



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Net Zero, Energy and Transport Committee

**Tuesday 23 September 2025**

**Session 6**



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**NET ZERO, ENERGY AND TRANSPORT COMMITTEE**

**28<sup>th</sup> Meeting 2025, Session 6**

**CONVENER**

\*Edward Mountain (Highlands and Islands) (Con)

**DEPUTY CONVENER**

\*Michael Matheson (Falkirk West) (SNP)

**COMMITTEE MEMBERS**

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

\*Monica Lennon (Central Scotland) (Lab)

\*Douglas Lumsden (North East Scotland) (Con)

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

\*Kevin Stewart (Aberdeen Central) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

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

Dr Shivali Fifiield (Environmental Rights Centre for Scotland)

Professor Valerie Fogleman (Cardiff University and Stevens & Bolton LLP)

Jonnie Hall (NFU Scotland)

Elsbeth Macdonald (Scottish Fishermen's Federation)

Catherine McWilliam (Institute of Directors Scotland)

Sue Miller (Stop Ecocide International)

Professor Simon Parsons (Scottish Water)

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 23 September 2025*

*[The Convener opened the meeting at 08:48]*

### Decision on Taking Business in Private

**The Convener (Edward Mountain):** Good morning and welcome to the 28th meeting in 2025 of the Net Zero, Energy and Transport Committee. I welcome to the committee Sarah Boyack, who is the Labour Party substitute member. Under rule 9.1.3A of our standing orders, Monica Lennon is not entitled to exercise the rights of a committee member in relation to agenda items 1, 2 and 3, because she is the member in charge of the bill that the committee will be considering under those items. Under those circumstances, the Labour Party substitute member Sarah Boyack is entitled to take her place.

Monica Lennon is, however, attending our meeting and, as all members of the Scottish Parliament are, she is entitled to attend the public evidence session. In accordance with how I have always run committees, I will give her a chance to ask some questions of each panel at the end of the discussions.

When we get to item 4, which does not concern the Ecocide (Scotland) Bill, rule 9.1.3A no longer applies to Monica Lennon and I understand that she will take part in the item in her capacity as a committee member; Sarah Boyack will not take part in that item. I hope that that is all clear.

Item 3 is consideration of the evidence heard on the Ecocide (Scotland) Bill; item 4 is consideration of a draft report on the Climate Change (Scotland) Act 2009 (Scottish Carbon Budgets) Amendment Regulations 2025. Do we agree to take those items in private?

**Members indicated agreement.**

## Ecocide (Scotland) Bill: Stage 1

08:50

**The Convener:** Our second item of business is an evidence session on the Ecocide (Scotland) Bill, which is a member's bill that Monica Lennon MSP has introduced. It is our first evidence session on the bill at stage 1. Our role at stage 1 is to gather evidence and information to decide whether to recommend that the Parliament support the general principles of the bill.

We ran a call for written views on the bill over the summer. Today, we will hear from two panels representing a diversity of interests and expertise. First, I would like to welcome Jamie Whittle, who is the chair of the environmental law sub-committee at the Law Society of Scotland; Professor Valerie Fogleman, who is professor of law at the Cardiff University school of law and politics, and a consultant at Stevens & Bolton LLP; Sue Miller, who is the chief networks officer at Stop Ecocide International; and Dr Shivali Fifield, who is chief officer at the Environmental Rights Centre for Scotland. Thank you all for attending this morning, and thanks to all those people who provided written evidence to help us prepare for the session.

As is generally the case, I will start with easy questions. The first question is for each of you. Is a new offence of ecocide needed in Scotland? What are the opportunities for the bill to tackle the climate and nature crises, and what do you perceive as its limitations? That is a really open-ended question and you will not get half an hour each on it; I would like a couple of salient points from each of you, so that you do not steal one another's thunder. Because Valerie Fogleman is in the room, I will let her start.

**Professor Valerie Fogleman (Cardiff University and Stevens & Bolton LLP):** Thank you very much. I thank the committee, and especially Colin Reid, for inviting me here.

The bill is needed, and I am very impressed by it; I think that it will deter environmental damage and harm. It is very well put together, except for one thing: the compensation provisions, which I do not think will work. As Colin knows, I am probably here because of the work that I have done on the environmental liability directive, which was implemented here by the Environmental Liability (Scotland) Regulations 2009. In the confines of those regulations, there is a duty on anybody who causes environmental damage. Granted, the Ecocide (Scotland) Bill is a lot broader, but putting those two pieces of legislation together would be very difficult. On the one hand, under the ELR, it is a duty, not a discretion—the competent authorities

have a duty to require the person who caused the environmental harm to remediate it; on the other hand, the bill says that you can seek compensation if somebody else, including the Scottish Environment Protection Agency, does the remediation, which is a discretion. So I see a tension there. That is really my main point.

I have a couple of other, very small points. The policy memorandum refers to climate change; I am not certain whether that is included or not. I think that the bill should also include preventative measures, because the work that I have been doing for the European Commission on the ELD has shown that the preventative measures quite often cost the most but are the most significant, and more so when environmental harm is caused.

I have kept it short, but I am open to answering any questions.

**The Convener:** I am sure that you will get lots of questions during the course of the meeting.

Jamie, you are at the top left of the screen as I look at it, so you are next.

**Jamie Whittle (Law Society of Scotland):** Good morning and thank you for including me in the meeting.

The environmental sub-committee at the Law Society of Scotland welcomes the introduction of the bill. We recognise the need for a stronger legal mechanism to punish severe environmental harm, particularly given the twin climate and nature crises that the convener referred to in his opening comments. If Scotland is serious about its attitude to the climate and nature crises, there is a need for a backdrop and context of stronger environmental protection.

The bill is not only about sanctioning those who cause harm: it has the potential to bring about a really important culture change. We have seen that with other examples of environmental law, for example in the way in which the Wildlife and Natural Environment (Scotland) Act 2011 dealt with wildlife crime by introducing vicarious liability. That had a significant effect on people's attitudes across Scotland and gave greater visibility to the need to act in particular ways, changing the attitude towards environmental risk.

In general, we support the introduction of the bill. I am happy to pick up on some comments that we made in writing, which are perhaps more on the mechanics of how the bill will be implemented in law. There is a close relationship with the Regulatory Reform (Scotland) Act 2014 and we wonder whether this bill would work more coherently if embedded alongside that act, rather than standing alone.

**The Convener:** Sue Miller is next in line, but something has happened to her screen. I will

suspend the meeting while we sort out our information technology problems, because I cannot see her.

08:57

*Meeting suspended.*

08:58

*On resuming—*

**The Convener:** I reconvene the meeting, which we paused because someone had lost control of the microphones—I do not know who it was; I think that it was someone from the IT department.

Sue, I do not know whether you got any warning that I was coming to you next, but you are next. Could you answer the question?

**Sue Miller (Stop Ecocide International):** I did know that.

I come from Stop Ecocide International and we speak from an international perspective. I can talk about general principles and the comparative context to give some practical, non-technical insight.

The legal framework for environmental law tends to be piecemeal and fragmentary. Ecocide law creates a safety net or outer limit, giving a red line beyond which things are not acceptable. It provides a clear demarcation of what a community, a nation and humanity find acceptable, and what we are prepared to put up with in development, commerce and so on. The objective is to change boardroom decision making, because it obliges key decision makers to take into account their personal liability, as well as looking at profits and doing the normal risk assessment. That somehow changes the way in which people look at things and encourages them to check that all the safeguards are in place. We think that that will have a huge effect on decision making and that it will also change investment flows and encourage investment into more sustainable practices, and research and development into doing things better. It is a huge opportunity to shift humanity's activities into a safer space.

09:00

On limitations, I guess that resourcing is always one. The resourcing that we put behind enforcement can limit how effective any such law can be. Unless anyone wants to ask me anything, that is my contribution at the moment.

**The Convener:** I am trying to keep the questions on theme, so members will ask you questions later.

Shivali Fifield, do you want to come in next?

**Dr Shivali Fifield (Environmental Rights Centre for Scotland):** Thank you for inviting us to speak today. I am the chief officer for the Environmental Rights Centre for Scotland, or ERCS for short. I echo what Jamie Whittle and Sue Miller said. I will not repeat that, but I would add that, as well as the twin crisis of nature and climate, the United Nations talks about the triple crisis of nature, climate and pollution. The reason why the bill is welcome and needed is because, as Sue says, it adds an overarching offence, at the top of what we would call the regulatory pyramid, to address the most serious forms of environmental harm. That is important for Scotland. We know that the majority of pollution and damage—environmental harm—is a cumulative impact of lesser acts, but on the rare occasion of a significant incident, our current legal framework is lacking. That is why the bill is needed. The opportunities are clear. As Sue Miller and Jamie Whittle said, it is about challenging the current social licence of polluters. That is really important.

We support the general principles of the bill. However, on limitations, we identify three areas that need to be clarified and strengthened. I am sure that we will talk about them in more detail, but I will summarise them. First, the definition should include omissions as well as acts. Secondly, the liability provision should apply only to relevant organisations and officials. At the moment, the bill is not strong enough to exclude workers and we are worried that workers will be scapegoated. Finally, we need further clarification on the defence of necessity. Those are three limitations that I am sure we can address in stages 1 and 2.

**The Convener:** I am going to ask a couple of specific questions. My first question is for Jamie Whittle. That will give you a chance to prepare, Jamie. Is the definition of ecocide in the bill sufficient?

**Jamie Whittle:** Our view is that the definition is clear. There is a definition of severe environmental harm, which is cross-referenced to the Regulatory Reform (Scotland) Act 2014. I can put that up on my screen in a moment. For environmental harm to be considered to be “severe”, it has to have “serious adverse effects” and be “widespread” or “long-term”. The definition looks to capture the most severe environmental harm of the highest order.

**The Convener:** Do any of the witnesses think that the bill does not define ecocide sufficiently? If you do not think that it does, you can raise your hand. Otherwise, you are agreeing with what Jamie Whittle has said. You have all looked away perfectly.

The next question is from Kevin Stewart.

**Kevin Stewart (Aberdeen Central) (SNP):** I would like to explore the key differences between the proposed offence and the existing offence of causing significant environmental harm in section 40 of the Regulatory Reform (Scotland) Act 2014. Why have there been so few prosecutions under section 40 of the 2014 act?

**Professor Fogleman:** The 2014 act does not cover prevention. A remediation order can be made, but there is a defence of compliance with a permit. The bill includes an autonomous offence. Compliance with a permit is not needed; the offence stands on its own. That is very significant. Whether the European Union had competence to provide for an autonomous offence in its environmental crime directive was a big issue, but the EU managed to do it. Obviously, Scotland is not bound by those competencies; it has the competence to do it. We need to get away from the idea of compliance with a permit being okay, because a lot of permits are very old. If I could just—

**Kevin Stewart:** You have said that a lot of permits are very old, and section 40 of the 2014 act has hardly been used—let us be honest. Why do we not modernise the permit system so that there is compliance with it and ensure that section 40 is used more, rather than introduce a raft of new legislation?

**Professor Fogleman:** The issue is very much to do with regulatory offences, such as permit time offences. The bill stands apart from that, as it includes an autonomous offence.

**Kevin Stewart:** I get that point, but if you are saying that somebody complying with a permit is not good enough at the moment because the permit system has not been modernised, why would our first course of action not be to modernise the system for complying with permits? Should we not ensure that the existing legislation is as tight as it can be and is actually used? I am playing devil’s advocate, but I have to be honest: I do not see the point of introducing new, supposedly overarching legislation if the current legislation does not work in the modern age.

**Professor Fogleman:** It does not seem to be working, because there are no prosecutions. I do not know whether that is to do with lack of money. That is a big issue for SEPA, because it does not have the money for enforcement these days.

I will give one quick example of why the permit system needs to be reviewed. In England, in the lake district, United Utilities has a permit to abstract water from the River Ehen, which comes out of Ennerdale Water. Under that permit, United Utilities was basically destroying one of the last populations of freshwater pearl mussels. The

Environment Agency could not stop it, because United Utilities was complying with the permit, so what the agency cleverly did was come out with a preventive order. It then started ratcheting down how much water could come under the abstraction permit. In such a case, would United Utilities fall under the ecocide bill? It was basically wiping out one of the last viable populations of freshwater pearl mussels. I think that that is an issue.

**Kevin Stewart:** It wouldnae come under the ecocide bill, because you are describing something in England and not in the Scottish jurisdiction. Let us hear from Mr Whittle, please.

**Jamie Whittle:** On the overlap between the two, in addition to what Professor Fogleman has just said, there is a narrower mental element of the new proposed offence. There is a narrower provision on corporate liability in the ecocide bill because neglect is not included in the way that it is under the 2014 act, and the additional vicarious liability provision is brought in. Probably the most striking provisions are the more severe maximum penalties, with the 20-year imprisonment element. There is also the proposed reporting requirement.

**Kevin Stewart:** I will paraphrase something that you said earlier, Mr Whittle: you said that a change in the law would lead to culture change. I am quite long in the tooth in this place, and I have to say that changes in legislation do not automatically lead to culture change. What makes you think that the bill would lead to that culture change?

**Jamie Whittle:** It is the potential severity of the punishment that would be levied on an individual or organisation that was deemed to have committed ecocide. There is a striking difference from the level of penalties under the 2014 act. They are at the type of level that grabs attention, and with attention comes the need to look at how organisations' policies operate, at organisations' attitudes towards risk and at whether organisations—and leaders of organisations, I would suggest—are more likely to take greater interest in how they carry out their affairs. I suggest that a culture change comes hand in hand with realising that there are severe consequences for breaking the law.

**Kevin Stewart:** Was there culture change after the introduction of section 40 of the 2014 act? Is that the reason we are not seeing any prosecutions there?

