Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

Stage 1 Report on the Regulatory Reform (Scotland) Bill

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Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

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Remit:

The remit of the Committee is to consider and report on the Scottish economy, enterprise, energy, tourism and renewables and all other matters within the responsibility of the Cabinet Secretary for Finance, Employment and Sustainable Growth apart from those covered by the remit of the Local Government and Regeneration Committee and matters relating to the Cities Strategy falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy.

Membership:

Marco Biagi
Chic Brodie
Murdo Fraser (Convener)
Alison Johnstone
Mike Mackenzie
Hanzala Malik (from 3 September 2013)
Mark McDonald (from 27 June 2013)
Margaret McDougall
Dennis Robertson (Deputy Convener)
Rhoda Grant until 3 September 2013.
David Torrance until 26 June 2013.

Committee Clerking Team:

Clerk to the Committee
Stephen Imrie

Senior Assistant Clerk
Fergus Cochrane

Assistant Clerk
Diane Barr

Committee Assistant
Jonas Rae
RECOMMENDATIONS AND CONCLUSIONS

Consultation responses prior to Parliamentary scrutiny

RECOMMENDATION 1: We recommend that the Scottish Government publishes, wherever possible, all individual consultation responses prior to parliamentary consideration of a Scottish Government Bill.

Wider Parliamentary scrutiny

RECOMMENDATION 2: We note the view of the Delegated Powers and Law Reform Committee that the provisions in Part 1 of the Bill should reflect the Scottish Government’s stated policy objective to introduce national standards of regulation for consistency, which are appropriate for specific areas of business. We further note the Scottish Government’s response that it is not unusual to provide the detail on what can be done in a schedule which accompanies an enabling Bill.

RECOMMENDATION 3: We note the view of the Delegated Powers and Law Reform Committee that the “super-affirmative” procedure should be used to enable parliamentary scrutiny of any proposal to substantially amend, remove or create new regulatory requirements, before an instrument is laid for approval. We agree with the response from the Cabinet Secretary for Finance, Employment and Sustainable Growth that the use of the affirmative procedure is not unusual in these circumstances and that it provides an appropriate level of parliamentary scrutiny.

National standards – a centralised approach

RECOMMENDATION 4: We welcome the Scottish Government’s collaborative approach to working with COSLA to agree national standards which are transparent, workable and which take account of local circumstances. We recommend that the Scottish Government adopt a similarly inclusive way of working by consulting widely on any proposed changes to regulations.

Exemption criteria and implementation

CONCLUSION 1: We endorse the view of the Delegated Powers and Law Reform Committee that the inclusion of a six month modification period is very unusual and is not subject to parliamentary scrutiny and that any modification of how the regulations apply to a regulator must be published
on being made. We therefore welcome the Cabinet Secretary for Finance, Employment and Sustainable Growth’s commitment to lodging a stage 2 amendment to provide for publication.

RECOMMENDATION 5: We recommend that the Scottish Government include the exemption criteria in either the code of practice or within guidance to ensure that decisions on exemptions to compliance with regulations under section 1 are transparent and consistent.

Regulators’ duty in respect of sustainable economic growth

CONCLUSION 2: We welcome the Minister’s confirmation that the code of practice will fulfil the role of assisting regulators in complying with the new regulatory duty, in particular providing guidance on balancing it with existing duties and helping to avoid any possible conflicts of interest. We look forward to considering the detail of the code of practice in due course.

RECOMMENDATION 6: We note the view of the Rural Affairs, Climate Change and the Environment Committee and its proposal to replicate the SEPA hierarchy for SNH and other regulators. The Committee further notes that the Minister for Environment and Climate Change has stated that this is unnecessary and we agree with the Scottish Government’s approach.¹

Definition of sustainable economic growth and whether the term should be changed to sustainable development

RECOMMENDATION 7: In the interests of effective parliamentary scrutiny and transparency, we welcome the Minister’s confirmation that a definition will be included in the code of practice. However, we note the conflicting views of many of those that have given evidence to the Committee on this point and the views of the Scottish Government. We are keen to avoid future conflicts on this issue being a matter for the courts and believe that the Parliament and the Scottish Government have a duty to minimise this risk.

Whilst we do not believe that it is legally necessary that a definition of sustainable economic growth be stated on the face of the Bill, we recommend that the Scottish Government ensures that its definition of this term is explicitly stated and explained in subsequent guidance and that, furthermore, it gives a commitment that drafts of this guidance are submitted to the Parliament for scrutiny prior to being issued by Scottish Ministers.²

¹ Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
² Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
Enforcement of the duty

CONCLUSION 3: We welcome the Scottish Government’s commitment to include in the code of practice guidance to regulators in respect of their duties and look forward to scrutinising the content of the code of practice in due course.

Code of practice – Parliamentary scrutiny

CONCLUSION 4: To ensure effective Parliamentary scrutiny of the detail of the code of practice, we intend to take evidence from stakeholders within our remit prior to the draft code being finalised and laid before Parliament.

CONCLUSION 5: We welcome confirmation from the Cabinet Secretary for Finance, Employment and Sustainable Growth that the Scottish Government will publish both the Code of Practice and the guidance that regulators must have regard to in respect of carrying out the duty to contribute to achieving sustainable economic growth, on issue, and when revisions are made.

Code of practice – procedure

CONCLUSION 6: As the Scottish Regulators’ Code of Practice is to provide guidance on how regulators will apply the duty and what they should have regard to when determining policies, we believe that it is essential that the content is agreed to in an inclusive and transparent way. We therefore welcome the creation of the working group and the Scottish Government’s commitment to include representatives of communities and consumers in its forthcoming consultation.

Power to modify list of regulators - selection of regulators included

CONCLUSION 7: We welcome the Minister’s confirmation that planning authorities and licensing boards will not be included in the list of regulators covered by Parts 1 and 2 of the Bill. We also welcome confirmation that the Scottish Government will consult before amending the list of regulators.

Marine licencing decisions - statutory appeal mechanism

RECOMMENDATION 8: We welcome the proposal for one appeal system which will make the process for offshore marine energy projects more transparent and more easily understood. Given the concerns raised about the need for a consistent approach to the appeals system, we ask the Scottish Government to consider whether existing legislation currently provides this or whether a more systematic approach is required.
Six week appeal time limit

RECOMMENDATION 9: Whilst we understand that the six week appeal timescale provides a consistent approach to appeals, we are not yet clear on the potential impact on both business confidence and investment, and also on the ability of individuals, communities and small businesses to appeal. We therefore ask the Minister to address this issue during the Stage 1 debate and to consider monitoring the impact of this measure following the Bill’s passage.

Planning authorities’ functions: charges and fees - measuring performance

CONCLUSION 8: We welcome the commitment from the Minister for Local Government and Planning to consider including a definition of satisfactory performance in the guidance or in a future statutory instrument which will provide necessary clarity for planning authorities and stakeholders.

CONCLUSION 9: It is essential to collect reliable qualitative and quantitative data to measure planning authority performance to understand the reasons for delays and to accurately determine when there is an undue delay. We welcome the clarification that performance measurement will include qualitative measures.

RECOMMENDATION 10: The Committee recognises that there are a range of factors which might cause delays in the planning process some of which are out-with the control of planning authorities. We therefore recommend that the Scottish Government clarify what measures it will undertake to improve the performance of agencies accountable to the Scottish Government, to avoid any undue delays in the planning process.

Linking fees to performance - resource implications

RECOMMENDATION 11: We recommend that Audit Scotland undertake an analysis of the cost of processing planning applications for planning authorities to gain an understanding of the impact of a lack of current resources on performance and to assist in measuring performance.

Impact on services

CONCLUSION 10: It is apparent from the evidence that a high quality and effective planning service should benefit the economy, businesses, the environment and our communities and is the aspiration of both the Scottish Government and stakeholders.

RECOMMENDATION 12: Some of the witnesses we heard from raised concerns that reducing fees could adversely affect the performance of a planning authority and the range of services that it could provide. However, we also heard reassurance from the Minister for Local Government and Planning that linking planning fees to performance, as well as undertaking other measures in the first instance, should provide the necessary incentive and support to improve planning authority performance and that
the measure to reduce fees will not be necessary. On this basis, we are content that the Bill remains as drafted but we also recommend that the Scottish Government monitor performance and reports back to the Committee a year after policy implementation.

RECOMMENDATION 13: We welcome the agreed performance markers as a qualitative and quantitative method of assessing the performance of a planning authority. However, we note the conflicting views received from the Minister for Local Government and Planning and COSLA on the use of the agreed performance markers as the basis of reducing planning authority fees and recommend that the Scottish Government continue to work with COSLA to resolve this issue and report back to the Committee, preferably before the conclusion of the Bill’s parliamentary passage.

Alternative approaches to improving performance

RECOMMENDATION 14: We welcome the Minister’s confirmation that the Scottish Government would provide assistance to improve the performance of a planning authority before resources are removed. We would appreciate clarity on the type of measures that it will undertake, and in the cases where fees are reduced, the proposed level and duration of any reduction.

Street traders’ licences

RECOMMENDATION 15: We recommend that the Scottish Government use the Stage 1 debate on the general principles of the Bill to confirm whether local authorities will retain the right to inspect mobile food businesses operating within their area and that the policy is co-ordinated with its proposal for a new food safety and standards body.

Stage 2 amendments – primary authority partnerships

CONCLUSION 11: We welcome the Minister’s clarification that the Scottish Government is considering introducing primary authority partnership amendments at stage 2 and look forward to receiving the analysis of the consultation responses prior to any amendment being lodged.

Policy and Financial Memoranda

RECOMMENDATION 16: We consider that the Policy Memorandum provides adequate detail on the policy intention behind the provisions in the Bill.³

RECOMMENDATION 17: We are content with the consultations carried out by the Scottish Government prior to introducing the Bill.⁴

³ Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
Subordinate legislation

RECOMMENDATION 18: We note the view of the Delegated Powers and Law Reform Committee that the continued use of the affirmative procedure for planning fees regulations, and any proposed changes to section 252 of the Town and Country Planning (Scotland) Act 1997, would provide the most appropriate level of parliamentary scrutiny. We agree with the view of the Cabinet Secretary for Finance, Employment and Sustainable Growth that the use of the negative procedure would provide an adequate level of parliamentary scrutiny and would be in line with other fee setting powers.

Ancillary provision

RECOMMENDATION 19: We note the view of the Delegated Powers and Law Reform Committee that the scope of the powers in sections 44(1) and 45 are drawn more widely than the policy objective and note the Scottish Government’s response that there is no uncertainty as the scope is limited by the scope of the provisions.

General principles of the Bill

RECOMMENDATION 20: The Committee recommends to the Parliament that the general principles of the Bill be agreed.\(^4\)

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\(^4\) Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Alison Johnstone), Against 3 (Murdo Fraser, Margaret McDougall and Hanzala Malik).

\(^5\) Agreed to by division: For 7 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson, Margaret McDougall and Murdo Fraser), Against 2 (Alison Johnstone and Hanzala Malik). There were votes on two amendments to this recommendation. The detail of those votes is included in Annexe B.
Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

Stage 1 Report on the Regulatory Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Regulatory Reform (Scotland) Bill was introduced in the Scottish Parliament by the Cabinet Secretary for Finance, Employment and Sustainable Growth on 27 March 2013. The Bill was accompanied by a Policy Memorandum, Explanatory Notes and a Delegated Powers Memorandum.

2. On 16 April, the Parliamentary Bureau referred the Bill to the Economy, Energy and Tourism Committee (EET) as the lead Committee to consider and report to the Parliament on the general principles of the Bill and appointed the Rural Affairs, Climate Change and Environment Committee (RACCE) as secondary Committee. The Bill was also considered by the Finance Committee and the Delegated Powers and Law Reform (DPLR) Committee.

3. The EET Committee scrutinised Parts 1, 3 and 4 relating to regulatory functions, miscellaneous and general provisions and Schedules 1, 2 and 3 of the Bill.

4. The RACCE Committee scrutinised Part 2 of the Bill: environmental regulation, as well as those aspects of Part 1 that related to the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (SNH).

