OFFICIAL REPORT
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Environment, Climate Change and Land Reform Committee

Tuesday 18 September 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 18 September 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
25th Meeting 2018, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)
Liam McArthur (Orkney Islands) (LD)
Andy Wightman (Lothian) (Green)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 18 September 2018

[The Convener opened the meeting at 09:32]

Scottish Crown Estate Bill: Stage 2

The Convener (Gillian Martin): Welcome to the 25th meeting in 2018 of the Environment, Climate Change and Land Reform Committee. I remind everyone present to switch off their mobile phones, because they might affect the broadcasting system.

Under agenda item 1, the committee will consider the Scottish Crown Estate Bill at stage 2. I welcome the Cabinet Secretary for Environment, Climate Change and Land Reform and her officials from the Scottish Government. Mike Palmer is deputy director of aquaculture, crown estate and recreational fisheries in the European maritime and fisheries and Europe division of Marine Scotland; David Mallon is head of the crown estate strategy unit; Laura Begg is from the legal division; and Annalee Murphy is a parliamentary counsel. It should be noted that officials are not allowed to speak on the record during the proceedings.

Members might find it helpful to have a reminder of the process. Everyone should have a copy of the bill as introduced, of the marshalled list of amendments, which sets out the amendments in the order in which they will be disposed of, and of the groupings of amendments. There will be one debate on each group of amendments.

I will call the member who lodged the lead amendment in the group to speak to and move that amendment, and to speak to all the other amendments in the group. I will then call the other members who have lodged amendments in that group to speak to their amendments and to other amendments in the group, but not to move their amendments at that time.

Members who have not lodged amendments in the group but who wish to speak should indicate that to me or the clerk. If the cabinet secretary has not already spoken to the group of amendments, I will invite her to contribute to the debate just before we move to the winding-up speech. There might be times when I can allow a little more flexibility for members to come in on points during a debate. Members should indicate to me or the clerk that they want to do that.

The debate on each group will be concluded by my inviting the member who moved the first amendment in the group to wind up.

Following the debate on the group, I will check whether the member who moved the lead amendment in the group wishes to press it to a vote or to seek to withdraw it. If the member wishes to press it, I will put the question on the amendment. If the member wishes to withdraw it, I will see whether any other member objects to withdrawal. If any member objects, the amendment will not be withdrawn and the committee must immediately move to vote on it.

If any member does not wish to move their amendment when it is called, they should say, "Not moved"—they should do so audibly. Any other member who is present may move an amendment that is not moved. However, if no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting on divisions is by a show of hands. It is important that members keep their hands clearly raised until the clerks have recorded the vote.

The committee is required to indicate formally that it has considered and agreed to each section of the bill, so I will put the question on each section at the appropriate point.

I hope that that is all clear to everybody.

Section 1—Crown Estate Scotland

Section 1 agreed to.

Schedule 1—Crown Estate Scotland: modification of enactments

The Convener: Amendment 1, in the name of the cabinet secretary, is grouped with amendments 7, 8, 19 to 21, 23, 24, 28 and 29. If amendment 8 is agreed to, I cannot call amendment 35 in the group on the management of marine assets. I invite the cabinet secretary to move amendment 1 and to speak to all the amendments in the group.

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): Thank you, convener, and welcome to your new post.

The amendments in the group are all of a minor or technical nature. Amendment 1 is a technical amendment that would take account of two new acts—the Gender Representation on Public Boards (Scotland) Act 2018 and the Islands (Scotland) Act 2018—that were passed by the Scottish Parliament after the introduction of the Scottish Crown Estate Bill. The amendment would insert provision to adjust references to "Crown

Estate Scotland (Interim Management)" in those two acts, as a result of the renaming of "Crown Estate Scotland (Interim Management)" by section 1 of the bill to "Crown Estate Scotland".

Amendments 7 and 8 have been lodged in response to parliamentary feedback at stage 1 and because of my commitment to ensuring that section 4 is sufficiently clear to give effect to the intention that Scottish ministers should not be able to direct a manager of an asset to delegate the management function of a Scottish Crown Estate asset to the Scottish ministers. I am pleased to have lodged amendment 7 to address that matter. It will clarify that the Scottish ministers and, furthermore, Crown Estate Scotland are not persons to whom the function of managing a Scottish Crown Estate asset may be delegated under section 4(1).

Amendment 8 is a consequential amendment and, as the convener has pointed out, agreement to it will result in pre-emption of amendment 35.

Amendment 19 is a minor drafting amendment. The duty to obtain at least market value for a "transfer of ownership" or "grant of a lease" and so on could be departed from if the manager is satisfied that the transaction is likely to contribute to the promotion or improvement of any of the socioeconomic or environmental factors that are listed in paragraphs (a) to (e) of section 11(2). The inclusion of an "or" in that list will make it clear that the list is not cumulative and that a transaction may be made for less than market value if any of the listed factors are relevant.

There are references to the "Crown Estate Transfer Scheme" in the bill. We think that it is neater to provide a definition of the transfer scheme in the interpretation section of the bill, as has been done with the Crown Estate Scotland (Interim Management) Order 2017. That will avoid the need to repeat the title of the statutory instrument in full, along with the number, every time the bill refers to the transfer scheme. Amendment 29, therefore, will insert a definition of the "Crown Estate Transfer Scheme" into section 43, and amendments 20, 21 and 23 will consequentially remove the full title and number of the transfer scheme from sections 11, 12 and 24.

Section 25 requires the Scottish ministers to

"lay a copy of each annual report"

that is prepared by a manager

"before the Scottish Parliament."

The bill as drafted would prevent Crown Estate Scotland and other managers from publishing their own annual reports until the Scottish ministers had laid a copy of their report under section 25.

Section 37 of the bill allows the Scottish ministers to delegate some of their functions, including the laying of annual reports, to Crown Estate Scotland. To take account of that possibility, amendments 24 and 28 will make adjustments that will refer instead to managers being prevented from publishing their own annual report until after it has been laid before the Scottish Parliament, to reflect the fact that annual reports may be laid before the Scottish Parliament by the Scottish ministers or by Crown Estate Scotland.

The bill is technical and the amendments in the grouping are technical.

I move amendment 1.

Claudia Beamish (South Scotland) (Lab): I want to highlight that, although I appreciate that gender representation on public boards is a legal obligation, I am pleased to see it being included in this context.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I may not have fully woken up and the question may be a dumb one. I would like confirmation that schedule 1, which is the list of bills to which we are adding through amendment 1, is capable of further amendment by order after the bill is passed.

Roseanna Cunningham: Yes, it is.

The Convener: No other members have comments. I invite the cabinet secretary to wind up.

Roseanna Cunningham: I have nothing further to add.

Amendment 1 agreed to.

Schedule 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Transfer of management function

The Convener: Amendment 30, in the name of Andy Wightman, is grouped with amendments 31 to 36, 25 and 26.

Andy Wightman (Lothian) (Green): The amendments in my name in this group make two propositions. The first is set out in amendments 30 and 31 and the second in amendments 32 and 33. I will deal with each set of amendments in turn.

The Smith commission recommended in paragraph 33 of its final report that, following the devolution of the management of the Crown estate,

"responsibility for the management of those assets will be further devolved to local authority areas".

As drafted, section 3 gives authority to ministers to make regulations to transfer those management

functions to any person mentioned in subsection (2). It remains possible that ministers may not choose to make regulations, or may choose to revoke any regulations that are made. In addition, it remains possible that regulations may be drafted in a way that makes the transfer of management functions unduly onerous and complex. Those are all questions to which there are no clear answers. They are possibilities in the future.

The Smith commission recommendation makes clear, however, that the responsibility "will be" further devolved to local authorities. Amendment 30 is designed to uphold that cross-party agreement. It provides that the transfer of management functions in relation to the foreshore is a statutory right, which regulations must be designed to facilitate, as amendment 31 makes clear.

Why does this relate only to the foreshore? It is one of the distinctive ancient Crown property rights. Ownership by the Crown is regarded by the Scottish Law Commission as a patrimonial right derived from the Crown prerogative. That is nowhere defined in statute, but it is, as the commission notes, the "predominant modern theory". It plays a distinct and critical role in coastal management, a function that more widely falls into the realm of local authorities. Its history, as set out in a recent book by John MacAskill published by Edinburgh University Press, is one in which the public interest in the foreshore has frequently been compromised by the long-standing requirement to, among other things, obtain best consideration from any sale or lease.

Amendment 30 is designed to fulfil the recommendation of the Smith commission by providing that the transfer of management functions is as of right and not, as currently drafted, in the gift of ministers. If agreed, I propose to bring forward subsequent amendments at stage 3 to the effect that any transfer of functions to local authorities relating to the foreshore will be exempt from the direction-making powers under section 4 and from certain functions imposed by other sections. That is for the future.

Local authorities should be free to manage the foreshore in a manner best judged by them to fulfil their responsibilities and the wishes of their electorate. That is what amendments 30 and 31 seek.

I now turn to the second set of amendments in my name—amendments 32 to 36. Amendments 32 and 33 are substantive and 34 to 36 are consequential. Amendments 32 and 33 achieve the same purpose, first in relation to the sea bed and secondly in relation to the foreshore.

The history of management of the foreshore and the sea bed around Scotland's coasts has often been one of conflict between the aspirations of local communities, local authorities and harbour authorities on the one hand, and the Crown Estate Commissioners on the other. Devolution should, I hope, change that.

09:45

Of Scotland's 375 harbours and ports, 241 are owned and managed by local authorities, 24 are owned by other public authorities, including Scottish ministers, and 33 are trust ports. They all operate under a statutory framework that is intended to secure the public interest and they are critical to Scotland's marine economy. Schedule 5 to the Crown Estate Transfer Scheme 2017 highlights the role of Crown land in relation to those harbours, as it amends a large number of statutes, including the Pittenweem Harbour Order Confirmation Act 1992, the Lerwick Harbour Act 1994, confirmation orders for the Berneray causeway, the Macduff Harbour Revision Order 1999 and the Scottish Natural Heritage (Rum) Harbour Empowerment Order 1999.

The committee recommended in its stage 1 report that the bill should be amended to ensure that the sea bed cannot be sold. In section 10, the bill provides that that is possible with the consent of Scottish ministers, and in any event a lease of up to 150 years is permitted under section 14. Scotland's ports and harbours are routinely and actively engaged in development activity by way of building new slips, piers, harbour walls and breakwaters that involves securing legal agreements with the Crown over the sea bed and, less frequently, the foreshore.

