



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 4 December 2013

Session 4

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**ECONOMY, ENERGY AND TOURISM COMMITTEE**  
**34<sup>th</sup> Meeting 2013, Session 4**

**CONVENER**

\*Murdo Fraser (Mid Scotland and Fife) (Con)

**DEPUTY CONVENER**

\*Dennis Robertson (Aberdeenshire West) (SNP)

**COMMITTEE MEMBERS**

\*Christian Allard (North East Scotland) (SNP)

\*Marco Biagi (Edinburgh Central) (SNP)

\*Chic Brodie (South Scotland) (SNP)

\*Alison Johnstone (Lothian) (Green)

\*Mike MacKenzie (Highlands and Islands) (SNP)

\*Hanzala Malik (Glasgow) (Lab)

\*Margaret McDougall (West Scotland) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Claudia Beamish (South Scotland) (Lab)

Fergus Ewing (Minister for Energy, Enterprise and Tourism)

Alex Fergusson (Galloway and West Dumfries) (Con)

Derek Mackay (Minister for Local Government and Planning)

Jenny Marra (North East Scotland) (Lab)

Paul Wheelhouse (Minister for Environment and Climate Change)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

Committee Room 4



## Scottish Parliament

### Economy, Energy and Tourism Committee

*Wednesday 4 December 2013*

[The Convener *opened the meeting at 09:30*]

### Regulatory Reform (Scotland) Bill: Stage 2

**The Convener (Murdo Fraser):** Good morning, ladies and gentlemen, and welcome to the Economy, Energy and Tourism Committee's 34th meeting in 2013. I remind all members to switch off or, at least, to turn to silent all mobile phones and other electronic devices. We have no apologies and are joined by three additional members—Alex Fergusson, Jenny Marra and Claudia Beamish—who are all welcome.

We are starting stage 2 of the Regulatory Reform (Scotland) Bill. I welcome the Minister for Energy, Enterprise and Tourism, Fergus Ewing; the Minister for Environment and Climate Change, Paul Wheelhouse; and their officials. Derek Mackay, the Minister for Local Government and Planning, will join us later for the amendments that are in his name.

For everybody's benefit, I will run through how we will deal with stage 2. Everybody should have a copy of the bill as introduced, the first marshalled list of amendments, which was published on Monday, and the first list of groupings of amendments, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in the group to speak to and move that amendment, and to speak to all the other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the usual way. If the minister has not already spoken to the group, I will invite him to speak just before the winding-up speech. The debate on each group will be concluded by my inviting the member who moved the first amendment in the group to wind up.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If they wish to press it, I will put the question on the amendment. If the member wishes to withdraw their amendment after it has been moved, I will ask whether the committee

agrees to their doing so. If any committee member objects, the committee will immediately move to a vote on the amendment.

If any member does not want to move their amendment when it is called, they should simply say, "Not moved." Please note that any other member present may move such an amendment. If no one moves the amendment, I will immediately move on to the next amendment on the marshalled list.

Only committee members are permitted to vote, and voting in divisions is by a show of hands. It is important that members keep their hands clearly raised so that the clerks can note the vote.

The committee is required to indicate formally that it has considered and agreed to each section of and schedule to the bill, so I will put the question on each section at the appropriate point. If we can, we will complete stage 2 today. If not, we will stop at a suitable point and take up next week where we left off. I hope that how we will proceed is clear to everybody.

#### Section 1—Power as respects consistency in regulatory functions

**The Convener:** Amendment 113, in the name of Jenny Marra, is grouped with amendments 114, 115 and 117.

**Jenny Marra (North East Scotland) (Lab):** Thank you for inviting me here. Amendments 113 to 115 and 117, in my name, would give more transparency and accountability to consultations that ministers undertake by extending the description of those who are to be consulted. The amendments are consistent with provisions in the Marine (Scotland) Act 2010, so I see no reason why they should not be considered for the bill.

At stage 1, the Law Society of Scotland and Scottish Environment LINK highlighted the point that the bill should be strengthened to ensure open and transparent consultation procedures. Furthermore, in its stage 1 report, the Rural Affairs, Climate Change and Environment Committee observed that

"Whilst the Minister confirmed that any consultation would be open to the public, the drafting of the Bill does not readily lend itself to that view."