5. The Scottish Government’s intention is that the Bill should “improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment”.

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6 Policy Memorandum
7 Explanatory Notes
8 Delegated Powers Memorandum
9 Policy Memorandum, page 1, paragraph 2.
6. In addition, the Bill makes specific provision about regulatory functions relating to marine licensing, planning authorities charges and fees, and street traders’ licences for food businesses.

Parliamentary scrutiny

7. The EET Committee issued a call for written evidence on the Bill, to which it received 35 written submissions and 14 supplementary responses. The Committee undertook three informal fact-finding meetings on 21 May 2013 and took formal evidence on the general principles of the Bill at five meetings between 29 May and 11 September 2013. The Committee would like to extend its thanks to all those who took the time to provide oral and written evidence on the general principles of the Bill. Details of that evidence can be found in Annexes C and D.

Reports by other committees

8. The RACCE Committee scrutinised Part 2 of the Bill, environmental regulation, as well as those aspects of Part 1 that relate to SEPA and SNH and the DPLR Committee considered the Delegated Powers Memorandum. We note the reports of both Committees.

9. The Finance Committee considered the Financial Memorandum accompanying the Bill. It raised one substantive issue on the provision in section 41 to reduce planning fees, should an authority fail to address performance issues. Section 41 is covered in detail within this report.

10. The Committee reports and responses are included at Annex A.

Consultation responses prior to Parliamentary scrutiny

11. The Scottish Government undertook the following three consultations prior to the Bill being introduced—

- From May to August 2012 the Scottish Government and SEPA consulted on Proposals for an integrated framework of environmental regulation.

- From August to October 2012 the Scottish Government consulted on Proposals for a Better Regulation Bill: Consultation, which covered regulatory functions, marine licensing decisions and planning authorities’ functions: charges and fees.

- From October 2012 to January 2013 the Scottish Government and SEPA consulted on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency.

12. The Scottish Government also undertook three consultations after the Bill was introduced—

- On 28 June 2013 the Scottish Government launched the Consultation on Primary Authority Arrangements relating to the
Devolved Regulatory Responsibilities of Local Authorities in Scotland
seeking views on whether some equivalent of the UK Primary
Authority initiative – which allows a business which has branches in a
number of local authority areas to form a partnership with one local
authority in order to receive tailored support in relation to a specified
range of regulation – should be adopted in Scotland, in the context of
Scottish regulation.

- On 19 May 2013 the Minister for Environment and Climate Change
  wrote to the RACCE Committee to confirm that a consultation on the
  National Litter Strategy may lead to possible Stage 2 amendments
  on extending the powers of public bodies other than SEPA being
  able to issue fixed penalty notices. On 4 July 2013 the Scottish
  Government launched the Consultation on a strategy to tackle and
  prevent litter and flytipping.

- The Scottish Government established The Scottish Regulators’ Code
  of Practice Working Group to develop a draft Scottish Regulators’
  Code of Practice, for consultation later in 2013, providing guidance
  which regulators would have regard to when determining policies,
  setting standards or giving guidance in relation to their duties.

13. The RACCE Committee raised a concern that not all individual responses
to the consultations were available online when the Committee began its scrutiny
of the Bill. We agree that in the interests of transparency and accessibility
consultation responses should be available prior to parliamentary scrutiny.

14. RECOMMENDATION 1: We recommend that the Scottish Government
publishes, wherever possible, all individual consultation responses prior to
parliamentary consideration of a Scottish Government Bill.
PART ONE – REGULATORY FUNCTIONS

Section 1: Power as respects consistency in regulatory function

Wider Parliamentary scrutiny

15. The Scottish Government adopted the five key principles for regulatory functions proposed by the Regulatory Review Group (RRG), which are that regulations should be “(i) exercised in a way that is transparent, accountable, proportionate and consistent, and (ii) targeted only at cases in which action is needed.”

16. Provisions in Part 1 of the Bill give Scottish Ministers a regulation-making power to encourage or improve consistency in the exercise by regulators of regulatory functions. This power may also be used to impose requirements, set standards or outcomes and to give guidance, where a regulator has discretion as to how to apply a regulatory requirement.

17. The Committee heard from a number of witnesses that they had difficulty understanding the implications of the proposed enabling power due to the lack of detail available on the circumstances in which it would be used or who it would apply to.

18. The Law Society of Scotland expressed regret “…that more information is not yet available about Government’s intentions as to the content of the regulations” and it “…urges the Scottish Parliament to clarify the approach that Scottish Government intends to take.”

19. Whilst the Scottish Council for Development and Industry (SCDI) questioned the limited detail available—

“There is limited detail surrounding which regulations and regulatory bodies Ministers intend to apply these proposed new powers. Therefore it is difficult to comment on the extent to which we believe it will streamline regulation.”

20. Others highlighted the impact on scrutiny. In its report the RACCE Committee indicated that whilst it was supportive of the Bill’s aims—

“…much of the detail of the Bill remains to be developed over time – through codes of practice, guidance and subordinate legislation” and “that scrutiny of the Bill at Stage 1 could have been improved if the Policy Memorandum had contained more detailed explanations of the policy intent behind the provisions in the Bill.”

21. The issue of the impact of the lack of detail on scrutiny was also raised by The Law Society of Scotland which expressed regret that there was not more information on the Scottish Government’s intentions as to the content of

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10 Regulatory Reform (Scotland) Bill: Section 6.3.(a) of the Regulatory Reform (Scotland) Bill.
11 The Law Society of Scotland, written submission, page 1, June 2013.
12 SCDI, written submission, page 1, June 2013.
regulations and urged “…the Scottish Parliament to clarify the approach that Scottish Government intends to take even only in general terms.”

22. Similarly, the Centre for Water Law, Policy and Science of the University of Dundee said in its written submission that—

“Along with the unicameral structure of the Scottish Parliament we would be concerned about the possible lack of scrutiny, for example, in deciding if regulations would have “equivalent effect” to a previous mandatory enactment.”

23. Andrew Fraser of North Ayrshire Council, told the Committee that “…giving ministers the power to make broad, sweeping regulations without parliamentary scrutiny is more likely to produce further bad legislation than good legislation.”

24. Whilst Councillor Cook of COSLA, added that, “…legislation that has generalised powers at its heart is, to be frank, not the right way to proceed.”

25. Scottish and Southern Energy (SSE) in its written submission recommended that the following approach should be adopted, saying that “Any changes to regulation should only be introduced following an open consultation period, in which any interested party can comment on the proposed changes.”

26. In its report, the DPLR Committee highlighted that the powers in Part 1 and 2 of the Bill are drawn more widely than the policy objectives for these powers, stating that—

“The Bill for example includes powers to amend or remove existing regulatory requirements, or to create new ones in respect of which a regulator will have regulatory functions, and to require regulators to enforce compliance with new requirements. The policy justification as it has been explained to the Committee is more limited to an intention to introduce national standards of regulation for consistency, which are appropriate for specific areas of business which have yet to be fully identified.”

27. In his response to the DPLR Committee the Cabinet Secretary for Finance, Employment and Sustainable Growth explained that the use of an enabling power for environmental legislation is not unusual, stating that “The trend in both the UK and Scottish Parliaments has been to provide broad enabling powers under a Bill, with a schedule which provides the detail on what can be done using the Bill”.

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14 The Law Society of Scotland, written submission, page 1, June 2013.
15 Centre for Water Law, Policy and Science – University of Dundee, written submission, page 1, May 2013.
18 Scottish and Southern Energy, written submission, page 2, June 2013.
28. The DPLR Committee also raised a concern about the use of the affirmative procedure to substantially amend, remove or create new regulatory requirements, as this would not enable the Parliament to amend these provisions. It recommended in this instance the use of a “super-affirmative” procedure to enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval.

29. In his response to the DPLR Committee the Cabinet Secretary for Finance, Employment and Sustainable Growth indicated that the use of the affirmative procedure was not unusual in these circumstances and provided examples of environmental legislation where it had been used previously, concluding that “I remain unconvinced that it is necessary for the provisions in, and principles behind, this Bill.”

30. RSPB Scotland also raised a concern about how decisions would be made to amend or revoke existing regulatory requirements and recommended that “Robust and sufficient safeguards would be needed to ensure that the provisions do not reduce levels of environmental protection.”

31. RECOMMENDATION 2: We note the view of the Delegated Powers and Law Reform Committee that the provisions in Part 1 of the Bill should reflect the Scottish Government’s stated policy objective to introduce national standards of regulation for consistency, which are appropriate for specific areas of business. We further note the Scottish Government’s response that it is not unusual to provide the detail on what can be done in a schedule which accompanies an enabling Bill.

32. RECOMMENDATION 3: We note the view of the Delegated Powers and Law Reform Committee that the “super-affirmative” procedure should be used to enable parliamentary scrutiny of any proposal to substantially amend, remove or create new regulatory requirements, before an instrument is laid for approval. We agree with the response from the Cabinet Secretary for Finance, Employment and Sustainable Growth that the use of the affirmative procedure is not unusual in these circumstances and that it provides an appropriate level of parliamentary scrutiny.

National standards

33. Whilst there was general agreement on the better regulation agenda, the Committee heard conflicting views on the merits of introducing national standards to achieve a consistent approach to the implementation of regulations.

34. Professor Russel Griggs, Chair of the Regulatory Reform Group (RRG), told the Committee that the Bill was necessary as “Inconsistency is a disbenefit not just to business, but to practitioners in councils, who must deliver.” Adding that “We do not get consistency if we do not have something in legislation.”

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20 RSPB Scotland, written submission, page 2, June 2013.
35. The majority of those in favour of this view were from the business community, telling the Committee that the introduction of national standards was necessary as “There are some pretty stark differences across the country, as far as application of regulation is concerned”, that it will mean that “…businesses can operate more effectively and competitively”, and that “…one agreed approach would make it easier for businesses – large and small – to understand how to comply with regulation”.23

36. The Committee heard that national standards could be used to tackle inconsistent and unnecessarily cumbersome processes, such as inconsistencies in “processes, procedures and conditions” and “…fees, paperwork and processes, and with definitions.”24

37. Concerns were raised about section 1(2)(c) which enables Scottish Ministers to prescribe fee levels charged or costs recovered. The Memorandum of Understanding (MoU) between the Scottish Government and COSLA, agreed on 30 May 2013, clarifies that this decision will be made in collaboration with COSLA, it states that “This will include, as appropriate, any consideration of nationally set fees or charging regimes which would be discussed by the Minister and COSLA Spokesperson in the first instance.”

38. One example given of a positive approach of applying national standards was to standardise forms used by local authorities. However, there was strong opposition to a national standard being applied which would impact on local decision making and democratic accountability. The Committee heard that retaining local flexibility in deciding how regulations are applied is essential as each local authority will have different priorities.

39. Professor Russel Griggs, Chair of the RRG, told the Committee that in applying national standards “…two things must be taken into account: the process of getting things to the point at which you can make a decision, and the local conditions that can come into play.”25

40. In its written submission, UNISON Scotland stated that, “Authorities must be able to set their own standards and respond to local situations.”26 Gareth Williams of SCDI, agreed, adding that “…when evidence can be put forward in favour of local flexibility, that should be available.”27

41. Whilst the Office of the Scottish Charity Regulator told the Committee that the Bill risked duplicating existing regulations, providing the following example—

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26 UNISON Scotland, written submission, page 3, June 2013.
“Section 1(9) of the [Charities and Trustee Investment (Scotland)] 2005 Act provides that OSCR must in performing its functions, have regard to the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed. This is identical with the principles set out at section 6(3)(a) of the Bill.”

A centralised approach

42. Some witnesses viewed the proposal for Scottish Ministers to apply national standards as centralising power and questioned this approach. Stephen Boyd of the STUC stated that the RRG should continue to deal with regulatory issues, saying that “…nobody has been able to make the case to me in any coherent fashion why we need the bill to supplement RRG activity”.

