Law Society of Scotland): Good morning, convener. Thank you very much for the opportunity to speak.

I am not necessarily going to break rank. In many ways, the Law Society of Scotland's response echoes previous comments, but there are three points, in particular, that I will pick up. One is about the need to have detail on on-going issues that were in place at the time of Brexit. We would welcome greater consideration of those; they include the nature of appeals, the cost of remedying environmental justice, the importance of ensuring enforcement, and consultation and public participation. Those sorts of issues exist and have required attention.

The second point is about the general question of what we mean by effectiveness. As the Law Society of Scotland has submitted, it is very difficult to measure the progress that has been made and to judge whether one has been effective unless there are some key indicators and strategies. As has been alluded to in relation to biodiversity, the report mentions the environment strategy that the Scottish Government is progressing at the moment, but thought needs to be given to, for example, the link in to that and

how we measure the outcomes that, ideally, should be reached.

The final point where we considered that matters were light in analysis was in relation to the initial administrative stages of regulatory decision making, whether in planning or other administrations. That is about the importance of trying to get things right at an early stage before one is drawn into an appeal stage.

The Convener: Okay. On the basis of the evidence, that is probably what I should have expected, but it was not a whole-hearted ringing endorsement of the process so far.

The first committee member to ask questions will be Sarah Boyack.

Sarah Boyack: From the written evidence, for which we are very grateful, and the oral evidence so far, it has come across that there are some really big-ticket issues that need to be addressed. What difference has been made as regards engagement with Environmental Standards Scotland? It is now sitting there, but I was struck by Scottish Environment LINK's comment that it

"welcomes the acceptance that Scotland is in breach of the access to justice requirements of the Aarhus Convention in relation to costs".

How do we ensure that a difference is made in that respect?

Perhaps we can start with Lloyd Austin. There seems to be a big gap between what Environmental Standards Scotland was meant to achieve and the narrowness of what has been expected of it thus far. Once Lloyd has commented, we can pick up what the other submissions had to say.

Lloyd Austin: It is still early days for Environmental Standards Scotland. The most important thing to say is that we very much welcomed its creation under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, because it was important, post-Brexit, that there was some form of environmental oversight body to replace the Commission. Of course, we also have the Office for Environmental Protection, which covers England and Northern Ireland and reserved areas. It is important that Environmental Standards Scotland is there, but it was never going to solve all the post-Brexit governance gaps.

I refer the committee to the report from the round table that the previous cabinet secretary commissioned in the previous parliamentary session; it was chaired by Professor Campbell Gemmill. It looked at the range of governance issues that needed to be fixed as a result of Brexit. An oversight body in the form of what became Environmental Standards Scotland was one of the

recommendations, and it was very positive that that was picked up and taken forward. However, a range of other recommendations—for example, on data and monitoring—have slipped and not been picked up.

Environmental Standards Scotland was never going to address access to justice issues. Failure to comply with article 9 of the Aarhus convention is a matter for the Government and the courts service; it is not a matter for Environmental Standards Scotland. Of course, Environmental Standards Scotland can offer its opinion, but somebody else has to fix it.

It is positive that the consultation acknowledges the failure to comply with article 9 of the Aarhus convention. The five bullet points that are set out in the report are all things that could help, but they are not things that we know will help, because we do not know the outcome of those processes that have been put in place. Therefore, essentially, we need some drive from the Government to pick up those five processes and make sure that they deliver the right outcome, which is to ensure that we move towards compliance, given the prohibitive expense of taking action on environmental law issues. I hope that that answers your question on our point about access to justice.

Sarah Boyack: Yes, that is really helpful. It links into the issue of the extent to which Environmental Standards Scotland has functioned in the way that people expected. I can see some nodding from Dr Shivali Fifield and Professor Sarah Hendry. Does one of you want to kick off on that?

Professor Hendry: Yes, I am happy to. I am not hugely involved with Environmental Standards Scotland. I, too, welcome its establishment. I think that one of the problems is that different people hoped for and expected different things. Some people had hoped for it to have a wider remit, to be more fully resourced and to be able to do more and to do it more quickly, while others feel that it is progressing nicely; some perhaps even feel that it has quite extensive powers, about which they are a little concerned. That spread of views is quite reasonable.

However, Environmental Standards Scotland could never have solved everything. One of the problems with the consultation was that it kind of excluded any wider discussion. It talked about the setting up of the organisation and how it was doing a good job. That seemed to be enough, but it would never have been enough, because it was only ever a part of the post-Brexit arrangements and the wider governance arrangements.

Dr Fifield: We launched our free advice service in the same year that Environmental Standards Scotland was launched. Out of the 250 inquiries that we received, we submitted 11 representations

to Environmental Standards Scotland—I will call it “ESS” for short. That is almost a third of its overall representations. I think that we have quite a good evidence base.

Again, I want to stress how much we welcome ESS, but its role is to address systemic failures in environmental governance; it is not, at the moment, to address individual complaints. We have had concerns around the timeliness of its responses to representations and how it has used its enforcement powers to date. We have detailed those concerns in our comprehensive consultation response, so I will not repeat all that. One of the key things that the report acknowledged was the inability of ESS, within its powers, to address individual problems.

How do we identify a systemic environmental governance problem? Individuals and communities cannot do that. We have had to spend a lot of time and resource identifying individual issues. An example is water pollution in the River Almond. Is that a systemic issue? After taking about six months to talk to communities, to fill in the gaps and to make connections with other issues, we were able to say, “Actually, we can raise this as a systemic issue.” We did that, but it took time for ESS to respond. There was also correspondence with SEPA, freedom of information responses and appeals to that. Twelve months later, we were informed that there was no case to find. Meanwhile, communities across the River Almond area were wondering what to do and where to go.

I hope that that is a good example of how, regardless of how wonderfully all the systems might work in theory, in practice, despite campaigning on water pollution and environmental degradation—an example of such an issue is sewage sludge spreading on agricultural land—for a good few years, even with our intervention, our correspondence with SEPA, submissions of FOIs and correspondence with Environmental Standards Scotland, individual communities have still been left with no remedy.

10:45

The Convener: Sarah, before you move on, I think that SEPA had quite a lot of inquiries, as well. It might be worth asking about that.

Sarah Boyack: I was going to move on—the example was given beautifully, actually—to SEPA and Scottish Water on what difference has actually been made. I will pick up the point that Bridget made about wellbeing and sustainable development. There is Scottish Government work in considering policy and legislation, and there is my member’s bill. What difference is ESS is

making to relationships? I ask SEPA first, then Scottish Water.