I have no doubt that ministers will want to consult as widely as possible when making changes to regulations, but we need to put that in the bill in order to prevent any interested parties and the public from being disenfranchised.

Amendment 115 seeks to keep Parliament fully informed of any changes that ministers make by ensuring that a statement is laid before Parliament detailing the consultation process and any changes that are made because of it. Again, I feel

that that is a sensible way of ensuring that accountability and transparency are at the heart of the bill.

I move amendment 113.

**The Minister for Energy, Enterprise and Tourism (Fergus Ewing):** Good morning. It is absolutely plain that Jenny Marra and the Scottish Government share the objective that there should be full and transparent consultation. The Scottish Government is fully committed to an open and transparent process with full and proper consultation and a high level of stakeholder engagement on the bill and the programme that it supports. That applies to our overall workings in relation to consultation on legislation. I hope that members would agree that we take that very seriously.

We benefit from open and transparent consultations, which very often lead to us changing our initial intention as we adapt to reflect the views of those who have taken the trouble to respond on matters relating to the consultation.

The particular aspects of the bill that would be affected by the amendments are section 1(3) and section 6. Section 1(3) sets out how we wish to consult, as does section 6. Although I am sure that Jenny Marra and I share similar views on the wider objective, the Scottish Government does not believe that the amendments are either necessary or helpful. Perhaps it would be helpful if I explain why that is.

The bill contains provisions to require consultation of relevant interests, and we consider that those provisions are sufficiently wide to be as inclusive as possible. We have some concerns about the practicality of the proposals. Would a requirement to consult

“such persons”

as are

“likely ... to be affected by ... proposed regulations”

mean that ministers would have to track down each and every such person? I am sure that that is not the intention of the mover of amendment 113, but were that interpretation to be placed on the amendment, it may pervert the very purpose that it seeks to fulfil. We believe that the wording that we have used in the bill in the sections that I have drawn to the attention of members is the normal standard wording.

Of course we are absolutely committed to the open and transparent process that Jenny Marra has said should be achieved; that is what we wish to achieve. We have concerns that because of the infelicity of the wording of the amendments, they may subvert the purposes that Jenny Marra and I both believe should be achieved. I do not believe

that the amendments are proportionate or necessary. I therefore invite the member not to press them.

**Jenny Marra:** I appreciate the minister's saying that we share the same intentions in relation to the amendments. Before I decide whether to press or withdraw them, as the wording of the amendments is problematic for the Government, would the minister consider meeting me to discuss how we could get the wording right and then relodge amendments at stage 3?

**Fergus Ewing:** I am very happy to meet any members to discuss such matters. I think that it is primarily a question of legal draftsmanship. The sections to which I referred contain fairly standard wording that has been tried and tested in previous bills. I would be happy to meet Jenny Marra. It would be useful, though, if prior to that meeting she could perhaps reflect upon my remarks and let me have her further thoughts because I think that these are primarily matters not of politics but of draftsmanship.

**Jenny Marra:** I agree with the minister. If the minister is happy to consider a reworded amendment at stage 3, I am happy to seek to withdraw amendment 113.

*Amendment 113, by agreement, withdrawn.*

**The Convener:** Amendment 9, in the name of the minister, is grouped with amendments 10 to 13.

**Fergus Ewing:** This group of amendments relates to the regulators and regulatory functions in the bill. After considering the evidence and views that were discussed at committee with regard to planning, and concluding that the bill is not the appropriate way of dealing with matters in the planning system, we have lodged amendment 9 to make it clear that the bill does not apply to planning authorities' regulatory functions. That does not mean that planning authorities do not need to deliver better regulation or contribute to sustainable economic growth; however, the established planning framework already ensures balanced decision making by planning authorities and takes into account sustainable economic growth. Our planning system's important role in contributing to sustainable economic growth will continue to be taken forward through the Scottish planning policy and national planning framework 3.

Amendment 10 relates to the Scottish Fire and Rescue Service, which plays a regulatory role in relation to fire safety legislation and its enforcement. It seeks to bring the service into schedule 1, which lists the regulators to whom the bill applies, and to support its focus on the principles of better regulation and delivering sustainable economic growth through consistent, proportionate, efficient and effective regulation. I

am very grateful to the Federation of Small Businesses for raising the matter and for the productive and constructive response that we received from the Scottish Fire and Rescue Service.