29 Susan Love of the Federation of Small Business (FSB) advocated a “collaborative approach”, whilst Riddell Graham of VisitScotland promoted working in partnership, telling the Committee that “The principle of working in partnership rather than imposing things works extremely well from a tourism perspective in those two areas [quality assurance and planning framework].”

43. The Memorandum of Understanding between the Scottish Government and COSLA was agreed to address local authority concerns about maintaining local discretion when implementing national standards.

44. In a letter to the Committee, the Minister for Energy, Enterprise and Tourism described the purpose of the MoU as “…setting out how we would work together to use these new powers”. The MoU lists the agreed core principles as—

- A commitment to local democracy and the value often associated with local flexibility and decision-making;
- A shared ambition to increase sustainable economic growth, nationally and at a local level, underpinned by optimising support for business within the local community;
- The established principles of Better Regulation.

45. The MoU outlines the collaborative approach that will be taken prior to implementing national standards where Ministers and a COSLA Spokesperson will discuss any relevant regulatory function which could be improved through a consistent national system and specific cases for local variation.

46. The use of a MoU to underpin primary legislation was questioned by Andrew Fraser of North Ayrshire Council, who said that “It is unusual for

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28 The Office of the Scottish Charity Regulator, written submission, page 1, June 2013.
32 Memorandum of Understanding, page 1.
legislation to require a non-statutory memorandum of understanding to make it acceptable and workable.\textsuperscript{33}

47. In a letter to the Committee the Minister for Energy, Enterprise and Tourism addressed concerns regarding the possible impact on local decision making of applying national standards to regulations, saying that—

“As you know, there has been a great deal of collaborative work with COSLA on this policy concept as I recognise the validity and value of local decisions in most contexts.”

48. **RECOMMENDATION 4:** We welcome the Scottish Government’s collaborative approach to working with COSLA to agree national standards which are transparent, workable and take account of local circumstances. We recommend that the Scottish Government adopt a similarly inclusive way of working by consulting widely on any proposed changes to regulations.

**Section 2: Regulations under section 1: further provision**

*Exemption criteria and implementation*

49. The provisions in section 2 require regulators to impose, set, secure compliance with or enforce a requirement, restriction, condition, standard or outcome, including imposing or setting new regulatory requirements.

50. In addition, it enables Scottish Ministers to direct that any provision of the regulations, for a temporary period of up to six months, is not to apply to a particular regulator or that it is to apply with modifications. Regulations can be amended for adjustments to be in place for a longer period. However, the proposed criteria to be used to assess any exemption request from national standards have not been set out in the Bill.

51. The Committee heard a range of views on the scope and merits of exemptions and whether the exemption criteria should be explicitly stated in the Bill or accompanying documents.

52. In its written evidence, SCDI welcomed the policy objective improving regulatory efficiency, but were concerned that the Bill contained “…little detail on any further circumstances under which a regulator could seek to opt-out from a national standard.”\textsuperscript{34}

53. David Martin of the Scottish Retail Consortium and Paul Waterson of the Scottish Licensed Trade Association both told the Committee that to achieve consistency there should be “as few opt-outs as possible”.\textsuperscript{35} Whilst Andy Myles said that Scottish Environment LINK “…would not be particularly keen to see an opt-out in the code of practice”.\textsuperscript{36}


\textsuperscript{34} SCDI, *written submission*, page 1, June 2013.


54. In written evidence, COSLA expressed a preference for an “opt-in” approach, but added that it supported an opt-out approach, saying that “Local authorities should be able to opt out for social, health, environmental, financial, economic or local democratic reasons.”\(^{37}\) Whilst Susan Love of the FSB said that agreeing the opt-out criteria should be “a collaborative process”\(^ {38}\)

55. In its report, the DPLR Committee drew to the EET Committee’s attention that the inclusion of a six month modification period was unusual and not subject to parliamentary scrutiny and recommend that any modification of how the regulations apply to a regulator “must be published on being made”.\(^ {39}\)

56. In his response to the DPLR Committee’s report the Cabinet Secretary for Finance, Employment and Sustainable Growth gave a commitment that the Scottish Government would do so, saying that—

“The Committee has recommended that directions modifying how the regulations apply to a regulator must be published on being made …The Scottish Government will lodge an amendment to provide for publication.”

57. **CONCLUSION 1:** We endorse the view of the Delegated Powers and Law Reform Committee that the inclusion of a six month modification period is very unusual and is not subject to parliamentary scrutiny and that any modification of how the regulations apply to a regulator must be published on being made. We therefore welcome the Cabinet Secretary for Finance, Employment and Sustainable Growth’s commitment to lodging a stage 2 amendment to provide for publication.

58. **RECOMMENDATION 5:** We recommend that the Scottish Government include the exemption criteria in either the code of practice or within guidance to ensure that decisions on exemptions to compliance with regulations under section 1 are transparent and consistent.

**Section 3: Regulations under section 1: compliance and enforcement**

59. The Explanatory Notes state that “…this section makes clear that the regulations may require a listed regulator to impose, set, secure compliance with or enforce a requirement, restriction, condition, standard or outcome (a regulatory requirement), including imposing or setting a new regulatory requirement (to the extent that a regulator has the power to impose or set it)”\(^ {40}\)

60. In its written evidence Law Society of Scotland is concerned that “…The regulations impose on the regulator a requirement that conflicts with any other obligation imposed on the regulator by or under an enactment”\(^ {41}\) has the potential to “cause more problems than it would resolve”, cautioning that—

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\(^{37}\) COSLA, *written submission*, page 1, June 2013.


\(^{40}\) Explanatory Notes, page 5.

\(^{41}\) Regulatory Reform (Scotland) Bill, section (3) (1).
“Given the many broadly-phrased statutory duties imposed on public authorities including for example the duty to foster climate change, or well being, or to survey for contaminated land, and not least those proposed in section 4 of this bill, it is inevitable that these will on some interpretations fall into apparent conflict with the duty imposed by section 3(1).”

Section 4: Regulators’ duty in respect of sustainable economic growth

Possible conflict with a regulator’s existing primary purpose

61. In a letter to the Committee, the Minister for Energy, Enterprise and Tourism described the rationale for the sustainable economic growth duty provision, saying it is “…to promote greater regulatory consistency by imposing a statutory duty in relation to sustainable economic growth, empowering regulators to align their activities and approach with the Government’s Purpose”.

62. The Committee received a substantial amount of oral and written evidence from a range of stakeholders both for and against the introduction of a specific duty for regulators to achieve sustainable economic growth in the exercise of their regulatory functions, except to the extent that it would be inconsistent with the exercise of those functions to do so.

63. A key concern for a substantial number of stakeholders was a possible conflict of interest with the primary function of regulators in complying with the new duty.

64. Professor Russel Griggs told the Committee that whilst the proposed sustainable economic growth duty had not been a specific RRG recommendation, it was his view that the duty would not take priority over other duties and that its purpose was to demonstrate “…visibly that the economic impact has been considered.”

65. In its written evidence, Oxfam expressed opposition to the duty, stating that “…we do not believe it is appropriate for the Government to require regulators to contribute to achieving sustainable economic growth. The aim of regulators should be to pursue their primary purpose.”

66. Trisha McAuley of Consumer Futures agreed, warning that the new duty may “…override regulators’ core functions” as it “…skews regulation towards one aspect of the work of regulators, possibly at the expense of protecting some of their core functions.”

67. The Association of Salmon Fishery Boards were concerned about complying with the new duty as well as existing sustainable development duties, saying that “…it is not clear how such a duty would interact with the current duty that SEPA, and other bodies, have to achieve sustainable development.”

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42 The Law Society of Scotland, written submission, page 4, June 2013
44 Oxfam, written submission, page 1, June 2013.
46 Association of Salmon Fishery Boards, written submission, page 1, May 2013.
68. Whilst Scottish Environment LINK thought that compliance with the duty might override environmental protection or well-being, saying that—

“There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which balance economic, social and environmental development concerns, with a growth duty which clearly gives added weight to economic concerns alone.”\(^{47}\)

69. Frances McChlery of the Law Society of Scotland told the Committee that the duty would “…make it less easy for the regulator to take a clear-cut decision.”\(^{48}\)

70. UNISON Scotland agreed, adding that the inclusion of the duty in the Bill gave the impression that regulators should prioritise economic growth above other duties, warning that “Many are concerned that it will leave their decisions open to a range of challenges when they give priority to ensuring public safety or that of the environment.”\(^{49}\)

71. Scottish Environment LINK suggested to the Committee that the Scottish Government introduce guidance to assist in resolving conflicts of interest, saying that “Where a regulator faces conflict we would like there to be a clear guidance for resolution and priority given to fulfilling the primary functions.”\(^{50}\) However, David Martin of the Scottish Retail Consortium thought that guidance would be insufficient as regulators could decide to “take it or leave it.”\(^{51}\)

72. Section 38 of the Bill sets out a general purpose, and a hierarchy of functions, for SEPA. The RACCE Committee recommended that, to provide clarity for regulators carrying out their duties, this hierarchical approach should be adopted specifically for SNH, saying that “…a very similar provision to that being placed on SEPA should also be applied to SNH to recognise its role in protecting the environment.”\(^{52}\)

73. More generally, the RACCE Committee recommended that this be adopted to assist all regulators, asking the Scottish Government to “…give further consideration to the use of the hierarchical model set out in section 38 as a means to aid clarity for regulators other than SEPA.”\(^{53}\)

74. In its report, the RACCE Committee indicated that it “remains concerned that the manner in which this section of the Bill has been drafted results in a lack of clarity on how the duty to achieve sustainable economic growth will sit alongside the primary purpose of regulators.”\(^{54}\)
75. In March 2013, the Scottish Government held meetings with COSLA and a number of other stakeholders and agreed that there was merit in linking the proposed economic duty to statutory guidance which would provide clarification on the practicalities of determining an appropriate balance between economic and other regulator-specific objectives.

76. In response to questions on whether the duty prioritises sustainable economic growth above the primary duties of regulators, the Minister Energy, Enterprise and Tourism confirmed that it will not, saying that—

“The duty, as I have already made clear, does not prioritise sustainable economic growth over other regulatory objectives ... it must be something to which regulators must have regard.”

77. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism confirmed that the code of practice will assist regulators in making decisions on prioritising their duties as it will “ ...provide a lot of practical assistance to regulators and stakeholders, and I hope that it will address some of the concerns that members have expressed in this committee and previously.”

78. CONCLUSION 2: We welcome the Minister’s confirmation that the code of practice will fulfil the role of assisting regulators in complying with the new regulatory duty, in particular providing guidance on balancing it with existing duties and helping to avoid any possible conflicts of interest. We look forward to considering the detail of the code of practice in due course.

79. RECOMMENDATION 6: We note the view of the RACCE Committee and its proposal to replicate the SEPA hierarchy for SNH and other regulators. The Committee further notes that the Minister for Environment and Climate Change has stated that this is unnecessary and we agree with the Scottish Government’s approach.

Definition of sustainable economic growth and whether the term should be changed to sustainable development

80. The Committee took a substantial amount of evidence stating that as there is no definition of sustainable economic growth in the Bill, and the term is not used in Scottish legislation or defined in statute, this lack of clarity could impact on the ability of regulators to enforce the new duty and lead to possible legal challenge.