Bridget Marshall: If you look at the investigations and analysis that ESS has done, you will see that SEPA and NatureScot are probably two of the bodies that have been subjected to most scrutiny. We welcome that scrutiny, but I think that it is worth saying, for balance, that the setting up of ESS now provides a greater opportunity for scrutiny of the implementation of environmental law.

Previously, under the EU system, very few cases were brought and investigated by the European Commission that directly affected Scotland or regulators including SEPA. The Commission had oversight of 28 countries, many of which had much less developed environmental protection systems than we have, so focus on the UK and, in particular, Scotland was very limited. In the few cases on which the Commission scrutinised us, scrutiny was at member-state level.

The new governance arrangements have successfully brought opportunities for scrutiny much closer to home. If you look at the number of investigations that ESS has undertaken in the short while for which it has been in existence, you will see that it is far higher than we, as a member state, would have been subjected to by the Commission. The range of issues is much broader, going from genuinely systemic ones, such as air quality, to much more local issues, and the direct contact with regulators such as SEPA is much closer.

It is worth saying for the record that the new arrangements will take time to bed in. They are operating very differently from the way in which the EU used to operate, and all of us who are players in the system are still learning about them, as is ESS. We need to make the whole system work as we have it at the moment, because we all want the same outcome, which is improvement in Scotland’s environment and improvement in things for communities. Therefore, we all need to work collaboratively within the system in order to make sure that it works effectively.

On the point about individual regulatory decisions, SEPA operates within a system set up by legislation, that has appeals processes and other scrutiny of individual decisions. We are clear, and the Government and ESS have been clear, that ESS has not been set up to be an additional appeal forum against individual regulatory decisions. However, as Dr Fifield said, if, in those individual decisions, SEPA were to be continually misdirecting itself, under the legal basis on which it operates you would see a systemic pattern, which can be investigated by ESS.

Those are the points that I want to make. They are all about the limited system that has been set up, which is something that we, as a country, should think about evolving, as new bits of legislation come into play. We need to continually ask ourselves what we need to do, not only to protect us from the effects of exit from the EU, but for wider environmental governance. I think that the whole panel has commented on that.

Sarah Boyack: Thanks. Does Scottish Water have a particular perspective on the matter?

Professor Parsons: As Lloyd Austin and others have said, our interactions with ESS are all new. It is a new organisation, and it is building a good new team in the organisation. Its role is really important. It is replacing governance and oversight that the EU provided previously. However, those were provided to member states: the big difference with ESS is that it goes down to public organisations.

That is the part that we have yet to truly understand. What does an action or a recommendation from ESS actually mean for us? That was always clear with the EU. As Bridget Marshall described very well, the EU would require an action from the member state, and the member state would decide how it would meet, or not meet, the recommendation.

That meant, for example, that when Scottish Water had discussions about priorities for investment, or in our consideration of ministerial objectives, it was always clear how action would flow through. At the moment, it is less clear how actions from ESS, for example, will flow through to us, as an organisation. We are regulated by SEPA, not by ESS. There is still a bit to do to get clarity about what it is.

The key point—Dr Shivali Fifield mentioned this—is that ESS's focus has to be on systemic and not individual issues, which is the role of SEPA. ESS is not here to provide the role of an ombudsman, for example. That role is already filled in this environment.

Sarah Boyack: Okay. Thanks very much.

The Convener: I feel that you left Jamie Whittle out, having gone through the rest of the panel. It is difficult, as convener—Jamie, I am saying this to you—to see whether you want to ask a question, because it goes through the broadcasting system. If you wave at me, I will assume that you want to come in. I do not know whether you are waving at me now, but I give you the opportunity to come in now.

Jamie Whittle: Thank you, convener. No, I am not waving. I will pass, but I thank you for the opportunity.

The Convener: Okay. Perfect. The next questions will be from Mark Ruskell.

Mark Ruskell: I was going to ask a series of questions about individual cases, but the evidence that we have just heard has been useful in that regard.

I have two follow-up questions. Is there work that ESS has done recently in which you have batched together concerns that have come from individual cases, then made recommendations about changing systemic approaches to regulation? An example might be acoustic deterrent devices. Shivali Fifield mentioned the River Almond, where the system has perhaps not worked well. Are there areas where ESS has worked well by collating individual cases and pointing to systemic change?

My other question is for SEPA. I was struck by your submission, in which you talk about an increase in the number of complaints. In your view, is there an expectation among complainers that ESS will pick up a batch of complaints that come to SEPA and work to address systemic issues? Could you elaborate a little on that? I will be a bit startled if SEPA is saying that it is concerned about the number of complaints and how it will resource the work, and that that is a problem with the system, rather than it addressing its practice. I am interested to hear comments on both those issues.

Bridget Marshall: I will start with the second question, if that is okay. That is an unintended consequence of the new system and, as I have said, we are all learning in that new system. There has been an idea that people must exhaust all existing domestic complaint remedies before going to ESS—that they must go through our complaints procedure before they can move on to ESS. We have had complaints from the Environmental Rights Centre for Scotland, which has said that in its letters to us. It is not that we object to that; we just think that it is an unintended consequence that is worth airing.

Obviously, we deal with all complaints in the same way, and we have begun to liaise much more regularly with the Environmental Rights Centre, so we have a sort of informal discussion with them before a complaint comes in. That is a sign that the system is beginning to mature a bit and that we are all finding our feet. As I said previously, it is important that all the players in the new system learn to work together as collaboratively as possible, because we are in a time of public sector funding uncertainty and it is really important that all our resources are used as effectively as possible.

At the heart of our comments is that there is an unintended consequence of the new system that

people had not really thought through. Perhaps it will settle down as we all become more used to operating within the system. Obviously, we always prioritise complaints, but we also prioritise scrutiny from ESS in our resourcing. It is important that we do that: we take seriously the obligations of those that regulate us. We prioritise work with ESS, which means that other work that we are doing might be slowed down to accommodate it.

Mark Ruskell: Okay. I appreciate that, and I appreciate your comments about the process.

Are there any other reflections on individual complaints and how they have been effectively addressed by ESS to drive systemic change, beyond the example of the River Almond?

The Convener: Shivali Fifield and Lloyd Austin would like to come in on that, if you are happy for them to do so and see where it goes, Mark.

Dr Fifield: I will quickly come back on SEPA's observation of the increase in complaints. We hope that that is a good thing. The Environmental Rights Centre for Scotland was set up to amplify the voices of individuals and communities. We do not want to make complaints: we want to make freedom of information requests and the information to be supplied straight away, but that does not happen, which is why we have to make appeals. Once we do an appeal, or threaten to do one, we might get the information.