Amendments 32 and 33 are designed to make it obligatory that section 3 regulations transfer the management of the sea bed and the foreshore, provided that it is in the public interest to do so. I was minded to frame this provision in relation to ownership of the foreshore and sea bed but, given that the bill continues to permit the alienation of the sea bed on leases of up to 150 years, and given that no amendments have been lodged to deliver on the committee's recommendation at stage 1, I have framed it in such a way that that statutory right is created for the transfer of management functions only. My view, however, is that such a scheme should include the circumstances in which ownership would also be transferred, given that lenders—for example, a Norwegian bank willing to lend £10 million to Lerwick Port Authority—might not be content with the security that rests on mere management, or indeed a long lease. If the minister is minded to agree with the principle underlying the amendments, I would be keen to explore how the provision could be extended to cover cases where

the port or harbour requires ownership of the sea bed or foreshore to be transferred.

I move amendment 30.

Roseanna Cunningham: The bill includes powers for the Scottish ministers to devolve management responsibilities in respect of Scottish Crown estate assets and opens up the possibility for local authorities and community organisations to take on the management of assets in their areas. That is a key principle of the bill that was supported by the Environment, Climate Change and Land Reform Committee following its consideration at stage 1.

I wish to respond to Andy Wightman's amendments before I go on to the Government amendment, because amendment 30 cuts right across the proposal that a community organisation could take on management of an area of the foreshore, as it would restrict those that could take on that management function to local authorities. Amendments 31 and 32 seek to restrict the power to make transfer regulations, as they seek to compel Scottish ministers to make regulations under section 3(1) transferring the function of managing assets relating to the sea bed to a local authority or a trust port if it is in the public interest to do so. However, that fails to take into account that not all local authorities may have the desire to take on the management of an asset. It also fails to give due weight to the fact that another person, such as a community organisation, may in fact be better placed and could demonstrate wider public benefits in managing such an asset.

As we speak, Crown Estate Scotland interim management are considering applications for pilots of local asset management. The scheme will test different approaches to local management and inform how aspects of the bill may be best implemented. The scheme is a clear indicator of community interest in management, and more than half of the 13 applications are from organisations that are not councils or trust ports. Amendments 31 and 32 would effectively prevent community organisations from becoming managers of those assets and, as I indicated, cut right across the pilot scheme process and a key provision of the bill.

It is my clear intention to use the new powers in the bill to enable further devolution of management on a case-by-case basis. That will allow decisions to be taken carefully, while recognising that a one-size-fits-all approach is simply not suited to such a diverse range of assets.

It is not clear, under amendment 32, who would determine whether the transfer would be in the public interest, and the amendment does not define the sea bed either.

The bill already establishes a process for the transfer by regulations, and it is unclear how the consultation obligation that is provided for in the amendment would work in this context.

Amendment 32 would, in particular, result in a more fragmented distribution of policing responsibilities out to 200 nautical miles, and representatives of offshore activities have expressed concerns about councils taking on sea bed leasing functions that are currently managed at the national level.

There is an overlap between amendment 32, on the sea bed, and amendment 33, which relates to the foreshore because, typically, the sea bed is understood to also include the foreshore. Amendment 33 does not contain a definition of the foreshore.

These amendments will remove ministers' discretion regarding the management of the sea bed and foreshore.

I also consider amendments 34 to 36 to be unnecessary, as provisions in the bill under section 6(1)(b) could be used to enable one or more trust ports to be eligible to become a manager if it were designated by the Scottish ministers as a community organisation.

There are also potential definitional difficulties associated with amendments 34 to 36, as they add only trust ports to the list of eligible delegates and transferees. At present, there are other types of port that exercise public functions and could, therefore, potentially seek to manage Scottish Crown estate assets.

For those reasons, I urge Mr Wightman not to press amendment 30 and not to move the other amendments in his name. If he wishes to contact me about his concerns about the ability of a trust port to become a manager, I will be happy to meet him to discuss the matter in advance of stage 3.

With regard to the Government's amendment 25, the Delegated Powers and Law Reform Committee and the Environment, Climate Change and Land Reform Committee requested that Parliament have the ability to scrutinise the content of regulations transferring the management of Scottish Crown estates by the affirmative procedure if the regulations were transferring the management of an asset of significance or of significant value. I recognise that concern and accept that the recommendations that a definition of what would constitute significance or significant value in relation to an asset should be set out in the bill, and also that the affirmative procedure should apply to regulations that would transfer the management of such an asset.

I have reached the conclusion that the transfer of the management of any part of the sea bed, except where it is the foreshore, is one of significance or significant value. The potential impact on third parties, such as mariners, is significant, as is the potential or actual financial value and the wider economic and environmental significance of the assets.

The amendment ensures that the affirmative procedure will apply to any transfer of management of strategic national infrastructure, such as cables and pipelines, offshore wind, tidal and wave energy and carbon capture and storage.

What constitutes part of the sea bed has been defined in the amendment, and includes the Scottish marine area that is that part of the sea bed out to the 12 nautical mile limit, and the Scottish zone, which lies between the 12 nautical mile limit and the 200 nautical mile limit. The Scottish zone is not owned by the Crown, but international maritime law gives a coastal state the rights in that zone, and those have been vested in the Crown. Marine assets that lie solely within the foreshore area, which is the land that lies between the high-water and low-water marks of ordinary spring tides, are not considered to be assets of significance or significant value and will therefore be subject to the negative procedure.

Amendment 26 is consequential on amendment 25.

I urge members to support amendments 25 and 26 in this group and I urge Andy Wightman not to press amendments 30 to 36.

Stewart Stevenson: Before I raise my particular issue, I pick up Mr Wightman's point about leases and whether they can be used as assets for bank borrowing. The maximum length of a lease is 175 years, which is set out in the Long Leases (Scotland) Act 2012. Mr Wightman and I both worked on the bill, so we are familiar with the act. Banks are much more imaginative in what they will lend money against. They habitually lend against long leases, which can, of course, be registered. I remember being at a Bank of Scotland board meeting in which there was a discussion about lending money against an asset that was two storeys of a building in Manhattan that had not been built but which the owner of the building had consent to build. That consent could be transferred to someone else, because the maximum height in Manhattan is six storeys and, although there are skyscrapers, in order to build higher you need to buy the rights from others. That was an asset, even though it was nothing but clear air and had no physical manifestation. Therefore, banks are much less worried than Mr Wightman makes out.

My substantial issue relates to amendments 32 and 33 and the definition of "trust port" that Mr Wightman uses. Proposed new subsection (1E) in amendment 32 says:

"In this Part a 'trust port' means a harbour authority other than one within subsection (1F) below.

Those are then listed. An item in the list is

"any company having a share capital".

Mr Wightman has told us that we have 33 trust ports. I do not know what they are but, before I came here, I looked at the structure of Aberdeen Harbour, which most of us think of as being a trust port. However, according to Companies House, there is one share in the organisation, which is owned by the Aberdeen Harbour Board. The organisation's structure is complex. I understand that the Aberdeen Harbour Board is not an executive board but a non-executive board. Therefore, the powers and the assets would be attributable to the company that has a shareholding.

My research on the issue may not be entirely complete, but what I have done indicates that Mr Wightman's definition may introduce difficulties and exclude some ports that we imagine to be trust ports. I suspect that that is not his intention.

The construction that is used in proposed new subsections (1E) and (1F) in amendment 32 is repeated in amendment 33.

Obviously, the further references to trust ports depend on the definition of a trust port in those subsections. However, although amendments 34 to 36 refer to "a trust port", I am not entirely clear what definition of "a trust port" is being used, because the definition that is used in proposed new subsection (1E) in amendment 32 and proposed new subsection (1E) in amendment 33 is restricted to "In this Part". I know that those subsections are identical but, in drafting terms, there is a little bit of confusion about that. Of course, that confusion may be only in my mind, so I will wait for a response to that.

Claudia Beamish: These are complex issues. I preface my short remarks by saying that the issue on which I agree with Andy Wightman—and on which our committee agrees and the Scottish Government agrees—is the Smith commission's statement that there should be further devolution. That is an important marker for these amendments.

I will be open and say that when I came to the debate, I was in agreement with amendment 30, because it is important that these issues are more robustly devolved to local authorities. However, I have listened carefully and, in view of the cabinet secretary's comments on amendment 30, I believe that, at this stage, it is important that we recall our

other deliberations in committee. It also happens that my role as the spokesperson for land reform is to argue that the devolution of land to communities is vital, and I would not want that to be affected in any way by the amendment.

I am not saying that I understand all the complexities of the issue in the way that others appear to and I am sure do, but I ask Andy Wightman to consider not pressing amendment 30 and the associated amendments, especially in view of the cabinet secretary's offer of further discussion.

10:00

I want to quickly highlight another important issue. I am glad that it is recognised that tenant farmers and rural estates have concern about the devolution to local authorities. I know that Andy Wightman's amendments do not cover that, but it is important to point that out.

After discussion with my colleague Alex Rowley, we had thought that we would vote for amendment 32, but I again ask Andy Wightman to consider holding back at this stage in view of the cabinet secretary's offer. Amendment 32 is important because of the possibilities for trust ports and, indeed, local authority ports and harbours to have the power to do what they want to do without being radically held up, which I understand is one of the issues. On the other hand, after hearing about the follow-on amendments, I think that the issues need discussing and refining, which is perhaps the purpose of stage 2.

I support the cabinet secretary's amendment 25. The division between affirmative and negative procedure that it sets out is appropriate.

Richard Lyle (Uddingston and Bellshill) (SNP): Anyone who knows Andy Wightman knows that he is a champion of community ownership, but I agree with my colleagues on his amendments. To my mind, if we agree to them, we will deny community organisations the opportunity to manage the foreshore. I do not believe that Andy Wightman's amendments go to the heart of what he really wants to achieve, so I ask him not to press them and to take up the offer of discussions with the cabinet secretary on the points that he wants to make.

John Scott (Ayr) (Con): My point is similar to what Richard Lyle and Claudia Beamish have said. I have sympathy with Andy Wightman's idea of further devolution and growing trust ports, but it appears from what the cabinet secretary has said that the proposals are incomplete and would not achieve Andy Wightman's ambitions. He should accept the cabinet secretary's offer, not press his amendments and work to bring forward amendments at stage 3.