81. The Law Society of Scotland warned that the lack of a definition would impact on the legal enforceability of the duty. It stated—

“It is unsatisfactory for legislation to impose a legal duty where there is so little clarity as to its meaning, regardless of the intention to provide guidance

57 Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
on the issue. Secondly, it is unclear what yet another duty on public bodies will achieve and how it is to fit with their other statutory duties. This raises questions of legal enforceability and where that is in doubt, what it adds that clearly authorised policy guidance cannot.\textsuperscript{58}

82. This view was echoed by a number of witnesses.\textsuperscript{59} In her written submission, Professor Andrea Ross of the University of Dundee, said that “Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability.”\textsuperscript{60}

83. Whilst Fraser Kelly of Social Enterprise Scotland highlighted the need for consumers of services to understand the sustainable economic growth duty. He asked—

“What do the people who use services—our customers—understand by “sustainable economic growth”? When we design the delivery of services within a regulatory framework, it is important that people can understand why services are designed and delivered in the way that they are.”\textsuperscript{61}

84. The Committee heard from some witnesses the possible legal implications of implementing a duty that is not properly defined or understood. Susan Love of the FSB cautioned that “…larger companies with deeper pockets will use the duty to challenge decisions.”\textsuperscript{62} Dave Watson of UNISON Scotland added that it could “…tie up our members in days and months of legal work at a cost to the local authorities involved.”\textsuperscript{63} Whilst Andy Myles of Scottish Environment LINK told the Committee that the danger of the statutory duty “…is that different parts of the Scottish community will have different perceptions of the law.”\textsuperscript{64}

85. Andrew Fraser of North Ayrshire Council told the Committee that as currently drafted the duty “will end up as a lawyers’ charter and will be argued over,”\textsuperscript{65} giving the example that some will argue that the “…duty should have been given more weight as a material consideration than, for example, the environmental impact and the local plan.”\textsuperscript{66}

86. Dave Watson of UNISON Scotland cautioned of the unintended consequence “…that regulators will be concerned about how companies—particularly big companies with deep legal pockets—will make use of this provision to the detriment of the public.”\textsuperscript{67}

\textsuperscript{58} The Law Society of Scotland, \textit{written submission}, page 5, June 2013.
\textsuperscript{59} UNISON Scotland, Professor Andrea Ross of the University of Dundee, Federation of Small Businesses, Scottish Environment LINK and Andrew Fraser of North Ayrshire Council.
\textsuperscript{60} Professor Andrea Ross, University of Dundee, \textit{written submission}, page 2, May 2013.
\textsuperscript{66} Economy, Energy and Tourism Committee, \textit{Official Report}, 5 June 2013, Col 2957.\textsuperscript{.}
87. In its report, the RACCE Committee indicated that with regards to the duty “…any lack of clarity with regard to the definition will make it difficult to implement, measure and enforce” and recommended that if the term is to remain in the Bill that the “…Scottish Government bring forward amendments to the Bill at Stage 2 to include such a definition.”

88. Another significant concern for witnesses was how the duty would be interpreted and understood. Richard Escott of SSE told the Committee that businesses require clarity to “…know what they and their satisfaction criteria are.” Whilst the Royal Environmental Health Institute of Scotland pointed out that “…it is difficult to know what is expected of regulators and what the desired outcomes are.”

89. The Association of Salmon Fishery Boards cautioned that the duty could be interpreted as “…economically sustainable growth (i.e. not environmentally sustainable).” A view which was echoed by Professor Colin Reid of the University of Dundee who posed the question “…is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability?”

90. In response to concerns about the legal enforceability of a duty to contribute to achieving sustainable economic growth and the need for a definition in the Bill, the Minister for Energy, Enterprise and Tourism told the Committee that—

“…our current view is that there is no compelling case for including a definition in the bill. I should point out that the duty will be underpinned by the code of practice. To address stakeholder concerns about the matter, a definition will be included in the code. The definition will be the one that we have provided.”

91. Whilst Stuart Foubister, Divisional Solicitor at the Scottish Government said that he expected no legal uncertainty, adding that—

“I can see the scope for dispute as to what the duty requires a particular regulator to do in a particular circumstance, but I do not think that that is the same as saying that there is a dispute as to what "sustainable economic growth" means.”

92. In response to the point that as the term “sustainable economic growth” had not appeared in a bill that had been passed by the Parliament there would be no litigation around it, as it had not been in the law, the Minister gave a commitment to “look at it carefully again because, if that is the case, that would...”

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68 RACCE Committee Report, page 12, paragraph 61.
70 Royal Environmental Health Institute of Scotland (REHIS), written submission, page 1, June 2013.
71 Association of Salmon Fishery Boards, written submission, page 1, May 2013.
72 Professor Colin Reid, written submission, page 1, May 2013.
be a reasonable point to make" and to write to the Committee prior to Stage 2 with his view of whether a definition should be included in the Bill.

93. The Committee also received evidence on the merits of the proposed sustainable economic growth duty and also on the inclusion of a sustainable development duty instead.

94. A key argument made by some of the submissions for the inclusion of a sustainable development duty instead of a sustainable economic growth duty is its legal enforceability. Whilst the term sustainable development is not defined in Scots, UK or European law, it is widely accepted to encompass a balance of social, economic and environmental factors.

95. The majority of evidence in favour of the inclusion of a duty to contribute to achieving sustainable economic growth came from the business sector, who told the Committee that the duty was necessary as it would “...give a signal throughout regulators that supporting sustainable economic growth is a priority for the Government”, “...raise the profile of the issue”, “...might lead to an improved level of evidence,” and provide “...a clear vision that Scotland needs sustainable economic growth.”

96. Others from within the business community, whilst in favour of the policy intent, expressed reservations about the practicalities of implementing the duty.

97. In its written submission, SCDI said that it “...can only offer cautious welcome, as the extent to which this duty will drive operational change remains unclear,” and David Watt of the Institute of Directors (IoD) told the Committee that a lack of a definition of sustainable economic growth might mean “that we could end up in court”.

98. Those against the duty on sustainable economic growth comprised local authorities, the legal community, the third sector, environmental bodies and other individuals. A recurring view expressed in their oral and written evidence was that including the duty in the Bill as drafted prioritised economic concerns over social and environmental concerns and therefore a sustainable development duty would be more appropriate.

99. Frances McChlery of the Law Society of Scotland told the Committee that it was “...a step too far and it skews the balance,” whilst Aedán Smith of the RSPB Scotland argued that it “…would introduce a bias towards economic

76 Economy, Energy and Tourism Committee, Official Report, 19 June 2013, Col 3050, Gareth Williams of SCDI.
78 Economy, Energy and Tourism Committee, Official Report, 12 June 2013, Col 3031, Colin Smith of RICS.
80 SCDI, written submission, page 2, June 2013.
82 Economy, Energy and Tourism Committee, Official Report, 26 June 2013, Col 3101 and 3103.
aspects over the other two pillars of sustainable development: environmental and social”\(^{83}\) and Councillor Michael Cook of COSLA added that the duty meant that “...equally important balancing considerations, whether they are social or environmental, are potentially subverted.”\(^{84}\)

100. Those in favour of a sustainable development duty included the Scottish Property Federation who indicated that its members would “…support a statutory presumption in favour of sustainable development as one of the most objective ways to stimulate sustainable economic growth.”\(^{85}\)

101. Whilst Scottish Land and Estates said that a sustainable development duty would be a “…useful signal that regulators can and should support and promote growth but only insofar as it is sustainable.”\(^{86}\) Aedán Smith told the Committee that the RSPB Scotland’s preference was either to “…have a duty for sustainable development” or “to keep the bill simple and not to go with that duty at all.”\(^{87}\)

102. In its report, the RACCE Committee requested clarity from the Scottish Government on the use of the term sustainable economic growth in the Bill given that sustainable development has international recognition and is legally understood. It also questioned why “…the term sustainable development cannot itself be used on the face of the Bill” and requested a Stage 2 amendment to “…include a definition of sustainable development in section 38 of the Bill.”\(^{88}\)

103. In response to the proposal from some witnesses to include a sustainable development duty instead of the sustainable economic growth duty, the Minister for Energy, Enterprise and Tourism said that—

“…the Scottish Government and regulators in Scotland value economic growth and protection of the environment. Those need not be mutually exclusive; we can, and should, aspire to deliver mutually supportive outcomes wherever possible.”\(^{89}\)

104. **RECOMMENDATION 7:** In the interests of effective parliamentary scrutiny and transparency, we welcome the Minister’s confirmation that a definition will be included in the code of practice. However, we note the conflicting views of many of those that have given evidence to the Committee on this point and the views of the Scottish Government. We are keen to avoid future conflicts on this issue being a matter for the courts and believe that the Parliament and the Scottish Government have a duty to minimise this risk.

105. **Whilst we do not believe that it is legally necessary that a definition of sustainable economic growth be stated on the face of the Bill, we**

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\(^{83}\) RSPB Scotland, *written submission*, page 2, June 2013.


\(^{85}\) Scottish Property Federation, *written submission*, page 3, June 2013.

\(^{86}\) Scottish Land and Estates, *written submission*, page 2, June 2013.


\(^{88}\) RACCE Committee Report, page 14, paragraphs 70-72.

recommend that the Scottish Government ensures that its definition of this term is explicitly stated and explained in subsequent guidance and that, furthermore, it gives a commitment that drafts of this guidance are submitted to the Parliament for scrutiny prior to being issued by Scottish Ministers.  

Reporting on the duty

106. The Committee heard from some regulators that they already follow statutory duties to report on either sustainable economic growth or sustainable development and therefore the new duty was either unnecessary or would cause confusion. OSCR in its written evidence said that it “...already reports on sustainable economic growth as required by Section 31 (1) (a) of the Public Services (Scotland) Act 2010.”

107. Whilst Roger Burton of SNH said that “There is a lack of clarity over the potential overlap between the new duty and our existing duty to report on sustainable development, and I am not entirely clear how we would tease those apart.”

Enforcement of the duty

108. Section 4 (2) of the Bill enables Scottish Ministers to give guidance to regulators with respect to the carrying out the duty, and subsection 3 states that regulators must have regard to that guidance. The Committee considered how compliance with the duty would be monitored and how failure to comply would be addressed.

109. The Scottish Retail Consortium said that guidance would be inappropriate as it has no statutory basis, warning that “There is also little guarantee that a regulator, when discharging its duties, will even observe the guidance.”

110. Section 4 (4) states that the duty does not apply to a regulator which is already subject to a duty to the same effect as that mentioned in that subsection. SCDI cautioned that “As sustainable economic growth is not defined within the legislation, duties of ‘the same effect’ are open to interpretation.”

111. In its report, the RACCE Committee raised a concern about how the duty would be enforced, saying that—

“...the Committee remains concerned that if the duty is not properly defined and understood it will be difficult to enforce. The Committee welcomes confirmation from the Minister that the code of practice will be

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90 Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
93 Scottish Retail Consortium, written submission, page 2, June 2013.
94 SCDI, written submission, page 2, June 2013.
112. CONCLUSION 3: We welcome the Scottish Government's commitment to include in the code of practice guidance to regulators in respect of their duties and look forward to scrutinising the content of the code of practice in due course.

Sections 5 and 6 Code of practice and Code of practice: procedure

Parliamentary scrutiny

113. The Bill provides for a code of practice in relation to the exercise of regulatory functions. Its purpose will be to encourage regulators to adopt practices that reflect the better regulation principles and the principle that regulatory functions should be carried out in a way that contributes to achieving sustainable economic growth.

114. In a letter to the Committee, the Minister for Energy, Enterprise and Tourism described the purpose of the code of practice as “…linking the proposed economic duty to statutory guidance which provides clarification on the practicalities of determining an appropriate balance between economic and other regulator-specific objectives”.

115. During Stage 1 consideration of the Bill, the Scottish Government established the Scottish Regulators' Code of Practice Working Group with a remit to develop a draft code of practice for consultation in late 2013. As the Bill and accompanying documents do not contain the detail of the proposed content of the code of practice, the Committee took evidence from stakeholders to gather their views of what it should include.

116. Roger Burton of SNH said that the code of practice had a significant role to play in “…defining how to deal with local decisions that need to properly reflect local circumstances in national standards.” Whilst Susan Love of the FSB said that there was an issue with “…the parameters of the duty and the extent to which the code of practice will sort those out and reach a suitable conclusion.”

117. In its report, the RACCE Committee indicated that it was “…disappointed in the lack of available information in relation to both section 4 and the proposed code of practice provided for by section 5” and its intention to consider taking “…evidence from stakeholders and the Minister with a view to submitting a formal response to the Scottish Government prior to the draft code being finalised and laid before Parliament.”