Amendments 11 to 13 relate to publication. We respect local democracy and decision making, and the bill's provisions will enable ministers to direct that regulations under section 1 do not apply, or apply differently, to a regulator for a limited period of up to six months. Such a variation would apply only where a regulator had made a compelling case that it is merited by local circumstances. Consultation and engagement will be a key element in developing regulations to encourage or improve consistency, so we expect exemptions or variations to be minimal.

Transparency will be an important element in the process. The code of practice that is provided for under section 5 will underpin the economic duty, will support and encourage consistent regulation and will be consulted on prior to introduction. Although we consider the code of practice to be the principal document, the bill also provides for guidance on the duty to be issued, and amendments 11 to 13 seek to require publication of ministerial directions, guidance and the code of practice. We consider transparency to be essential in ensuring awareness and in supporting and encouraging delivery of consistent regulation and the bill's overall aims. Moreover, the amendments acknowledge the Delegated Powers and Law Reform Committee's views and recommendations.

I move amendment 9.

*Amendment 9 agreed to.*

*Section 1, as amended, agreed to.*

#### **Schedule 1—Regulators for the purposes of Part 1**

*Amendment 10 moved—[Fergus Ewing]—and agreed to.*

*Schedule 1, as amended, agreed to.*

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

*Amendment 11 moved—[Fergus Ewing]—and agreed to.*

*Section 2, as amended, agreed to.*

*Section 3 agreed to.*

#### **Section 4—Regulators' duty in respect of sustainable economic growth**

**The Convener:** Amendment 1, in the name of Alison Johnstone, is grouped with amendments 2

to 8. I point out that, because of pre-emption, if amendment 3 is agreed to I cannot call amendment 4, and that if amendment 6 is agreed to I cannot call amendment 7.

**Alison Johnstone (Lothian) (Green):** The group of amendments seeks to do two different things. The first set of amendments—1, 4 and 7—seek to replace the bill's three references to "sustainable economic growth" with the phrase "sustainable development". Before I go on to argue why I have proposed the three changes, I will make it clear to the committee where they occur.

If amendment 1 is agreed to, the regulators' duty that is introduced by section 4 will refer to sustainable development; agreement to amendment 4 will make sustainable development rather than sustainable economic growth a principle in the code of practice; and if amendment 7 is agreed to, the purpose of the Scottish Environment Protection Agency will be edited to refer to sustainable development rather than sustainable economic growth.

09:45

The second set, which comprises amendments 2, 3 and 6, seeks to make different changes, which I will try to make clear. Amendment 2 would remove the whole of section 4, which will introduce a duty on regulators in the first place with reference to sustainable economic growth. Amendment 3 would remove from the code of practice the requirement for regulators to adhere to sustainable economic growth as a principle, and amendment 6 would remove from SEPA's purpose the reference to contributing to sustainable economic growth.

As I am sure we are all aware, the definitions of sustainable development and sustainable economic growth were a major focus for witnesses in the scrutiny by this and the Rural Affairs, Climate Change and Environment Committee. Many people have, throughout the process, questioned what was meant by sustainable economic growth. It is the Scottish Government's purpose, and ministers in power have every right to set out what their policy priorities are. However, the fact remains that the phrase has never appeared in primary legislation and is not a concept that is recognised in law. Ministers have provided a definition in answers to parliamentary questions and have assured us that help will come in the code of practice. I do not have strong views on whether or where any such definition should be spelled out, but I can see that the courts will still have a defining role to play under the bill as drafted.

My central question is not about definitions, because we understand the general thrust, but about whether it is right to place such an economic duty on regulators in the first place. Is it right that regulators must start thinking about ways to grow the economy? As I made clear in the stage 1 debate, nobody wants regulators to act inefficiently or in overly complicated ways, but they must be able to focus on their job.

Regulators help to stop the tiny minority of people who cheat or deceive and thereby gain economic advantage over businesses that play by the rules. That is how regulators help our economy to operate smoothly. They enable a fair competitive environment in which business can develop, and they should be allowed to focus on that main purpose.