**Jamie Whittle:** I cannot give you any statistics on that, I am afraid. My impression is that there was certainly a growing awareness of that when it came in, but the jump with what is proposed under the ecocide bill is much more significant.

**Kevin Stewart:** Let us hear from Sue Miller, please.

**Sue Miller:** I cannot speak to section 40, as I am not an expert in Scots law. Permits are quite often granted because of commercial expedience or because of the strength of particular lobbies. You may find that permits are granted for things that turn out to be ecocidal or that might be found to be ecocidal. Having an outer ring of what is acceptable will govern which permits are granted in the first place and bring that level of activity into the safe space.

From my point of view, from which I cannot comment on section 40 in any detail, the granting of permits also needs to take into account the potential for ecocidal activity.

**Kevin Stewart:** In that case, it would probably be more logical to deal with modernisation of the permit system before introducing a bill or legislating for something that would overarch a system that, in your opinion, currently does not operate very well.

09:15

**Sue Miller:** I cannot say, because I do not know how the permit system works in Scotland.

The important point is that there is an outer limit, or a line in the sand, which makes a statement about what is, and is not, acceptable. An ecocide law would do that.

It would also chime with what is going on internationally, because the ecocide law is progressing at the International Criminal Court. Gradually, systems will converge on some sense of agreement about what is acceptable, and Scotland would be taking a lead in that.

**Kevin Stewart:** Scotland always likes to take a lead. However, although I understand why you are giving evidence at committee today, as the chief networks officer at Stop Ecocide International, you have just said that you do not know how Scottish legislation and the current permit system operate. In that case, why do you think that what is proposed here is the right thing, rather than modernisation of the existing systems, which may well lead to quicker and better improvements in those areas?

**Sue Miller:** I can speak only to non-technical things related to Stop Ecocide International's global movement. That is what I can answer questions on.

**Kevin Stewart:** Can we hear from Shivali Fifield, please?

**Dr Fifield:** In some ways, we are talking about apples and pears. I do not disagree at all that we need to improve the permit system in Scotland. However, in relation to the Scottish National Party Government's commitment to keeping pace with

the European Union, the ecocide bill is very much about responding to the EU environmental crime directive. Currently, the RRA does not cover the most serious environmental harm as defined in the new bill, and it also does not cover the sanctions that correspond to that most serious of crimes. Therefore, we see it as an extension of, not a replacement for, the RRA.

There is currently a gap in environmental governance in Scotland. There is no doubt that there are many issues with environmental governance in Scotland, but this is about an addition, not a substitution.

**Kevin Stewart:** Thank you. That is helpful.

I am a very logical person when it comes to legislation, and I think that, sometimes, we take the most difficult paths to get to where we want to be. In that logical sense, would it not be wiser to, first of all, modernise the permitting system across the board and consider where section 40 is not working before we put in any further additions? I want to see Scotland keep up with our European partners in almost every aspect of life. However, logically in all of this, would it not be best to first deal with those matters that I have discussed before we move on?

Those items could probably be dealt with much more quickly than through a bill that is being discussed right at the tail end of a parliamentary session and that is unlikely to make progress. I am sorry for saying that, Monica, but that is the reality.

**Dr Fifield:** A review of the whole permitting system would be welcome, but it would take a huge amount of time. In relation to the lack of enforcement of our current legislation, one of the issues is resources. We have talked about that at length when reviewing environmental governance, so I will not go down that rabbit hole just now. Whatever we do, even if we have the best permitting culture, the point about the bill is to address the outcome if a once-in-a-lifetime event occurs, although we hope that it never does. The fact that the bill considers not prevention—which is what permits are meant to do—but the impact of an action is quite important.

**Kevin Stewart:** We would all prefer that some of those things did not happen, but you have talked of a once-in-a-lifetime event. I will play devil's advocate again. Let us say that the bill passes and is enacted and a once-in-a-lifetime event occurs, which leads to court action. The defence from the folks who have committed the offence is, "Well, we did all of that within the permits that we were given," and we have not actually modernised the permitting system—

**The Convener:** I will suspend the meeting again, because we have an unstable connection. Sorry, Kevin, to cut you off in mid-flow.

09:21

*Meeting suspended.*

09:22

*On resuming—*

**The Convener:** I apologise to those online, both witnesses and those who are watching the meeting, for the continued interruptions. I am told that it is a gremlin in the system and that there is no reason for it, so we will just have to work through it. Therefore, we get to hear again what Kevin was saying—so, we will hear you twice, Kevin.

**Kevin Stewart:** Thank you, convener, and let us hope that it is only twice.

You might have got the gist of where I was going, Shivali, with my playing devil's advocate again. In a situation in which the ecocide bill has been enacted and an offender appears in court and says that they did everything in line with the permitting system, which has not been modernised, how would a court react? I know that it is difficult to guess, but my thoughts are that a court would say, "Oh well, they did everything within the permissions that they had." It might well be that the overarching ecocide legislation would do nothing, because we had not modernised the permit system around it. Do you have any comment on that, please?

**Sue Miller:** Was that directed to me?

**Kevin Stewart:** No, to Shivali, please.

**Sue Miller:** Oh—I am unmuted, sorry.

**Dr Fifield:** Again, I think that we need to do both—I cannot stress that enough. We absolutely need to reform our permitting system, but one of the things that I hope that we will come on to is where the liabilities in the bill need to be strengthened. We propose a strict liability for what we call relevant organisations.

However, let us think about your scenario. In it, there would be two things. If a relevant organisation or corporation was behaving in a way that it knew or thought would be detrimental to the environment, it is its responsibility to address that. Whether it is working within permits or not, there are lots of other duties and responsibilities on organisations to prevent an ecocide-level crime. That is why a strict liability offence for organisations is important. That is the first thing that I would say.

The second thing that I would say is that, as Professor—

**Kevin Stewart:** Dr Fifield, I do not disagree with anything that you have just said, but what I am getting at is that the bill could be enacted, an

offence could happen, and the offender's defence could be that it has stuck completely and utterly with the permissions that it was given. Again, I am not a lawyer, but I would argue that that is a pretty good defence. Surely what we have here is putting the cart before the horse. Do you agree?

**Dr Fifield:** We need both. As I understand it, under the bill, that would not be an appropriate defence. We would want it to be a strict liability offence, on the balance of probabilities. Jamie Whittle is probably better equipped to answer the question.

**Kevin Stewart:** Jamie, do you want to come in?

**Jamie Whittle:** Picking up on Shivali Fifield's last point, one of the differences between the Ecocide (Scotland) Bill as introduced and section 40 of the 2014 act is that, under the latter, if actions that would otherwise have been an offence were carried out in accordance with a permit, that can be a defence. Under the bill, that defence is not present. The defence, in section 2, is based on necessity. As I see it, the element of ecocide is essentially a layer over and above what may or may not have been permitted. It is to cover situations such as a massive oil spill, an example being the Deepwater Horizon incident in the Gulf of Mexico, which was of such an enormous scale that it went far beyond any permitted activity. Ecocide is to deal with severe incidents that go beyond the more regulatory level.

Like Shivali, I would not suggest that what is proposed here needs to be parked while any review of permitting is considered. What I would suggest, which has been a consistent theme of submissions made on behalf of the Law Society, is that it is really important to have coherence in environmental law, and the way in which our laws, our regulatory work and resourcing run together. As part of that, we suggest in our submission that it would be appropriate to consider the environmental liability regulations, too, to ensure that they all fit together coherently.

**Kevin Stewart:** Can I get this right for the record? You are saying that permitting would not be a defence when it comes to the bill, if enacted.

**Jamie Whittle:** That is my understanding. The defence that is set out in section 2 of the bill is the defence of necessity, whereas in section 40(6) of the 2014 act, there is a defence that links in to regulations.

**The Convener:** Michael Matheson has a brief question.

**Michael Matheson (Falkirk West) (SNP):** Good morning. It is important that, before introducing any provision that creates new criminal law, we are clear about the nature of the gap in

the law that we are trying to address and how the new offence would operate in practice.

Given the definition of "ecocide" in the bill and how that relates to the 2014 act provisions, can you give me a practical example from the past 10 to 20 years of an offence that the existing regulatory framework in Scotland has been insufficient to deal with and regarding which this new criminal law would have enabled us to prosecute an individual or an organisation? I will come to you, Jamie, given your expertise in Scots law.

09:30

**Jamie Whittle:** I cannot think of a specific instance off the top of my head, but I am happy to come back to the committee on that in writing if it would assist.

**Michael Matheson:** That would be helpful.

**Professor Fogleman:** The MV Braer incident was given as an example in the various submissions on the bill. That incident would fall outwith the permit defence if it had been caused by negligence, for example. It caused a lot of devastation, so I think that it would fit very well under the bill.

**Michael Matheson:** Can you remind me of the circumstances of that example?

**Professor Fogleman:** Oh gosh! I must admit that it has been a long time since I have read about the Braer. It was an oil spill that caused a lot of devastation to the marine world. It also gave a lot of businesses, such as ferries and sightseeing, for example, a lot of financial problems. Fishing is obviously a big issue when there is a big marine oil spill.

I cannot remember exactly what the facts are about the Braer, but it is the kind of example that we are talking about. If the incident had been caused by negligence, as happened with the Exxon Valdez when the master ran the ship aground because, as in that case, they had had too much to drink, that would be an example of an incident where the bill would fit very well.

**Michael Matheson:** I understand the concept and importing an example to fit that concept, but we do not know whether the definition in the bill would have applied to the circumstances of the example that you have given. Is that correct?

**Professor Fogleman:** The bill is not looking only at incidents; it is also looking at a pattern of wrongdoing. I am sorry, I cannot speak to Scotland on this but, in England, we have a massive problem with the water companies continuing to cause pollution of the waterways. That would apply.

**The Convener:** Before we go too far with that, I am keen to have an open discussion, but I am not keen to point fingers at somebody who might or might not have done something, because they might turn around and say that an act of defamation has been carried out in the committee because somebody has accused them of doing something. As convener, I would be more comfortable if we talked about the principle or the idea rather than saying that an individual has done something. I am sorry for interrupting, Michael, but I want to protect myself and you and the other committee members.

**Professor Fogleman:** Part of the bill is onerous, without a doubt. In 1987, I was practising law in Texas, when environmental law offences became significant and we used to jokingly refer to the designated felon of a company if something went wrong. Saying to an individual in a company that they cannot get away with a fine and that they might actually go to prison had a big impact. It changed the culture. The other witnesses were talking about a culture change, and this is a culture change. The bill would also bring Scotland closer to what the EU is doing with the environmental crime directive. In fact, a lot of the bill is patterned on ecocide under that directive.

**Michael Matheson:** Shivali, given your interest in Scots environmental law, do you have a view on that?

**Dr Fifield:** As Jamie Whittle said, and as we said in our previous communication with Monica Lennon during the consultation process, we have not been able to identify a specific ecocide-level crime in Scotland in the past five years, but what we are looking at is the potential for such a crime.

As you said, we are looking at things that are similar to significant oil spills. We hope that such things never happen, but the point of the bill is that, if they do, we have the mechanisms to address them. We hope that having a bill will shift the balance of probabilities, so that people will think more about pro-environmental acts and the need for a just transition to less pollutive industries and practices.

**Michael Matheson:** Thanks.

**Bob Doris (Glasgow Maryhill and Springburn) (SNP):** The Braer oil spill happened in 1993, so the current legislation supersedes that example, but I appreciate why it was given.

I am getting my head around an issue that it might be best for Mr Whittle to come in on. Section 40 of the 2014 act, which has been cited by Kevin Stewart, deals with significant environmental harm. In my briefing, I see that there are also the Environmental Liability (Scotland) Regulations 2009, which set out that companies and organisations must proactively take "preventive or

remedial measures". I am learning as I go along, so I am sure that there are other parts of the general legislative landscape that I am not aware of. The deputy convener's question was whether there are any examples from the past decade or so in which the legislative framework has not been fit for purpose to deal with a significant environmental incident. We do not have clarity on that.

I want to ask Mr Whittle a second question, because I will not be coming back in due to time constraints. Who decides what piece of legislation to use when seeking legal recourse? If the bill goes on the statute book, lots of people will be keen to see it used. However, it might be more appropriate to use section 40 of the 2014 act or the 2009 regulations. I am conscious of setting a legal precedent that determines the bar for what ecocide actually is and it is such a significant threshold that is meant to be reached. Mr Whittle, could you give me some reassurances?

**Jamie Whittle:** Ultimately, I expect that the decision to pursue a prosecution would be made by the Crown Office. It would need to be informed by the police and/or SEPA, but I would have thought that the way that a conviction is processed and which crime is most appropriate to pursue is ultimately a determination for the Crown Office.

**Bob Doris:** Could there be a situation in which the threshold for ecocide might be doubtful in relation to the law but the Crown Office and others want to see greater penalties than can be imposed under the 2014 act? That might mean that they seek a remedy using the new legislation so that greater penalties can be imposed, rather than because the incident meets the threshold for ecocide. Is that a danger, Mr Whittle?

**Jamie Whittle:** I have no comment on that, Mr Doris.

**The Convener:** Mark, you were waiting to come in on various issues, and we have finally come to you.

**Mark Ruskell (Mid Scotland and Fife) (Green):** This has been a fascinating evidence session, and I certainly welcome the bill coming to the committee at stage 1. Sometimes members' bills can highlight the Government's blind spots, so the session has been really interesting. I want to pick up on a couple of things that came out of Kevin Stewart's questioning.

First of all, we have this system of environmental regulation and environmental permitting, and I am interested in other jurisdictions that have adopted ecocide as an overarching offence. Has that driven reform of regulation, permitting and licensing, simply because of an underlying fear that some of the regulations are not fit for purpose and that, even

though companies might have a licence under those regulations, they might, in some extreme examples, still be found by a court of law to have committed ecocide? I am just interested in finding out what this overarching legal change will do, if anything, to drive further environmental regulatory reform.