118. In its report, the DPLR Committee highlighted that whilst the code of practice will be subject to parliamentary scrutiny, the guidance to regulators in

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95 RACCE Committee Report: Page 15, paragraph 78.
98 RACCE Committee Report: page 16, paragraphs 83 and 85.
99 RACCE Committee Report: page 18, paragraph 96.
respect of carrying out the sustainable economic growth duty will not, stating that it had—

“…some concerns as to this assimilation of the contents of matters which regulators will need to have regard to, between 2 documents to which quite different levels of Parliamentary scrutiny will apply (with none at all proposed in the case of the section 4 guidance).”

119. It recommended that “…both the section 4 guidance and the section 5 code of practice must be published, on issue and when any revisions are made”.

120. CONCLUSION 4: To ensure effective Parliamentary scrutiny of the detail of the code of practice, we intend to take evidence from stakeholders within our remit prior to the draft code being finalised and laid before Parliament.

121. CONCLUSION 5: We welcome confirmation from the Cabinet Secretary for Finance, Employment and Sustainable Growth that the Scottish Government will publish both the Code of Practice and the guidance that regulators must have regard to in respect of carrying out the duty to contribute to achieving sustainable economic growth, on issue, and when revisions are made.

Code of practice: procedure

122. The Policy Memorandum states that “The code is to be developed collaboratively with business representatives, public bodies, regulators and COSLA.”

123. Trisha McAuley of Consumer Futures raised a concern that it “…does not mention collaborating with people who represent consumer interests and citizen interests” adding that there is a need to “…ensure that communities are properly consulted”.

124. Whilst in its written evidence, the Centre for Water Law, Policy and Science at the University of Dundee said that “We would like to see (as in all cases where consultation is required by statute) a general requirement to consult the public.”

125. In response to the concern raised by Consumer Futures that the public, communities and the third sector would not be included in the consultation process, the Minister for Energy, Enterprise and Tourism gave an undertaking to

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100 DPLR Committee Report: page 9, paragraph 48.
101 DPLR Committee Report: page 9, paragraph 49.
102 Policy Memorandum: page 2, paragraph 8.
104 Centre for Water Law, Policy and Science – University of Dundee, written submission, page 2, May 2013.
“…consult her [Ms McAuley] and her colleagues prior to the finalisation of the code and get her views on that extremely important matter.”

126. CONCLUSION 6: As the Scottish Regulators’ Code of Practice is to provide guidance on how regulators will apply the duty and what they should have regard to when determining policies, we believe that it is essential that the content is agreed to in an inclusive and transparent way. We therefore welcome the creation of the working group and the Scottish Government’s commitment to include representatives of communities and consumers in its forthcoming consultation.

Section 7: Power to modify list of regulators

Selection of regulators included

127. Section 7 of the Bill provides the Scottish Ministers with the power, by order, to modify the regulators listed in schedule 1. Orders under this section would be subject to the negative procedure.

128. In taking evidence on the general principles of the Bill, some stakeholders such as SNH, VisitScotland and OSCR indicated that whilst they were listed in schedule 1, they were not regulators. This made it difficult to determine how the Bill would impact on their functions.

129. Some witnesses questioned why the Scottish Government and its agencies were not included in the list of regulators. In its written submission, Scottish Land and Estates noted that Historic Scotland had been removed from the list of regulators as it does not have a legal identity which is separate from Scottish Ministers and requested clarity on “…what proposals there are to ensure that the same objectives can be achieved by other means for such regulatory bodies within the Scottish administration which are not separate legal identities?”

130. Given concerns about possible legal challenges to planning decisions, the Committee requested clarification of whether planning authorities would be covered by the Bill, and also licensing boards, and as such subject to the new sustainable economic growth duty.

131. The Minister for Energy, Enterprise and Tourism confirmed that neither would be subject to the new duty, explaining that in relation to planning authorities stating that “…we think that the application of the bill to planning authorities is not the appropriate way to deal with matters, because sustainable economic growth is already a consideration that is enshrined in planning law.”

132. Councillor Cook of COSLA questioned how decisions to modify the list of regulators in schedule one would be made, stating that “A key proposition for us is that any effort to change something that is as yet unseen would be a matter for

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106 Scottish Land and Estates, written submission, page 2, June 2013.
partnership discussion instead of something on which an individual minister would simply come to a view.”\textsuperscript{108}

133. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism clarified that “We would certainly consult COSLA and all other relevant bodies were we minded to consider using that power.”\textsuperscript{109}

134. **CONCLUSION 7:** We welcome the Minister’s confirmation that planning authorities and licensing boards will not be included in the list of regulators covered by Parts 1 and 2 of the Bill. We also welcome confirmation that the Scottish Government will consult before amending the list of regulators.


PART THREE - MISCELLANEOUS

Section 40: Marine licencing decisions

Statutory appeal mechanism

135. Section 40 extends statutory appeal mechanisms to decisions by Scottish Ministers relating to offshore marine energy projects of 1MW and above within Scottish waters. At present, decisions made by Ministers in these cases can only be challenged by way of judicial review. The section amends the Marine (Scotland) Act 2010 by inserting a new section 63A to provide for a statutory appeal to be made to the Court of Session by any person or body that is aggrieved by the decision of Scottish Ministers.

136. Independent analysis of the responses to the Scottish Government’s Proposals for a Better Regulation Bill consultation indicated that whilst there was overwhelming support for the proposal to extend access to the statutory review mechanism, there was also a two to one overall majority in favour of a common review procedure across all relevant legislation.

137. In written evidence, the Right Honourable Lord Gill, Lord President of the Court of Session, stated that “In my view, it is desirable that there should be one, uniform type of remedy available from the Court of Session against decisions on infrastructure projects. The remedy should not depend on the type of project.”

138. Although there was general support for the policy objective of a consistent appeal process, some witnesses advocated a wider review of the judicial process.

139. Professor Colin Reid of the University of Dundee highlighted that “There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention.” RSPB Scotland agreed, adding that there was “…a real need for a joined-up approach to judicial reform.”

140. Others suggested that existing legislation be used instead, with the Law Society of Scotland suggesting awaiting the outcome of the current consultation on the Courts Reform (Scotland) Bill and proposed reform of the tribunals system in terms of the Tribunals (Scotland) Bill and suggested that the “…Scottish Parliament considers giving guidance to the Scottish Government as to the inclusion of environmental permitting and appeals into the reforms to administrative law currently under consideration.”

141. Whilst Scottish Environment LINK suggested awaiting the enactment of the Marine (Scotland) Act 2010, saying that “… the provisions in the 2010 act

110 The Right Honourable Lord Gill, Lord President of the Court of Session, written submission, page 3, May 2013
111 Professor Colin Reid, written submission, page 4, May 2013.
112 RSPB Scotland, written submission, page 3, June 2013.
113 The Law Society of Scotland, written submission, page 3, June 2013.
have still to be brought in and we need to find out whether or not they actually work.”

142. A further suggestion from both RSPB Scotland and Scottish Environment LINK was the use of an environmental court system as a means to consider different appeals.

143. **RECOMMENDATION 8:** We welcome the proposal for one appeal system which will make the process for offshore marine energy projects more transparent and more easily understood. Given the concerns raised about the need for a consistent approach to the appeals system, we ask the Scottish Government to consider whether existing legislation currently provides this or whether a more systematic approach is required.

**Six week appeal time limit**

144. Any statutory appeal to a decision made by Scottish Ministers under the proposed inclusion of section 63A into the Marine (Scotland) 2010 Act, must be made within six weeks. In the Policy Memorandum it states that this will “...involve less time and expense in court” and that subsequently it “...would lead to quicker final decisions”.

145. The Committee heard conflicting views on the merits of a six week appeal time limit being introduced, with SCDI in favour saying that it “…provides a means of improving consistency between onshore and offshore development”, but adding that further detail on how this would work was required, asking “...who will pay for appeals, and if unsuccessful is there any recompense for unnecessary delays?”

146. Frances McChlery told the Committee that whilst the Law Society of Scotland was content with the proposed timescale, she cautioned that “…any challenger only knows whether they have a case when they get the decision in their hand”.

147. Aedán Smith of RSPB Scotland raised a concern that the six week appeal time limit would impact on the ability of small businesses and individuals to appeal a decision as they “…are not necessarily so well equipped to get engaged with the issues.”

148. In contrast, Richard Escott of SSE told the Committee that the new appeal process would prolong decision making, as “…appeals could still be brought forward via Judicial Review”. Adding that a parallel appeals process would

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115 Policy Memorandum: page 7, paragraph 37.
120 SSE, *written submission*, page 1, June 2013.
create uncertainty for SSE and recommending instead a “…single appeals process that covered the entire consenting process.”

149. **RECOMMENDATION 9:** Whilst we understand that the six week appeal timescale provides a consistent approach to appeals, we are not yet clear on the potential impact on both business confidence and investment, and also on the ability of individuals, communities and small businesses to appeal. We therefore ask the Minister to address this issue during the Stage 1 debate and to consider monitoring the impact of this measure following the Bill’s passage.

**Section 41: Planning authorities’ functions: charges and fees**

**Measuring performance**

150. Section 41 of the Bill enables Scottish Ministers to make provision in planning fee regulations for different fees to be levied by different planning authorities where Scottish Ministers are satisfied that the performance of the planning authority is not, or has not been, carried out satisfactorily.

151. **Independent analysis** of the consultation responses indicated that linking planning fees to performance was the most frequently answered of all the consultation questions. The analysis showed that “The balance of views across respondents to the question broadly favoured the notion of linking fees and performance but most qualified this by counselling caution as to how it was to be done.”

152. The Committee received a great deal of written and oral evidence on this issue, with stakeholders raising a number of specific concerns about the proposal to link planning fees to performance.

153. As there is no definition of satisfactory or unsatisfactory performance in the Bill or accompanying documents, a key area of contention was how performance would be measured and what unsatisfactory performance would look like.

154. In the Financial Memorandum, it states that “One of the desired outcomes of linking fees to performance is to deliver an efficient and effective planning system that eliminates undue delay.” This gave stakeholders the impression that time taken to process applications would continue to be the main method for measuring planning authority performance.

155. The Committee heard that the current method of gathering statistics on the number of applications concluded within the statutory two month period did not provide an accurate picture of planning authority performance and that a qualitative and quantitative approach was required. This view echoed the findings of Audit Scotland’s 2012 report *Modernising the Planning System* which

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122 Financial Memorandum: page 32, paragraph 47.
stated that “...time is only one indicator of performance and a more comprehensive performance measurement framework is needed.”

156. Nancy Jamieson of Heads of Planning Scotland told the Committee that the system of performance recording is “crude” and that “There are many reasons for delays in the planning system. Sometimes it is difficult to get the big picture if we look just at bald statistics.” Whilst UNISON Scotland indicated that “Delays are due to underfunding and heavy workloads. Members also point out that there is a range of community planning partners involved in the process. There are no proposals to introduce carrots or sticks for these organisations.”

157. Malcolm Fraser of Malcolm Fraser Architects highlighted the importance of accurate performance data, saying that “Challenging the figures and ascertaining how to get figures that accurately reflect how many applications planning departments, as opposed to applicants, are not dealing with in time would be a good, simple, straightforward output for the committee.”

158. Garry Clark of the Scottish Chambers of Commerce agreed, adding that currently “…it is difficult to compare performance between different planning bodies. That will have to be squared before the new rules can really bite.”

159. A number of witnesses raised potential unintended consequences of focussing on outputs rather than outcomes. In its written submission, SCDI warned that measuring time taken could “…create false incentives to prioritise speed over optimal results.” Malcolm Fraser of Malcolm Fraser Architects agreed, providing the Committee with the following example of how a planning authority could meet a time target by turning down an application and inviting a second one, saying that “A planning authority then has the great benefit of deciding on two applications on time.”

160. SEPA was concerned that a consequence could be that they are “…asked to respond to poorer quality consultations with inadequate supporting information which in turn could lead to delay and additional cost”.