We are sympathetic about the limited resources of Scottish Water, SEPA and ESS, but they have a duty to ensure that high environmental standards are enforced. We have to remember that we have communities at the other end who want improvements in their environments. We would not have to make FOI requests if the public registers were maintained. We appreciate the difficulty that SEPA had; nevertheless, if we had those public registers, we would not have to make the requests.

Surely the key message here is not about how many complaints SEPA is receiving but about what we are doing to tackle the root cause of complaints. Individuals do not come to us easily; they want answers as to why they have issues in their environment. That is the first thing to say about unintended consequences.

I think that we are probably a part of the unintended consequences, but we are quite proud of that. As to whether ESS has done well in packaging systemic issues, that is one of the things that we hope will happen as ESS develops and consolidates, but that is not what it has been doing. It has been left to us and to communities to identify whether there is a systemic problem.

I would love ESS to start monitoring the issues that we are having and to present to us the trends.

ERCS is beginning to do that, through 250 inquiries. We are not there yet—we are a tiny wee organisation—but we are doing our best.

We have identified, for example, a breach, which we submitted to Environmental Standards Scotland, of the Climate Change (Scotland) Act 2009 in respect of lack of publication of a climate impact assessment on the infrastructure investment plan. We have also notified to Environmental Standards Scotland a breach of the access to justice provisions in article 9.4 of the Aarhus convention, but our independent activities, such as pre-litigation correspondence for the Scottish Government, has got a more timely response on getting the published climate impact assessment.

I hope that the situation will get better; as I have said, we have very good relations with Environmental Standards Scotland, but it is a work in progress.

11:00

Lloyd Austin: I agree with Shivali about the individual issues. I will look at the point about individual cases from a policy perspective. When the UK Withdrawal from the European Union (Continuity) (Scotland) Bill was going through Parliament, Scottish Environment LINK was quite vocal about wanting exclusion of individual cases to be removed. That was on the basis that the European Commission did not have such an exclusion in its remit. Quite a few of the significant cases that the Commission took forward over the years, whether in the UK or elsewhere in the EU, started off as individual cases that led to case law that all 28 member states, including the UK and Scotland, had to comply with. However, that exclusion was not removed and it is in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

To some extent, I agree with the Government's concern about seeking to prevent an additional layer of appeal in the process. I have to say that, from the community or individual point of view, there is not a layer of appeal already, because of the other issues that we have talked about: access to justice and other challenges that communities and individuals face when they want to challenge a public body.

There are pros and cons to that. The difficulty is in knowing when a concern that has been raised by a community about an individual case is an individual case or a symptom of a systemic issue. Is it for the community or complainant to identify it as a symptom of a systemic issue, or is it for the public body concerned? If that exclusion is going to remain in the 2021 act, there needs to be some kind of interpretation and clarity that indicates that

communities and others can bring forward an individual case, but that it is for ESS to group cases together and to analyse whether individual cases from communities are symptoms of a systemic issue or are some sort of one-off exception.

Finally, I will go back to where I started. If ESS is not to provide an additional layer of appeal, there has to be, in other mechanisms, a system of effective governance that enables communities and individuals to be more challenging about individual decisions, through the individual regulators themselves, the courts or the Scottish Government.

The Convener: Mark?

Mark Ruskell: All done.

The Convener: All done? Gosh.

Mark Ruskell: Yes—unless other witnesses wish to offer insights.

The Convener: No. That is not me saying no to them answering; they are shaking their heads. Witnesses could have contributed if they wanted to do so.

Ben, I will give you, as deputy convener, the opportunity to ask your questions now.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning. Thank you for your time and your submissions.

Before I ask my questions, I draw members' attention to my registered interest as a solicitor on the roll of Scottish solicitors and as a previously practising, now non-practising, member of the Law Society of Scotland.

This is all about the climate crisis and the biodiversity crisis on a larger scale, but for the constituencies that we represent and the communities whom we serve, it is about quality of place, quality of the local environment and quality of life. What interests me about the wider issue is the question how we make improvements together. I take SEPA's point about working collaboratively. I have certainly seen that in my constituency at the Seafield waste water treatment works, for example, on which Professor Parsons and SEPA have been engaged. We have seen improvement through collaboration without the need for legal process.

There are questions, however, about access to justice in order to make improvements. I am open-minded about the idea of an environmental court. I know that Dr Fifield has been involved in considerations of the Water of Leith basin in my constituency: thank you for that.

What are the panel's views on the need for an environmental court in Scotland? Do we really

need that? To what extent do you agree with the concern that has been raised by ERCS in its written evidence—that the Scottish Government's consideration of the issue in the review did not meet the requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, even taking into account that the Government went on to publish a further briefing on the issue and extended the consultation period? Dr Fifield seems to want to answer that question first.

Dr Fifield: I am not sure whether I should answer the question first, because, of course, I am the chief officer of the Environmental Rights Centre for Scotland, which raised the issue of the Government being in breach of the statutory duty to properly consider whether an environmental court can enhance governance arrangements. As you know, we sought senior counsel advice on that. The irony is that the only reason why we have not moved to litigation is the prohibitive expense of access to justice. I will hand over to somebody else to talk a bit more about that.

The Convener: I will bring in Jamie Whittle first, then, to give a legal point of view. *[Interruption.]* I think that everything is done for you, Jamie, as far as I remember from when I contributed remotely. People activate your microphone. They are usually quite good at ensuring that it is not activated when you are making a comment that you do not want to be heard. I think that that has been done for you.

Jamie Whittle: Thank you. I am obliged, convener.

The Law Society of Scotland's position on the environmental court idea has been set out in responses thus far. It has certainly commented on that in the past and in its recent consultation response.

The headline point is probably that, although the Law Society very much acknowledges that a further briefing on the idea was provided by the Scottish Government, it would have welcomed greater consideration of the benefits of having an environmental court. The Law Society considers that a well-designed environmental court could provide significant improvements to access to justice.

Aside from that main point, another aspect that the Law Society suggested might merit consideration is the idea of specific court procedure for environmental matters. By way of an analogy, we have in the Court of Session a commercial court and procedure for commercial matters. When one is dealing with aspects to do with the environment and particular technical aspects require to be dealt with, having a system that incorporates that more fully may merit consideration.

Finally, if such a notion is taken forward, one of the very important things to embed in the system is ensuring that there is sufficient technical expertise in the judiciary and the legal system to be able to deal with matters that might come before the courts.