Professor Fogleman, I see you nodding vigorously.

**Professor Fogleman:** I am thinking about the countries that have done this, such as Belgium. With regard to the EU, there is a wonderful article by Professor Dr Michael Faure, which looks specifically at the environmental crime directive and getting away from the permitting defences.

However, at the end of the day, these things are still coming down in silos—I do not think that there is enough interaction between them, from what I have seen so far. A lot of this sits outwith the issue of permits, but, when it comes to the permits themselves, I have not seen that interaction between the revising of permits and ecocide legislation. Others—Jamie Whittle or Shivali Fifield, perhaps—might have seen that.

**Mark Ruskell:** Did you want to come in, Dr Fifield?

**Dr Fifield:** I will be very brief. Internationally speaking, so much domestic ecocide law is new; indeed, the report that we commissioned from Dr Rachel Killean and Professor Damien Short goes into that in great detail, and I would ask the committee to look at that. I can send members both that report and a more recent paper that Rachel and Damien have done on the impact of domestic crimes.

Overall, as the previous speaker has said, part of the EU environmental crime directive is about ensuring that ecocide-level crime is brought in as part of improvements to the whole suite of environmental governance. That also sits very well with the United Nations special rapporteur who covers the right to a healthy environment, who is now Elisa Morgera but was previously Professor David Boyd. They have done a lot of research into how the inclusion of such a right has improved overall environmental governance as well as new legislation supporting a just transition, so they will have a lot more evidence on how recognition of that right has achieved that, with ecocide-level crime as part of that suite, too. However, Sue Miller might know more about that and have more examples than I do.

**Mark Ruskell:** Just before I leave you, Shivali, I think that you mentioned strict liability and particular sectors for which strict liability might be established as another form of backstop. I am thinking, for example, of genetically modified crops being released into the environment, or a GM fish

that could decimate wild salmon populations. Could an ecocide law focus more on that area of strict liability being established in certain situations, or should that really be the subject of a separate conversation about environmental damage and how responsible certain sectors need to be?

09:45

**Dr Fifield:** With an ecocide law, we need to be clear that the act is the thing that we are trying to address. Therefore, we have suggested a strict liability offence for organisations, because—*[Interruption.]* I am just looking at my notes, just so that I am clear, because this can be quite confusing.

It makes it a corporate offence to have committed an ecocide-level crime. That means that a corporation, or any other body, may be held criminally liable where severe environmental harm has been committed, as in our definitions. That, as well as including omissions in the definition, will ensure that, if there has been an ecocide-level crime, we are looking at the organisation not having done something, as well as doing something.

That is very similar to what is already covered in the RRA, and in the environmental crime directive. Those two things cover a little bit of what you were talking about, Mark.

However, to be clear, we do not think that an ecocide-level crime bill can be about something that has not happened; it can only be about something that has happened. That is a really important distinction in relation to this bill.

The first speaker talked about prevention. The only way that the bill can be about incorporating the prevention principle is by acting as a deterrent.

**Mark Ruskell:** Thanks. Can we move to other speakers online?

Great, we have the screen back. We will go to Sue Miller.

**Sue Miller:** On the first question about other countries, as Shivali Fifield said, it is very new at the moment.

Ecocide laws have been around for 20-odd years, many of them in the former Soviet countries, because they had to write their constitutions at around about the time of the code of crimes against the peace and security of mankind, which was a forerunner to the Rome statute. Therefore, a lot of them brought ecocide crimes into their constitutions at that stage. I am not aware, however, of any of them ever being used, which I think is something to do with the definition simply not being practical.

The first country that has brought ecocide into its legal system based on the definition drafted by the independent expert panel in 2021—which is the definition that we use at Stop Ecocide International, and the one that has been proposed at the International Criminal Court—is Belgium. However, the law is so new—it came into force only last year, I think—and the threshold is so high that there have been no cases in relation to it. It is, therefore, an unfolding process.

Following the International Court of Justice's advisory opinion—which I think came out in July of this year—states have new obligations, in that they have a duty to prevent environmental harms. With that sort of duty having been expressed by the United Nations's highest court, states need all the support that they can get. The introduction of something such as an ecocide law would therefore help them to meet those obligations, because it would help to focus the minds of those involved in the activities that might cause ecocide.

**Mark Ruskell:** Are there examples of individual states that have gone back as a result of an ecocide law and said, "We're concerned that our environmental regulatory framework is problematic and has holes in it. We need to, in light of the ecocide law, go back and improve it"?

**Sue Miller:** In Colombia at the moment, they are considering whether they can bring their environmental laws into line with the definition. They have quite good environmental laws, but they want to bring them closer into line with the definition. Once the definition came out, Chile also consolidated its existing laws and said, "Actually, we've worked out that we almost reach that threshold."

Certain states, particularly those that are more vulnerable to ecocide, are reviewing their legal systems by asking, "How can we bring that into closer alignment with what's going on internationally and with this definition?"

Those are a couple of examples.

**Mark Ruskell:** Thank you for those examples. Jamie?

**Jamie Whittle:** I do not practise in international environmental law so I cannot really comment on comparatives of what is going on in other countries at the moment.

I alluded at the beginning of the session to a piece of legislation that came in some 14 years ago—the Wildlife and Natural Environment (Scotland) Act 2011, which introduced potential vicarious liability for landowners if they had an employee who was found culpable of committing wildlife crime. That is a striking example of where there was culture change as a result of legislation being introduced. You saw employment contracts

being rewritten and employees being sent on continuing professional development courses to make sure that they were aware of the effects of the committing of wildlife crime. It was particularly focused on raptor predation. That is more of an In-Scotland example, but it is, to all intents and purposes, a very effective one.

**Mark Ruskell:** Obviously, that legislation has had a cultural impact on the way that businesses operate.

I am interested in you addressing the question whether you think that an ecocide law would effectively encourage Scottish Government regulatory bodies to review existing legislation. I think that perhaps the assumption in this room is that Scotland's environmental legislation is fit for purpose, but is that your view?

I am aware that, for example, the legislation for mineral permissions goes back to 1974, so there is the adoption in that case of regulations that, arguably, many communities believe are not fit for purpose in the modern world. What is your overall view of environmental legislation in Scotland? Do you think that an ecocide bill such as this one would drive reform? Is reform needed?

**Jamie Whittle:** In evidence that I gave to a previous committee in relation to environmental governance, I made the comment—and it is consistent with submissions made on behalf of the Law Society—that Scotland, since devolution, has introduced some incredibly progressive pieces of environmental legislation, whether it is the Climate Change (Scotland) Act 2009, the Nature Conservation (Scotland) Act 2004, or our policy on wild land, for example. They are things that do not necessarily exist south of the border and are not necessarily driven by the EU legacy, so I think that it is fair to say that Scotland has been a particularly progressive country in terms of its legislative programme for the environment.

Where there may be weaknesses are those relating to governance more widely and the way in which we have a very fragmented world of environmental law, which can be difficult to follow and to piece together. Therefore, when there is the opportunity for coherence or for a refresh to make sure that things fit together and are not inconsistent, that is absolutely essential. I will also pick up on an earlier comment about the critical importance of resourcing the implementation of these good laws. Indeed, in our written submission, we said that so much of this proposed ecocide bill hinges on the ability to resource what is required to follow through with it.

I do not see this bill, in and of itself, triggering the need for an overall refresh of the environmental array, but I would suggest that what is important is the way that it is placed. It needs to

sit within a coherent context so that it is understandable and so that there is clarity.

**Mark Ruskell:** Shivali Fifield, do you want to come back in on that point?

**The Convener:** First, Mark, I will just point out that we are less than a third of the way through the questions but three quarters of the way through the time. That always happens when we have interesting panels. Panelists, I ask you to be mindful that the longer you speak, the more you ensure that no one else can speak and the less chance we have to get through all the questions. You are the ones who will have to face your colleagues after this, and I will have to face committee members, so, please, keep your answers short and concise.

**Mark Ruskell:** I was going to ask Shivali Fifield whether she wanted to come in on any of those points, but I see that she is shaking her head.

My final question is around the cultural change in organisations and industry—I think that Jamie Whittle has already answered it, but I would like to get very brief responses from others. Do you have evidence of where the introduction of an ecocide law has driven that cultural change? Jamie, you have already used an example from previous environmental legislation in relation to vicarious liability, but I am interested in the views of other witnesses as to specific examples of where you think that culture change has happened in certain sectors. Valerie, do you want to come in?

**Professor Fogleman:** I cannot speak for Scotland, but I can definitely speak for the US, especially Texas. The difference now is that an individual can go to prison, which takes the approach away from fining out of profits, or whatever. That is a significant culture change. I saw that when I was practising in Texas.

**Mark Ruskell:** What does that mean, though? I know what it means for the individual, but what does it mean for the organisation? What changes as a result of that?

**Professor Fogleman:** The company becomes a lot more aware of its environmental obligations and liabilities, and puts more money into complying with those obligations, because, now, it affects one of its own.

**Mark Ruskell:** Right, okay. Sue?

**Sue Miller:** I do not have specific examples in relation to ecocide, because legislation on it is so new and in development. However, I was in practice with a law firm in the UK when the data privacy regulations came in, and I can tell you that it certainly changed the culture in the firm to have the possibility of a managing partner getting a prison sentence if there was a data breach. I think

that legislation does have an effect—it makes the firm leaders think twice.

**Mark Ruskell:** Shivali?

**Dr Fifield:** I think that I have answered that question already. Again, it is very difficult to see the direct causal link, because the laws in Belgium and France are so new; however, having the UN special rapporteur on the right to a healthy environment shows that the need to address that triple planetary crisis has led to better environmental governance and better laws, and has supported organisations and companies to shift to more environmentally friendly practices. I can share those examples with the committee post-session.

**The Convener:** Thanks, Shivali, that would be helpful.

Right, I will try to move things along quite quickly. We have heard from various witnesses on whether the defence of necessity is required. My question requires a simple yes or no answer from each of you. Is the defence of necessity required? Jamie?

**Jamie Whittle:** Yes—

**The Convener:** Yes is fine; you only get a short answer. Sue, yes or no?

**Sue Miller:** Oh, in the Scottish context, I cannot say. Can I abstain?

**The Convener:** Abstained, right. Shivali?

I cannot hear you, sorry—you dropped off, for some reason. Try it again.

**Dr Fifield:** Sorry, I will be brief; I will try to be quick about this. We wish that it were not required, but we believe that, with the concerns that the Scottish Government has raised and in relation to article 6(2) of the European convention on human rights, we would need to accept in principle that relevant organisations and officials can rely on that defence.

We support the placing of the burden of proof for the defence on the accused, on the balance of probabilities, but most importantly, the defence needs to be clearly defined, and at the moment, it is not. We accept that it needs to be there, but there needs to be a better definition of “greater harm” and more certainty about exactly how that defence would be used and whether it would be an objective or subjective test. We can find more detail on that, too.

10:00

**The Convener:** I think that that is a yes in principle. That was a very long answer to a yes or no question.

Valerie, see if you can give me a yes or no answer, please.

**Professor Fogleman:** Can I give a “perhaps”? It is more important that the authorities have discretion on whether to bring a prosecution.

**The Convener:** I will try to give you a real-life scenario. Take, for example, a river in Scotland—it does not matter where it is—where the water is abstracted to create power, which goes into the national grid, and to provide drinking water for local communities. One year—as has happened this year—the water levels get critically low, and abstracting the water means that a freshwater mussel population is destroyed, and it is determined that the act represents ecocide, because the mussels were definitely an endangered population. If the defence is that doing that was necessary to give power to the national grid and to provide local people with drinking water, who will make the decision in that regard?

Valerie, you are shaking your head. I think that local people might be annoyed if they cannot get a drink of water in the evening.

**Professor Fogleman:** The defence does not deal with that situation right now because the bill says “to prevent greater harm”. Is it a harm if you cannot get drinking water?

**The Convener:** Well, at the end of the day, you will probably die if you cannot drink.

**Professor Fogleman:** That defence would have to be revisited to cover that kind of situation. That goes back to my Ennerdale Water example.

**The Convener:** It does a wee bit, but it also feeds into Kevin Stewart’s point that, if the permits had been properly issued in the first place, or reviewed in line with current changes, that situation would not have arisen.

I will move straight on because many other committee members want to come in.

**Sarah Boyack (Lothian) (Lab):** I will ask some questions about liability and how it is defined in the bill. The bill proposes thresholds of “intent or recklessness” for individuals and “consent or connivance” for responsible individuals in an organisation. Some of the substantial amount of written evidence that we have received suggests that those are very high thresholds for accountability, and that the thresholds should also include negligence. It has also been suggested that there should be strict liability for individuals or organisations, or the penalisation of neglect on the part of responsible individuals, as is the case in other environmental legislation.

I am keen to get views from witnesses on how the bill is drafted. Do you support the approach to liability?

Dr Fifield, you are nodding your head. Is that deliberate? Are you happy with the bill as currently drafted?

**Dr Fifield:** No, absolutely not. That is one of our main areas of concern. As you say, as the bill is currently drafted, the standard of “consent or connivance” is unusually high for environmental offences, and criminal offences in environmental law in Scotland generally apply strict liability as in section 40 of the 2014 act. We would recommend having a strict liability offence for relevant organisations, as defined in the 2014 act, and a separate mens rea of consent, connivance or recklessness, which aligns with the definitions in section 1 of the bill, for relevant officials.

That means, most importantly that it would exclude workers—I think that we will go on to vicarious liability in a moment. Although we absolutely appreciate and understand that the intention of the bill was to focus on organisations and senior officials, the current wording leaves it too open with respect to workers. As we said, a strict liability offence for relevant organisations means that it becomes a corporate offence. That also addresses the question in the Scottish Government’s memorandum about the difficulty of proving intentional recklessness.