I, too, welcome amendment 25, which introduces the affirmative procedure in some cases. I agree with Claudia Beamish that the balance is now correct.

The Convener: I invite Andy Wightman to wind up and to say whether he wishes to press or withdraw amendment 30.

Roseanna Cunningham: Convener, can I just say something before that? It might be helpful for the committee to hear who has expressed an interest so far—the 13 applications that are already in. Would members find that helpful?

The Convener: Yes.

Roseanna Cunningham: They are from: Clyde Fishermen's Association and Clyde Fishermen's Trust; Western Isles Council; the Community Inshore Fisheries Alliance; the Findhorn Village Conservation Company; Forth District Salmon Fishery Board; Galson Estate Trust; Lochgoilhead Mooring Association and Lochgoilhead Jetty Trust; Mallaig Harbour Authority; Orkney Islands Council; Portgordon Community Harbour Group; Shetland Islands Council; St Abbs and Eyemouth Voluntary Marine Reserve Committee; and the Tay and Earn Trust. Therefore, of those who are expressing an interest thus far, only three are local authorities and only one on the list—Mallaig Harbour Authority—is a trust port.

The Convener: I invite Andy Wightman to sum up and to say whether he wishes to press or withdraw amendment 30.

Andy Wightman: I thank members for their contributions to the debate on this group. A number of members raised technical drafting points, as is to be expected at stage 2, but I am interested in testing the substance of the propositions.

I remind members that the Smith commission's recommendation was not about whether the Crown estate should or would be devolved but said, "Responsibility … will be transferred". I take the points that have been made about community bodies, but there is nothing to prevent local authorities from further delegating the responsibilities to community bodies. I have never taken the view that ministers should determine such things. Indeed, I have never taken the view that ministers should determine community right-to-buy applications. Ministers have far too much discretion and control over such matters.

Amendments 30 and 31 are designed to fulfil the spirit of the Smith commission's recommendation. In other words, they are designed to provide a statutory right to ensure that the regulation-making power in section 3 is used to fulfil the commission's recommendation that local authorities have the right to manage the

foreshore. Neither as the bill stands nor under my amendment would there be any obligation on local authorities to take on board those management functions, so those that do not wish to would have no need to do so.

The debate on trust ports is important. I do not agree with the cabinet secretary that they are community bodies that can be added by order under section 6. They were established in the 19th century by statute and are statutory bodies with a well-understood statutory framework. It is important that they should have the right to have management functions for, or the ownership of, the sea bed transferred to them and I welcome the cabinet secretary's offer to discuss that further. I do not propose in amendment 32 that any rights to the sea bed be granted outwith a port's normal area of operations, which are already defined in statute. All ports and harbours have lines on maps by which their existing authority to dredge and set up moorings is defined.

Given the range of views that have been expressed on the amendments in this group and the cabinet secretary's willingness to sit down and talk about the issues that I have raised, I will not press amendment 30 or the others in my name in the group.

Amendment 30, by agreement, withdrawn.

Amendments 31 to 34 not moved.

The Convener: Amendment 2, in the name of the cabinet secretary, is grouped with amendment 16.

Roseanna Cunningham: Scottish public authorities are one category of persons who are eligible to become managers of Scottish Crown Estate assets. The bill does not define what a Scottish public authority is and relies on the definition in the Interpretation and Legislative Reform (Scotland) Act 2010. Using that definition potentially includes cross-border public authorities, of which there are only two—the traffic commissioner for Scotland and Citizens Advice Scotland—neither of which would be expected to become a manager.

The intention is not to transfer the function of managing Scottish Crown Estate assets to any cross-border public authority that is a Scottish public authority—that is, one that exercises functions

"only in or as regards Scotland".

Therefore, amendments 2 and 16 provide that the references to transfer or delegation of functions to Scottish public authorities are restricted to those public authorities

"with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998)".

That avoids any suggestion that Scottish ministers intend to transfer management functions to cross-border public authorities.

I encourage members to support the amendments.

I move amendment 2.

Amendment 2 agreed to.

The Convener: Amendment 3 is grouped with amendments 4 and 6.

Roseanna Cunningham: This set of Scottish Government amendments has been lodged because we identified a need to ensure that the relevant provisions of the bill permit Scottish ministers to impose requirements on Scottish Crown Estate asset managers for the treatment of records.

Part 1 of the Public Records (Scotland) Act 2011 already places obligations on the majority of Scottish public bodies in respect of the management of public records, such as the keeping, securing and preservation of such records. The obligations would apply to a number of bodies that might become Scottish Crown Estate asset managers, including local authorities, Crown Estate Scotland and Scottish ministers. The 2011 act does not, however, apply to community organisations or some other public authorities. As that would create a gap in the management of some records relating to the management of some Scottish Crown Estate assets, depending on who manages them, I have concluded that the bill should contain a provision to permit Scottish ministers to impose similar requirements on other Scottish Crown Estate managers that are not caught under the 2011 act as regards the management of records.

Amendments 3, 4 and 6 amend the bill to make it clear that Scottish ministers, when making regulations under section 3(1)(a), may make provisions about the management of records relating to the exercise of the transferee's functions as a manager. Proposed new section 3(7) provides a definition of the management of records that confirms that

"keeping, storage, securing, archiving, preservation, destruction or other disposal"

are all included in the power to make provision about the management of records. I encourage members to support the amendments.

I move amendment 3.

Amendment 3 agreed to.

Amendment 4 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 5 is in a group on its own.

Roseanna Cunningham: Section 3(4) of the bill as introduced contains a power to make regulations to transfer the management of an asset or any associated rights or liabilities that had been transferred to a community organisation by way of regulation, in the event that that community organisation ceases to exist, to another person who is eligible to become a manager of a Scottish Crown Estate asset. There is also the possibility that a manager might dispose of any such asset or acquire new rights and liabilities during the intervening period, or that a community organisation might still be responsible for rights and liabilities relating to former assets when it ceases to exist.

To take into account those possible scenarios, amendment 5 adjusts section 3(4)(a) to allow transfer regulations to make provision when a community organisation ceases to exist to transfer the function of managing any Scottish Crown Estate asset and any right or liability that the manager might have in relation to a Scottish Crown Estate asset or a former Scottish Crown Estate asset to another eligible manager.

I move amendment 5.

Amendment 5 agreed to.

Amendment 6 moved—[Roseanna Cunningham]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Directions requiring delegation of management function

10:15

Amendment 7 moved—[Roseanna Cunningham]—and agreed to.

Amendment 8 moved—[Roseanna Cunningham].

The Convener: I remind members that if amendment 8 is agreed to, I cannot call amendment 35.

Amendment 8 agreed to.

The Convener: Amendment 9, in the name of the cabinet secretary, is grouped with amendments 10 to 15.

Roseanna Cunningham: This group of Scottish Government amendments has been lodged in response to recommendations at stage 1 from the Delegated Powers and Law Reform Committee and the Environment, Climate Change and Land Reform Committee.

Amendment 9 addresses the desire to strengthen engagement with potential asset managers and other interested parties as part of the delegation process. Sections 3 and 4 confer on the Scottish ministers the ability, by way of two distinct methods—transfer and delegation—to pass the management function of Scottish Crown Estate assets to another person. In respect of the ability to transfer management functions, section 3(5) places a duty on Scottish ministers to consult certain interested persons prior to making regulations that transfer the function of managing a Scottish Crown Estate asset.

Amendment 9 places a duty on the Scottish ministers to carry out a similar consultation process prior to giving a direction requiring the delegation of management functions. That will facilitate increased engagement with relevant parties, which we consider to be of particular benefit, as delegation of a management function is likely to be a method by which community organisations take on management functions. Amendment 9 ensures that stakeholders are involved in the process, that the views and opinions of potential managers are heard and that they have a greater ability to provide supporting evidence. That will enhance the information and evidence available to Scottish ministers during the delegation process, which will inform the decision-making process itself. Amendment 10 requires the same consultation to be carried out before revising or revoking any delegation direction, and it also requires the consent of the proposed delegate for such a revision or revocation.

Both the Delegated Powers and Law Reform Committee and the Environment, Climate Change and Land Reform Committee sought clarification of the types of information that would be published in the notice of direction under section 4. Amendment 11 confirms the intention outlined in my letter to the Delegated Powers and Law Reform Committee to amend the bill so that the direction itself is published rather than a notice of direction. As introduced, the bill requires no publication of the revision of a direction, but as a result of amendment 12, Scottish ministers will be required to publish the revised direction.

Amendment 13 is consequential on amendment 11 to continue to provide that a notice of a revocation of a direction be required rather than the revocation itself. Amendment 14, too, is consequential on amendment 11 and provides that the information that must be included in a published direction is: the fact that a direction has been given; the manager to whom the direction or revised direction has been given; the proposed delegate of the function of managing an asset; and the asset in relation to which the direction or revised direction has been given. Information might be regarded as being commercially sensitive or commercially confidential depending on individual circumstances, and that will be assessed on a case-by-case basis. In certain circumstances, it might be necessary to withhold

such information from publication. Finally, amendment 15 tidies up the drafting of section 4(7)(b) as a consequence of amendment 14.

I encourage members to support the amendments.

I move amendment 9.

Amendment 9 agreed to.

Amendments 10 to 15 moved—[Roseanna Cunningham]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Delegation agreements

Amendment 36 not moved.

Amendment 16 moved—[Roseanna Cunningham]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Meaning of "community organisation"

The Convener: Amendment 17, in the name of the cabinet secretary, is in a group on its own.

Roseanna Cunningham: Amendment 17 will amend the definition in section 6(1)(b) of community organisations that are eligible to become Scottish Crown Estate managers, so that the Scottish ministers may designate a body as a community organisation for the purposes of the bill only if it is an incorporated body. An unincorporated organisation has no separate legal personality from its members. If an unincorporated community organisation were to be able to take on the management functions of a Scottish Crown Estate asset, that would cause problems if it wished to enter into contracts, to own property or to engage employees. It could not contract in its own name so, as a result, individual members rather than the organisation itself would have to enter into contracts.

There is a risk that office holders and sometimes even members of unincorporated organisations would incur personal liability with potentially serious financial consequences—for example, liabilities under a contract that had been entered into on the organisation's behalf, for certain criminal offences that the organisation had committed, such as health and safety offences, or to compensate third parties who had suffered injury while using the Scottish Crown Estate asset or its facilities that were managed by the organisation.