Ben Macpherson: Having that expertise is also really significant for communities and those who bring any challenge so that they know in which direction to turn. I do not know whether you want to say anything more about that. It seems quite a clunky and cluttered landscape at the moment. Is the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 relevant here? Is that making a difference in the here and now? I do not know whether you want to add any more on that.

Dr Fifield: There are a couple of things. It is not only about the lack of expertise, as you have already identified. We have written extensively on the issue in two different reports. At the moment, where environmental cases are taken is so complicated. Having one place in which to bring all those environmental cases together would also increase the expertise of the judiciary. We have found that a tribunal system—there are hundreds of examples across the globe, and we have cited many of them in our reports—is more accessible and cheaper, because all the experts are together, and people have one place to go to. There could be an outreach model rather than just having one place in the Court of Session to go to.

The other issue is how we can begin to think about merits. As members know, in the judicial review at the moment, we cannot think about the merit of a case. We can also consider other areas of reform. Time and again, when we think about how we can make justice more accessible and affordable, we keep coming back to a Scottish environmental court model. I do not think that it is good enough to read in the report, “We don’t have many cases. Therefore, there isn’t a problem.” We do not have many cases because it is impossible to get access to justice.

Ben Macpherson: And—

The Convener: I am sorry, deputy convener, but Sarah Hendry is keen to come in on that point, as is Lloyd Austin. I have opened a floodgate, but Sarah Hendry has been waiting patiently.

Professor Hendry: I am not pushing to come in, but I am happy to say a little bit.

The discussion about an environmental court has been going on for a long time, and not just here. That was a missed opportunity in the report. The Government could have said more about it and done so in more positive terms. It could have produced the additional briefing paper earlier or incorporated some of that. It could have suggested

taking the issue forward with further consultation on what a court would look like, because it is very complex. The regulatory field is so complex. Is it just civil? Is it criminal as well? Is it just about appeals? Is it about first instance and appeals? All of that could have been an opportunity to take the area of consultation forward and link it into some of the big strategic issues around biodiversity and the thinking about quality-of-life issues—what we used to call “environmental incivilities”. They make such a difference to people’s lives and bring things closer to home. Not being more positive about some form of specialist court was a missed opportunity. It would have helped the Government enormously if it had done that. That is my thinking on it.

Lloyd Austin: I agree with Sarah Hendry on the missed opportunities. I do not know whether the consultation met the legal requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, but I note Shivali Fifield’s reference to counsel’s opinion on that. I also note the irony of the fact that that question could not be addressed because of the problems of access to justice. It almost becomes a vicious circle.

With regard to the big picture of an environmental court, Sarah Hendry also said that the debate has been going on for a long time. There is an awful lot of material out there. When the debate started in Scotland, back in the early 2000s, Scotland would have been ahead of the field in setting up an environmental court but, from 15 to 20 years ago, there are now more than 1,000 environmental courts or tribunals in jurisdictions around the world. If we went forward with one, we would be catching up with the rest of the world. Therefore, it is a huge missed opportunity.

The report is quite weak in its analysis, in examining the evidence for and against, and in the assertions that are made against actions. Shivali Fifield used the example of there not being very many cases; well, we know why that is. That is the vicious circle again.

I want to draw members’ attention to something in Scottish Environment LINK’s response. We have strongly favoured the concept of an environmental court or tribunal for many years, and we supported it in the last consultation in 2016-17. The analysis of those responses said:

“A substantial majority of the respondents favoured the introduction of an environmental court or tribunal. The majority envisaged a specialised court or tribunal as a means to reducing costs and improving access to justice”.

The Government’s decision not to proceed at that time may well have been right in the circumstances of the time because, as the Government said, there was enormous uncertainty at that point about the landscape that was caused

by Brexit, and it decided not to proceed “at present”. It did not say that it was opposed to that in principle. The consultation a few years later, when the Brexit issue had settled down a bit and the Government has had time to move on, could have been an opportunity to do a proper analysis of the pros and cons and of the options on how to proceed. Should such a court be a new entity? Should it be an evolution of one of the existing entities? Should it be done under the tribunal system? It is a huge missed opportunity.

11:15

Finally, I want to underline the merits point. One of the big issues for individuals and communities is that they often disagree with regulators and public bodies about the merits of a case or an issue but, if they challenge it, both parties end up dealing with those merits by proxy, because the judicial review system means that they have to attack each other on procedure rather than have a proper look at the merits. The idea of having an expert environmental court or tribunal in which the court officers are experts on the environment to resolve those disputes on the merits would be hugely advantageous to both parties—the public body party and the community party.

Ben Macpherson: It would be about building a mechanism for justice for the medium to long term, not just in the years ahead. Jamie Whittle, you talked about the commercial specialist court. Approximately how many years has that been in place? Decades?

Jamie Whittle: Certainly ever since I was a trainee, which was around 2000. It was in existence before then, so I expect that it has been in place for over 25 years.

Lloyd Austin made a point about the ability to go into the merits of a case. There are very strict rules in the Court of Session, for example, where there is the concept of planning judgment; the courts cannot go behind what may have been decided by a decision-making body. There are limitations in being able to look at the quality of an environmental decision, and sometimes things will skirt through without being challenged effectively.

In that context, it is important to take a step back and ask the question about the underlying purpose that one is trying to achieve. If tackling the nature crisis and the climate crisis are your drivers, coupled with an access to justice element that can benefit constituents, it is important to look at that question in the wider context.

Ben Macpherson: Okay. Thank you. Does anyone else want to contribute on those points?

The Convener: It was indicated that some supplementaries might require to be asked. Sarah

Boyack said that she might want to ask a question on the matter, and I note that Mark Ruskell definitely has a question. Sarah, do you want to start? I am trying not to say “kick off”, because we do not want that in the committee. Do you want to start with a question, and then we will go to Mark Ruskell?

Sarah Boyack: I was thinking about the upcoming human rights legislation, which may propose a new human right to a healthy environment, and about how that would be delivered in practice with both an enforcement framework and different legal and non-judicial opportunities for redress. How does that relate, following on from Ben Macpherson’s questions about an environmental court and linking into Aarhus convention compliance? I can see a couple of nods. I do not know who wants to kick off.

Professor Hendry: I responded to the human rights bill consultations as, I think, did others. For the record, I support a human right to a clean environment and, indeed, to water and the incorporation of economic, social and cultural rights into domestic law. That is my position.

There are huge issues around resourcing the human rights bill and the time that that will take. As an environmental lawyer, I think that it is a little bit sad that that is what we need to realise the right to a clean environment and a decent quality of life for people. In a country such as Scotland, which has lots of resources and a well-established system of environmental law, it would be really nice if the natural environment and people’s interactions with it were regulated and monitored in a way that did not require the extra step of giving people a human right to enforce through some other set of mechanisms in order that it can be achieved. That is my thinking around that.