I have yet to see convincing evidence that there is a major problem in that regard that requires the duty that is set out in section 4. I fail to see the link between the proposed duty and the policy intention of there being greater regulatory consistency. Scotland is a good place in which to do business. The Scottish Trades Union Congress made the point in its evidence that we are not living in an overly regulated world—far from it. We are part of the second least regulated product market and third least regulated labour market in the world. Regulators are willingly engaged with the regulatory review group, and good progress is being made on consistency in non-legislative ways. I have not heard any complaints from the minister in that regard. If that is the case, why must we add unnecessary complications with legislation that is not needed, and new duties when collaborative initiatives are already working?

Those are some of the arguments for amendments 2, 3 and 6. I will now move to the argument for replacing the term “sustainable economic growth” with “sustainable development”, which turns on the fact that sustainable development is a well-used and well-understood concept in law that expressly balances decision making. It promotes the idea that social, economic and environmental priorities need to be fairly balanced for the benefit of people today and for future generations. Witnesses were concerned, during the bill consultation and at stage 1, that the economic duty would skew decision making. Sustainable development has the value of expressly balancing priorities. It does not make the job easy, but it means that regulators will not risk foregoing a valid regulatory action just because an illegal activity might be making money.

I hope that the minister will respond to those arguments, which are not about whether a definition of sustainable economic growth is required but about whether a sustainable economic growth duty and related provisions are

needed at all. Regulators are successfully working in non-legislative ways on consistency. Scotland is not an overregulated business dystopia, as some people would portray it, and the section 4 economic duty risks decision making that values economic considerations over social and environmental priorities.

I hope that those arguments will convince members to vote for my amendments. To be clear, my preference—because there would be pre-emptions—is for agreement to amendments 2, 3 and 6, which would remove text. However, if members do not agree to them, I hope that we can pass amendments 1, 4 and 7, which would introduce the phrase “sustainable development”. Amendments 5 and 8 are consequential and would be needed if amendment 2 were to be passed.

I move amendment 1.

**The Convener:** We discussed that matter extensively at stage 1 when we prepared our report. Do any members wish to speak on the amendments?

**Mike MacKenzie (Highlands and Islands) (SNP):** I am sorry to say that I do not recognise a lot of what Alison Johnstone says. My mailbox is invariably full of complaints from small businesses that feel that the burden of regulation falls disproportionately on them and that regulation is often applied inconsistently. I welcome the general thrust of the bill, which will I think give more resources to regulators to tackle genuine offenders and to assist businesses that wish to comply with regulation, which the bill will allow them to do.

**Chic Brodie (South Scotland) (SNP):** Alison Johnstone said that the issue is not about definition, but she proceeded to spend some time defining or going over the meaning of sustainable development and sustainable economic growth. As we have said before, the two are not mutually exclusive and should not be seen as such. Therefore, I will certainly oppose the amendments.

**Claudia Beamish (South Scotland) (Lab):** I support the amendments in the name of Alison Johnstone, particularly amendments 1, 4 and 7. The essence of those amendments, as described by my colleague, is that the term “sustainable economic growth” should be replaced by “sustainable development”. As I highlighted in the stage 1 debate in the Parliament, sustainable development takes into account social, environmental and economic issues and fuses them into a way forward for Scotland. The World Commission on Environment and Development definition—the Brundtland definition—which has been widely used and recognised globally since as far back as 1987, states:

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Sustainable development promotes the idea that social progress, environmental progress and economic progress are all attainable within the limits of the earth’s natural resources. Sustainable development approaches everything in the world as being connected through space, time and quality of life.

In view of the challenges that we face in drafting legislation in Scotland to get it right for present and future generations, it is essential that the term “sustainable development” is used in the bill. In my view, the term “sustainable economic growth” lacks clarity of definition. As my colleague Alison Johnstone highlighted, there are concerns that confusion could lead us into the courts, which is the last thing that we need for regulation and for business.

That was highlighted in evidence to my committee, the Rural Affairs, Climate Change and Environment Committee, by Professor Colin Reid of the University of Dundee, who stated:

“It is unsatisfactory for legislation to impose a legal duty where there is so little clarity to its meaning”.

That is mentioned in paragraph 58 of our stage 1 report. Further, in written evidence to the committee, Scottish Environment LINK raised concerns about the economic growth duty on regulators and stated:

“We know of no legal definition of sustainable economic growth and, therefore, have no assurance that it aligns with the sustainable development definition and principles”.