The most important point here is that the pushback might be about what defence organisations would have. We suggest that, even with a strict liability offence, organisations would have a limited defence where they could prove that, on the balance of probabilities, the harm was caused solely by an unforeseeable external event, such as sabotage or natural disaster, or that there was a rogue employee who was outside the scope of the organisation’s authority. That balances strict liability with fairness and legal certainty.

**Sarah Boyack:** Do any of the other witnesses agree with that?

**Professor Fogleman:** I have a lot of reservations about making it a strict liability crime, because I do not think that the courts will want to impose up to 20 years’ imprisonment on somebody for strict liability. Shivali Fifield has a good point about having a strict liability offence for organisations and a separate mens rea for officials, but when a company’s controlling mind and will lies in the directors and officers, I do not know how that will work with strict liability on the one hand and reckless intent and so on on the other.

**Sarah Boyack:** As none of the other witnesses wants to come in on that, I will move to the next question, which is about how vicarious liability for

the acts of employees or agents is separate from acts of directors and so on who are at fault. Jamie Whittle mentioned the Wildlife and Natural Environment (Scotland) Act 2011. How does that relate to what is in the bill? Are you happy with how it is all set out?

**Jamie Whittle:** The focus in the 2011 act was much more on the relationship between employer and employee, and the vicarious liability provision in the bill is similar. An activity might not be captured by section 3 of the bill, which covers a situation in which a corporation or organisation is involved; it might be related to an individual employer. There is a double catch, as it were.

**Sarah Boyack:** And that is good.

**Jamie Whittle:** It certainly adds strength to the bill, and we support it.

**Sarah Boyack:** That is helpful. Does anyone else want to come in?

**The Convener:** Shivali Fifield had her hand up.

**Dr Fifield:** We have had a lot of conversations with the Scottish Trades Union Congress and Unison and other legal experts on vicarious liability. It takes us back to why we were talking about redefining the bill to include a separate offence for relevant organisations and officials. We can propose wording for that, which we have already drafted.

The important thing about vicarious liability is that the provision is lifted from the 2014 act and, in our view, it does not protect workers as the bill intends. It merely provides that, if an employee or agent has committed ecocide, the employer can also be charged with ecocide. The problem is that the threshold for ecocide is so high so we anticipate and are concerned that, in such scenarios, the directors, with all their resources, will find lots and lots of wriggle room and loopholes so that they can say, "Under those three caveats, it was not us. That person, that worker, that subcontractor acted without our knowledge and they should be prosecuted, not us."

**Sarah Boyack:** How would you amend the bill?

**Dr Fifield:** We would amend the bill by making it clear that only "relevant organisations" or "responsible officials", and not workers, could be culpable; we have suggested wording to reflect that.

That would clearly mean that in none of the examples in which an employee or a subcontractor has caused environmental harm could the worker be prosecuted. None of the above would be to confer any liability on the employee, worker or agent of the relevant organisation. Ecocide could be committed only by responsible officials or relevant organisations.

We would put in an additional caveat that includes specific provisions to protect whistleblowers. Otherwise, as the unions and Professor David Whyte have argued, there are too many loopholes to leave the employee as the responsible person.

**Sarah Boyack:** Do the other witnesses agree with Shivali Fifield on that issue?

**The Convener:** They are all looking away.

**Sarah Boyack:** Yes—I do not see anyone wanting to come in.

I want to follow on—

**The Convener:** Just before we move on, I think that the deputy convener wants to come in on that particular point.

**Michael Matheson:** I come back to Shivali Fifield. I want to understand fully your explanation regarding the issue of liability.

If an employee, under your definition of "worker"—I am not too sure how you would create that definition—were to act in such a way and commit an act that constitutes ecocide under the bill, and they are found to have done so and the case is proven, who, on the basis of how you are trying to amend the bill, should go to prison for 20 years?

**Dr Fifield:** What we are proposing regarding the person who commits the offence is, I think, the bill's intention.

To answer your first question on who the responsible official is, the legislation defines "responsible official" very well already. We would use the definition that appears in the 2014 act. If a front-line worker is carrying out the instructions of a responsible official, it is the responsible official, and the organisation, who would be liable, because the worker has been carrying out instructions. There is an exception—

**Michael Matheson:** Excuse me, but that is not the question that I asked. What I am asking is: if a worker acts in such a way that results in ecocide, under the basic definition in the bill, who should be sentenced by the courts?

**Dr Fifield:** If a worker who is carrying out an instruction commits ecocide, it should be the director, and the organisation. There will be very—

**Michael Matheson:** What happens if they are not acting on an instruction? What if they act in their own way, as a worker, and commit the offence of ecocide as a result? Who should then be sentenced by the courts?

**Dr Fifield:** There is an exception, in the definitions that we have given, to say that if a worker has gone rogue, a defence can be inserted

by the responsible official or relevant organisation. If they can show that, on the balance of probabilities, they took all reasonable measures within their power, and exercised all due diligence, to prevent or to stop all steps, they would not be liable. At present, however, that defence is not relevant to a worker.

**The Convener:** Just before we go back to the questioning, I think that history has proven that, if somebody knows that they are doing something wrong, defending themselves by saying that they were only following orders has never been acceptable. You seem to be suggesting that it might be acceptable. My view is that that surely cannot be the case. If someone knows that they are doing wrong, they are doing wrong and they should not do it.

**Dr Fifield:** I do not disagree with you. In discussing examples of acts being perpetrated, we are never talking about just one person. We are suggesting amendments to the bill in such a way as to ensure that, in the case of a specific act of ecocide, we put the responsibility on the organisation and the directors who take the decisions on such acts.

10:15

**The Convener:** Okay. I come back to Sarah Boyack.

I note that our time is technically up, and we have another panel after this one, so you will have to be really sharp and snappy in your answers. I am sorry if that does not give you a chance to explain everything—that is just the timescale that we have. We have a stage 3 debate in the chamber this afternoon, so I do not want to run on too late.

**Sarah Boyack:** We have just been talking about organisations and individuals. What happens if it is actually an individual who has committed the alleged crime? Would it be appropriate to prosecute an individual—for example, a member of the public who, by their actions, creates a wildfire that goes on for more than a week and has massive consequences? We have experienced that situation quite recently. Would it be legitimate, under the bill, to prosecute somebody if that was reckless behaviour?

**Professor Fogleman:** Yes. If somebody in a dry forest has a campfire and walks off and leaves it while it is still burning, and it causes a massive wildfire that destroys homes and habitats and so on, why not?

**Sarah Boyack:** Thank you—that answer was swift.

What about the other witnesses? Do I see nodding heads, or do you disagree?

**Jamie Whittle:** I agree with what has been said. One of the distinctions between the RRA and this ecocide bill is that the test on ecocide is about recklessness—it involves either intention to cause environmental harm or being reckless. The RRA extends to carelessness.

We are dealing with complete disregard for, or indifference to, the consequences of actions. The scale of damage that you allude to is very significant. It might tip into being severe—it is not for me to make that call—but it is a relevant and recent example.

**Sarah Boyack:** Thank you. Keep it snappy, convener.

**The Convener:** Thank you, Sarah—there is nothing like being told what to do as convener by a committee member. I might refer to those later questions that you wanted to ask. [*Laughter.*]

To make it clear, when I talked about a river earlier, I was not referring to the River Spey. If I had been, I would have had to declare an interest. In case anyone thinks that I was, I declare that I have an interest in the River Spey.

Let us move on to penalties. The penalties are 20 years in prison and an unlimited fine. That is massive. Is that required—yes or no?

Jamie Whittle can go first.

**Jamie Whittle:** Yes, I would submit that it is important to have severe fines to really hammer the point home.

**The Convener:** Does anyone think that the penalties are too strong, or do you all think that prison for 20 years is the right place to be for somebody who commits ecocide?

**Jamie Whittle:** I add that it would obviously be at the discretion of the court in sentencing, so it is not a sentence of 20 years or nothing—it is a sentence “not exceeding 20 years”.

**The Convener:** There is a reference to 20 years and an unlimited fine, but I take that point.

Some people have suggested in the consultation that fines should be linked to turnover, rather than the bill simply referring to unlimited fines. Would that be a good way of doing it? In the same way, some speeding fines can be linked to income. Should the fine be linked to income—yes or no? Would anyone be against doing that? It might be a good amendment to the bill.

Yes? Okay. I see that no one is against that.

I was snappy—I now move straight to Mark Ruskell for the next questions.

**Mark Ruskell:** Some of the witnesses may have already covered this issue. Do you think that the

bill is necessary for alignment with the European Union environmental crime directive? Valerie, do you want to start?

**Professor Fogleman:** I am sorry—can you repeat that?

**Mark Ruskell:** Do you think that the bill is necessary for alignment with the EU environmental crime directive?

**Professor Fogleman:** Yes.

**Sue Miller:** Yes.

**Jamie Whittle:** Yes.

**Dr Fifield:** Yes.

**Mark Ruskell:** We have looked at how other countries have introduced ecocide legislation. Are there any other lessons from, or examples of, the roll-out of such approaches that you feel that it would be relevant to highlight at this point or which you think are pertinent to Scotland?

Sue, you operate internationally, so you must have some views on that.

**Sue Miller:** When it comes to lessons to learn from ecocide law, it is still early, so there is very little evidence to present to the committee.

I do not know whether now is the appropriate time to say this, but I would say that the bill protects the precautionary principle. That is a really important aspect. I can say something about that now, but I have put in a request to speak, too. Would the committee like to hear about that?

**Mark Ruskell:** If you could be brief, that would be excellent.

**Sue Miller:** At the moment, a lot of new technologies are unfolding and being released into the world, and we know that regulation is always playing catch-up with them. You can see it happening with social media and with artificial intelligence: there is a fear about these things, and the regulation struggles to catch up.

A lot of new technologies—such as solar radiation modification, synthetic biology and so on—are about protecting the environment, but they are untested. If we have ecocide legislation in place, we already have a safe space, in a sense, for the technologies to roll out into, and it protects the precautionary principle, too. In short, ecocide legislation provides a space until regulation has a chance to catch up, and it means that much more due diligence will need to be done before such technologies are released into the world.

That was the little piece that I had to say about that.

**Mark Ruskell:** That is a useful point. I assume that, because the precautionary principle is

embedded in EU law, adopting ecocide legislation, in effect, provides states with a way of maintaining alignment. Is that the point that you are making?

**Sue Miller:** I do not know whether it is specifically that point. Ecocide legislation creates a safe space, but I am not sure whether it is specific in that sense. I would have to get back to you on that.

The general principle is that, if you release something into the world that creates the sort of damage that would qualify as ecocide, you will be putting yourself in a dangerous situation. I think that such an approach would act as a very strong safeguard when it comes to new technologies.

**Mark Ruskell:** If there are no further reflections on that, I will hand back to the convener—or did you want to come in, Jamie?

**Jamie Whittle:** Yes, perhaps I can add to Sue Miller's point about the precautionary principle by pointing out that another key guiding principle on the environment is the preventative principle, and both are embedded in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which we have as part of our exit from Europe. Therefore, they are enshrined in Scots law.

**Mark Ruskell:** Thank you.

**The Convener:** We come, at last, to Douglas Lumsden, who has kept very quiet through the whole session. You have some questions, Douglas.

**Douglas Lumsden (North East Scotland) (Con):** Yes, convener. I will be quick.

On enforcement, is section 9 of the bill, which seeks to extend enforcement powers in relation to ecocide, sufficient to ensure that the relevant authorities have the power to investigate a potential offence?

I will come to Jamie Whittle first of all. Do you have a view on that?

**Jamie Whittle:** I do not have a specific view on that. Indeed, we did not pick up on that question in our written submission, as we do not have any suggestions to make on that section of the bill.

**Douglas Lumsden:** Does anybody else have a view on that? I might be really quick here, convener.

**The Convener:** Monica Lennon will have a chance to ask her questions, too.

**Douglas Lumsden:** I have another question on enforcement. We heard earlier that organisations such as SEPA are really up against it when it comes to resource. How will giving SEPA even more powers through the bill help when it is already struggling in that respect?

**The Convener:** I think that Valerie Fogleman wanted to come in on that point. Did you want to come in there, Valerie?

**Professor Fogleman:** No.

**The Convener:** I apologise. Sorry, Douglas—please continue.

**Douglas Lumsden:** If SEPA is already struggling for resource, how will giving it extra powers help?

If no one has an answer to that, I will ask one other question. I am trying to understand what would happen if an incident happened in Scotland but the organisation's headquarters was in Carlisle, for example. How would the proposed ecocide law work if the organisation was headquartered somewhere else?

Perhaps Jamie Whittle could give us a Law Society of Scotland view. How would that be handled?

**Jamie Whittle:** I would suggest that, if the crime takes place in Scotland, even if a foreign company or a company outwith Scotland was responsible, the company could still be prosecuted in Scotland, as Scotland would be the jurisdiction where the prosecution would take place, regardless of any individual's nationality.

**Douglas Lumsden:** Let us say that the organisation was based in the United States. How would a 20-year penalty that had been imposed on a US company be enforced? Would there have to be an agreement to get the individual back to a court in Scotland? How would it work?

**Jamie Whittle:** I need to pass on that, but I can come back to the committee in writing more fully.

**Douglas Lumsden:** Does anybody else have a view on how that would work cross border?

If not, I will hand back to the convener.

**The Convener:** Monica Lennon has a couple of questions.

**Monica Lennon (Central Scotland) (Lab):** Thank you for the opportunity, convener. I also thank our witnesses. It has been encouraging to hear the broad support for the principles of the bill. Many of the points that have been raised relate to matters to which I gave careful consideration when thinking about drafting options. I am struck by the discussion and the questions around how we get the wording and the terms correct and achieve proportionality in relation to culpability, liability and the defence of necessity.