Sarah Boyack: Yes, the point is that getting it right in the first place means that you do not need the redress. Dr Fifield, do you want to come in on that point?

Dr Fifield: The Environmental Rights Centre for Scotland is the only environmental non-governmental organisation on the advisory board to the human rights bill. That has been a real privilege and great opportunity. We have fought hard to advocate for the right to a healthy environment to be part of the bill’s framework—particularly the substantive element of the right, comprising the six features—but I completely agree with Sarah Hendry that we should not be in the position of having to put that into a human rights framework.

How the two fit together is a really important point. We raised in two places the current breach of access to justice under the Aarhus convention

and how the human rights bill would address that. We responded to the consultation document in detail. Although both the consultation and the environmental governance report acknowledge the current breach, neither gives a clear undertaking of how that breach will be remedied by the deadline of 1 October 2024.

There are issues that have been raised that the human rights bill will address: the reform of legal aid, issues of standing and the reasonable test for judicial review. Again, however, we do not know how much of that will be just on the human rights bill and how much will go into other areas of environmental governance.

A number of different oversight bodies have been mentioned in the human rights bill in the thinking about different powers. We assume—we have advocated for—Environmental Standards Scotland to be that oversight body: the regulator that regulates the regulators or the ombudsman function. That needs to be properly considered when thinking about how environmental standards are consolidated and developed in the future.

Fundamentally, what we are talking about with the environmental court is an independent judicial route to remedy, and, in terms of access to justice on the environment, that is different from anything else that we have been talking about today. Your point, deputy convener, is well made: how do we improve the judicial route to remedy so that, when all else fails, there is a credible threat of legal action? That, in itself, will improve regulation and enforcement.

One thing that we noted in our response to the environmental governance report, as I have mentioned, is that we have concerns about how Environmental Standards Scotland seems to be risk averse in carrying out its enforcement powers. It has more enforcement powers at the moment than, for example, the Scottish Human Rights Commission, and the human rights bill wants to increase the powers of the commission. You have a body here that has those powers but seems reluctant to use them. Jim Martin, the chair of Environmental Standards Scotland, said in one of his speeches that one of the reasons for that is the prohibitive cost of going to judicial review.

An environmental court or tribunal would be one way of reducing costs, and it would be an opportunity for Environmental Standards Scotland to reduce its costs on the public purse and actually follow through on enforcement action. ESS does have the right to judicial review, but, as I said, is probably quite concerned about the cost of going that extra mile if it needs to do so.

Sarah Boyack: That is really useful. Does anyone else want to come in on the back of that?

Lloyd Austin: Scottish Environment LINK strongly supports the concept of a human right to a healthy environment and its inclusion in the proposed human rights bill. Our concern is that unless the governance questions, including those on access to justice, the environmental court and the powers of Environmental Standards Scotland are answered and fixed, there is a risk that we will have a human right to a healthy environment that is a human right on paper and is not an effective and enforceable one. The linkage between the governance debate and the human rights bill is important and, in order to make the human rights bill effective, the governance questions need to be answered.

I would like to return briefly to Sarah Boyack's point about getting it right up front rather than sorting things out by redress. I completely agree that that is the most desirable thing to do, but, having just spoken about a vicious circle, I would like to point out that you can have a virtuous circle as well. If there is a right to redress—in other words, if communities and individuals have a right to hold public bodies to account where they may have failed—that provides an incentive to a public body to get it right first. So, the incentive to getting it right up front is for the right to redress to be there. In the absence of that right to redress, the incentive to get it right first is not there and, therefore, there is a risk of errors being made.

The Convener: Shivali, you made some comments about ESS. I am not going to defend it; I am just going to ask a question of you. It is a relatively new organisation that is bedding in, finding its feet and trying to establish a pattern of work. We have had evidence from it in the committee, and we see—I think this is the right way to put it—a trend. You were a little bit condemnatory. Do you think that it is a little bit unfair to judge it at the moment as it finds its feet?

Dr Fifield: Yes, and I apologise if I was condemnatory. I want to stress how much we welcome ESS and how good a working relationship we have with it. We have submitted 11 representations to ESS. It is about striking that balance between wanting ESS to be as strong and as powerful as it can be—I suppose that that is the advocacy around an environmental court—and everybody wanting to test their powers and just wanting the best for our clients as well. So there was no overt criticism.

The Convener: It is just an observation. If you want them to run as fast as possible, they will have to learn the process of not tripping over their own feet as they do it, if you will excuse the analogy. I am just worried that they are new and we need to give them time.

Mark, you have some questions before I ask a further question, and then Bob.

Mark Ruskell: Going back to the deputy convener's questions on the environmental court, the case for that and our lack of compliance with Aarhus, how do you see the debate moving forward? Lloyd, you mentioned, I think, that in the previous parliamentary session there was a round table on environmental governance that was chaired by Campbell Gemmell. It feels like we have been going around the issue for some time. If you see a way forward, what does it look like? There have been calls in evidence for a further governance review. I am interested in how that would be different from what we have seen coming through and what the Government has already conducted.

Lloyd Austin: I think that that was partly directed at me. I agree that the discussion has been on-going. The key risk is that, with the report as it is, there will be no next steps. The most important thing for stakeholders and, I hope, the committee is to achieve some form of next step.

Mark's question was, "What is that next step?". I think that it has to be some kind of commitment to do a proper analysis and look at the options in relation to an environmental court. We have suggested in LINK that that will need some kind of expert working group, rather akin to the way that Alan Werritty's group worked on the grouse moor management question.

11:30

I completely accept that that looks as though it is going round another review and another process, but the risk is that, if you do not do anything like that, you do nothing, which would be the worst-case scenario. You have to do something of that type in relation to an environmental court.

In relation to access to justice, the ball is in the Government's court. It could be clearer and firmer about how the five processes that are outlined will deliver access to justice and address cost questions. In respect of the wider governance review and the report that I mentioned from the previous session, the committee could put that back to the Government and say, "You have taken forward environmental principles and ESS in the continuity act. That is very good progress made, tick, but what about these other things that Professor Gemmell's group raised?". That is something that the committee could discuss with the minister. Those are things that are probably in the Government's court to decide whether it wants to pick them up

The Convener: I slipped past the deputy convener, who has another question. Back to you, Ben.