Because an unincorporated organisation cannot own property or take on a lease, that must instead be done in the name of individual members. Difficulties would arise if that individual were no longer a member of the organisation, because the property title would still be held by them.

In addition, unincorporated bodies are not subject to the same robust statutory, regulatory and transparency requirements as corporate bodies. Although they would still be required to meet the transparency and accountability requirements that will be placed on them by section 18 of the bill, along with the requirements relating to management plans and annual reports in sections 22 and 24, other difficulties might arise because of the lack of legal requirements being placed on their governance, and the lack of regulatory control.

Amendment 17—which will restrict to corporate bodies the type of community bodies that can be designated as community organisations under section 6(1)(b), and which could, thereby, be given responsibility for the function of managing a Scottish Crown Estate asset—will provide additional reassurance for Parliament that organisations that take on that role will be subject to a legal regime that allows them to do so effectively with less risk to their individual members. Furthermore, they will be subject to the same stringent statutory requirements on incorporation and in respect of on-going regulation relating to transparency, governance and administration as bodies under section 6(1)(a) that take on the management of assets. I encourage members to support the amendment.

I move amendment 17.

John Scott: I welcome the cabinet secretary's amendment 17. We called for that approach at stage 1. I welcome the fact that moving to bodies corporate or full incorporation will give protection to all parties—the Scottish Government, the Crown Estate and individuals—and will provide more transparency and a very clear framework in which to operate.

Claudia Beamish: I hesitated about whether to speak to amendment 17, as John Scott has highlighted the issues that I wanted to highlight. Amendment 17 is very important, wise and protective, not least for community groups that may need guidance on issues in order not to get themselves into difficulties, if that does not sound patronising.

The Convener: Would the cabinet secretary like to wind up?

Roseanna Cunningham: I do not think that there is any more for me to say.

Amendment 17 agreed to.

Section 6, as amended, agreed to.

Section 7—Duty to maintain and enhance value

The Convener: Amendment 18, in the name of the cabinet secretary, is grouped with amendments 40 and 41. I should point out that, if amendment 18 is agreed to, I cannot call amendment 40.

Roseanna Cunningham: Amendment 18 has been developed in response to the committee's stage 1 recommendations, and will strengthen the obligations on managers to manage assets in a particular way. It will place on managers the obligation that they

"must have regard to the desirability of managing"

Crown estate assets

"in a way that is likely to contribute to the promotion or improvement ... of"

the wider socioeconomic and environmental factors that are listed.

We do not expect, nor would it be good management, to run the Scottish Crown estate at a loss. We want managers to look beyond the balance sheet, but we do not want to tie managers' hands where it is not appropriate to do so—in particular, since there is such a diverse portfolio and there are obligations contained in wider legislation that managers will have to comply with concerning sustainable development and the environment.

The solution that I have proposed seeks to maintain the value and income from Scottish Crown estate assets while obliging managers to take account of wider socioeconomic and environmental factors in carrying out that management. In fact, Crown Estate Scotland is currently developing tools to help it to understand, measure and monitor better the social, economic and environmental value of assets. That will be used to inform future planning and investment decisions. The intentions are that that will become core business, and that the information will be shared with other organisations with a view to driving inclusive and sustainable economic benefit. Amendment 18 will strengthen the bill, but in a proportionate way.

It is also important to highlight that section 1 of the Community Empowerment (Scotland) Act 2015 requires

"any ... person carrying out functions of a public nature"—

as a manager of a Scottish Crown estate asset will do—to

"have regard to the national outcomes in carrying out the functions".

The new national performance framework, which the First Minister launched on 11 June, embeds the United Nations' sustainable development goals, so managers will be required, under existing legislation,

"to focus on creating a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth."

Similarly, the Climate Change (Scotland) Act 2009 places an obligation on public authorities to act in the discharge of their functions in a way that contributes to the Government's goal of reducing emissions.

I understand that amendment 40 also seeks to strengthen section 7(2) by proposing that the word "may" should be changed to "must", and that it is linked to amendment 41, which would remove all the wider factors except sustainable development. In my evidence to the committee, I set out the clear imperative to ensure that the value of the Scottish Crown estate and the income that arises from it are maintained, otherwise the net revenue that is paid into the Scottish consolidated fund will be reduced, to the detriment of the Scottish people as a whole.

I also remain of the view that there is a clear imperative to ensure that the value of the Crown estate in Scotland is maintained. Devolution of the Crown estate to Scotland under the terms of the Scotland Act 2016 resulted in the United Kingdom Government's block grant to Scotland being reduced by the estimated annual amount of net revenue earned by the Crown estate. All the income, minus any running costs, is now paid into the Scottish consolidated fund to benefit Scotland as a whole. There is therefore a public interest in ensuring that the value of the assets is at least maintained. Less money being paid into the Scottish consolidated fund may have a knock-on effect on the operation of other schemes that provide wider socioeconomic or environmental benefits.

We must remember that the bill is not just about management of the foreshore by community organisations, or of the rural estates. It is also about management of strategic national infrastructure—the telecommunications cables, the oil and gas pipelines, the potential for offshore renewable energy, and the rights in the sea bed beyond the 12-mile limit of territorial waters.

I recognise the concerns that have been expressed about section 7(2), which is why I have lodged amendment 18, which will deliver the recommendation of the committee's stage 1 report, and I am concerned that amendment 40 could have unintended consequences for such a diverse portfolio.

10:30

Section 7(1) will not empower a manager to focus on short-term gain at the expense of longer-term benefits. Such a short-term approach is, by definition, incompatible with a duty to maintain and to seek to enhance the value of the estate as a whole, and the income that arises from it. I am therefore confident that amendment 18 is the right approach and that it will deliver the committee's helpful recommendation. However, I am happy to discuss the issue further, following stage 2.

That overarching duty would affect the key strategic decisions of managers, but members will be aware that under section 11 managers will be able, for example, to sell and lease assets for less than market value in the interests of

"economic development ... regeneration ... social wellbeing ... environmental wellbeing"

and "sustainable development".

Amendment 41 proposes the removal of all the wider factors in section 7(2), except "sustainable development". I wish the reference to "sustainable development" to be retained in the section, but I am concerned that removal of the reference to other socioeconomic and environmental factors would be very unfortunate. It is desirable that asset managers contribute to wider public objectives such as economic development, regeneration, social wellbeing and environmental wellbeing, and removal of those requirements from section 7(2) might act as a barrier to a manager actively considering and contributing to such factors.

Although we all want our natural resources including rural land, the sea bed and the foreshore to be managed sustainably, I do not support amendments 40 and 41. Amendment 40 competes with my amendment 18, which would not tie the hands of managers in taking strategic decisions. Amendment 41 would remove the references to wider benefits beyond "sustainable development" that were supported by stakeholders during the devolution process and in response to the consultation on the long-term framework.

However, as I have highlighted, I recognise the strength of feeling around the wording in amendments 40 and 18. Therefore, I am very happy to discuss the issue further, following stage 2. I urge members not to support amendments 40 and 41.

I move amendment 18.

The Convener: I invite Mark Ruskell to speak to amendment 40 and the other amendments in the group.

Mark Ruskell (Mid Scotland and Fife) (Green): I acknowledge the movement that the cabinet secretary has made by lodging amendment 18, which picks up on the committee's recommendation. However, I am disappointed because I still think that there is a fundamental misunderstanding of what sustainable development is. That is a shame, given that sustainable development goals are incorporated in the Government's objectives and have been part of our legislation and understanding for many years.

Section 7(2) creates a list of things, including "economic development", "regeneration", "social wellbeing" and "environmental wellbeing", that are already incorporated in the very nature and notion of "sustainable development". The idea of sustainable development is that economic, social and environmental aspects are considered as a whole. That is important because it means that we can consider win-wins, and when we consider the economic health of our communities, we can consider the environmental basis on which that economic health is delivered. I am sure that we will return to that issue with amendment 42.

It is important that we do not take a pick-and-mix approach to the list in section 7(2). A decision should not be justified on economic grounds without consideration of environmental or social impacts. Likewise, it is important that a decision on environmental grounds is not considered without due process and without economic, regeneration and social considerations. In order to return best value from the assets and to enhance the value of the assets for future generations, we need to put sustainable development front and centre. Sustainable development incorporates all the other items that are listed in section 7(2), so I feel that the other items are unnecessary. That I is why I will move amendment 41.

John Scott: I will speak to the cabinet secretary's amendment 18.

Although it might have been the committee's view at stage 1 that the term "must" should be used rather than "may" and that there should be some movement on the matter, I and the Scottish Conservatives are of the view that the bill is absolutely fine as it is. However, I have to say that I am not quite certain what the term "desirability" in the cabinet secretary's amendment 18 might mean in law, or what its effect in law might be, so I would welcome an explanation of that.

I do not support amendments 40 and 41 in the name of Mark Ruskell, because I believe that what is in the bill is quite sufficient. I take his point about lists, but the debate once again highlights—as he has mentioned—that there is a lack of understanding about, or a clear definition of, "sustainable development". I suspect that he and the cabinet secretary would not be on the same page with regard to what it means in this regard; indeed, I think that if you were to ask all members

in the room to write down what they believe to be "sustainable development", you would get many different answers. We might as well keep the list, which reinforces my view that we should keep section 7 as drafted.

Finally, I believe, as the cabinet secretary does, that with the use of the term "may", Crown estate managers will have maximum flexibility to maximise all the benefits of the Crown estate to the Scottish people and the Scottish Government.

That is my position, convener.

Stewart Stevenson: On amendment 41, which seeks to delete four items from the list in section 7(2), I simply ask us to consider examples of activities that would not be possible if we were to delete the term "social wellbeing", because no reasonable person would imagine their being covered by sustainable development. There might, for example, be a derelict property on a piece of Crown Estate land, and it might benefit the community if it were to be demolished and the area were restored to grass. I am not sure that that would be sustainable development, but it might well promote social wellbeing in a particular community. It is certainly not development—it is the opposite. Indeed, you might almost call it "undevelopment".

Similarly, with regard to the term "environmental wellbeing", there might be a piece of ground that might previously have been subject to industrial contamination, and it might be appropriate for the community to respond by wishing to decontaminate that land. Visually, it might remain absolutely the same, and doing nothing with it might be the right thing to do after decontamination. That, too, would not be development. It would be a perfectly environmentally friendly and sustainable thing to do, but I cannot see how it would be encompassed by the definition of sustainable development.