161. An issue for a number of witnesses was that prioritising speed could impact on the quality of the decisions made. Both Councillor Cook of COSLA and David Cooper of Aberdeenshire Council stressed that the quality of planning decisions was critical, saying that “…in our view, the important thing is quality decision making” and that whilst there are a multitude of reasons for time taken

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123 Audit Scotland, Modernising the Planning System Report, page 22.
125 UNISON Scotland, written submission, page 4, June 2013.
126 Economy, Energy and Tourism Committee, Official Report, 12 June 2013, Col 3013.
128 SCDI, written submission, page 3, June 2013.
130 SEPA, written submission, page 2, June 2013.
131 Economy, Energy and Tourism Committee, Official Report, 5 June 2013, Col 2960 - Councillor Cook of COSLA.
“...it is far better to get an application properly assessed, taking on board objectors' views, rather than rush it through.”\(^{132}\)

162. Whilst Dave Watson of UNISON Scotland highlighted that planners have a responsibility to balance both community and commercial interests, which were not reflected in the Bill, telling the Committee that “If you read the planning sections of the bill, you would think that the only customers of a planning department are developers, when, in fact, the customers are us—the community.”\(^{133}\)

163. Some witnesses advocated the use of the Planning Performance Framework (PPF), which was introduced by planning authorities in 2012, as an effective method of accurately measuring and reporting performance. With Alistair MacDonald of Royal Town Planning Institute Scotland (RTPI Scotland) calling the PPF “…a first step in the process of establishing a broad range of qualities for planning authorities to be measured against”\(^{134}\) and Aedán Smith of RSPB adding that it is “…a better way of measuring planning performance than simply finding out how long it takes to process applications.”\(^{135}\)

164. In response to a question on whether a definition of satisfactory performance would be included in the Bill, the Minister for Local Government and Planning said that—

“It might be more appropriate to include a definition in guidance or in another vehicle—perhaps a statutory instrument—but one would not necessarily legislate for performance. I propose the same in this context.”\(^{136}\)

165. On how performance of planning authorities would be measured, the Minister for Local Government and Planning indicated that a range of agreed performance markers would be used, telling the Committee that—

“There are markers of good performance that are based on the planning performance framework. Those pose a number of questions on timescales, offering of processing agreements, pre-application consultation for major applications and whether a plan is less than five years old, which is a statutory requirement. There is a range of indicators.”\(^{137}\)

166. In a letter to the Committee, COSLA stated that it had not agreed to the performance markers being used as the basis of decisions on reducing fees—

“Whilst we have worked together to agree key markers of performance to include in the Planning Performance Framework (PPF) developed by Heads of Planning (HOPS), these markers are not agreed to give indications of any weighting to be applied in any ministerial assessment nor do they


\(^{133}\) Economy, Energy and Tourism Committee, Official Report, 12 June 2013, Col 2979.

\(^{134}\) Economy, Energy and Tourism Committee, Official Report, 12 June 2013, Col 3023.

\(^{135}\) Economy, Energy and Tourism Committee, Official Report, 26 June 2013, Col 3108.


indicate any triggers whereby an authority would be deemed to be placed in 'penalty clause measures'."

167. CONCLUSION 8: We welcome the commitment from the Minister for Local Government and Planning to consider including a definition of satisfactory performance in the guidance or in a future statutory instrument which will provide necessary clarity for planning authorities and stakeholders.

168. CONCLUSION 9: It is essential to collect reliable qualitative and quantitative data to measure planning authority performance to understand the reasons for delays and to accurately determine when there is an undue delay. We welcome the clarification that performance measurement will include qualitative measures.

169. RECOMMENDATION 10: The Committee recognises that there are a range of factors which might cause delays in the planning process some of which are out-with the control of planning authorities. We therefore recommend that the Scottish Government clarify what measures it will undertake to improve the performance of agencies accountable to the Scottish Government, to avoid any undue delays in the planning process.

Linking fees to performance

170. The Policy Memorandum states that the recent planning fee increase of 20 percent was in "...recognition of the resource pressures faced by planning authorities" and that this increase should be linked to performance as "Scottish Ministers want to be sure that increased funding through increases in planning application fees leads to improved planning performance by authorities."  

171. There is no detail in the Bill or accompanying documents of the length of time that increased fees could be withheld when a planning authority’s performance has been found to be unsatisfactory.

172. Those in favour of linking fees to performance were mainly from the business sector. David Watt of the Institute of Directors told the Committee that in his view "...the number 1 problem with planning is delay."

173. Other witnesses from the business sector, such as the Scottish Property Federation, Scottish Land and Estates and the Royal Institute of Architects Scotland respectively, told the Committee that they wished to see an improved service for the increased fees that they were paying, saying that "...increases in planning fees should be related to a tangible improvement in the performance of the planning system", "...it is important that there is a clear connection between quality of service/performance of the Planning Authority and the level of fee paid by the applicant", and of the need to establish "...a legislative link
between planning fees and performance\textsuperscript{142} to ensure that necessary changes were made.

174. Whilst there was agreement from the majority of those from within the business sector of the need to improve the planning service some were unconvinced that reducing fees to planning authorities would bring about that improvement.

175. Richard Escott told the Committee that whilst SSE is “...looking for quality and predictability of timing”, he was “...not convinced that adjusting planning fees is the best way of delivering the desired outcome.”\textsuperscript{143} Whilst Susan Love said that planning issues for small businesses tend to be around culture and practice and that the FSB do not see “... how reducing an authority’s fees will bring about the changes that we would like to see.”\textsuperscript{144}

176. Scottish Land and Estates raised a similar concern for rural businesses and requested that the Scottish Government “...work in partnership with Planning Authorities to ensure that every opportunity to support improved performance had been taken before a change to the level of planning fee was introduced.”\textsuperscript{145}

177. Whilst David Martin of the Scottish Retail Consortium added that in his view “The issues are structural, and money will not necessarily solve them.”

178. Conversely, the Committee heard from some witnesses that they were satisfied with the service they received from planning authorities, such as Belinda Oldfield of Scottish Water who said that poor performance “…is not our experience of the planning authorities since 2010”\textsuperscript{146} and Colin Smith of the Royal Institution of Chartered Surveyors (RICS) who said that: “Clients with whom we have worked on delivering projects in the city centre would be perfectly willing to pay a higher fee for the standard of service that they get in Edinburgh on major applications.”\textsuperscript{147}

179. In his evidence to the Committee, the Minister for Local Government and Planning explained the rationale for linking fees to performance—

“A 20 per cent fee increase was a big ask. It will get more resources into the system, but we have to be serious about performance and I believe that that mechanism will be a driver to improvement.”\textsuperscript{148}

180. In its written evidence, UNISON Scotland stated that the performance management of planning authorities is “…the role of democratically elected councillors”\textsuperscript{149} and in a letter to the Committee, COSLA described the measure

\textsuperscript{142} Royal Incorporation of Architects in Scotland, \textit{written submission}, page 1, June 2013.
\textsuperscript{145} Scottish Land and Estates, \textit{written submission}, page 3, June 2013.
\textsuperscript{149} UNISON Scotland, \textit{written submission}, page 4, June 2013.
as “...fundamentally too much Ministerial interference in the operations of a
specific council service.”

181. In response, the Minister for Local Government and Planning disputed this
view stating that planning was an “...area in which the Scottish Government has
clear responsibility, and given that every planning application in the country could
be determined by the minister.”

Resource implications
182. The majority of the oral and written evidence that the Committee received
on this issue was against linking fees to planning authority performance. Those
opposed were concerned that reducing fees to planning authorities which were
already under-resourced would lead to reduced levels of performance and
service.

183. In its 2012 report, Audit Scotland found that “The funding model for
processing planning applications is becoming unsustainable. The gap between
income and expenditure is widening, leading to greater dependence on already
constrained council budgets.”

184. Alison Polson of Planning Aid for Scotland told the Committee that “...there is a broader resourcing issue”.

Whilst, Nancy Jamieson of Heads of Planning Scotland said that “…we seriously need to look at the resourcing of
planning authorities” and highlighted the current gap between the level of fees
and the cost of processing applications, indicating that—

“...in some major applications there is a huge gap. We need to address
that by restructuring fees so that we can fund both the pre-application
advice—which at the moment we in Scotland do not charge for—and the
actual processing of the application.”

185. Colin Smith of the RICS agreed, adding that “If we are to have a system
that focuses resources on major applications, which of course have the biggest
economic, social and design impact, I think that there is a reasonable case for
having differential fees to reflect the resources that planning authorities require to
put into that work.”

186. In response to questions on the costs to planning authorities of processing
applications, the Minister for Local Government and Planning told the Committee
that whilst this data was not currently available “We are working in partnership
with Heads of Planning Scotland to establish the cost of planning applications
and to take that work forward as best we can.”

187. The Minister added that he did not expect planning authorities’ incomes to
reduce as performance would improve “The mechanism will improve behaviour

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and outcomes, and there will be no loss of income because planning authorities will step up to the plate.\textsuperscript{155}

188. **RECOMMENDATION 11:** We recommend that Audit Scotland undertake an analysis of the cost of processing planning applications for planning authorities to gain an understanding of the impact of a lack of current resources on performance and to assist in measuring unsatisfactory performance.

**Impact on performance**

189. Some witnesses\textsuperscript{156} described the measure as “counter-productive”, with East Renfrewshire Council saying that the expectation that performance would improve with less resources was “flawed”, adding that “There is no explanation given as to how this will happen.”\textsuperscript{157}

190. In its written submission, North Lanarkshire Council cautioned that a “Reduction in performance is likely to be linked closely with decreasing resources and so a reduction in fees will only increase the problem rather than act to address it.”\textsuperscript{158}

191. The Law Society of Scotland agreed and suggested that a more constructive approach was required to improve performance, stating that “…simply removing the authorities’ resources and collapsing the application service would not help the development industry in the area, nor the wider community” and suggested creating “…a task force of planners who could be deployed in support of a local authority with problems.”\textsuperscript{159}

192. The Financial Memorandum states that “It is not clear if reducing fees will have a consequential impact on the number of applications submitted to poor performing authorities.” Susan Love of the FSB told the Committee that small businesses have less option to move to a better performing authority, and would therefore prefer a “…system that is being fairly and equitably monitored.”\textsuperscript{160}

**Impact on services**

193. In his evidence to the Committee, the Minister for Local Government and Planning outlined the type of services that planning authorities would be expected to provide and measured on as follows—

“A good system of permitted development, pre-application consultation and elected member engagement, as well as confidence in the system at the outset and a bit of certainty, are all key ingredients of a high-quality well-performing planning system.”\textsuperscript{161}


\textsuperscript{156}The Law Society of Scotland, North Lanarkshire Council, East Renfrewshire Council.

\textsuperscript{157}East Renfrewshire Council, *written submission*, page 1, June 2013.

\textsuperscript{158}North Lanarkshire Council, *written submission*, page 1, May 2013.

\textsuperscript{159}The Law Society of Scotland, *written submission*, page 8, June 2013.

\textsuperscript{160}Federation of Small Businesses, *written submission*, page 5, June 2013.

194. However, a key concern raised during the evidence sessions was that a reduction in income would lead to a planning authority reducing the range of services provided. Alistair MacDonald of RTPI Scotland warned that “The resources that go into the pre-application process might just disappear.”

195. Nancy Jamieson of Heads of Planning Scotland explained that “Over the years, more has been added to the planning system, and it is difficult to do all those extra things and speed up the process at the same time.”

196. The Committee heard that the pre-application process in particular was invaluable, with Colin Smith of RICS stating that it can improve the quality of a planning application as it “…can raise and deal with issues and engage with the community, societies and everyone else to ensure that what is ultimately submitted is as well thought through as possible.”

197. Whilst Alison Polson of Planning Aid for Scotland told the Committee that it was vital to continue to engage with communities to ensure that they understood applications, saying that “If people do not get that chance, the risk is that there will be more challenges that have to go through the system.”