I am also encouraged by the Scottish Government's memorandum to the committee—I hope that the witnesses have had a chance to look at it. It might allay some of my colleague Kevin

Stewart's fears about the timing of the bill, although I have been reminded that a number of bills were completed in the final week of the previous session of Parliament. We still have quite a bit of time in hand.

As for what stage 2 amendments could look like, you have been working on some suggested wording, Dr Shivali Fifield, and it would be good to see that. I am certainly open to discussing amendments.

On the issue of responsibility should an ecocide crime occur, I am sympathetic to the concerns about undue pressure on workers and the risk of coercion. I guess, Dr Fifield, that you are saying that responsibility could be shoved down to workers while people at the top of an organisation try to get off scot free. How could the bill and the communications around it raise everyone's awareness of taking responsibility, so that we can achieve the aims of the bill, which are about preventing the harm of ecocide from occurring in the first place?

I am keen to hear from Dr Fifield, but it would be helpful to hear if anyone else has a comment on that.

**Dr Fifield:** We have already talked about the extent to which having an ecocide act would increase awareness and understanding within organisations to improve practice, and perhaps also to encourage a wider culture of reforming the permitting system and reviewing wider environmental governance issues, as Jamie Whittle has already discussed. There is something about having a positive culture and a positive change.

As the bill stands, and as I have said already in the conversations that I have had with unions, the provisions on vicarious liability are too open. There are things that we could propose to make the bill tighter, so that workers are not scapegoated.

On the point that Ms Boyack raised with me about individuals committing significant environmental harm, we must remember that we have a suite of environmental laws that should address that. We are talking about ecocide-level crime; we should be able to address individual misdemeanours under existing environmental laws, such as the Regulatory Reform (Scotland) Act 2014 and the Wildlife and Natural Environment (Scotland) Act 2011.

On your point about vicarious liability, we can ensure that the bill relates to corporate offences at the highest threshold, as intended. That would be in line with the EU directive as well.

I do not know whether there is anything else that you wish me to address.

10:30

**Monica Lennon:** Would anyone like to add to that?

**The Convener:** Do you have a second question? I am conscious of the time.

**Monica Lennon:** I will make this the final question because I am also keen to hear from the second panel of witnesses. We know that the EU environmental crime directive has become quite well established and that it will come fully into effect for member states in May next year. What risks might there be if Scotland does not criminalise ecocide? What might be the attitude in the EU and other jurisdictions to doing business with Scotland if we do not keep pace on the matter?

Sue, can you respond first?

**Sue Miller:** I guess that there would be a mismatch of expectations and regulations in relation to any business that was carried out with the EU. Scotland's stated objective of keeping pace with the EU is also important. Those are the primary issues. Scotland will want to keep in lockstep with the EU in its on-going trade and commerce, but there is a danger that it will fall out of sync.

**Professor Fogleman:** I second that. The environmental crime directive is major legislation. It took an unbelievable amount of time to put that together after an unbelievable number of amendments, many of which focused on ecocide. It would be a real shame for Scotland to fall out of sync with that.

**The Convener:** I thank the witnesses for coming to give evidence. I apologise for making you answer more questions and stay longer than you had expected, but that may have happened because you gave such detailed answers, so I am going to let you shoulder some of the blame. I know that some of you have offered to submit information to the committee after the meeting. The sooner that you can do that, the better, because there are pressures on our timescale.

I suspend the meeting until 10:40.

10:32

*Meeting suspended.*

10:41

*On resuming—*

**The Convener:** Welcome back, everyone. I welcome to the meeting our second panel of witnesses on the Ecocide (Scotland) Bill: Catherine McWilliam, nations director Scotland, Institute of Directors; Professor Simon Parsons,

director of environmental planning and assurance, Scottish Water; Elspeth Macdonald, chair—I mean, chief executive officer; I was probably promoting you—Scottish Fishermen's Federation; and Jonnie Hall, deputy chief executive officer and director of policy, NFU Scotland.

Thank you all for attending. You will have seen how, at the end of the last session, I was trying to keep things moving, because of time, and I apologise for having kept you waiting. I do not like doing that, and I do not like having to apologise for it, but I hope that you will accept my apologies.

My first question is a simple yes or no one, just to warm you up for the rest of your answers. Is a new offence of ecocide needed in Scotland? I will start on my left: Jonnie, is your answer yes or no?

**Jonnie Hall (NFU Scotland):** No.

**The Convener:** Elspeth?

**Elspeth Macdonald (Scottish Fishermen's Federation):** No.

**The Convener:** Simon?

**Professor Simon Parsons (Scottish Water):** No.

**The Convener:** Catherine?

**Catherine McWilliam (Institute of Directors Scotland):** I am not going to be able to give a specific yes or no. Because of the nature of the IOD, some of our members will sit on either side of the argument. I would say that the principle is commendable, but we need more guidance.

**The Convener:** Thank you.

My next question is based on that. Do you think that there is a significant risk of an ecocide event, as defined in the bill, happening in Scotland? We will start the other way round, with Catherine McWilliam.

**Catherine McWilliam:** I refer you to my previous answer. We would be looking for more clarity and guidance on some of the terms in the bill, which is an issue that we will probably discuss later.

**The Convener:** It sounds as though you are taking the fifth amendment. Simon?

**Professor Parsons:** I will be taking the same approach. We need to understand what will actually lead to a conviction under the bill, but it sounds as though a lot of it is about intent. Therefore, it would be important to understand what was meant by intent to cause such incidents.

**Elspeth Macdonald:** A lot of clarification will be needed. I am not a lawyer, but my reading of the bill as drafted makes me think that lots of things could fall under the criteria for ecocide as it has

been set out. That is why this type of discussion, and the clarification that will be needed on the bill's intent and what it will capture, are extremely important.

**Jonnie Hall:** To echo my fellow witnesses, a significant amount of work will be required to define what is meant by intent to cause harm and terms such as “long-term”, “widespread” et cetera, particularly in a farming context where we are talking about many and multiple agricultural businesses—17,500, to be exact—of different sizes and operating in Scotland at different scales. Such things suddenly become very important when it comes to deciding what would constitute an ecocide event, and I am also thinking about the context of the regulatory framework that already exists to prevent environmental damage. I am sure that we will come on to discuss some of that.

10:45

**The Convener:** I was going to say that you had all done so well, but Jonnie Hall blew it by more than a sentence or two. Do you think that we should make ecocide a criminal offence? I will start in the middle and work my way outwards, which means that Elspeth Macdonald should speak first.

**Elspeth Macdonald:** I have very serious concerns about making ecocide a criminal offence as it is defined in the bill.

**Jonnie Hall:** If the intent of the bill is to prevent environmental damage of any sort, as I have already alluded to, there are significant safeguards and measures already in place as deterrents, so I do not think that an ecocide bill is necessary.

**Catherine McWilliam:** Similarly, as colleagues have already commented, our concerns relate to the unintended consequences and some of the indirect consequences of ecocide being made a criminal offence. We would be particularly concerned that this would add to the cumulative regulatory burden for the small and medium-sized enterprise community.

**Professor Parsons:** We have very strong environmental regulations already in Scotland, which work on a mixture of deterrents and support. I am not sure that greater deterrence is the best route to achieve environmental improvements.

**The Convener:** I will move to the next question. At the start, I should have clarified my interests, although I know that committee members get bored of it. I suspect that, as Jonnie Hall will speak a bit about agriculture, I should remind committee members that I am a member of a family farming partnership in Moray, but I am not a member of the NFUS. That is my declaration out of the way, so I hand over to Sarah Boyack.

**Sarah Boyack:** Do the witnesses agree with the definition of ecocide? Is it clear to you what kind of and what level of environmental harms the bill is targeting, or do you think that that could be clearer? Who would like to kick off?

**Catherine McWilliam:** To set the context, as the committee will be aware, the Institute of Directors Scotland is a cross-sector, cross-industry organisation of leaders and decision makers across Scotland. To go back to my earlier comment, it is very difficult for us to land on one side of the issue or another, given the nature of our membership.

With that in mind, we have had a conversation with some of our ambassadors who work across sustainability. It is very clear that the definition and the terminology will be critically important because it feels as though certain elements are open to interpretation. We accept that the detail will come in the guidance notes, but it is absolutely critical that those elements are clear. From the point of view of the boardroom, we have questions about the practical implementation of the bill as it is currently defined, taking into account the questions that non-executive directors would have to ask. Given that many of them are experienced in certain areas but not others, we need to consider how we make it easy for people to not fall into traps.

**Professor Parsons:** The definition of ecocide is of unlawful acts with a

“substantial likelihood of severe and either widespread or long-term damage to the environment”.

I think that we can all understand the definition to a degree, but it is about what it actually means. What would constitute “widespread” or long lasting? The rules and guidance that accompany the bill will be very important for my organisation and others.

**Sarah Boyack:** Is that about the definition that is in the bill or is it about the guidance?

**Professor Parsons:** Currently, if I read the definition as it is written in the bill, we can probably all understand the scale of an ecocide issue, but we would need some guidance as to what each of the terms means and how they would relate to our organisation.

**Sarah Boyack:** That is very useful, thank you.

**Jonnie Hall:** The bill has a wee bit of guidance about geographical spread and the impact on species or habitats. Part 1 of the bill uses the term “widespread” and talks about the long-lasting element of environmental damage. Nevertheless, as I have already alluded to, if committing ecocide is to be a criminal act, clearer and more in-depth guidance about how it will be interpreted and,

therefore, what might constitute a crime, will be required.

**Elspeth Macdonald:** I very much agree with my colleagues that, as it stands, there is not sufficient clarity in the bill about the definition of ecocide. Also, there is no clarity about what is not ecocide. I would be concerned about the definition—as it stands, to my reading—capturing a number of legitimate, regulated activities that might, nonetheless, cause widespread and long-term environmental harm. Those could be a wide range of things, such as building new roads and offshore wind farms. We need much greater clarity around the definition of what is and is not ecocide.

**Sarah Boyack:** Thank you—everybody was quite succinct, which is really good.

Could you give us your views on whether the definition of ecocide in the bill should apply to environmental harm caused cumulatively, as a result of a course of conduct or on-going activity, versus a one-off single emergency-type incident? How would that impact on different types of industries and economic activity across the country? You have already mentioned some forms of economic activity that could be included. Do you want to expand on that?

**Elspeth Macdonald:** I am certainly concerned about the possibility of the cumulative impact of legitimate, regulated, legal activity being considered as ecocide.

That touches on a wider point around ecocide that I have noted as I have been reading into the subject matter. Various academic articles talk about the fact that much of the significant environmental harm that our world faces is caused by the cumulative activities of all of us—all of the things that we do as we go about our day-to-day lives, whether that is getting on a plane to go on holiday or all sorts of other activities. If the bill is to progress, there needs to be greater clarity on the distinction between one-off emergency major incident-type events and the cumulative impact of lots of different people undertaking lots of different, perfectly legal, legitimate and, in many cases, regulated activities. That is a really important distinction that needs to be made, and I do not think that that comes through in the bill.

**Sarah Boyack:** Would you like to come in, Jonnie? I am thinking particularly about Scottish businesses' use of natural resources for food production.

**Jonnie Hall:** Clearly, long-term implications are vitally important. We now live in a world where, certainly in an agricultural context, we must deliver on our sustainability agenda. The term “regenerative” is very much part of the agenda that Scottish agriculture is being asked to—and will—deliver on. Therefore, we are talking about time

horizons in which things could accumulate over different time frames.

If we are talking about specific events in an ecocide context as being one-off events, I would almost draw a parallel with the difference between point-source pollution and diffuse pollution. There is a difference between a significant event that might cause a consequence, and impact that might accrue over time because of on-going practice that, as Elspeth Macdonald has already alluded to, is already well governed and documented.

As we sit here today, we might not know the future environmental impact of today's activities. People who are operating today, in an agricultural or other context, might be doing so within the regulations and in good faith, but, at some point, somebody might say that, actually, over time, that activity has created an environmental impact that we did not appreciate. Will that activity be considered as a criminal offence? There is a distinct difference between the two things—a one-off event today versus something that might happen over time. Therefore, we need to tread carefully in differentiating between the two.

**Professor Parsons:** I agree 100 per cent with what colleagues are saying. We can probably all understand the definition being applied to an individual event that causes a very widespread impact. However, there could be impact from a continuation of activities that we are licensed to do, such as extracting from and discharging to the environment. If we are compliant with those licences and, in X years' time, we think that they are no longer the right activities, it would be very difficult to understand why we should be prosecuted for that.

A good example of something that we are all working with in society at the moment is perfluoroalkyl and polyfluoroalkyl substances or PFAS—if you have heard of that. Ten years ago, PFAS were viewed as good. However, they are now widespread across the environment—at some point in the past 10 years we have all probably bought something that contains PFAS. They are now widespread in the environment.

**The Convener:** I have no idea what that means. Could you explain it to me?

**Professor Parsons:** PFAS are a series of chemicals that are in Teflon and are used in waterproof coatings. They are called “forever chemicals” because they do not degrade in the environment. Their use has been widespread across the world.

We now have standards for our drinking water in the UK—and Scotland had those standards well in advance of the rest of the UK—to ensure that there is no pollution from PFAS in our glasses of

water and to protect the water that we use in our homes.

However, we find PFAS in water sources all across Scotland; whether in the Fair Isle or in Edinburgh, we find PFAS. We have used those chemicals for many years, thinking that their use was a good thing, but PFAS are now widespread in the environment and we do not quite know how to get them out.

**The Convener:** Okay, so my frying pan is bad for two reasons.

**Sarah Boyack:** Presumably it partly comes down to a risk assessment, as well. Catherine McWilliam, what are your thoughts?