On the basis of the examples that I have given, I find it difficult to support anything that would delete the terms "social wellbeing" or "environmental wellbeing", in particular, from what the manager may or, indeed, must do.

Claudia Beamish: I support amendment 40, in the name of Mark Ruskell, which would make it obligatory for managers to promote and improve in Scotland what has been clarified in Mr Ruskell's amendments. As colleagues might remember, I spoke on this issue at stage 1; we had a good dialogue with the cabinet secretary at that stage, and I welcome the consideration that has been given to the issue.

I realise that the cabinet secretary might have worded amendment 18 to avoid a situation in which the nature of a particular asset might make meeting one of the factors listed in the bill a practical impossibility. If that is the case, I would welcome more discussion on the matter, because I do not think that we are quite there.

I still support the use of the word "must" in section 7. Amendment 40 would strengthen the duty in relation to the various factors, but I just think that we need to look at the issue further.

Stewart Stevenson: Just for clarity, I note that amendment 18 states that the manager "must have regard". Is that in line with what the member seeks?

Claudia Beamish: It is in line with what I seek, but the word "desirability" is weak, and I would like the measure to be firmed up. There is further discussion to be had on that. I am sorry to seem to be dancing on the head of a pin, but that is where I am.

I ask Mark Ruskell to consider not moving amendment 40. I do not know whether it is appropriate to ask the cabinet secretary to withdraw an amendment, but I ask her to do so with amendment 18, if I am allowed.

I am not minded to support amendment 41, which would leave only sustainable development as the mandatory factor to be considered, and would leave out the other four factors. However, that is not for the same reasons as my committee colleague Stewart Stevenson gave. Actually, I think that the examples that he gave are indeed issues of sustainable development, because that can involve the removal of something that is no longer sustainable.

To my mind, there is a clear understanding and definition of sustainable development—although I know that John Scott and others disagree—but I do not know that everybody follows that or agrees with it. To give one example, regeneration is an important factor that needs to stay in the list, because it is a big part of what we are doing in Scotland for rural communities, coastal communities and many other communities that will be affected by the devolution of the Crown estate. I understand that, as Mark Ruskell said, economic development, social wellbeing, environmental wellbeing and regeneration are indeed all part of sustainable development, but it is good to spell that out, so I do not support amendment 41.

Alex Rowley (Mid Scotland and Fife) (Lab): It is important to acknowledge that the cabinet secretary has taken on board what the committee said by lodging amendment 18, although I do not think that it is strong enough. However, the cabinet secretary said that she is willing to have further discussion on the matter. That would be the best way forward, so I hope that Mark Ruskell will consider not pushing the issue at this time. Likewise, I agree with others on amendment 41—I

cannot support it because the bill is stronger with those other terms.

Roseanna Cunningham: One or two members have mentioned the use of the word "desirability", but that is a fairly common drafting construct—it is not unusual terminology that we have dreamed up out of nowhere. As with the term "reasonable person", it is a widely understood way of constructing a form of duty that is not an absolute legal duty. It is a normal process. Basically, we are trying to ensure that, in a diverse portfolio, we do not end up imposing something that means that all the factors in the list have to be looked at even when they are not relevant to particular circumstances. We are trying to find a line in between the issues in this conversation. There is no purpose in forcing a manager to carry out a tick-box exercise when half of it simply does not apply. We must ensure that we do not impose unnecessary constraints.

Claudia Beamish: Will there be an obligation on managers to explain why they have not taken something into account? If not, it will just slide into oblivion.

10:45

Roseanna Cunningham: That is not what the amendment says, but it might be an area for a useful conversation about how we might look at this and take it forward in a way that does not end up tying managers' hands. We are trying to avoid tying managers down to things that are not particularly relevant. It might be an area in which we have to think about guidance, or we might have to come back and look at the issue again. We are all trying to get to the same place.

I also want to make some remarks about sustainable development. The conversation that we have already had shows that there is a slight danger in relying entirely on the phrase "sustainable development". I reiterate what I said in my earlier comments. We already have an obligation, which derives from the Community Empowerment (Scotland) Act 2015, that requires any manager who carries out functions of a public nature—that is what the Scottish Crown Estate Bill is about—to have regard to the national outcomes in carrying out those functions. The national performance framework embeds the UN sustainable development goals. At one level, therefore, the requirement in respect of sustainable development is already imposed on managers as it is imposed on all those who are involved in carrying out functions of a public nature. That requirement is already there under existing legislation.

We consider that it is appropriate to keep the more detailed list in section 7(2), partly because of some of the interesting conundrums that were raised inevitably by my colleague Stewart Stevenson, who will always find something of that nature. He may have highlighted an issue about which there might be some debate, whereas keeping the list would remove that debate. Claudia Beamish has already said that.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Lyle, Richard (Uddingston and Bellshill) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Beamish, Claudia (South Scotland) (Lab)
Carson, Finlay (Galloway and West Dumfries) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)
Scott, John (Ayr) (Con)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 18 disagreed to.

Amendments 40 and 41 not moved.

Section 7 agreed to.

Section 8 agreed to.

After section 8

The Convener: Amendment 42, in the name of Mark Ruskell, is in a group on its own.

Mark Ruskell: Amendment 42 attempts to enshrine a golden rule that has applied to the harvesting of kelp for many years, if not generations. It is a rule that has ensured that the kelp-harvesting sector has stayed in business and that the very environmental resource that that sector relies on has been protected for future generations. The golden rule is really quite simple: it is that kelp should be harvested in a way that does not prohibit the regrowth of the individual plant. The form of words that I have incorporated into the amendment is reflected in the licences that are issued to those who hand-harvest kelp at the moment—it is a very well-established principle.

My amendment would not ban the harvesting of kelp, but it sets a clear expectation that kelp must be harvested in a way that does not prohibit the regrowth of the individual plant.

If we were to consider forests on land, these days we would not be clear-felling ancient woodland. We might consider pollarding or coppicing an individual tree, but it would not be good practice to clear-fell a forest in that way.

Much the same is true of kelp forests. It is not sustainable to clear-fell them, either.

The difficulty in this area is that, once an area is clear-felled of kelp through dredging, it will take many years for the exposed rock to regrow the kelp; in some cases, due to the changing ecological conditions, it might be impossible for the kelp forests to re-establish themselves in areas that have been stripped. Therefore, in many cases, once the kelp forests are gone from a particular area, they may be gone forever or for a very long time. Once the kelp forests are gone, we lose the benefits that they deliver. I am sure that, over the past few weeks or months, members of the committee will have received correspondence about proposals to mechanically dredge and about what the benefits of kelp are to our coastal communities and our environment. However, I would like to talk about one example that, for me, has particularly underlined the importance of kelp.

My understanding is that kelp forests provide an important nursery for juvenile fish, particularly cod, saithe and pollock—the white fish that our fishing communities depend on. After kelp dredging was introduced in Norway, surveys found that there was a more than 90 per cent reduction in the number of juvenile fish in the areas that had been dredged. Through dredging for kelp, we would be removing the nurseries that support our white-fish sector. Further, the roots of the kelp—the holdfast, as they are called, which dredging pulls up—provide an important habitat for crabs and lobsters. This is one of the few environmental issues on which I have seen the white-fish sector and the creeling sector come together in opposition; I cannot think of another issue that has brought together so many diverse stakeholders in their concerns.

Kelp forests are priority marine features. They are vulnerable to climate change, so we should protect them. Of course, if we look at the policies from Natural England, we can see that it is advising against mechanical harvesting. I really do not think that we in Scotland should be engaged in a race to the bottom over environmental standards. Having said that, I also do not believe that we should be stifling innovation in situations in which a business can legitimately come forward with a sustainable way to mechanically harvest kelp. However, the golden rule that I mentioned should be applied. There should be the legal backstop that kelp should be harvested in a way that does not prohibit the regrowth of an individual plant. That is common sense, and that is why I lodged the amendment.

I move amendment 42.

The Convener: As a new convener, although I am hugely sympathetic to everything that Mark Ruskell has said, I am concerned about the fact that we have not taken evidence on this issue, which means that members—myself included—have not had the opportunity to drill down into what is involved.

I have another concern, which is based on my background in oil and gas safety. Often, innovation around any measure can also mean that things are safer for workers, as it can remove the need for any kind of manual handling to be done. I would have liked to explore that area, if we had had the opportunity to take evidence on it.

Stewart Stevenson: I am as big a fan of kelp as Mark Ruskell is, and all the environmental observations that he has made have considerable merit. I am delighted to see the creel and white-fish sectors agreeing on something, as there are areas in which there often appears to be some difference of view. The real issue is whether the amendment is the right way to address the issue of how to protect wild kelp and ensure that it can regenerate. As I understand it, the proposal is covered by section 21(1)(6) of the Marine (Scotland) Act 2010, which provides that someone needs a licence if they are going

"to use a vehicle, vessel, aircraft"

and so on to conduct harvesting of kelp. Indeed, I understand that there is a process under way on that subject.

I, too, have received a lot of correspondence, and I will share one example with the committee. The North Minch Shellfish Association makes the point that

"The ecological consequences of the industrial harvesting of kelp have not been specifically evaluated",

and that goes to the heart of whether this is the time and place to do that. I would find it quite easy to support protecting kelp in an appropriate way, but I would not support it coming into the bill without our having considered the issue or taken evidence from the two sides of the argument. We should ensure that, when we move forward on that subject, we do so on the basis of sound science.

I have no knowledge that would enable me to reject anything that Mark Ruskell has said, and I am not going to look terribly hard for it. However, I think that the committee, in considering such things, should always ensure that it acts on the basis of information and understanding of the wider issues. Bluntly, if we were to act in the absence of that, what could happen—it is always unhelpful when such a thing happens—is that we will end up in court with a judicial review, possibly from the company concerned, although I suspect that the economic value might not justify that quite expensive process.

There is considerable risk in addressing the issue in the bill in the way that Mark Ruskell

proposes. I invite him to withdraw amendment 42 and to work with the Government to see whether the provisions of the Marine (Scotland) Act 2010 would lead to the right outcome or whether there is another way of doing it that would give this committee or another committee an appropriate opportunity to take all the evidence before reaching a final conclusion about how we can protect wild kelp. It is not that I do not want to protect it, but a question of how—and where and when—we do that.