Ben Macpherson: It is related to what Mr Austin has just said. Panel members have made strong arguments why, in your view, there should be an environmental court, but, regarding the compliance with the Aarhus convention, the Scottish Government's review accepts that there is a need to consider improvements to access to justice in principle and sets out a number of proposals, in particular proposals to tackle the prohibitive costs of legal action. Mr Austin, you gave some views in your previous answer, but do you or other panellists have any further views on the proposed reforms from the Government in its response?

Lloyd Austin: The Government's paper puts forward—

Ben Macpherson: Sorry, I mean in the review, rather than in the response.

Lloyd Austin: In the review; absolutely. The Government refers to five current pieces of work that are on-going to aid access to justice. It includes a reference to the human rights bill process, but, as Sarah Hendry indicated earlier, the consultation on that bill does not indicate how access to justice will be fixed, so there is an unanswered question in that regard. There are opportunities, but how will it come up?

There is talk of the review of protective expenses orders that is being carried out by the Scottish Civil Justice Council. We do not know what the council is doing, or what it is going to propose. We do not know whether it will address the situation. We have asked the council to consult with stakeholders, but it is not doing any form of public consultation.

There is reference to an exemption from court fees for Aarhus cases in the Court of Session. That is very welcome and positive, but it has a number of limitations. First, it does not address any courts or tribunals other than the Court of Session. Secondly, court fees are not the most significant part of any costs associated with court cases. It is a small, but welcome, measure.

There is talk about legal aid reform, which, again, is another positive idea, but it does not give any pledge to deliver any reform or resources. The review states that the Government will

"explore means to provide further expert support to prosecutors and the judiciary".

That is the expertise question. It is best answered by an environmental court, because that leads to a concentration of expertise in the same place.

The five processes that are referred to are welcome and positive. They might lead to solving the problem, but there is no clear demonstration that they will. Government has to grip the activities

and demonstrate how they will, rather than how they might, address the cost issues.

Jamie Whittle: Lloyd Austin noted a number of the costs. I highlight the importance, from a Law Society of Scotland perspective, of the need for making sure that there is access to legal aid in civil environmental matters. It is particularly difficult for people to obtain legal aid support to run an environmental case. The consultation is looking at potentially extending that to non-governmental organisations. It can be a real challenge for individuals, and it leaves people thinking about the costs of environmental litigation. As a solicitor, it is inevitable that one is asked about costs at the front end of potentially representing somebody. It is a very difficult exercise to carry out, in part because one can never be certain about how long a case is going to run, and whether it will be appealed or appealed further.

Protective expenses orders are an extremely welcome tool that the Court of Session has implemented in to its practice. It was noted a moment ago that that is focused on only the Court of Session for the time being. That does not, however, cover a party's own costs. If they cannot get legal aid and are not well resourced, they have to crowd fund and maybe rely on restricted fees from lawyers, dare I say, or even pro bono work; those instances do come. I have seen a number of cases that never made it to the doors of court because, even if a protective expenses order could be achieved, a party's own costs were prohibitive in and of themselves.

Ben Macpherson: May I add a supplementary question on that point? I talked earlier about the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Has that had any meaningful positive impact on those considerations?

Jamie Whittle: I would need to go away and crosscheck that, but I think that, as a general trend, in the past decade, because of protective expenses orders, more cases have come to the Court of Session specifically for judicial review than we might otherwise have seen. There has been an increase in the number of judicial reviews that have come forward, although there are not many. In my experience with the sheriff courts, environmental cases are quite rare for sheriff courts to deal with. When looking at the timetable for cases, you see that a sheriff court will have its range of general matters, civil and criminal. Some of these detailed environmental cases can take time, and, after Covid, there can be challenges to fit them into diaries and suchlike. There is still a lot of work and analysis to be done.

The Convener: Let me clarify. The fees that could be racked up before you get to court, if you, in fact, decide to go to court, sound quite terrifying. By the time that you have taken an environmental

King's Counsel opinion, probably a second opinion because the first one was not definitive enough and all the lawyers that all that requires, you are probably edging on to £30,000 just to get it to court. Is that way out of scope, or is it closer to £60,000 to get it to court? Then there is the fear of getting to court and losing the case and somebody then trying to reclaim their costs against you. Give us an indication of what we are talking about; that may help us to understand why legal support may be required.

Jamie Whittle: That is a very accurate best estimate. In my crystal ball gazing, if I were to suggest to a client who was perhaps going forward on a restricted fee basis where counsel and solicitors were involved—because I am based out of Edinburgh, when I am practising, I need to include an Edinburgh-based firm to deal with procedural work—I would suggest that, to deal with a hearing of up to one day at a judicial review, a party's cost would be in the region of £30,000 to £40,000; that sort of broad bracket. That would require a very focused judicial review. The judicial review process has changed in the past number of years whereby we have a much more focused, front-loaded system so that parties are lodging written notes of arguments to the court. The corollary of that is, hopefully, to reduce court time. Cases can go on for multiple days. I can think of one case that was down for four days and ran for 14 days, so there is a huge unpredictability of cost there.

Picking up on your point, convener, about other parties' costs, if one does not have a protective expenses order, the broad rule is that expenses tend to follow success. Therefore, if a party were unsuccessful, they would be likely to face the costs of the Government body that they may have challenged. If a developer, for example, is involved as a third party, they may have legal expenses. One could come away from a one-day exercise with a bill in the region of £100,000; that is not out of the ordinary.

The Convener: Right, I have just decided that I am not taking any of these cases.

Bob Doris: Convener, I apologise for asking a question back to Mr Whittle that is probably stating the obvious, but I think that it is important to put it on the record. The deputy convener mentioned a few matters that the Government has taken forward to address the issues of cost. It was either Mr Austin or Shivali Fifield who said that that does not guarantee that that will resolve matters, but the Government is looking at various issues. Can you understand why the Government has been treading carefully on this? The exchanges that Mr Whittle has had with the convener show that the significant exposure of the public purse in all of this has to be a concern. I know that that is not the

concern that witnesses here today necessarily want to hear, but there is a significant exposure to Scotland's budget, depending on how we take some of the reforms forward. Is that a reasonable contention to put on the record, Mr Whittle?

Jamie Whittle: I would suggest that, of course, costs in all shapes and forms have to be considered properly in litigation. Historically, costs in and of themselves have been a deterrent to people bringing actions to court. I have seen a judgment from the Court of Session—it may have been linked in with the Aarhus convention—that specifically referenced the fact that litigation in the UK is considered to be generally more expensive than on the continent of Europe as a process.

You raised a point about the consideration for the Scottish Government. With the protective expenses regime that one has at the Court of Session, there is a sifting process. There is a process by which the court considers whether a case has sufficient merits and prospects of success before it is granted a protective expenses order. There is quite a process to go through to apply for one.