Will the minister clarify whether the definition that was given by the Cabinet Secretary for Finance, Employment and Sustainable Growth in a written answer to my colleague Claire Baker is the working definition that the Scottish Government uses? As Alison Johnstone said, there has so far been no legal definition in any act in Scotland. John Swinney answered the question in the following terms:

“Our definition of sustainable economic growth is wider than just aggregate GDP growth. The Government economic strategy identifies the key drivers of sustainable economic growth—Productivity, Participation, and Population, alongside our desired characteristics of growth—Solidarity, Cohesion, and Sustainability. We continue to monitor performance against these drivers and characteristics of growth through the Purpose Targets on Scotland Performs. These provide a much broader measure of economic growth, incorporating important social, regional and inter-generational equity objectives alongside measures of aggregate GDP.”—[*Official Report, Written Answers*, 20 November 2012; S4W-10998.]

That seems a long and complex definition to be considered in the process of regulation. Is that the definition, or will regulators be working to an alternative one?

The matter is further complicated by the fact that in the draft marine plan, which is out to consultation at the moment, sustainable development seems to be a subset of sustainable economic growth. We read that the high-level marine objectives

“also reflect and incorporate the five guiding principles of sustainable development, which the Scottish Government acknowledges as an important element of increasing sustainable economic growth.”

There really is confusion here. I argue that there is too much confusion about sustainable economic growth, and that the term should not be used in the bill, although I respect the Scottish Government’s policy position.

In the view of many it makes sense to use the term “sustainable development”. In its briefing, Scottish Environment LINK says:

“The importance of sustainable development was recognised in the passage of the Water Resources (Scotland) Act 2013 when the Bill was amended at Stage 2 in response to the Infrastructure and Capital Investment Committee’s recommendation to give ‘equality of emphasis to all three pillars of sustainability rather than just the economic aspects’.”

Finally, in recommendation 5 of our stage 1 report, the Rural Affairs, Climate Change and Environment Committee stated:

“The Committee remains unclear as to why the term sustainable economic growth has been used in the Bill rather than sustainable development on the grounds that while neither has a statutory definition sustainable development has international recognition and is understood legally across a number of regimes and jurisdictions. The Committee recommends that the Scottish Government bring forward amendments to the Bill at Stage 2 to include a definition of sustainable development in section 38 of the Bill.”

At stage 1 it was disappointing that no response was given by Paul Wheelhouse when I raised that issue, although he did make an intervention on it early in my speech in the stage 1 debate. He stated:

“In section 38, we make it ... clear to SEPA ... what we mean.”—[*Official Report*, 12 November 2013; c 24297.]

Is that really the case? Section 38 is the general purpose of the bill, and this goes to the heart of the matter.

It is disappointing that the Economy, Energy and Tourism Committee in its final top-line recommendations in its stage 1 report did not address the use of the term “sustainable development”.

It is not too late. I contest that sustainable development is the way forward for Scotland and that the term “sustainable economic growth” should not appear on the face of the bill. I support amendments 1 to 8.

**Marco Biagi (Edinburgh Central) (SNP):** I heard in evidence a great many statements of the potential for conflict of interest, and the issue has come up again. I highlight the section that was added to the bill following the original consultation, which states:

“In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth”—

and this is the crucial part—

“except to the extent that it would be inconsistent with the exercise of those functions to do so.”

To me, that takes away the conflict of interest argument.

Having heard the views that have been put forward thus far, I would say that the clarity of definition is almost secondary to the clarity of effect. I would welcome from the minister some examples of what the positive effects would be, in terms of what regulators will do differently as a result of the use of the term “sustainable economic development”. That is something that perhaps did not come out as much in the evidence as we all would have liked.

In terms of clarity of effect, where the term “sustainable development” has been used in Scotland—indeed, it is in the duties of some public bodies at the moment—in practice it has not been seen to be about the three pillars but has been seen to be more about the environmental pillar. That is a perfectly valid position for someone to take as a policy direction, but we cannot assume that the international definition has penetrated the public and regulatory conscience in Scotland, so to use the term “sustainable development” would offer that risk.

I ask Alison Johnstone to explain why a duty on sustainable development might be needed when the Climate Change (Scotland) Act 2009 already puts duties to contribute to action on climate change on, I believe, all public bodies.