Richard Lyle: I, too, want to preserve and protect kelp and ensure that it is there for future generations. We have all received numerous emails and tweets over the past few days and weeks about the harvesting of sea kelp. I am reminded, as other members are, that the committee has not taken any evidence on the issue from those who would be affected or from any other interested parties, especially since the activity, as I understand it, cannot go ahead without a marine licence being obtained, which includes a robust environmental impact assessment. Am I not correct in saying that there is even a marine application licence for that? However, I understand the concerns and I will certainly take note of what is said by members to inform how I will vote on the issue.

Claudia Beamish: I support amendment 42. It is absolutely right that those responsible for the newly devolved management of Crown Estate assets should be tasked with considering sustainability when deciding whether to license harvesting.

Mark Ruskell's amendment will ensure that licences are not granted for harvesting wild kelp

"from any area of the seabed under their management where such harvesting would inhibit the regrowth of the individual plant."

As we have heard from him, kelp forests are a priority marine feature. Clearly, there are serious issues about its protection that need to be considered.

11:00

Sustainable kelp harvesting has a long tradition in Scottish inland waters. It is done with care and sensitivity to our marine environment and in relation to the other jobs that depend on the kelp forests. Future kelp harvesting must continue to be sustainable. It must not threaten sea life, sea-bed habitats, the protected seabirds that feed on the sand eels in those habitats or the nurseries of young pollock, cod and other white fish.

Over the past six years, in which I have been a member of this committee and its predecessor, I have taken a keen interest in marine environmental issues. A significant issue to consider is that kelp forests, along with seagrass beds and other areas of our inshore waters, are invaluable carbon sinks that merit great respect. The climate change plan recognises the developing research into those complex issues, which we ignore at our collective peril. Although I have not been able to investigate it in detail, I understand that there is Norwegian research that evaluates failure to regrow kelp after harvesting.

We should take the precautionary principle in relation to kelp harvesting. It is important to ensure that sustainable jobs are supported in our coastal communities now and in the future. There must be careful analysis of whether Marine Biopolymers' proposal would lead to sustainable harvesting—

Richard Lyle: May I intervene?

Claudia Beamish: Can I finish my point, please?

I do not see it as my role in committee today to comment on an individual application—that would be inappropriate—so I am deliberately avoiding pointing out research or expert views that relate to that specific potential development.

Richard Lyle: I do not think that anyone disagrees with you, but my earlier point was that we have not taken evidence on the issue. I welcome what you have brought to the fore, but I wish that we had discussed the matter well before now.

Claudia Beamish: I understand that, but between stages 1 and 2 there have been approaches by a number of groups and individuals—possibly partly on the back of the application, which I do not want to refer to any more. However, there is plenty of evidence in relation to climate change, carbon sinks and marine protected features that point us in the direction of supporting Mark Ruskell's amendment 42.

It is important to highlight that many sustainable jobs depend on the "protection and enhancement" of the marine environment, which is a clearly stated aim in the Marine (Scotland) Act 2010. That includes creel fishers. We have heard from Alistair Sinclair—I acknowledge that that was only yesterday—that he has the support of the 400 creel fishers whom he represents. In addition, the white fish sector has given us information about its concerns and we have heard from marine tourism operators, hand-divers for scallop, hand-divers for kelp and sea kayak companies.

I have had emails from some of those people asking me to support the amendment today. I ask that all other members seriously consider supporting the amendment in order to put down a robust marker to protect our kelp forests.

The Convener: Before I bring in other members, I ask everyone to speak through the chair if they want to make a further comment on the back of their original comments. I am not entirely keen on the intervention strategy that is being used. This is a committee—I would rather that people speak through the chair, and I will take you if I have time.

Finlay Carson (Galloway and West Dumfries) (Con): I welcome Mark Ruskell's opening statement—he has brought into the public domain an issue that certainly needs to be discussed—and I agree with much of it.

Mark Ruskell said that there is a well-established principle for the harvesting of wild kelp. However, it would be inappropriate to legislate on this matter under the Crown Estate (Scotland) Bill. The issue would be more appropriately dealt with through the licensing system. If we get the opportunity to examine the matter, it should be viewed from a scientific perspective; we should also look at what the environmental and economic impact of kelp harvesting would be. I would welcome further work on that.

As I have said, I welcome Mark Ruskell's amendment, but I am not sure that it is appropriate to deal with the issue under the legislation that we are considering.

Angus MacDonald (Falkirk East) (SNP): As we have heard, there is no doubt that this is an important subject, given the social media traffic and emails that I have received, and the submissions that have been made to the committee in recent days. I agree with the convener and others that the committee must take more evidence on the issue before reaching a conclusion.

It is worth stressing that the bill is an enabling bill and that we are discussing an issue that is not, as yet, the subject of a marine licence application, although I believe that a scoping report has been submitted to Marine Scotland. I do not want to dwell on that. I have some sympathy for the concerns that have been raised, but I am slightly concerned that we are straying into operational matters in our consideration of what is an enabling bill.

I have a question for Mark Ruskell. If amendment 42 is agreed to, is it not likely that amendments will be lodged at stage 3 that seek to ban managers from doing other things? I suggest that amendment 42 is out of kilter with the general duties under the bill. That is my main concern and, ideally, I would like Mark Ruskell to withdraw his amendment for the time being.

John Scott: Most of what I was going to say has already been said, but I will reiterate it nonetheless.

Unlike Claudia Beamish, I am not convinced that the bill is the correct place to introduce such a measure. I do not believe it to be appropriate. Of course, I note the significant concerns of the different industry bodies that have contacted us. Both sides have points of view.

In common with other members, I hugely regret the fact that we have not taken evidence on the subject. Stewart Stevenson made a valid point when he said that it might not be too late to take evidence. There is a precedent for taking evidence at stage 2. It is unusual, but Stewart Stevenson is a man who knows the rules, and he probably knows what I am talking about.

There is a process to be followed here, and I am not sure that the proper process that is expected of this Parliament is being followed. I find it surprising that Claudia Beamish said that she was avoiding expert views.

Claudia Beamish: I would like to clarify what I said. I made that remark specifically in relation to the dredging application, which I was sent information about. I did not want to refer to the Norwegian example for that reason.

John Scott: Notwithstanding that, you have been keen to extol the case, very strongly, of the people whom you are representing—

Claudia Beamish: In broad terms, yes.

John Scott: —without giving any credence to any other arguments that have been presented.

I believe that there is a process to be followed. It is possible to act in haste and repent at leisure, so I urge Mark Ruskell to withdraw his probing amendment. The cabinet secretary might wish to discuss his amendment with him to see what—if anything—can be achieved at stage 3, but I think that there is a better way of going about things than the one that is suggested in amendment 42.

Alex Rowley: I support amendment 42 for the reasons that have been set out by Mark Ruskell and Claudia Beamish.

I want to pick up on a couple of points. Angus MacDonald talked about managers being asked to ban the harvesting of wild kelp, but that is not what amendment 42 is about. If that was what it was about, the points that have been made about the need to have the scientific evidence would be far more relevant. Amendment 42 is saying that managers must not grant a right to carry out the harvesting of wild kelp where such harvesting would inhibit the regrowth of individual plants. That is what the amendment is about. It is perfectly appropriate that that guidance and that clear

direction to managers are given in the bill so that we protect and ensure that that established principle is put into play where the harvesting of wild kelp takes place.

In a sense, it is a mistake to talk about the science. The amendment does not speak about bans.

Roseanna Cunningham: I have a considerable legal difficulty at the moment, given that a marine licensing process is currently being undertaken, albeit that it is at the pre-application stage, and I am the responsible minister for whom that would end up being a decision-making process. Therefore, I cannot make a great deal of comment about the amendment, and I certainly cannot indicate any value judgment on the issue one way or the other, as that would be instantly prejudicial to an on-going process. I want people to be very clear about that. The pre-application process is part of the process.

I will have to pick my way through a minefield to try to make a couple of points about the situation that we are in.

The bill is about the general managing requirements for the assets, not specific activities. It is also about the devolution of management of Crown Estate assets to those with an interest in them—we have had discussions about community organisations and local authorities, for example—with a view to increasing local control over decision making. The bill already contains powers for the transfer or delegation of the management of a Crown Estate asset, which include the ability to restrict the activities that a manager can undertake as a manager. That reflects the ethos of the bill to allow decisions to be taken on a case-by-case basis.

Amendment 42 is not about trying to give effect to those principles at all. In effect, it tries to bring about a ban on the conduct of one particular marine activity: the seaweed harvesting that is being discussed. I simply make the point that other members have made: thus far, there has been no evidence gathering that would adequately inform committee members one way or the other, and the proposal is being made in the absence of any proper process.

There is an existing robust marine licensing regime that regulates activities. The pre-application process is part of that regime. As I indicated at the outset, that process is already under way.

Amendment 42 therefore cuts across what the Scottish Parliament has already legislated for in the past decade, which is a statutory regime that requires licences to be granted before such activity can be carried out. That regime includes a full assessment of the environmental impacts. To take a decision before those impacts have even been assessed does not seem appropriate and is certainly not evidence based. That is not to say that we do not recognise that there are concerns about potential environmental impacts. However, as I said at the outset, I am in an extraordinary position in that I cannot indicate a view one way or the other for fear of creating a difficulty with the process that is already under way.

If Mark Ruskell insists on pressing amendment 42, I can only ask members to abstain in the vote. I am, of course, happy to continue to discuss the matter at stage 3.

11:15

Mark Ruskell: I will deal first with the issue of whether this is an appropriate bill for such an amendment. I believe that it is, because kelp is a property right of the Crown. Everything that is attached to the land forms part of the land. The bill is an appropriate place in which to consider how kelp can be harvested sustainably.

On the process of taking evidence during the bill's passage through Parliament, I agree that it would have been better to have had evidence on this issue at stage 1. However, sometimes events in the real world overtake the work of this Parliament. We have to be fleet of foot and respond to evidence and concerns that the public brings to us. If the amendment is passed at stage 2 today, that would still give time to consider evidence and representations from stakeholders and for other discussions with the Government, ahead of the final opportunity to amend the bill one way or another at stage 3.

Amendment 42 would not enshrine a new principle in legislation. It is a well-established principle. I emphasise, as Alex Rowley and Claudia Beamish have, that the amendment does not provide for a ban on a proposal from a particular company—that proposal is irrelevant. It would enshrine in legislation the already well-established principle for the licensing of hand harvesting of kelp that has been in place in Scotland for many years. It would create a level playing field with whatever other interests may wish to put forward licence applications to harvest kelp in the same way or in a different way. It would not establish a new precedent. It would merely take an existing licensing precedent and ensure that it has a more robust legal basis. It would not determine what is a good or bad way to harvest kelp. It would set out a key golden rule, which is that kelp must be harvested in such a way that does not prohibit the regrowth of an individual plant. That is why I will press the amendment.