Bob Doris: I know that you want to bring others in, convener. That was quite an extensive answer. I thought that it would, hopefully, be relatively brief. Let us just put that on record.

The deputy convener talked about the Government wanting to enhance non-judicial routes to justice and remedy, the review of protective expenses orders, the exemption of court fees from July 2022 and legal aid reform. I was merely, as part of that conversation, asking whether you appreciate that the Scottish Government has to think about the cost to the Scottish public purse as it takes forward potential reforms. I think that that was quite a straightforward question. I do not think that I actually got an answer to it.

Jamie Whittle: Well, I beg your pardon. I appreciate that point. That is noted.

Bob Doris: Okay. Thank you.

The Convener: Justice costs.

Dr Fifield: The Faculty of Advocates has said that justice should be state-funded and that court fees should be removed. There is an issue around the human rights question here: when all else fails, should everybody else have access to the courts? There may be a cost, but, hopefully, if, as Lloyd says, it is a virtuous circle, just having the credible threat will up everybody's game and improve the quality of the environment. Again, if we think about different costs, I suppose that we would argue for balance between economic, social and environmental costs as well.

I hope that the reluctance is not only because of cost. Hopefully, there will be less cost if we get the administration right and a specialist committee is established to look into whether an environmental court or tribunal is the right way forward. Of course, we believe that it is, but it is only by having that specialist committee to really consider all those arguments that we can properly answer your question.

Bob Doris: That was helpful. I should note that I spoke about the Government having to tread carefully because of exposure to the public purse, rather than having reluctance, and perhaps that is why there has been a prolonged period of consideration. I suppose that time will tell on that.

Dr Fifield: Can I just—

11:45

The Convener: We are very short on time. I have to balance your right to give me an answer and committee members' requirement to ask questions. I will go to Mark Ruskell, who is online, and perhaps you will get a chance to answer when he asks his question.

Mark, I think that you have some questions. Do you?

Have I wrongfooted him, or have we lost connection? On the basis that we have—*[Interruption.]* Mark, did you have follow-up questions?

Mark Ruskell: No.

The Convener: Sorry. I wrongfooted you. My mistake.

I was going to ask about the Aarhus convention, but I guess that we have kind of covered that. The one concern that I have about what I have heard today is about making the process more specialised. Once you make it more specialised, you get experts. Once you get experts, you get increased fees. Once you get increased fees, you go into a circle of whether you can afford to get justice as well. I do not know whether that is a problem.

Professor Hendry, I think that you want to tell me that that is wrong—do you?

Professor Hendry: I very much hope that an expert court would not lead to increased fees. The aspiration is that an expert court, because of its expertise, would expedite matters, and that is the evidence from many countries. There is a much wider issue around access to justice generally, legal aid and that whole panoply of justice that does not just affect environmental issues, even in their broadest sense. I do not think that an environmental court or a specialist decision-making body would see an increase in costs.

Ideally, it would reduce costs by having the expertise built into it.

The Convener: So the speed would save the fees, perhaps.

Professor Hendry: Well, expertise is really useful, isn't it? The need to bring in expert witnesses can be reduced by having experts—both a judicial expert and, as there is in many environmental courts or tribunals, a scientific expert—sitting in the court. That is one possible way ahead.

The Convener: Okay. Thank you.

I think that Bob Doris has further questions and reflections on an earlier question.

Bob Doris: I am interested in the line of questioning about ESS looking at systemic issues, because it cannot deal with individual cases. That got me thinking a little more about how SEPA or Scottish Water would do that in the first place. I could be wrong, but I would have thought that, if SEPA or Scottish Water saw a pattern in the complaints coming in and investigations, those public bodies would do significant analysis of that to identify what was systemic in that.

That is vital information to inform ESS before anyone gets to ESS. As we know, complainants have to go through Scottish Water or SEPA in the first place, exhaust all the appeals functions there and then go to ESS. What relationship is developing? We must get to a stage where if, for example, it becomes self-evident that a community group that Dr Fifield supports is dealing with something systemic, that can then be evidenced by work that SEPA or Scottish Water has done in advance. What does that relationship look like?

Bridget Marshall: You are right. We work constantly with communities, and we understand the impact that how we regulate has on the environment and on communities. We work constantly with the Scottish Government on improving what we do, and we very much run along the lines that, as Sarah Boyack said, it is better to get it right in the first place. We constantly work with those whom we regulate as well as with the Scottish Government and communities to make sure that we have the right impact in terms of what is expected in the legislation that we operate under.

One thing that we are learning about is the fact that we now have ESS and the Environmental Rights Centre in the picture—as I said, we are working much more closely with the Environmental Rights Centre. It is in its very early stages, but we are optimistic that the more informal resolution and the feeding in of the concerns that the Environmental Rights Centre picks up in the community will help the process of constant

evaluation, monitoring and improvement that SEPA is involved in, which is the way in which we approach our work as a regulator.

Bob Doris: I will just double-check something before Professor Parsons comes in—he could also deal with this point when he answers.

Bridget, are you saying that you anticipate that, in the near future, there will be an understanding of environmental issues that are clearly systemic? Although individuals and communities may have to go through your processes, will there be an understanding, almost before something gets to ESS, that a case will be deemed to be permissible for further investigation and potential enforcement because of the data, information and expertise that SEPA and Scottish Water have and the national trends that they see? Do you anticipate that that will happen?

Bridget Marshall: Ultimately, ESS always has to make a call about whether an issue is systemic, but there is closer working involving all the expertise in the system. One area that has been touched on but not developed is the evaluation and monitoring of what is happening in Scotland's environment. Previously, we were in the EU framework, in which evaluation and monitoring were undertaken by the European Environment Agency and the Commission. After EU exit, that is still an area that we, as people with an interest in the environment, need to focus on to work out how we understand trends and share our expertise and knowledge.

We have information that is still available on Scotland's environment web—SE web—but there is more that we can do to evaluate and understand what is happening in the environment and with the trends. That can then make ESS's role easier. It can put into context some of the complaints that come through from the Environmental Rights Centre and it can help bodies such as SEPA to understand how we can improve the interpretation of the law and the powers that we have been given to make the greatest impact on the environment.

As you suggest, it will not be straightforward, but all this is in the early stages of development and there is more to do. My message today is largely that we need to do that collaboratively.

Professor Parsons: I will build on that and give a real example. We talked about the River Almond, where the big issue is something called combined sewer overflows. Those are the overflows that are built into our sewerage system to provide a sort of relief valve to the environment. We have licences that are set by SEPA, and we are compliant with those—that is very much our role. We recognise, as we have heard from others and as the committee has heard previously, that

sewer overflows are a growing issue across the UK. It is in the press regularly, so we are sensitive to that.