198. There were environmental concerns raised by Aedán Smith of RSPB Scotland who cautioned that reduced resources could impact on the planning authority’s “…capacity to carry out environmental protection roles” and Scottish Environment LINK who thought that it could “…increase the pressure on authorities to grant permission before an application has been fully assessed, potentially resulting in significant detrimental environmental impacts and possible breaches of legislation such as the Habitats Regulations.”

199. CONCLUSION 10: It is apparent from the evidence that a high quality and effective planning service should benefit the economy, businesses, the environment and our communities and is the aspiration of both the Scottish Government and stakeholders.

200. RECOMMENDATION 12: Some of the witnesses we heard from raised concerns that reducing fees could adversely affect the performance of a planning authority and the range of services that it could provide. However, we also heard reassurance from the Minister for Local Government and Planning that linking planning fees to performance, as well as undertaking other measures in the first instance, should provide the necessary incentive and support to improve planning authority performance and that the measure to reduce fees will not be necessary. On this basis, we are content that the Bill remains as drafted but we also recommend that the Scottish Government monitor performance and reports back to the Committee a year after policy implementation.

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166 Economy, Energy and Tourism Committee, Official Report, 26 June 2013, Col 3107.
167 Scottish Environment LINK, written submission, page 4, June 2013.
201. **RECOMMENDATION 13:** We welcome the agreed performance markers as a qualitative and quantitative method of assessing the performance of a planning authority. However, we note the conflicting views received from the Minister for Local Government and Planning and COSLA on the use of the agreed performance markers as the basis of reducing planning authority fees and recommend that the Scottish Government continue to work with COSLA to resolve this issue and report back to the Committee, preferably before the conclusion of the Bill’s parliamentary passage.

*Alternative approaches to improving performance*

202. The Business and Regulatory Impact Assessment (BRIA), states that should planning fees be linked to performance “The Scottish Government would work in partnership with planning authorities to ensure that every opportunity to support improved performance had been taken before a change to the level of planning fee was introduced.”

203. The Bill and accompanying documents do not contain the detail of the form of support that the Scottish Government would provide. Witnesses suggested to the Committee a number of alternative approaches which could be used to improve the performance of a planning authority.

204. Colin Smith told the Committee that whilst RICS supported reduced fees for " …persistent poor performance and lack of effort to improve", he thought that it was far better to “ …reward good performance, best practice and delivery, and there are a lot of good examples of that in our experience and from elsewhere.”

205. Whilst the Scottish Property Federation and UNISON Scotland respectively suggested the use of a peer group “ …drawn from high performing local authorities or a central government resource that could assist a poorly performing authority to improve its processes” and which could “ …encourage better liaison, more sharing of best practice.”

206. Frances McChlery of the Law Society of Scotland suggested that “…the Government should send somebody or a number of people in to sort it out. That is more constructive than removing resources from it.” Whilst Gareth Williams of SCDI recommended the use of “ …a link between certain milestones being achieved through the process and overall customer satisfaction” and Andy Myles of Scottish Environment LINK thought that single outcome agreements “ …might be a much better mechanism for improving performance.”

207. In evidence to the Committee the Minister for Local Government and Planning confirmed that before using the power to reduce fees there will be “ …a

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168 Business and Regulatory Impact Assessment (BRIA), page 18.
period of probing to understand the range of factors–some of which might be outwith the planning authorities’ control–and to allow an opportunity for improvement.”  

208. **RECOMMENDATION 14:** We welcome the Minister’s confirmation that the Scottish Government would provide assistance to improve the performance of a planning authority before resources are removed. We would appreciate clarity on the type of measures that it will undertake, and in the cases where fees are reduced, the proposed level and duration of any reduction.

**Section 42: Application for street traders’ licences: food businesses**

*Street traders’ licences*

209. Section 42 proposes to amend section 39(4) of the **Civic Government (Scotland) Act 1982** so that a mobile food business that wishes to trade in more than one local authority area in Scotland can use a certificate of compliance from the same registering food authority for each street trader’s licence application.

210. The majority of respondents to the Scottish Government consultation supported this proposal. However, a number of concerns were raised by respondents about how the system would work.

211. The STUC in its written submission warned that the proposal could “…lead to regulatory arbitrage i.e. businesses seeking out the local authority area with perceived weakest regulation” and advised that “In order to avoid this occurring it will be necessary for each LA to retain the right to inspect any business operating in their area.”  

212. In its written evidence, The Royal Environmental Health Institute (REHIS) agreed, adding that “This must not, however, prevent another food authority, within which the vehicle, kiosk or moveable stall is trading, from inspecting the vehicle kiosk or moveable stall and taking appropriate action if necessary.”

213. David Cooper of Aberdeenshire Council, also agreed and asked that this be explicitly outlined in the Bill, saying that “If something can be built into the legislation that still allows the authority in whose area a business is operating to carry out inspections, we will be happy with that.”

214. Whilst welcoming the proposal, UNISON Scotland were concerned that “Currently the government is planning to set up a new food standards body and UNISON is concerned that this Bill is not properly co-ordinated with that proposal.”

215. **RECOMMENDATION 15:** We recommend that the Scottish Government use the Stage 1 debate on the general principles of the Bill to

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177 REHIS, *written submission*, page 2, June 2013.
confirm whether local authorities will retain the right to inspect mobile food businesses operating within their area and that the policy is co-ordinated with its proposal for a new food safety and standards body.
MISCELLANEOUS ISSUES

Stage 2 amendments – indications to date from the Scottish Government

Primary Authority Partnerships
216. Primary authority was established by the UK Government under the Regulatory Enforcement and Sanctions Act 2008 and has been in operation in England and Wales (and in Scotland in respect of reserved regulatory functions) since 2009.

217. In a letter to the Committee on 28 March 2013, the Minister for Energy, Enterprise and Tourism indicated his intention to lodge a Stage 2 amendment, subject to the responses to the Scottish Government’s consultation on Primary Authority Partnerships, stating that “I am keen to have the option of adopting Primary Authority Partnerships at the earliest opportunity, by introducing Stage 2 amendments to the Regulatory Reform (Scotland) Bill.”

218. The Committee heard evidence both for and against adopting primary authority partnerships in Scotland. David Martin of the Scottish Retail Consortium told the Committee that Primary Authority Partnership should be underpinned by statute, as it is “… a business-led solution which does provide greater assurance of compliance and would better facilitate more of a risk-based approach to enforcement.”

219. Whilst Stephen Boyd of the STUC said that the RRG had seen little hard evidence about how Primary Authority Partnerships “…benefited companies in practice” and warned of the unintended consequence that “Over time, companies might gravitate towards local authority areas where regulation is regarded as being less stringent.”

220. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism indicated the Scottish Government’s intention to lodge a Stage 2 amendment and gave a commitment to provide “… more detail after our analysis of the responses that we have received has been completed. I will do my best to provide more detail, if I can, prior to stage 2.”

221. CONCLUSION 11: We welcome the Minister’s clarification that the Scottish Government is considering introducing primary authority partnership amendments at stage 2 and look forward to receiving the analysis of the consultation responses prior to any amendment being lodged.

Policy and Financial Memoranda

222. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill.
223. **RECOMMENDATION 16:** We consider that the Policy Memorandum provides adequate detail on the policy intention behind the provisions in the Bill.\(^{184}\)

224. In relation to the details of the consultations conducted by the Scottish Government prior to introducing the Bill.

225. **RECOMMENDATION 17:** We are content with the consultations carried out by the Scottish Government prior to introducing the Bill.\(^{185}\)

226. The same rule also requires the lead committee to report on the Financial Memorandum. The Financial Memorandum states that for Part 1 of the Bill it is anticipated that there will be “…no net impact on costs” for local authorities and that there will be “…business benefits arising from more consistent regulation”.\(^{186}\)

227. To assist the lead Committee, the Finance Committee sought written submissions from a range of stakeholders.\(^{187}\) It raised only one issue in relation to the proposal to reduce planning fees for a planning authority that were not performing satisfactorily, which is covered earlier in this report.

228. The majority of the evidence that the Committee received indicated that there were no expected financial implications for regulators, with VisitScotland indicating there were none for them, SNH saying that there were “…no material implications in terms of resources” for them, although they would have more certainty when the code of practice was established and OSCR telling the Committee that that “…see no great resource impact or implications”.\(^{188}\)

229. The Committee heard evidence from Dave Watson of UNISON Scotland that complying with national standards may have resource implications for local authorities, saying that “…the committee would want to know from the financial memorandum whether such centralisation would have cost implications … we would be concerned about the capacity in some authorities to deal with it.”\(^{189}\)

230. Whilst Councillor Cook of COSLA said that “The expectation that has been created around the memorandum of understanding is that there will be discussion with the Scottish Government about anticipated cost impacts as a result of something that the Government wants to bring forward.”\(^{190}\)

\(^{184}\) Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).

\(^{185}\) Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Alison Johnstone), Against 3 (Murdo Fraser, Margaret McDougall and Hanzala Malik).

\(^{186}\) **Financial Memorandum:** page 24, paragraphs 7 and 9.

\(^{187}\) The written submissions received by the Finance Committee are available on the Parliament’s website at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66030.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66030.aspx)


231. In response to concerns raised by the RACCE Committee about potential costs associated with additional reporting requirements the Minister for Environment and Climate Change confirmed that this should not be the case as future annual reports will include the outcomes of the new duties placed on them by the Bill.
Delegated powers in the Bill

Subordinate legislation

232. The DPLR Committee considered the Delegated Powers Memorandum and reported its findings to the EET Committee. It raised a number of specific concerns.

233. In relation to the provisions for planning authorities' functions: charges and fees the Explanatory Notes state that “Section 41 also removes subsections (5) and (6) so that all regulations made under section 252 [Town and Country Planning (Scotland) Act 1997] are subject to negative parliamentary procedure.”

234. In its report the DPLR Committee drew to the EET Committee’s attention that when the Scottish Parliament passed the Planning etc. (Scotland) Act 2006 it considered that with specified exceptions, the affirmative procedure would be an appropriate level of Parliamentary scrutiny for the exercise of these powers. It concluded—

“…that the Scottish Government has not provided sufficient justification to it for the provision in section 41(c) that all regulations made under section 252 of the Town and Country Planning (Scotland) Act 1997 in connection with planning fees and charges should be subject to the negative procedure, or why the level of scrutiny enacted in the Planning etc. (Scotland) Act 2006 should be departed from.”

235. In a letter to the DPLR Committee the Cabinet Secretary for Finance, Employment and Sustainable Growth acknowledged that the policy position had been to use the affirmative procedure for fees regulations but explained that the policy position had changed—

“The Scottish Government's position is that subjecting planning fees regulations to negative procedure would provide an adequate level of parliamentary scrutiny and would be in line with other fee setting powers.”

236. RECOMMENDATION 18: We note the view of the Delegated Powers and Law Reform Committee that the continued use of the affirmative procedure for planning fees regulations, and any proposed changes to section 252 of the Town and Country Planning (Scotland) Act 1997, would provide the most appropriate level of parliamentary scrutiny. We agree with the view of the Cabinet Secretary for Finance, Employment and Sustainable Growth that the use of the negative procedure would provide an adequate level of parliamentary scrutiny and would be in line with other fee setting powers.

237. Section 44(1) provides that any powers of the Scottish Ministers to make an order or regulations under this Act includes the power to make (a) different

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191 Explanatory Notes: page 18, paragraph 90.
192 DPLR Committee Report: page 9, paragraphs 109 – 110.
provision for different purposes and (b) incidental, supplemental, consequential, transitional, transitory or saving provisions.

238. In its report the DPLR Committee drew attention to its concern about the—

“...potentially wide and uncertain scope of the power in section 44(1) to make supplemental provision, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill. Section 1(1) enables Ministers to make any provision they consider will encourage or improve consistency in the exercise by regulators of regulatory functions. Section 10 enables regulations which make provision for any of the many purposes set out in Schedule 2. Those powers would be wide and to some extent uncertain in their possible scope, without adding a further power to make supplemental provisions.”

Ancillary provision

239. Section 45(1) contains further powers to make ancillary provisions. The Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of the Act (if passed). Such an order may modify any enactment (including the Act itself), instrument or document.