The Convener: The question is, that amendment 42 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Beamish, Claudia (South Scotland) (Lab)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Ruskell, Mark (Mid Scotland and Fife) (Green)

Abstentions

Carson, Finlay (Galloway and West Dumfries) (Con)
Lyle, Richard (Uddingston and Bellshill) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Martin, Gillian (Aberdeenshire East) (SNP)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 3, Against 0, Abstentions 6.

Amendment 42 agreed to.

Sections 9 and 10 agreed to.

Section 11—Duty to obtain market value

Amendments 19 and 20 moved—[Roseanna Cunningham]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Meaning of "market value"

Amendment 21 moved—[Roseanna Cunningham]—and agreed to.

Section 12, as amended, agreed to.

Section 13 agreed to.

After section 13

The Convener: Amendment 43, in the name of Liam McArthur, is grouped with amendment 44.

Liam McArthur (Orkney Islands) (LD): I apologise to the convener, colleagues and the cabinet secretary for my late arrival this morning. There is a Justice Committee meeting going on, to which I will have to return.

Unlike colleagues, I have not had the benefit of sitting through the evidence at stage 1. Nevertheless, devolving the management of the Crown estate in Scotland to the communities with the most interest in and reliance on the future use of those assets has been an issue that I have pursued since before I was elected in 2007. I therefore welcome the bill and what it can help to achieve, although, like most of us, I accept that it can and should be strengthened, not least to unlock and secure the benefits for communities arising from developments in the marine environment out to 12 nautical miles, at this stage.

To be clear, that includes but should not be limited to the revenue accrued through rental agreements. I also think it important that decisions over how those benefits are set, raised and allocated are taken at a local level. Indeed, that is the underlying principle of my amendments.

I appreciate that some might be concerned about adding to the cost of projects, particularly in the early phase when they might be more vulnerable, but I am confident that the flexibility in my proposals and the mutual interest of local authorities and developers in avoiding projects being in effect throttled at birth will ensure that a proportionate—and potentially phased—approach is taken. Of course, in each instance, there would be a requirement for detailed prior consultation.

As colleagues will be aware, the Orkney and Zetland County Council acts already provide evidence—and perhaps a blueprint—of how this might work. Over the past 40 years, the local management and commercial extraction of marine resources have been achieved through formal agreements, such as works licensing under the Orkney and Zetland acts, and agreements with the oil industry. Those arrangements have worked well, both in the interests of the local communities and, I think, at a national level. That track record of our island authorities has been recognised and underpins how inshore regional marine planning is being taken forward and should be extended.

The principle that local authorities should be compensated for disruption and inconvenience associated with development work seems to be widely accepted. We have seen that in territorial planning, albeit on a voluntary basis, and we are starting to see it emerging in offshore developments, although, again, on a voluntary and, I think, patchy basis. However, the fundamental point is that communities that have to endure the burden of development, dislocation, risk and exploitation of scarce resources must be involved in decision making about the developments that do and do not happen. Community benefit is a necessary adjunct of that decision-making process.

None of this should be unduly controversial. Indeed, much of what I have said sits comfortably with the Government's commitments in its prospectus "Empowering Scotland's Island Communities". I realise that the amendments might need some fine tuning ahead of stage 3, and I am happy to work with the cabinet secretary and her officials to achieve something workable. However, I hope that the committee will see fit to agree to the principles underlying my amendments and that we can take them forward.

On that basis, I move amendment 43.

Stewart Stevenson: I will raise a small issue with regard to adjacent local authorities that might be said to share an area. For example, in the area between Bute and Arran, the 12-mile limits for the authorities concerned overlap, and I am interested

in hearing how that would be dealt with. The definition used in subsection 2(b) of amendment 43 says that the area in question would run

"from Mean High Water Springs out to 12 nautical miles".

In the case of Bute and Arran, there will be an overlap between the two adjacent authorities.

Claudia Beamish: If Liam McArthur decides to press amendment 43 instead of agreeing to discussions prior to stage 3, I will be keen to support it. This is a very complex issue, and having read what the island authorities have had to say about it, I find their argument that this is where the benefit should go for distribution to be cogent. After all, they know their communities well. As long as the criteria are set appropriately—and, to be blunt, they have not been with regard to certain issues such as onshore wind, which is something that I have experience of—the approach is a very good one to support.

I also think that addressing the possibility of delays to revenue coming in might be appropriate with regard to start-ups. I do not think that anyone will want to jeopardise jobs or the possibilities of renewable energy, but it might affect, say, other aspects of the industry that are just developing, such as carbon capture and storage, should we go down that road.

In short, I say yes to the amendments in principle, but there might well be further discussion to be had.

Mark Ruskell: I have a question on how amendment 43 might impact on the planning system and marine licensing. My understanding is that, at the moment, community benefit is not a material consideration. It is considered to be a voluntary contribution, although it is desirable, and that is reflected in Government policy. However, it does not form a material consideration in planning and I am unclear about how it sits within marine licensing. If amendment 43 is agreed to today, will it change that in any way and elevate the status of community benefit in relation to the determination processes that exist elsewhere in legislation?

Roseanna Cunningham: The Government is resisting amendment 43 and consequential amendment 44. They are unnecessary because the Scottish ministers have made a commitment to ensure that coastal communities will benefit from the net revenue from the Scottish Crown estate marine assets. Wider arrangements that are promoted by the Scottish Government are already in place.

In addition, for some time, the Scottish Government has encouraged all renewables developers to provide community benefit, which is what Mark Ruskell has just been talking about, as part of any new projects. The Government also promotes good practice principles in relation to that. We also encourage aquaculture developers to evidence community benefit as part of any proposed new development.

The Scottish Government has no powers to oblige developers to pay community benefits for such schemes. It is not necessary in practice, as there are examples of local community benefit schemes being put in place on a voluntary basis by developers in Scotland.

On ensuring local community benefit, we have had constructive discussions with the Convention of Scottish Local Authorities and have agreed an interim mechanism for local authorities to receive a share of the net revenue out to 12 nautical miles. Having said that, members might have noticed that I was having a vigorous conversation with the official to my left because—and this sometimes happens with amendments at any stage—our reading of amendment 43 is that it would impose a duty on the Scottish ministers to make regulations about a community benefits requests scheme in relation to Scottish Crown estate assets within the Scottish marine region for the Orkney Islands, as defined in article 8 of the Scottish Marine Regions Order 2015.

Liam McArthur might not have intended to lodge an amendment that relates solely to the Orkney Islands, but he might have. I can see that there might be an advantage in a local press release along those lines. Our understanding of amendment 43 as it is drafted is that it would apply only to the Orkney Islands Council. I am not certain that that is what is intended; perhaps we need to discuss that.

I am happy to have a conversation with Liam McArthur about that, because arrangements are being made to distribute the revenue to coastal councils later this year for the purpose of benefiting local communities. We have agreed with COSLA that we will review the interim arrangements, including whether we can establish a closer link with the net revenue raised in a local authority area and how benefit to local communities can be assured. Active conversations are already being held in and around the issue.

I ask Liam McArthur not to press amendment 43 and not to move amendment 44. I will be happy to engage with him in a discussion about how we could give effect to what I suspect is a general feeling around the issue, rather better than what is drafted here.

Liam McArthur: I will start by coming clean in relation to the Orkney-specific focus of amendment 43. I am fairly sure that that was unintentional; it might just have been muscle memory and force of habit. It illustrates, as do some of the other points that have been made and

as I conceded in my opening remarks, that the amendments were lodged with the view that they would almost certainly need some further work.

I thank Stewart Stevenson, Claudia Beamish and Mark Ruskell for the points that they raised during the debate. Stewart Stevenson made a point about adjacent local authorities. That issue does arise and there are already examples in marine planning that would point in that direction and might address some of those points, whether it be competing interests or mutual interests, and how those might be properly balanced.

I welcome Claudia Beamish's support for the principle underlying amendment 43. The cabinet secretary has illustrated the complexity of the issue but, as Claudia Beamish said, the arguments that local authorities have put forward have been cogent and coherent in articulating the underlying principle.

11:30

On Mark Ruskell's points about the impact on marine licensing and community benefit not being a material consideration in planning, as I think I said in my opening remarks, although community benefit has been a feature of planning applications in land-based developments, that has been on a voluntary basis and it has been patchy. I can point to examples from my Orkney constituency and from the early stages where the process was unsatisfactory. Although the process may have improved and communities are better sighted on what has been negotiated in similar circumstances, it remains the case that that is done on a voluntary basis. There is a concern that, for some of the developments that we are talking about, a firmer right is required.

The cabinet secretary noted that conversations are on-going with COSLA. I thank her for her invitation to continue the discussions on what might be achieved at stage 3. On that basis, I seek to withdraw amendment 43.

Amendment 43, by agreement, withdrawn.

Section 14 agreed to.

After section 14

The Convener: Amendment 22, in the name of the cabinet secretary, is grouped with amendment 27.

Roseanna Cunningham: Amendment 22 inserts a new section after section 14 that makes provision about rights and liabilities. The amendment makes it clear that the costs and liabilities that are associated with managing a Scottish Crown estate asset must be met from Scottish Crown estate funds and cannot be met from any other funds that the manager has in respect of any other purpose. The amendment also gives the Scottish ministers a power to make regulations transferring rights and liabilities between managers that can be exercised even when the management function is not also being transferred or delegated. The power is additional to the power in section 3(1)(b) to transfer rights and liabilities, which may be used only when a transfer of management of an asset is being made. The power relates to rights and liabilities relating to Scottish Crown estate assets, former assets and historic Scottish assets, which are assets that once formed part of the Crown estate in Scotland.

Amendment 27 provides that regulations that are made under the new section will be subject to the affirmative procedure if they textually amend an act and that otherwise they will be subject to the negative procedure.

I move amendment 22.

Amendment 22 agreed to.

Sections 15 to 19 agreed to.

Section 20—Strategic management plan

The Convener: Amendment 37, in the name of Andy Wightman, is grouped with amendments 38 and 39.

Andy Wightman: Section 20 places a duty on the Scottish ministers to prepare a strategic management plan for the Scottish Crown estate. By way of introduction, I want to spell out briefly why I lodged amendments 37 to 39. Recommendation 32 of the Smith commission report states:

"Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament."