What do we do if we hear about overflows and have complaints or have concerns raised with us? We work closely with SEPA and the Scottish Government to understand the current picture, and we then provide a plan for improvement as part of that. That is exactly what we have done with our improving urban water route map, which sets out our improvements over time for monitoring, as Bridget Marshall talked about, and improvements for the environment. That process works incredibly well in Scotland—a lot better than it does anywhere else in the UK. Scotland has a really well-structured approach, which is: understand, identify, improve and deliver.

For me, success would be ESS not having a role in that. We have just had a discussion about an environmental court, and we would view something going to an environmental court as a failure on our part to interact with our customers, our communities and the key stakeholders before it got there. For us, it is about how we identify issues and identify a plan for improvement as part of that, without necessarily the need for a third party to do that. However, we heard about the 250 complaints, and we fully recognise that people need to have the opportunity to go somewhere else, and we should all welcome that.

Bob Doris: Moving on, convener—

Ben Macpherson: Can I come in, convener?

The Convener: We are pushed for time but, as you are the deputy convener, I will give way to you.

Ben Macpherson: Thanks very much. Professor Parsons made some important points there. There are instances—I can think of at least one in my constituency—where public bodies and agencies have to interact with private landowners. Is that not one of the areas of consideration where the use of legal mechanisms may be beneficial for the common good in certain circumstances?

The Convener: I will limit the answers on that to one from Simon Parsons. I will then come back to Bob Doris.

Professor Parsons: Yes, 100 per cent, Mr Macpherson. As you will be aware, across Scotland, public bodies work well together. Our experience of working with SEPA, NatureScot and other organisations is that we work together towards the common good of improving the environment in Scotland.

On the specifics in your constituency, we need to work with private organisations as well. The vast majority of those have the same focus as us, but there are often commercial issues that we

need to address as part of that. There is a view that we may need a legal route to do that. Lloyd Austin used the word “deterrent”: that is important, but I do not think that private organisations would necessarily want to go down a route that ends up in a court to satisfy something that is probably in the public good.

The Convener: Thank you.

Bob, make this your last question, please.

Bob Doris: I hope that I do not get shot down in flames by the witnesses but, having listened to the entire evidence session, it appears as though—I sit on the Social Justice and Social Security Committee so I understand the language that I am about to use—there has been a safe, secure and successful transfer of powers to a Scottish level, but they are clearly imperfect. They were imperfect before the transfer, and we have not heard about any improvements—at least, it is reasonable to say that the improvements have been modest at best. I am just trying to be balanced in my approach.

However, we heard from Bridget Marshall of SEPA that additional scrutiny and focus have been brought by ESS and that a wider range of issues are now being discussed, including more localised ones. That seems to be something really positive that should be captured in this evidence session.

We are not the only part of the UK that is grappling with the issue. I am conscious that, in England, the Office for Environmental Protection is doing something similar—that is all that I have got in the tank in relation to what England, Northern Ireland and Wales are doing. I have just found out that there is an interim environmental assessor for Wales, which apparently is an advisory role to the Welsh Government.

My question is: where has Scotland done well vis-à-vis the other parts of the UK? Where are they ahead of us? Where can we learn from them about what we have to do better? This is not happening in isolation. We should learn from each other's experiences across the UK.

If anyone has something concrete and meaningful in relation to some of that, it would help our scrutiny.

Lloyd Austin: Having gone through the EU exit process, the two things that Scotland has done well have been the introduction of the environmental principles and the establishment of ESS. Those are not what we have focused on today, but we have noticed that they have happened. NGOs collectively were very keen on those two things, so it is welcome and positive that they have happened.

One reason why section 41 was included in the UK Withdrawal from the European Union

(Continuity) (Scotland) Act 2021 in the first place was to be able to ask the question: that having been done, was it enough? That is why we have been focusing very much on the access to justice and environmental court aspects. However, it is worth pointing out that those two things have been done.

As you say, in England, they have been done in a slightly different way, under the Environment Act 2021. England has the principles and it has the Office for Environmental Protection, which also covers Northern Ireland. The governance gap in Wales is a wee bit bigger than it is anywhere else in the UK.

On other places, I would expect any next steps on the investigation of environmental courts to involve looking at lessons from other jurisdictions. As I mentioned, there are more than 1,000 jurisdictions with environmental courts around the world. There are lots of examples there. In one of ERCS's reports, Campbell Gemmill looked at some of those examples. Scotland could learn a lot from other jurisdictions where environmental courts have been established.

12:00

Jamie Whittle: To add to those comments, one thing that I would like to offer is that it is particularly important to note that the Scottish Government has clearly identified, through the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, the importance of maintaining high standards of environmental protection. In my submission, it should be applauded and recognised that that level of standard is the aim to be maintained.

Another thing that runs in parallel is that, since devolution, one thing that has stood out for me is that forms of legislation created by the Scottish Government have not necessarily had a European background but have been generated out of a desire to protect the environment. For example, the Nature Conservation (Scotland) Act 2004, which relates to biodiversity, does not, to my knowledge, have a parallel south of the border.

Although I appreciate that many of the points that have been raised today have been critiques of the paper that have been presented, it is important to remember the context of the high pedigree of legislation in Scotland. That sets the strategic mark for environmental governance to follow and ensure that that law is maintained and upheld. We certainly have a vast array of environmental legislation now.

The Convener: That is the perfect place to leave this discussion, because I saw everyone round the table nodding their heads in agreement,

and it is always nice to end on a note of agreement.

Thank you very much for your expertise. Our next step will be to consider the evidence that we have heard and to take further evidence from ESS at our meeting on 5 March. We will hold an evidence session with the Cabinet Secretary for Transport, Net Zero and Just Transition in the near future, after the Government has published its response to the consultation.

I ask the witnesses to stay put while we complete the next short item on our agenda.

Subordinate Legislation

Bus Services Improvement Partnerships and Local Services Franchises (Provision of Information) (Scotland) Regulations 2023 (SSI 2023/368)

12:02

The Convener: Agenda item 6 is consideration of a statutory instrument that is laid under the negative procedure, which means that its provisions will come into force unless the Parliament agrees to a motion to annul them. No motions to annul have been laid.

Unless members have any comments, I invite the committee to agree that it does not wish to make any recommendations in relation to the instrument. Are we agreed?

Members *indicated agreement.*

The Convener: That concludes the public part of our meeting.

12:03

Meeting continued in private until 12:26.

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