240. In its report the DPLR draws to the EET Committee’s attention its concern about the—

“...potentially wide and uncertain scope of the power in section 45 to make supplemental provisions in an order under the section, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill.”

241. In a letter to the DPLR Committee the Cabinet Secretary for Finance, Employment and Sustainable Growth clarified that “The provision is not uncertain in scope as it is limited by the scope of the provisions being supplemented etc.”

242. RECOMMENDATION 19: We note the view of the Delegated Powers and Law Reform Committee that the scope of the powers in sections 44(1) and 45 are drawn more widely than the policy objective and note the Scottish Government’s response that there is no uncertainty as the scope is limited by the scope of the provisions.

193 DPLR Committee Report: page 9, paragraphs 112 and 114.
194 DPLR Committee Report: page 9, paragraphs 115 and 116.
GENERAL PRINCIPLES OF THE BILL

General principles of the Bill

243. RECOMMENDATION 20: The Committee recommends to the Parliament that the general principles of the Bill be agreed. 195

195 Agreed to by division: For 7 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson, Margaret McDougall and Murdo Fraser), Against 2 (Alison Johnstone and Hanzala Malik). There were votes on two amendments to this recommendation. The detail of those votes is included in Annexe B.
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Rural Affairs, Climate Change and Environment Committee consideration
The Rural Affairs, Climate Change and Environment Committee’s report to the Economy, Energy and Tourism Committee on the Regulatory Reform (Scotland) Bill is available at:


Finance Committee consideration
The Finance Committee’s call for written evidence on the Financial Memorandum to the Regulatory Reform (Scotland) Bill prompted 4 responses, the majority of which made no substantive comments. The Finance Committee therefore agreed not to undertake any further scrutiny of the Financial Memorandum and did not produce a report to the Economy, Energy and Tourism Committee. The responses received are available at:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66030.aspx

Delegated Powers and Law Reform Committee consideration
The Delegated Powers and Law Reform Committee’s report to the Economy, Energy and Tourism Committee on the Regulatory Reform (Scotland) Bill is available at:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/65385.aspx
ANNEXE B: – EXTRACTS FROM MINUTES OF THE ECONOMY, ENERGY AND TOURISM COMMITTEE

12th Meeting, 2013 (Session 4) Wednesday 24 April 2013

Decision on taking business in private: The Committee agreed to take items 3 and 5 in private.

Regulatory Reform (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1 and to take all reviews of the evidence, and consideration of draft reports, in private at future meetings.

16th Meeting, 2013 (Session 4) Wednesday 22 May 2013

Regulatory Reform (Scotland) Bill: The Committee reviewed the evidence heard in its fact finding meetings.

17th Meeting, 2013 (Session 4) Wednesday 29 May 2013

Regulatory Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Professor Russel Griggs, Chair, and Garry Clark, Member, Regulatory Review Group;

Roger Burton, Programme Manager for Wildlife and Social and Economic Development Programmes, Scottish Natural Heritage;

Riddell Graham, Director of Partnerships, VisitScotland;

Martin Tyson, Head of Registration, Office of the Scottish Charity Regulator.

Regulatory Reform (Scotland) Bill (in private): The Committee reviewed the evidence heard.

18th Meeting, 2013 (Session 4) Wednesday 5 June 2013

Regulatory Reform (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Councillor Michael Cook, Vice President, Convention of Scottish Local Authorities;

David Cooper, Environmental Health Manager, Infrastructure Services, Aberdeenshire Council;

Andrew Fraser, Head of Democratic and Administration Services, North Ayrshire Council;


Regulatory Reform (Scotland) Bill (in private): The Committee reviewed the evidence heard.
19th Meeting, 2013 (Session 4) Wednesday 12 June 2013

**Regulatory Reform (Scotland) Bill**: The Committee took evidence on the Bill at Stage 1 from—

Stephen Boyd, Assistant Secretary, STUC;
Fraser Kelly, Chief Executive, Social Enterprise Scotland;
Trisha McAuley, Director for Scotland, Consumer Futures;
Dave Watson, Scottish Organiser, UNISON Scotland;
Malcolm Fraser, Director, Malcolm Fraser Architects;
Nancy Jamieson, Vice-Convener, Heads of Planning Scotland, Development Management Sub Committee;
Alistair MacDonald, Convenor, Royal Town Planning Institute Scotland;
Alison Polson, Brodies LLP, representative for Planning Aid for Scotland;
Colin Smith, Director, Turley Associates, representative for the Royal Institution of Chartered Surveyors.

**Regulatory Reform (Scotland) Bill (in private)**: The Committee reviewed the evidence heard.

20th Meeting, 2013 (Session 4) Wednesday 19 June 2013

**Regulatory Reform (Scotland) Bill**: The Committee took evidence on the Bill at Stage 1 from—

Susan Love, Policy Manager for Scotland, Federation of Small Businesses;
Andy Myles, Parliamentary Officer, Scottish Environment LINK;
David Watt, Executive Director, Institute of Directors Scotland;

**Regulatory Reform (Scotland) Bill**: The Committee took evidence on the Bill at Stage 1 from—

David Martin, Head of Policy, Scottish Retail Consortium;
Belinda Oldfield, Regulation General Manager, Scottish Water;
Paul Waterson, Chief Executive, The Scottish Licensed Trade Association.

**Regulatory Reform (Scotland) Bill (in private)**: The Committee reviewed the evidence heard.
21st Meeting, 2013 (Session 4) Wednesday 26 June 2013

**Regulatory Reform (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Richard Escott, Head of Offshore Developments, Scottish and Southern Energy;

Frances McChlery, Solicitor, Law Society of Scotland;

Aedán Smith, Head of Planning & Development, Royal Society for the Protection of Birds Scotland;

Bill Adamson, Head of Food Standards, Hygiene and Regulatory Policy,

Food Standards Agency in Scotland;

George Fairgrieve, Council Member, Royal Environmental Health Institute of Scotland.

**Regulatory Reform (Scotland) Bill (in private):** The Committee reviewed the evidence heard.

22nd Meeting, 2013 (Session 4) Wednesday 4 September 2013

**Regulatory Reform (Scotland) Bill (in private):** The Committee considered reports from other parliamentary committees and its approach to the scrutiny of the Bill at Stage 1.

23rd Meeting, 2013 (Session 4) Wednesday 11 September 2013

**Regulatory Reform (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Derek Mackay, Minister for Local Government and Planning, Stuart Foubister, Divisional Solicitor, John McNairney, Chief Planner, David Palmer, Head of Marine Planning and Policy, and Sandra Reid, Better Regulation Policy Advisor, Scottish Government.

**Regulatory Reform (Scotland) Bill (in private):** The Committee reviewed the evidence heard.

25th Meeting, 2013 (Session 4) Wednesday 25 September 2013

**Regulatory Reform (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to, some by division, and the Committee agreed to consider a revised draft at a future meeting.

27th Meeting, 2013 (Session 4) Wednesday 2 October 2013

**Regulatory Reform (Scotland) Bill (in private):** The Committee considered a revised draft Stage 1 report. Various changes were agreed to, some by division, and the report was agreed for publication.
Note of divisions in private:

Alison Johnstone proposed that the following text be added after paragraph 243. The proposal was disagreed to by division: For 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik)), Against 6 (Dennis Robertson, Mike Mackenzie, Mark McDonald, Chic Brodie, Marco Biagi and Murdo Fraser), Abstentions 0.

but that, in light of witness concern and following the Rural Affairs, Climate Change and the Environment Committee’s recommendation, the sustainable economic growth duty should be amended to refer to ‘sustainable development’ or removed at Stage 2.

Alison Johnstone proposed that the following text be added after paragraph 243. The proposal was disagreed to by division: For 2 (Alison Johnstone and Hanzala Malik)), Against 6 (Dennis Robertson, Mike Mackenzie, Mark McDonald, Chic Brodie, Marco Biagi and Murdo Fraser), Abstentions 1 (Margaret McDougall).

but retains concerns that the duty to contribute to sustainable economic growth will dilute regulators’ ability to deliver their primary functions and risk greater litigation of regulatory decisions.
ANNEXE C: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

17th Meeting, 2013 (Session 4) Wednesday 29 May 2013

Written Evidence

Office of the Scottish Charity Regulator (OSCR) (192KB pdf)
Regulatory Review Group (81KB pdf)
Scottish Natural Heritage (148KB pdf)
VisitScotland (175KB pdf)

Oral Evidence (463KB pdf)

Supplementary Evidence

Scottish Natural Heritage (224 KB pdf)
Professor Russel Griggs - Chair of the Regulatory Review Group (69KB pdf)

18th Meeting, 2013 (Session 4) Wednesday 5 June 2013

Written Evidence

Convention of Scottish Local Authorities (COSLA) (167KB pdf)

Oral Evidence (373KB pdf)

Supplementary Evidence

Aberdeen Council (238KB pdf)
COSLA (59KB pdf)
COSLA - July 2013 (62KB pdf)

19th Meeting, 2013 (Session 4) Wednesday 12 June 2013

Written Evidence

Planning Aid for Scotland (83KB pdf)
Royal Institution of Chartered Surveyors (RICS) (118KB pdf)
Royal Town Planning Institute Scotland (133KB pdf)
Scottish Trades Union Congress (176KB pdf)
UNISON (138KB pdf)

Oral Evidence (530KB pdf)

Supplementary Evidence

UNISON (94KB pdf)
UNISON - July 2013 (61KB pdf)

20th Meeting, 2013 (Session 4) Wednesday 19 June 2013

Written Evidence

Federation of Small Businesses (205KB pdf)
Scottish Environment LINK (426KB pdf)
Scottish Council for Development and Industry (133KB pdf)
Scottish Water (168KB pdf)
Scottish Retail Consortium (296KB pdf)

Oral Evidence (455KB pdf)

21st Meeting, 2013 (Session 4) Wednesday 26 June 2013

Written Evidence

Scottish and Southern Energy (110KB pdf)
Law Society of Scotland (203KB pdf)
Food Standards Agency in Scotland (71KB pdf)
Royal Environmental Health Institute of Scotland (73KB pdf)
Royal Society for the Protection of Birds Scotland (204KB pdf)

Oral Evidence (398KB pdf)

Supplementary Evidence

Law Society of Scotland - July 2013 (73KB pdf)
Royal Society for the Protection of Birds Scotland - July 2013 (155KB pdf)

23rd Meeting, 2013 (Session 4) Wednesday 11 September 2013

Written Evidence

Scottish Government (8KB pdf)

Oral Evidence (542KB pdf)
ANNEXE D: OTHER WRITTEN EVIDENCE

Written evidence

Association of Salmon Fishery Boards (118KB pdf)
Carnegie UK Trust (82KB pdf)
Centre for Water Law, Policy and Science, University of Dundee (238KB pdf)
East Renfrewshire Council (121KB pdf)
Healthcare Improvement Scotland (129KB pdf)
North Lanarkshire Council (5KB pdf)
Oxfam (171KB pdf)
Professor Andrea Ross (117KB pdf)
Professor Colin Reid (83KB pdf)
Royal Incorporation of Architects in Scotland (76KB pdf)
Scottish Environment Protection Agency (122KB pdf)
Scottish Land and Estates (137KB pdf)
Scottish Property Federation (130KB pdf)
The Right Honourable Lord Gill - Lord President of the Court of Session (77KB pdf)

Other correspondence

Letter from Minister for Energy, Enterprise and Tourism 28 March 2013 (92KB pdf)

Memorandum of understanding between CoSLA and the Scottish Government in respect to the Regulatory Reform (Scotland) Bill (14KB pdf)

Letter from the Miniser for Energy, Enterprise and Tourism 5 September 2013 (217KB pdf)

Letter from the Minister for Environment and Climate Change 5 September 2013 (287KB pdf)

Letter from COSLA on planning provisions 9 September 2013 (97KB pdf)

Letter from the Cabinet Sectary for Finance, Employment and Sustainable Growth 25 September 2013 (2391 KB pdf)
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