**Catherine McWilliam:** I will give a very specific example about what is important when we overlay this work with other initiatives or projects that are taking place. My members in the Highlands and Islands are all very rurally located. They are actively campaigning for things such as the upgrade to the A9 so that they can get more people to come into the area to appreciate it for its natural beauty. That is the first example of a conflict.

When considering things such as the current diversion on the North Coast 500 route, we have to come back to what that actually involves and what we mean by ecocide. We are trying to encourage more people to come a beautiful region in Scotland, but in order to get them there, we need the infrastructure in place and the amenities to support that.

**The Convener:** Bob Doris wants to come in, but first I want to press on one little thing. Under the offence of ecocide, the bill defines long-term harm as damage that

“is irreversible or is unlikely to be reversed through a process of natural recovery within 12 months”.

That means that, although something might be able to be done to speed up the process, if there was not a natural recovery process, an unfortunate event would still be ecocide, even if somebody had done everything in their power to reverse it. Are you comfortable with that?

**Jonnie Hall:** We have a principle that is already established under cross-compliance in relation to agricultural support payments. If one of the cross-compliance requirements is breached—not all the requirements say this, but some do—a farmer or crofter has up to 12 months to reverse that. That removes the permanence element.

In the context of the bill, this relates to the issue of damage that is not long lasting. If something can be reversed, a penalty might be attached in relation to support payments, but an incident will not result in further punishment.

**The Convener:** My understanding of that situation is that people can take action themselves—

**Jonnie Hall:** Yes.

**The Convener:** —whereas the bill says that there has to be

“a process of natural recovery”,

which confirms that people cannot do anything. If nature cannot reverse something, it has got to be ecocide.

**Jonnie Hall:** I think that that is a very short term and myopic view. If someone can intervene to rectify an issue, that should be an option.

**The Convener:** I see nods.

**Bob Doris:** My question is on the exact same thing, but that is fine, because maybe it shows that there is something in that. I wonder whether 12 months is always a realistic recovery period. It must have been based on incidents or events that have already happened, but the natural cycle of things might mean that 18 to 24 months would give enough time for a robust and evidence-based recovery plan to be put in place, rather than having a cliff edge of 12 months. Does Jonnie Hall have any comments on that?

11:00

**Jonnie Hall:** I agree. The 12-month period—and, indeed, the whole cross-compliance framework that Scottish agriculture currently operates under—is a legacy of being part of Europe and under the common agricultural policy. I suspect that it would be within the gift of the Scottish Government and the Scottish Parliament to change that requirement, if that were deemed the right thing to do.

We operate under EU retained law in many respects in relation to the environment, not least in an agricultural context. The 12-month period is simply a hangover from the common agricultural policy and cross-compliance from Europe. I am not saying that it is necessarily right; we could look at extending it. Certain situations may well need time to recover and require us to go in with a more natural approach, rather than going in with a more interventionist approach to hasten the recovery.

**Bob Doris:** My point was not that we should ditch the 12 months; it is about having a bit of nuance and light and shade. Do you have examples of situations where a derogation would be reasonable, rather than ditching the period altogether?

**Elsbeth Macdonald:** The proposed time limit is arbitrary. The time limit for recovery, whether it is

natural or human enhanced, will surely depend on the nature of the harm.

Restoration after some types of environmental harm might be able to happen quite quickly, while it might be much slower in other situations. It is therefore difficult to pick an arbitrary figure as the definition of the long term for all types of harm that might be captured under the bill.

**Bob Doris:** Again, because of time constraints, I will not explore that further.

I will turn to my final comment on the definition. This point does not mean that I disagree with the policy intent of any of this, but I think that there might be a need for clarity. I think that the witnesses on the previous panel pretty much all agreed that, if an individual left a barbecue in an open area and it led to a forest fire and there was significant damage, that would be seen as an ecocide event. However, we heard in the same evidence session that the policy intent is also to create a corporate offence at the very highest level.

A forest fire is an event at a very serious and high level, but that does not necessarily mean that it is a corporate offence. Is there a blurring around the intention of the bill? If we have an offence in relation to barbecue fires, and then a corporate offence at the highest level, they seem to rub up against each other a bit. I do not know whether you heard the previous evidence session, but do you have any comments on that?

**Elsbeth Macdonald:** Under the bill as drafted, it is not clear exactly what ecocide would be.

**Jonnie Hall:** I agree.

**Professor Parsons:** It would be really important to know whether the barbecue fire example met what is a very high bar in terms of the definition of ecocide, compared with other crimes, for example. When I walked in here today, I would not necessarily have thought that a barbecue fire could be considered ecocide.

**Bob Doris:** Maybe I have picked up the previous evidence session wrong, and the point is about a lack of clarity rather than a flaw in the bill, but I wanted to draw that to your attention.

**Professor Parsons:** A big part of the bill is about intent; I think that “wanton intent” is one of the phrases. My reaction to your comment, Mr Doris, is that what you described seems like a very different crime from what I would have perceived to be hitting the bar for ecocide.

**The Convener:** I clarify that the term “wanton intent” was taken out.

**Mark Ruskell:** Jonnie Hall spoke about making a distinction between a catastrophic event, such as a point-source pollution, and longer-term

practices that might degrade the environment over time and which we might not know about until it is too late.

Can you point to particular risks around ecocide in each of your sectors? Are you saying that you do not see ecocide applying at all to your sectors and that you are more concerned about a wider definition that could capture long-term management of farms, the seas and Scottish Water assets over time? Are there other examples in farming—say, a pollution incident in which hundreds of tonnes of slurry goes into a river and kills it off—that you could clearly call ecocide?

**Jonnie Hall:** That sort of thing is already governed by regulations that SEPA enforces. That is the point that I really want to make—there is a whole raft of environmental regulation, and not just on cross-compliance with regard to agricultural support payments and grants et cetera. There are actual laws of the land that SEPA already enforces on exactly the sort of thing that you have just highlighted—that is, point-source pollution, with slurry escaping into and polluting a watercourse, or whatever it might be. Moreover, to safeguard our environment, there are other things that relate to more widespread prevention of agricultural damage, and which set out what farmers and crofters are and are not allowed to do.

At the end of the day, Scotland’s agriculture and food and drink sectors will in many ways utilise—and, indeed, need to utilise—their environmental credentials as a unique selling point for what Scottish agriculture produces and what the food sector delivers. It is critical that that integrity is backed by a degree of regulation, as well as, for example, farm assurance schemes.

I could list a whole catalogue of existing things that require farmers and crofters to prevent agricultural pollution. We have something called the PEPFAA code, the first P of which stands for prevention, and there are various pieces of legislation behind that. If an incident happens, SEPA has the capacity to issue penalties or, in the more extreme cases, take people to court and have them prosecuted.

**Mark Ruskell:** If yours is a highly regulated sector where prevention comes first, what is your concern about addressing ecocide? What would Simon Parsons’s concern be for the water industry? If it seems inconceivable that there could be ecocide, what is your concern about adopting such an approach, if you think that it does not apply to your sectors?

**Professor Parsons:** First, I would say that, in the same way that Jonnie Hall just described, Scottish Water is hugely dependent on a healthy environment for the water that we take and the discharges that we put back into the environment,

and we have benefited from a very strong and collaborative approach to regulation here in Scotland, with SEPA and other bodies as part of that.

Therefore, I think that the regulations that we already have are successful, and they work in a way that encourages us to be better every year. If we are not, and if there are instances where we are not good enough, there are penalties that SEPA, in particular, will issue to us. We are also subject to regulations on significant environmental harm, so the key question is: does the bill represent the next level up from that sort of environmental harm? As for whether the bill will change how we manage our abstractions, our reservoirs or our discharges to the environment, I do not think that anything in it at the moment will lead to that sort of change.

**Mark Ruskell:** What is the concern, then?

**Professor Parsons:** More regulation.

**Mark Ruskell:** You have said that the bill would have no impact, because you are already highly regulated. I am not sure what your sectors' concern is. Does Elspeth Macdonald want to come in?

**Elspeth Macdonald:** Again, my sector is highly regulated and again, like Jonnie Hall's sector, it is made up of a large number of businesses that range from very small ones to bigger ones, but which largely fall within the definition of SMEs. There is lots of sector-specific legislation.

My concern about the bill—I am not a legally qualified person; perhaps I can be better informed by somebody who is—is that I am not clear about whether things that might be legitimately undertaken by people in my industry might be captured by some of its definitions. I would like clarification and further information on that.

We have all talked about the fact that our sectors are heavily regulated, and there might well be an issue about how well all that existing legislation is being enforced. Perhaps the committee and parliamentarians might want to consider that as the bill moves forward; we already have a lot of legislation, and the bill would add another layer. If the issue is that the existing layers are not being adequately resourced or taken forward, addressing that might in turn address some of the concerns that might lie behind the bill.

It is really important to recognise my perspective and that of Jonnie Hall. We are in the business of producing food, which is a public good. It is also important that people understand that there can be no food production without some sort of impact. We do not want the bill to inadvertently capture, in its definition of ecocide, the cumulative impact of legitimate regulated activities.

**Mark Ruskell:** Do particular parts of Catherine McWilliam's membership have particular concerns? Are your members all saying that everything is fine because they are regulated, that they see no threats and that they just do not like the idea of ecocide and what it might turn into?

**Catherine McWilliam:** Some of those issues have been dealt with by other speakers. We take a more general approach, looking at SMEs and particularly at micro SMEs. There should be an element of proportionality to any penalties that are imposed. That goes back to understanding the terminology and definitions that are used in the bill. We do not have feedback from any specific sector, but we could look to gather that over time.

**The Convener:** The deputy convener wants to come in and then we will move to questions from Kevin Stewart.

**Michael Matheson:** I am hearing from some of you a feeling that the bill is not necessary, while some are seeking further guidance or explanation about some of the bill's provisions. It is worth reflecting on the fact that this is not a regulation-making bill; it is a bill that would create a criminal offence. The guidance and explanatory notes associated with the bill will take you only so far, because the real definition will be set by the courts and some terms will be defined by the courts if the bill is passed.

Is it your contention that the existing regulatory framework for dealing with environmental offences is sufficient? If it is not sufficient, where are the gaps that should be addressed so that the bill would be unnecessary?

I put that question to you first, Jonnie.

**Jonnie Hall:** My immediate reaction is that the existing regulatory framework in the agriculture and land use context is sufficient. I cannot think of any particular environmental event relating to agricultural land use that would not be covered by the existing regulations, which means that there is recourse for the authorities—either SEPA or the Scottish Government's approval of payments and inspectorate division—to take action where that is necessary.

**Elspeth Macdonald:** I agree. I believe that we have an extensive raft of legislation that regulates our sector and is capable of dealing with illegal activity and with the types of offences that might be carried or the harms that might be caused.

When I cast my mind back to when I read the policy memorandum for the bill, my recollection is that it did not seem to me to set out evidence of any need for the bill. It spoke quite a lot about beliefs about ecocide and about thoughts and feelings about environmental protection. Those are all extremely important and valid, but does that

meet the test for making something a criminal offence? I do not recall seeing any evidence in the policy memorandum that set out why Scotland needs an ecocide bill.

**Professor Parsons:** I agree. Scotland has a strong regulatory framework. If I try to think about any incidents that might lead to a criminal case of ecocide, I do not see anything that would not be covered by existing regulations. When I think about abstractions, or about the management of reservoirs or of discharges to the environment, I do not see anything that would not be covered by existing regulations.

If the offence part is linked to our being grossly irresponsible or to deliberate behaviour, I would see it being captured as part of our corporate licences and how we interact with organisations such as SEPA. At the moment, I cannot see what having it as a criminal offence would add to our current regulations.

11:15

**Catherine McWilliam:** I am far less of an expert in environmental regulation than my colleagues are, so I can only give a general response to that question. What we hear consistently from our members is that people get the what and why around a lot of the regulation that we have in Scotland, but that a lot of the difficulty comes with the how. Implementing regulation is about support, guidance and resource; it is not necessarily about the funding or the money, but about where people get the case studies and the best practice advice. It could come down to the question of how we communicate with existing regulators, what needs to be done and how it can be done across a variety of sectors.

**Kevin Stewart:** Good morning. Some of you have already answered this question, but I would like a yes or no answer, please, for the record. Is it clear to you how the bill would interact with existing environmental legislation and regulation?

**Catherine McWilliam:** Not currently.

**Professor Parsons:** No.

**Elsbeth Macdonald:** No.

**Jonnie Hall:** No.

**Kevin Stewart:** That is clear. We talked with the earlier panel about some of the existing legislation and regulation, particularly section 40 of the Regulatory Reform (Scotland) Act 2014; we also talked about how the bill could possibly interact with environmental liability regulations. The conversation then drifted on to permits and licensing. Some of you have already said that what might be required is a review of licensing or permissions rather than this overarching bill. Do

you have comments about section 40 of the 2014 act, and what do you think about permits and licensing?

**Catherine McWilliam:** That is not an area in which I have any expertise at all.

**Kevin Stewart:** Fine, thank you.

**Professor Parsons:** Obviously, that act has been with us for a while. The difference that I see here is that the bill looks at “severe” harm rather than “significant” harm. Regulation about significant harm is already part of the act.

Scottish Water is very reliant on SEPA’s setting of permits or licenses; our job is then to meet those licenses because SEPA has determined what the environmental capacity of, say, a water source or a discharge point would be. Our role is very much about ensuring that we are compliant with those licenses and permits; as part of that activity, having a programme that ensures that they are updated, refreshed and fit for current regulation would make sense. At the moment, the framework for organisations such as ours wanting to discharge to or take from the environment is that that activity is managed with permits and licenses. That works.