**Jenny Marra:** This is an interesting debate. Mike MacKenzie’s contribution let the cat out of the bag as to the purpose of the section on sustainable economic growth. He said that he supports it because his mailbag is full of letters from businesses that find the burden of regulation too onerous and is applied inconsistently. Is that not the nub of all this? Is it not that, as I argued at stage 1, the fact that the consideration of sustainable economic growth overrides all other regulatory considerations—

10:00

**Mike MacKenzie:** Just to clarify my point, I want to make it clear that businesses accept that there has to be regulation. However, they are seeking

better regulation that, instead of being a blunt hammer, fulfils its purpose effectively and is more precise and helpful.

**Jenny Marra:** I thank Mike MacKenzie for that clarification, but his initial point was, I think, consistent with the points that he made in the stage 1 debate about regulation being too onerous, which was the reason why he was supporting this particular section.

I support Alison Johnstone’s amendments for two primary reasons: first, I believe that the consideration of sustainable economic growth overrides all other regulatory functions and could have a severe environmental impact; and, secondly, because there is no legal definition of the term, our public authorities could end up spending a lot of money unnecessarily in our courts.

**Chic Brodie:** Can I comment, convener?

**The Convener:** No. I am afraid that you do not get a second bite of the cherry, Mr Brodie.

As no other members wish to speak, I call the minister.

**Fergus Ewing:** I thank members for their contributions on this matter, which I think we are debating for the fourth or fifth time now. Nevertheless, I am grateful for this debate, as it gives me an opportunity to respond to a number of the specific arguments that have been made this morning.

As sustainable economic growth is an essential component of the Scottish Government’s purpose, we are determined to promote in all Scottish regulators a broad and deep alignment to it. The bill’s sustainable economic growth duty provides an important line of sight to the Government’s purpose by complementing existing duties, increasing transparency and encouraging greater regulatory consistency as well as more engagement and joined-up working. Many regulators already contribute to sustainable economic growth in their day-to-day activities and the wording of the duty in the bill seeks to build on that to support and empower regulators in contributing to the Government’s purpose as well as making them more accountable for their decisions.

The Scottish Government and regulators value both sustainable economic growth and the protection of the environment. Those things need not be mutually exclusive. In any case, the duty does not prioritise sustainable economic growth over other regulatory objectives. I hope that I am not misinterpreting Jenny Marra, but she said that the duty would override other regulatory functions. That is not correct. Marco Biagi was correct to point out the wording in proposed new section 20A

of the 1995 act as inserted by section 38 of the bill, which says:

“In carrying out its functions for that purpose SEPA must, except to the extent that it would be inconsistent with subsection (1) to do so, contribute to—

(a) improving the health and well being of people in Scotland, and

(b) achieving sustainable economic growth.”

What is a matter of fact is that stating that the duty in the bill to consider economic growth overrides other duties is a false assertion and is not factually correct. This debate has at least been useful in, among other things, establishing, as Mr Biagi clearly did in his remarks, that that is simply not the case. Nor was it ever the case. Section 4(1) states:

“In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so.”

The plain meaning of those words is that it is simply not the case that we are creating a new duty that overrides existing ones.

It follows, then, that Alison Johnstone’s assertion that the bill would prevent regulators from, as she put it, focusing on their job is, I am afraid to say, not correct either. It is simply not the case that the bill will prevent regulators from focusing on their job. Indeed, it is not clear what possible basis there could be for such an assertion, given that it rests on the false premise that the economic duty would supplant, override, dominate and take precedence over their duties in respect of, for example, the environment. That, again, is simply not the case. Were it to be the case, Alison Johnstone would have a point but, given that it is not, I respectfully submit that she does not have a point.

Moreover, there is not really much agreement among the body of regulators on the arguments that have been pressed by those who support these amendments. The Food Standards Agency has said:

“We do not have a problem with the wording.”—[*Official Report, Economy, Energy and Tourism Committee*, 26 June 2013; c 3118.]

In a restatement of my fundamental argument, the Convention of Scottish Local Authorities has said:

“Sustainable economic growth is a key priority for local authorities, especially given the current the economic circumstances, although it cannot be pursued at the expense of appropriate consideration of environmental and community factors”

Moreover, Scottish Natural Heritage has stated:

“We currently exercise all our functions in a way that seeks to maximise our contribution to this”

Government’s purpose of economic growth. It also pointed out that

“we think that it will simply add to and reinforce our existing duties”

and that

“we are already working towards the national performance framework”.—[*Official Report, Economy, Energy and Tourism Committee*, 29 May 2013; c 2932, 33.]