The management was devolved under the Scotland Act 2016, but the revenues were not—they remain reserved, notwithstanding that the Civil List Act 1952 provides that the Scottish Crown estate revenues should be paid into the Scottish consolidated fund. The reason for that on-going reservation is yet to be established, but one explanation is that the Treasury is protecting the interests of the monarch and their successors, who have a constitutional obligation to surrender the revenues of the Crown at the beginning of every reign. It is worth noting that, if that does not happen, the bill will be rendered meaningless. That failure to devolve the revenues is why Scottish ministers are having to have discussions with the Convention of Scottish Local Authorities to work out a way of implementing their commitment to transfer 100 per cent of the net revenues out to 12 nautical miles to local authorities.

The 2016 act constrains the freedoms of this Parliament to legislate over management and provides no scope whatsoever to legislate in respect of revenues. That is why I lodged four amendments that would have exercised the devolved competence to legislate on Crown property rights that was provided in section 3(1) of part 1 of schedule 5 of the Scotland Act 1998. Those amendments were to extinguish the Crown's rights in native oysters and mussels, in the foreshore, in the sea bed and, through the repeal of the Royal Mines Act 1424, in naturally occurring gold and silver. Those rights are, in my view, a feudal relic and an anachronism in relation to any modern form of land tenure and should have no place in that system. However, to my disappointment, the convener ruled that those amendments were outwith the scope of the bill. Removing those rights from Scotland's system of land tenure would have taken them outwith the Crown estate, outwith the constraints that are imposed by the 2016 act and this bill and, indeed, outwith any attempt by a future monarch to refuse to surrender Crown revenues. I will continue to make the case at stage 3 for doing that, and I am happy to enter discussions with the cabinet secretary if she is minded to contemplate such a move.

As an alternative to the amendments that were ruled out of scope, I lodged an amendment that would place a duty on ministers to set out their view on the desirability of doing precisely those things that I would prefer to be done today, through this bill. Amendments 38 and 39 are designed to prevent the duty from being delegated to Crown Estate Scotland.

To be clear, amendment 37, which is the substantive one in the group, would require that, in any strategic plan for the Crown estate, ministers must express their views on the desirability of extinguishing the Crown's property rights and interests in naturally occurring oysters and mussels, in the foreshore, in the sea bed and in gold and silver, the latter of which are vested in the Crown under the Royal Mines Act 1424; incidentally, I think that that is the oldest statute on the Scottish statute book.

I move amendment 37.

Stewart Stevenson: I congratulate Andy Wightman on moving the bar backwards. I think that, previously, the oldest act that we had referred to in debate was the Common Good Act 1491, which he knows about.

Mr Wightman said that the effect of his proposal would be to abolish the Royal Mines Act 1424. That act is quite a short one—it is but two lines long. Essentially, it nationalises the extraction of silver and gold where there are three half pennies of silver in one pound of lead, so that they become the property of the Crown. Therefore, abolishing the act would undo the nationalisation and transfer of other people's assets to the Crown.

I understand that there is only one gold mine in Scotland and that, at the time of the 1424 act, the location of that gold mine was on land that was owned by the Campbells. Therefore, the abolition of the 1424 act would transfer back to the Campbells their rights to gold and silver.

Andy Wightman: Will the member take an intervention?

The Convener: You will have an opportunity to answer some of these points later.

Andy Wightman: I appreciate that, but I would like to clarify at this stage the contention—

The Convener: I understand, but I would like to hear from Mr Stevenson. You can respond when you sum up.

Stewart Stevenson: If transferring the Campbells' rights to gold and silver back to them is Mr Wightman's intention, that is fair enough—he is entitled to have that intention—but it is not an intention that I would support.

If, as Mr Wightman suggested, his proposed amendments would abolish the 1424 act—I am not sure that they would, based on my reading of what is before us—we need to know what would happen then, and I am not sure that the amendments before us deal with that.

Claudia Beamish: It is clear that anything that will abolish feudalism in this day and age is an imperative. The issues are complex and, to be open about it, I have not made the time to delve into the detail of the situation—I am not giving the excuse that I have not had the time; it is just that I have not made the time. However, in these circumstances, I ask Andy Wightman to consider withdrawing his amendment to enable further detailed discussions to be held with the cabinet secretary and others so that we can ensure that we are heading in the right direction of travel. I hope that something can be brought back at stage 3.

Roseanna Cunningham: Amendment 37 would require the Scottish ministers to set out their views on the desirability of extinguishing the Crown's property, rights and interests in the various assets that are listed: oysters and mussels, the foreshore, the sea bed and gold and silver. I should highlight that the right to gather naturally occurring oysters and mussels has not formed part of the rights of the Crown Estate in Scotland since November 2014, as those rights were transferred to the Scottish ministers. As such, that right is not a right of the Scottish Crown Estate following the transfer that took place from the Crown Estate Commissioners last year.

The bill is concerned with the management of Scottish Crown estate assets and devolving management of those assets to bodies with an interest in them, such as local authorities and community organisations. Although the bill enables transfer of ownership of assets in the course of management, it is not about the question in principle of the Crown's ownership of those assets and whether those assets should form part of the Crown estate at all. Therefore, the proposed amendment is not relevant to the purpose of the bill. It would not be appropriate to require the Scottish ministers to comment in the strategic plan—which is concerned with the management of the Crown estate—on whether the Crown's rights should be extinguished.

Although amendment 37 does not directly seek to legislate to extinguish the Crown Estate's property, rights and interests in the listed assets, its effect would be to require the Scottish ministers to consider the desirability of doing so in the strategic management plan, which the bill requires to be prepared every five years. Any such consideration would have to take account of the fact that it is not within the Scottish Parliament's powers to take forward such legislation.

Any attempt by the Scottish Parliament to extinguish the Crown's property, rights and interests in Crown estate assets is likely to be outside legislative competence. Account would have to be taken of the fact that extinguishing the Crown's right in an asset would have a knock-on effect on hereditary revenues that are generated by that asset, which are reserved even though the revenues are now paid into the Scottish consolidated fund. The hereditary revenues are the moneys that are currently generated from an asset and those that will be raised in the future. That has particular relevance to the potential for offshore energy in the Scottish zone, which is that part of the sea bed outwith the 12-mile limit of territorial waters.

More fundamentally, only the sea bed out to the 12-mile limit forms part of Scotland's territorial waters. The rights to the sea bed between 12 and 200 nautical miles from Scotland are governed by international law under part 5 of the United Nations Convention on the Law of the Sea. The convention confers on the coastal state certain special rights to that area of the sea bed, including rights to exploration and the use of marine resources, for example, for energy production from water and wind. The coastal state is the United Kingdom. Devolution of the management of those rights was recently granted to Scotland and Crown Estate Scotland (Interim Management) on the basis that they would form part of the rights of the Scottish Crown Estate. If the Crown's rights in the sea bed were extinguished, it is likely that the management of the sea-bed rights beyond the 12-mile limit—that is, the rights over the zone in which we see great potential for development of renewable energy—would revert to the UK Government.

As for the rights to gold and silver, if the Crown's rights were extinguished, those rights would fall to whoever was the owner of the lands when the Royal Mines Act 1424 became law. If the owner's descendants could not be traced, the rights would fall to the Crown anyway as bona vacantia. Therefore, in our view, the exercise would be futile.

In those circumstances, I ask Andy Wightman not to press amendment 37 and not to move the consequential amendments 38 and 39.

The Convener: I invite Andy Wightman to wind up.

Andy Wightman: I thank members for their comments.

To be clear, amendment 37 would require ministers to set out their views. When it comes to matters such as the Royal Mines Act 1424, I had an amendment that was deemed not to be within scope, so it was not lodged. For members' information, it contained a provision whereby, on such day as the act was repealed, gold and silver would vest in the Scottish ministers, so it would not be my intention for the Campbells or anyone else to get back their gold and silver.

I am well aware that management of naturally occurring oysters and mussels, which the cabinet secretary mentioned, was transferred a couple of years back and that they no longer form part of the Crown estate. Nevertheless, the Crown still has rights in them, notwithstanding the fact that they are not managed as part of the Crown estate; they are managed by Scottish ministers. That is no different from other Crown property rights, such as bona vacantia, which the cabinet secretary mentioned, that have always been managed in Scotland by the Crown Office.

11:45

I mentioned the section of schedule 5 to the Scotland Act 1998 that devolves competence over property rights of the Crown. An issue could arise about the fact that revenues remain reserved, but in the Civil List Act 1952, assets of the Crown that have never been part of the Crown estate—bona vacantia, ultimus haeres and treasure trove—were admitted to not form part of the civil list settlement at that time because they were never part of the Crown estate. Indeed, the 1952 act has now been amended to take account of the devolution of the Crown estate. I do not therefore think that there would be any substantive problem with abolishing those rights. It is, of course, worth noting that we

abolished the Crown's rights and paramount superiority under the Advocate General and nobody took any issue with that.

In light of members' comments and the cabinet secretary's comments on what she regards as Scottish ministers' duties under section 20 in terms of the scope of the bill, I will not press amendment 37.

Amendment 37, by agreement, withdrawn.

Section 20 agreed to

Sections 21 to 23 agreed to.

Section 24—Annual report

Amendment 23 moved—[Roseanna Cunningham]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Laying and publication of annual reports

Amendment 24 moved—[Roseanna Cunningham]—and agreed to.

Section 25, as amended, agreed to.

Sections 26 to 36 agreed to.

Section 37—Power to delegate functions to Crown Estate Scotland

Amendments 38 and 39 not moved.

Section 37 agreed to.

Sections 38 and 39 agreed to.

Section 40—Regulations

Amendment 25 moved—[Roseanna Cunningham]—and agreed to.

Amendment 44 not moved.

Amendments 27 and 26 moved—[Roseanna Cunningham]—and agreed to.

Section 40, as amended, agreed to.

Sections 41 and 42 agreed to.

Schedule 2—Consequential and minor modifications

Amendment 28 moved—[Roseanna Cunningham]—and agreed to.

Schedule 2, as amended, agreed to.

Section 43—Interpretation

Amendment 29 moved—[Roseanna Cunningham]—and agreed to.

Section 43, as amended, agreed to.

Sections 44 and 45 agreed.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

At its next meeting on 25 September, the committee will take evidence in round-table format on the register of controlled interests in land.

Meeting closed at 11:50.

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