**Kevin Stewart:** So, updating those permits and licenses would be the priority to take into account things such as the forever chemicals that you mentioned earlier?

**Professor Parsons:** Forever chemicals or, probably the biggest challenge that we face, which is climate change. It is about how we are adapting our operations to climate change, which we have very much seen this year across much of the east of Scotland with water shortages, for example, when we have had extended periods of dry weather.

**Elsbeth Macdonald:** Like Catherine McWilliam, I do not have any specific expertise around section 40 of the Regulatory Reform (Scotland) Act 2014, so I do not consider myself well qualified to speak to that.

My industry is a licensable activity; fishing vessels must be licensed before they can catch fish commercially. It is not an industry where permits are involved, and licensing is carried out in a rather different way under fisheries legislation. However, the way that existing legislation interacts should be sufficient to allow us to use those systems to manage businesses, and look at businesses that are compliant and those that are not.

I want to make a point that is perhaps slightly more relevant to the last question from the deputy convener. The background information about the bill talks about a review that is under way by the Scottish Sentencing Council, looking at penalties

and sanctions in wildlife and environmental legislation. That, too, is perhaps pertinent to what we are talking about today. How effective is the existing law in dealing with environmental harm and how much is there a need to do anything more?

**Jonnie Hall:** I will not go into the regulatory detail of section 40, but in relation to the water environment in particular and how agriculture interfaces with it, we have a cascade all the way back to the water framework directive from Europe. The Parliament passed the Water Environment and Water Services (Scotland) Act 2003 and, ever since, we have had a raft of regulatory frameworks that have created a licensing regime for SEPA, whereby there are general binding rules for light-touch activities. However, as the interventions, actions or activities go further up the scale, there are authorisations at one level and then we are talking about licences. All that is currently in place.

That is not to say that it should be fixed forever more. We would argue that some of that needs to be reviewed, as Professor Parsons said, due to changing circumstances and so on. However, there is clearly a place for having a regulatory regime that is governed by elements of authorisation and licensing—call it what you want. That is vital.

In the other context, we have something called the Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017, which means that farmers and crofters cannot just go on their land, drain it, plough it and do whatever they like. They have to get prior notification for all those things. Therefore, as I have said a few times this morning, there is that element of a focus on prevention rather than anything else. We would be the first to say that if somebody overrides that, ignores that and just goes in and intentionally does something to the environment that they have some responsibility over, throw the book at them, but that book already exists. SEPA already has powers to take individuals to court and impose fines or whatever, but that is such a rare event in our industry. Everybody operates within a regulatory framework, and they understand why.

**Kevin Stewart:** It has been said about the regulatory reform act that there have been very few prosecutions. Is that because people are adhering to the existing legislation and regulation?

**Jonnie Hall:** In the interface between SEPA and farming and crofting, SEPA has been incredibly well engaged with the farming community, particularly in priority catchment areas. It has recognised the fact that there is no criminal intent on behalf of farmers and crofters to cause environmental damage. Environmental

damage can occur through a lack of awareness, confusion and a degree of non-compliance. In those situations, it is far more important that we educate, change and guide individuals to do the right thing, rather than necessarily take them to court. However, where there are cases where people have clearly ridden roughshod over the requirements that they should be adhering to, fixed-penalty notices are served and, occasionally, they go to court. It is a case of looking at the matter in context and, when an environmental incident happens, asking about the intent. I guess that that is where the concern is about the bill.

**Kevin Stewart:** One of the previous witnesses said, and I paraphrase, that the bill would be the safety net at the outer limit of activity. Jonnie, am I right in saying that you are arguing that we maybe require to ensure that existing regulation and legislation is well known by the folks that you and others on the panel represent in order to get preventative measures in play?

**Jonnie Hall:** I agree.

**Kevin Stewart:** I see that Elspeth is nodding. Simon?

**Professor Parsons:** Very much so. We are very different as we are a single organisation, rather than being a body that is made up of smaller organisations. Compliance with our licences and regulations is incredibly important for us and the organisation is very focused on that. Occasionally, we are not compliant, but for the vast majority of time, we are.

**Kevin Stewart:** Catherine, does that apply to your members?

**Catherine McWilliam:** Yes, broadly speaking.

**Mark Ruskell:** I am interested in a scenario in which the bill, as it stands, is passed into law. What would change in your sector as a result and is that to do with governance or risk management?

Catherine, you represent a wide range of interests including, I imagine, big oil and gas majors such as Shell and BP with complex corporate governance structures, right through to SMEs. Let us start with the bigger companies: what are your bigger members telling you would be the impact on the culture in the board in relation to governance and risk management if the bill were to become law?

**Catherine McWilliam:** For larger members, it may be slightly easier, because they would have expertise in their organisations to look at examples elsewhere. We know that in Europe and the Pacific Islands, similar legislation is already in practice and learning could be taken from there. We have concerns about smaller organisations, because they will have smaller boards and different types of expertise around the table. We

would need to consider how we ensure that people are equipped with the resources and knowledge that they need in order to have the right conversations in the boardroom so that they are not caught out unintentionally. For me, that comes down to the proportionality element of the possible penalties and punishments in the bill. I know that the point about criminality has been made a few times, but time needs to be spent on the guidance notes to help people to be preventative rather than reactive.

**Mark Ruskell:** It surprises me that some of your larger corporate members would not be concerned about the bill. Am I right that smaller members think that an ecocide event might be possible under their control?

**Catherine McWilliam:** It is not that larger members would not be concerned but, from the conversations that we have had, I feel that they would be better equipped to act.

**Mark Ruskell:** So, they would be better equipped to deal with it.

Simon Parsons, from the perspective of a state utility, what would change if the bill passed into law?

**Professor Parsons:** As with any new legislation or regulation, we would need to look at it and understand from a board and leadership perspective whether our current processes and risk appetite would need to adapt. A big part of that would be to ensure that senior leadership across the business understood the new legislation and what would constitute good or bad practice under it. We are quite used to new legislation and new regulation being introduced. When that happens, we ensure that we and the board understand the implications. We would test whether or not we would need to make any changes to our processes to meet the new requirements, although I would hope not.

**Mark Ruskell:** No immediate changes are required. You operate in a highly regulated environment, with ministerial objectives and an economic regulator. Is that system fit for purpose under the bill?

**Professor Parsons:** Yes.

**Mark Ruskell:** Earlier, if I picked it up correctly, Elspeth Macdonald said that there are some concerns within the sector about the lack of investment in enforcement. Is your point that there could be situations in which fishers go into an area where a species gets fished out, which could constitute ecocide, but, because there is a lack of enforcement, licensing and enforcement of the licence should have kicked in earlier and people are therefore left in a difficult situation? I am just trying to imagine it from the fishers' point of view.

What is your concern? What changes as a result of the bill? Are you reliant upon the state effectively requiring you to stick with and enforce the licences, or does the bill bring in a new set of responsibilities for you? How do fishers address that challenge?

11:30

**Elspeth Macdonald:** No. My issues are different. My sector is concerned about a general diminution of resources in the marine directorate and in what it can deliver across the piece. Before parliamentarians embark on such a significant measure as is in the bill, it is important that they understand the effectiveness of existing legislation and its enforcement.

Your question was about what would change in the sector if the bill was passed as it stands. What is and what is not ecocide is not clear to me, and it is not clear whether the cumulative impacts of lots of different actors could be considered to be ecocide. As Jonnie Hall highlighted, most members of our industry do their best to be compliant, and if they are deliberately not compliant, there is a book that should be thrown at them.

What would change in the sector? The majority of people would continue to go out and do what they do because theirs is a legitimate regulated activity. What would change is not so much in the sector, but some of the environmental non-governmental organisations might start to put pressure on the regulators to say things like, "My goodness! This is the cumulative impact of trawling and it is having a widespread impact that will be long term and it could cause environmental harm."

I am therefore concerned that, as the bill is drafted, others could see our legitimate regulated activity as passing the bar for ecocide.

**Mark Ruskell:** Is your concern with the marine directorate that the science is not agreed? Fishers could be trawling and dredging in an area with no understanding of the impact that it will have on species, so someone could come back later and say that they have just dredged out the last remaining flame shell reef or something like that. Is it the shifting nature of data and understanding of the environment that is causing your members concern, because they do not know whether they will be retrospectively charged with ecocide under the bill?

**Elspeth Macdonald:** It is a little bit like the point that Jonnie Hall made earlier about something being seen as harmful further down the road when, at the time, it was not well known. Let us be honest—nobody has a completely comprehensive understanding of what the seabed looks like,

because it is a big area. We have the understanding that we have. We have an extensive network of marine protected areas. Next week, I will be going in front of another committee to talk about fisheries management measures and restrictions on bottom trawling in a number of marine protected areas, of which we are supportive.

We must recognise that we do not know everything about our environment and we cannot predict what will happen in the future. That is why we must be careful that a bill of this sort recognises that our knowledge of the world is imperfect. We do not want unintended consequences that we have not foreseen today to criminalise people for perfectly legitimate activities.

**Jonnie Hall:** I do not have much to add, but I will take us back to the initial conversation about the lack of clarity around terms such as “widespread”. The bill talks about geographic areas and particular impacts on species, but a species could range over a huge area or ecosystem. All of those things could traverse, if that is the right word, a range of different agricultural businesses.

It would be very difficult, from what I see in the bill, to point a finger at all the businesses that are operating on that widespread scale—a landscape scale or a catchment scale—when looking at a particular criminal activity, if that is what it is. It goes back to the point that we have made a few times already, that if individual farmers or crofters as businesses have breached an existing regulation, they will be subject to the existing sanctions.

I am struggling to see how provisions particularly on that widespread and long-lasting element would work in an agricultural context. Very few agricultural businesses operate over a whole catchment or geographical area or impact on a whole species or ecosystem. They might be responsible for their bit and what happens on their bit, but that is already covered by existing regulation.

**Mark Ruskell:** Do you have any comments on the defence of necessity in the bill? Are there any examples of where that would come up as a defence from any of your sectors?

**Jonnie Hall:** I cannot think of any specific example from a farming or crofting point of view.

**Mark Ruskell:** Anyone else?

**Elsbeth Macdonald:** There is a defence of necessity in producing food; it is a necessary thing for humanity to have. In the call for evidence, I touched on a couple of non-food production examples. First, we know that the Scottish Government’s flagship policy to expand the

development of offshore wind will have significant environmental impacts that will be widespread in the long term. I am sure that the Government would claim a defence of necessity by saying that we must reduce our fossil fuel emissions because that is the greater good.

Secondly, there is road building and airport extensions. It is not in the jurisdiction of this Administration, but we heard yesterday that Gatwick airport has approved a second runway. Is the fact that people want to go on more holidays a valid defence of necessity? There are other examples of defence of necessity, but, from my perspective, a defence of necessity is the necessity of producing food.

**Mark Ruskell:** That is quite broad, because you could put a wind farm in one location and perhaps have less environmental impact, or you could fish from a part of the sea where there is no environmental pressure.

**Elsbeth Macdonald:** That goes back to the point that a lot more needs to be made clear around the defence of necessity and how the balancing of those things would be judged.

**Mark Ruskell:** Simon Parsons, are there particular examples in the water industry of something being absolutely necessary?

**Professor Parsons:** Abstraction for drinking water would be the obvious one. We abstract from many sources across Scotland, some of which are struggling with the availability of water, particularly this year. You could foresee that we would need to abstract to provide drinking water for households, which could have a negative environmental impact, although we work very well with SEPA to manage the impact and I know that some of Jonnie Hall’s members might have restrictions on their abstractions. We need to ensure that we are abstracting to supply potable water to communities across Scotland.

**Mark Ruskell:** Catherine McWilliam, do you have anything to add on that?

**Catherine McWilliam:** No, I have nothing to add.

**Mark Ruskell:** Okay. Back to you, convener.

**The Convener:** The next questions come from Michael Matheson.

**Michael Matheson:** I want to turn to sections 1, 3 and 4 of the bill, which deal with the issue of liability. In the bill, liability is split broadly into two forms: individual liability, which requires “intent or recklessness”, and the responsibility of an organisation or an individual in an organisation, in the provisions on “consent or connivance”. Some have suggested that the threshold that has been set for liability in the bill is too high. Do you agree?

**Elsbeth Macdonald:** I do not have a particularly strong view on the matter. Although I would like to explore it further and I might be able to come back with some written comments on it, we did not spend a lot of time agonising over that part of the bill.

**Michael Matheson:** Catherine McWilliam?

**Catherine McWilliam:** Likewise, I have nothing specific to add. However, we have questions about what would constitute reasonable precaution or due diligence, particularly from the point of view of how our members or directors could demonstrate that. Again, it comes down to questions around definitions.

**Michael Matheson:** Simon Parsons?

**Professor Parsons:** I have nothing to add, but I note that we will need to understand the specifics as the bill develops.

**Michael Matheson:** Jonnie Hall, do you have a view?

**Jonnie Hall:** No, I only echo what my fellow witnesses have just said.

**Michael Matheson:** Okay.

The bill also makes provision around vicarious liability. I will come to you first on this, Jonnie. We heard evidence from panel 1, earlier this morning, that suggested that the vicarious liability provided for in a piece of wildlife legislation, and the changes that it led to, resulted in a culture change in the sector. Is that your experience?

**Jonnie Hall:** When that legislation went through, it certainly raised a lot of concerns about the relationship between employee and employer in terms of whose responsibility it was. However, I do not think that it is a particularly live issue now, because I am not aware of any particular cases in which vicarious liability is an issue. Clearly, there is now a precedent within other pieces of Scots law, where vicarious liability is part of the legislation.

I will echo the answers to the previous question a bit and note that it would again be something that we would need to think about quite carefully, because the business is clearly one thing but employees and the actions of individuals can be another. The vicarious liability issue clearly links those two things together. That issue is probably more for a panel of legal experts than for me, although I cannot speak for others.