I quote those specific examples in response to Mr Biagi’s request that I cite comments from regulators. To be fair, he also asked us to provide some examples about how this might work in practice. Because those are matters for the regulators, I cannot speak with authority for them, but I think it reasonable to expect that, as some businesses have pointed out to me and committee members such as Mr MacKenzie, regulators should, in pursuing their duties, seek to liaise and work with businesses and discuss the areas where their regulatory functions might have an impact. If, for example, a new set of regulations relating to the environment, emissions, the control of substances and the management of the various functions for which SEPA, SNH and other regulators have responsibility were to be introduced, it would make sense for the regulators to work with the sector of businesses that would be most affected, to visit and have discussions, dialogue and conversations with those businesses and to seek to understand the impact on business and businesses’ point of view instead of standing back and having no such dialogue, conversation or interchange. In applying the regulations, they should do so as a guide rather than as an enforcer.

Of course, regulators have a duty to act on breaches of regulations where necessary, but I respectfully submit to Mr Biagi, who asked me to provide some narrative instead of simply reading out the wording in front of me, that—and, indeed, I hope that all members will agree with me—it is reasonable to expect that regulators’ general mode of working or *modus operandi* should be as guides or facilitators, attempting to understand the impact of regulations, particularly new regulations, on a sector and working with businesses and sectors to ensure that we respect the environment without ignoring the impact on businesses of new burdens, costs and regulations that might arise from Europe or any other source.

In conclusion, Presiding Officer—

**The Convener:** I am not the Presiding Officer, minister.

**Chic Brodie:** Not yet.

**The Convener:** No, not yet.

**Fergus Ewing:** Perhaps one day, convener. I do apologise.

I have lost my train of thought slightly but, in conclusion, I want to make one more substantive point. I do not mean this in a political way, but I am slightly puzzled as to why the major Opposition party in Scotland does not appear to support economic growth. The attempts to elide references to “economic growth” have been consistent, not arbitrary or capricious, and have been supported by the Labour Party’s big guns. Most people in Scotland would agree with the Scottish Government that the focus on economic growth as a major purpose of the Government is right because it creates jobs and businesses and provides the means of and a conduit for creating a fair, prosperous and green society. Therefore, it is a matter of mild puzzlement to me—I push it no further than that, convener—why this fairly simple aim, which I believe is supported by the vast majority of people in Scotland, does not seem to be shared by the main Opposition party in Scotland.

Be that as it may, we are firmly committed to promoting sustainable economic growth and the current provisions in the bill and, for those reasons, the Scottish Government does not support the amendments.

**The Convener:** Thank you, minister. I invite Alison Johnstone to wind up and indicate whether she intends to press or withdraw amendment 1.

**Alison Johnstone:** I will start with Mike MacKenzie’s suggestion that small businesses might find the duty helpful. My personal view is that introducing this economic duty will not make matters easier to understand. Are we to expect the regulator to weigh up whether something benefits economic growth by looking at the definition that Claudia Beamish read out and weighing up the environmental impacts? I think that that would be very confusing. As the Law Society and others have said, it would make it very difficult for regulators to come to a sensible decision.

**Mike MacKenzie:** Will the member take an intervention?

**Alison Johnstone:** I would rather push on, if members do not mind.

Marco Biagi suggested that there is no need to worry because the bill says that the duty will not impact on a regulator’s primary focus, but I think that regulators should be able to focus entirely on their main duty. It is more than a case of looking for where there is a conflict—the bill introduces a conflict. At the moment, regulators can focus on their main job. We are now asking them to weigh up regulation and how much something contributes to the economy.

At stage 1, we had the opportunity to meet a senior officer who had decades of experience of environmental health and trading standards. It was

his view that the inclusion of the duty in the bill would create a conflict with the responsibility to protect public health and safety, and he felt that the duty could be removed from the bill. He gave the example of a case in which a major pub-owning company has several local pubs that are perhaps serving customers short measures. They could be said to be contributing to economic growth, and the regulator would have to weigh up whether it should regulate or whether that is okay because it is contributing to the economy.