It was a concern before, as you rightly identified, and I suspect that it might be a concern now. However, I am not sure how it would play out in reality.

**Michael Matheson:** Does anyone else in any other sector have any experience of changes coming about as a result of its introduction?

Nobody? Okay.

My final point is on the issue of who should be liable. We heard evidence in the earlier session that liability should rest largely and solely—it would be fair to say that I am paraphrasing—with the decision makers and the directors in the organisation, and that the workers should be protected from the provisions in the bill. Given that your members are directors, Catherine, what is your take on that suggested change to the bill?

**Catherine McWilliam:** Again, it will be very much a caveated take. I see the principle of it. However, our members would be looking for reassurances that they would not be scapegoated and blamed for employees taking matters into their own hands. It would come down to interpretation, guidance, definitions and how it is positioned. We can accept that the liability would sit with the decision maker of the organisation.

**Michael Matheson:** Simon Parsons, you are a director in a public agency. Do you think that you should be liable for the actions of your organisation, irrespective of who carries them out, which could carry a criminal penalty of up to 20 years in prison?

**Professor Parsons:** When you take on the role of director, you accept that that is part of your responsibilities. The easiest way to think about it is probably in relation to health and safety legislation. We all take on responsibilities associated with health and safety legislation, and we are very aware of those.

As Catherine McWilliam mentioned, the key point is what is linked to corporate action or corporate negligence, what is linked to an individual's actions and how we separate those two out. That would need developing as the bill progresses.

**Michael Matheson:** I just want to make sure that I understand this properly. If someone in your organisation carries out an act that results in what, under the bill, is defined as ecocide, who should be liable and face prosecution for committing the offence: the person who initiated it or the directors?

11:45

**Professor Parsons:** A lot of this is quite hypothetical at the moment. If the individual is following guidance or a process or determination from senior management, for example, if I understand our current environmental regulations well enough, the organisation would be prosecuted, not the individual. I would need to

understand the difference between the individual act versus the corporate act on that issue, and I would need to link it through to health and safety legislation. That is the only example I can think of that would be equivalent.

**Michael Matheson:** Do the witnesses have any other comments on that? No. That is me, convener.

**The Convener:** That is an interesting situation, because I do not think that doing something that you know is wrong is a defence for doing that act. History has proven that saying that you are following orders is not a good enough excuse for doing something wrong. I was not quite sure that I had followed the previous issue.

The deputy convener mentioned an unlimited fine and 20 years in the nick. An unlimited fine might mean nothing if you get a huge bonus, whereas a fine of £500 for somebody who has very little income, perhaps a crofter, might be massive and might be a death knell to their business, so I do not quite understand how that range works. One of the suggestions was to link fines to the turnover of the organisation. How do you feel about that? Scottish Water has a massive turnover and a massive amount of money, and it could pay a massive fine. A crofter on the west coast has very little turnover and should get only a very little fine. What do you think? Professor Parsons, do you want to refute that comment?

**Professor Parsons:** It is probably not for me to decide the level of the fines. It would need to be considered whether taking money out of a public sector organisation would be the right outcome for us as an organisation.

**The Convener:** That is an interesting idea—because it is a public sector organisation, it does not get a fine. I am sure that that is not quite how you would put it, but that is my interpretation.

Jonnie, what are your views on that?

**Jonnie Hall:** The word is proportionality, in two senses. It goes back to the issue of the extent and the long-lasting nature of the environmental damage, but I agree that there would need to be proportionality in terms of the impact that a fine would have on the viability of the business. I am pretty sure that the bill's intention is not to put any business out of business but to punish, in a proportionate way, if a criminal act has been committed. It is about proportionality in both ways.

**Douglas Lumsden:** Elspeth Macdonald mentioned the unintended consequences of the bill. Do you fear that environmental non-governmental organisations will rush to the police to use the bill to outlaw some forms of legitimate, legal and justifiable fishing or farming?

**Elspeth Macdonald:** Yes, I have concerns in that regard. It is well known that there are individuals and bodies who do not like what the fishing industry does.

**Douglas Lumsden:** Yes.

**Elspeth Macdonald:** They do not approve of practices that are regulated and legal and that are an efficient and effective way of producing affordable, healthy food. We know that many people oppose that. As the bill is drafted, it creates the potential for such claims to be made. I made that point in my response to Mr Ruskell.

**Douglas Lumsden:** Jonnie Hall, do you share that fear?

**Jonnie Hall:** Yes, absolutely. At the end of the day, the food and farming sector of Scotland, along with Elspeth's sector, is not only vital to putting food on people's tables but is actually the most important sector of our economy, and it is a catalyst for economic growth. The last thing that we want to do is overly burden our primary producers to the point where they might almost fear going about their practices to deliver the outcomes that we all require.

**Douglas Lumsden:** I will move on to enforcement, which we have touched on already. Do you have any views or concerns about how the bill might be enforced, or about the resources that would be required to enforce the bill effectively? Do you have a view, Simon?

**Professor Parsons:** I would say no to that question, Mr Lumsden. That would be a question to ask SEPA, if it were the agency implementing the bill.

**Douglas Lumsden:** Is it clear who would enforce the bill in different areas?

**Professor Parsons:** Not to me at the moment, no.

**Douglas Lumsden:** Elspeth, do you have a view on that?

**Elspeth Macdonald:** The enforcement provisions are not clear to me, possibly because we have very different regulators in fishing. SEPA's jurisdiction does not extend beyond three nautical miles, I believe, so I think that the enforcement provisions for anything in the marine sector would need to be considered further.

There is a broader issue around resources that all regulators face. Somebody said earlier that there have not been many prosecutions under the Regulatory Reform (Scotland) Act 2014. It is important to have a greater understanding of whether that is because the prosecutions have not been successful, because the bar is too high or not high enough, or because regulators are not sufficiently well resourced or supported to enforce

more. A number of issues need to be further explored.

**Douglas Lumsden:** Jonnie, when it comes to farming, is it clear who would be enforcing the law?

**Jonnie Hall:** No. I suspect that an awful lot of it would fall under SEPA's remit, but there would be other aspects that would be for the rural payments and inspections division of the Scottish Government and for NatureScot. We have not really mentioned NatureScot, in terms of habitats and wildlife. I know that all those agencies are very much under pressure.

This is a bit of a general statement. While we require the backstop of a regulatory baseline, as it were, in order to prevent environmental damage of any form, where we really need to be, and where I think the agricultural industry wants to get to—I suspect that fisheries is exactly the same—is to be doing things in a much more sustainable way in future. That is what we are being asked to do. In doing so, we are delivering on our ambitions around climate, biodiversity and other things.

Purely doing things on an enforcement basis and a regulatory basis alone will not get us there. Seeking out good practice and best practice will be important. I see that as a role for the agencies of Government, too. It is not just about enforcing the law.

**The Convener:** I call Sarah Boyack—but very briefly, please.

**Sarah Boyack:** I will reflect on that last comment by Jonnie Hall. If organisations—businesses, farmers or whatever—are complying with legislation, such as planning law or the conditions of a permit, why would they be liable, rather than the Government or the regulator, if that is the responsibility in terms of ecocide?

**Jonnie Hall:** I am sorry. Do you mean if the obligation was on the regulator, rather than the individual?

**Sarah Boyack:** If somebody is actually committing ecocide—if that is the allegation—but if they are in compliance with the Government's regulations, would that be lifted up to the Government to be responsible?

I could leave that question on the table.

**Jonnie Hall:** That is not for me to comment on.

**Sarah Boyack:** Well, think about accountability, and about raising the bar and expectations.

**The Convener:** It might then be a matter of who in the Government you would hold accountable.

Mark Ruskell may ask a supplementary question, if it could be a really quick one, please.

**Mark Ruskell:** I know that Monica Lennon wants to come in, so I will leave it.

**Monica Lennon:** I will try to squeeze quite a lot in here. I am conscious of the time, and we have had some really good evidence today.

I will come to you first, Jonnie. I read NFU Scotland's written submission to the committee with interest. I want to be clear about this in my mind, as some of what you have said today differs from some of the written comments that you made. In your written submission you say that NFU Scotland is

“broadly supportive of the overall aim of the Bill to criminalise the most serious forms of environmental harm.”

You go on to say that you

“understand that the Bill intends to fill a gap between existing environmental regulations and criminal law, similar to other Ecocide legislation found across other countries, and acts as a deterrent for the most egregious and reckless actions that could cause irreversible damage to ecosystems.”

You also say that

“The Bill will be unlikely to affect day-to-day operations of most agricultural businesses”

and that you

“are satisfied with the number of safeguards within the Bill,”

while calling for “clearer guidance”.

I just want to check, because the committee will look at written and oral evidence. Is there anything in your written evidence that you want to change or clarify?

**Jonnie Hall:** No, not at this moment. The questions that I have responded to this morning were very clear. Is the bill necessary? No, but if it passes, it will provide extra backstops. I think that that was the point that Mark Ruskell was making. If it came into force as an act, would it provide that additional safety net, call it what you will?

From day 1, we have been on the record as saying that there is a raft of environmental regulation that ensures that farming and crofting are highly unlikely to cause what might be called an ecocide event in this context. That is because of the nature and the fragmentation of the agricultural businesses that we are talking about, and the fact that all that regulatory protection is in place.

**Monica Lennon:** You have rightly highlighted the importance of food production and food security. The Nature Friendly Farming Network, which represents some farmers, supports an ecocide law because it wants greater protection for soils, wildlife, forests and biodiversity. Do you recognise that ecocide law is coming into force in other countries because of the benefits that it can

have for farmers and food producers, who can also be the victims of ecocide-level crime?

**Jonnie Hall:** Yes, I can understand that individual farm businesses might be victims if there were a significant land-related or water-related pollution event. However, as we touched on earlier, it is not only a requirement for individual farm businesses to protect the quality of water and soils, but in the long-term interests of farming, crofting and food production in Scotland. We absolutely need to get on the front foot with sustainability and our regenerative intent sooner rather than later, and we are working with the Scottish Government on that. Soil health and the management of ecosystems and ecosystem services are fundamental to food production, and pollinators and all the rest of it come into play. Farming is all about working with nature, not against it.

**Monica Lennon:** I have a brief question for Elspeth Macdonald. I know that the Scottish Fishermen's Federation is opposed to the bill, and that has been your position from the very beginning and throughout the early consultation and development of the proposals. I am therefore guessing that you would never come to the Parliament to support an ecocide bill.

Earlier this morning, we heard from a witness about major oil disasters such as the MV Braer, although we are not saying that that is an example of an ecocide crime because the law did not exist at the time. Could you say something about the potential impact on your members of widespread pollution and disruption that could happen in the future? What could that do to a business such as those that your members conduct?

**Elspeth Macdonald:** First, I would not go so far as to say that SFF would never support an ecocide bill, were such a bill to have the correct safeguards and address all the points in our written submission and some of the points that we have made today. We would never say never—

**Monica Lennon:** I will take that. That is good news.

**Elspeth Macdonald:** We have concerns about the bill as it is drafted, but that is not to say that we would necessarily have the same concerns if the bill were in another form that addresses the points that we make about safeguards.

12:00

Your point about things such as oil spills is valid. Interestingly, I had just written down those two words. The incident to which you referred, which was a long time ago—long before I was involved in the industry—had an impact, but I am not sure whether the impact on fishermen was significant,

long term and widespread. We have to recognise that sectors and businesses can be affected by the actions or inactions of others, but it is important to distinguish between the consequences of an accident, for example, and things that happen wilfully and intentionally.

There is a lot to explore in relation to how all this would weave together. Your point that our businesses could be affected by others is valid, but there is just too much to unpick.

**Monica Lennon:** Thank you for your evidence. I am open to listening.

My final question is primarily for Professor Parsons, but Catherine McWilliam is welcome to contribute, too. Under the terms of the bill as drafted, Professor Parsons, as a Scottish Water director, you could be culpable if there were an ecocide crime. I will not give any examples, but water companies have illegally discharged raw or untreated sewage into rivers and seas, which has caused significant damage and resulted in significant fines. What would an ecocide law mean in practice for directors such as you and for discussions in boardrooms such as that of Scottish Water? What practical difference would it make to how you approach governance, prevention, culture and behaviour throughout the organisation? How much internal discussion has there been in Scottish Water about its position on an ecocide law? Have the discussions gone beyond director level?

**The Convener:** That was quite a long question, but I am going to squeeze the time that you have to answer it. Please be as succinct as possible.

**Professor Parsons:** I will be. First, I need to address the point about discharges to the environment. We have licensed discharges to the environment. Sewer overflows are a core part of our infrastructure, so they are a big part of how we operate. Existing legislation on environmental pollution incidents allows SEPA to prosecute and fine us in that regard. There is a robust set of rules, regulations and legislation around that activity.

Earlier, I think that I answered the question about the impact that an ecocide law would have on our organisation. Once we understood in more detail the regulations and guidance that would come with the bill, we would ensure that our current processes operated within it and that our senior leaders, our board and our directors, including our non-executive directors, understood the legislation and the regulations, as would be the case with any significant new regulations.

**The Convener:** Catherine McWilliam, if you are going to answer the question, you may talk only about how your approach would differ to what has

been suggested. I am sorry, but we are up against the clock.

**Catherine McWilliam:** All that I will add is that there would be a role for organisations such as the IOD to upskill our members in relation to the implications of the bill.

**Monica Lennon:** Thank you.

**The Convener:** This morning's two evidence sessions have raised a heap of questions on the bill that the committee will want to consider. We might want to discuss some hypothetical situations so that we understand what could happen. The evidence has been really helpful. I thank the witnesses and ask them to leave the room as quickly as possible, because we are up against the clock and about to go into private session.

12:04

*Meeting continued in private until 12:59.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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