The duty introduces a conflict that is entirely unhelpful. We have other approaches such as the enforcement concordat and provisions are already in place. Our regulators are doing a good job and we should let them do it.

The Scottish Government’s proposal has united some incredibly diverse groups in concern and opposition. Those include Oxfam, the Law Society of Scotland, Unison, Consumer Focus Scotland, Scottish Environment LINK and the Association of Salmon Fishery Boards, to name but a few. Oxfam expressed opposition to the duty in its written submission, in which it said:

“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.”

Trisha McAuley of Consumer Futures warned that the new duty

“might 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.”—[*Official Report, Economy, Energy and Tourism Committee*, 12 June 2013; c 2984, 3003.]

The Association of Salmon Fishery Boards was concerned about complying with the new duty as well as existing sustainable development duties, saying in its submission 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.”

Scottish Environment LINK thought that compliance with the duty might override environmental protection or wellbeing, and stated in its submission:

“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.”

Unison Scotland agreed, adding that the inclusion of the duty in the bill gives the impression that regulators should prioritise economic growth above other duties. It warned in its submission:

"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."

Dave Watson of Unison 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."—*[Official Report, Economy, Energy and Tourism Committee, 12 June 2013; c 2985.]*

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."—*[Official Report, Economy, Energy and Tourism Committee, 5 June 2013; c 2955.]*

10:15

Frances McChlery of the Law Society of Scotland told us that the duty will

"make it less easy for the regulator to take a clear-cut decision."—*[Official Report, Economy, Energy and Tourism Committee, 26 June 2013; c 3099.]*

We are here to scrutinise legislation and to ensure that it is fit for purpose—we do not want to pass laws that will end up having to be clarified in our courts.

Professor Andrea Ross of the University of Dundee stated in written evidence:

"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."

The minister suggested that SNH firmly supports the duty, but in oral evidence to the committee SNH said that it would make no difference whatever to the way in which that body works.

Our regulators already take economic impact into account. If a regulator closes down a bakery because there is an infestation of mice, they do their very best to ensure that the bakery is up and running. Our regulators get that, and the duty is simply unnecessary. The regulatory review group is working very well without that interference—

**Chic Brodie:** Will the member take an intervention?

**Alison Johnstone:** Yes.

**Chic Brodie:** That has been the most depressing five minutes that I have listened to. Alison Johnstone said in her last point that regulators already consider economic growth. Enshrining it in the bill does not therefore put it in conflict with other bills.

Can she give us any real evidence for what she says? We have heard from witnesses on both

sides of the argument. Where is her evidence that the regulators will not look at all aspects of their role, including this duty, in order to meet the purpose that has been set?

**The Convener:** I point out that the debate is over—the member is winding up. I ask her to close.

**Alison Johnstone:** The bill creates a conflict that does not exist at present. I do not believe that regulators should be saying, "Oh, can I protect the environmental interests of X or Y here, or do I need to suss out how much money this might bring into the economy?" It is an unwelcome distraction.

It is not as if we live in a culture in which environmental concerns are given the same consideration as economic ones. Chic Brodie's own Government has allowed a golf course to be built on a site of special scientific interest. If we want to embed sustainability and the need for a more balanced look at our decision-making processes, we should either delete section 4 from the bill or use the term "sustainable development" to show that we are serious about that.

I question the need for the duty, and the bill would be improved by changing "sustainable economic growth" to "sustainable development". Our regulators should be allowed to focus on regulating.

**The Convener:** I take it that you are pressing amendment 1.

**Alison Johnstone:** I am pressing the amendment.

**The Convener:** The question is, that amendment 1 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 1 disagreed to.*

*Amendment 12 moved—[Fergus Ewing]—and agreed to.*

*Amendment 2 moved—[Alison Johnstone].*

**The Convener:** The question is, that amendment 2 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 2 disagreed to.*

*Section 4, as amended, agreed to.*

#### **Section 5—Code of practice**

*Amendment 13 moved—[Fergus Ewing]—and agreed to.*

*Section 5, as amended, agreed to.*

#### **Section 6—Code of practice: procedure**

**The Convener:** I remind members that if amendment 3 is agreed to, amendment 4 will be pre-empted.

*Amendment 3 moved—[Alison Johnstone].*

**The Convener:** The question is, that amendment 3 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 3 disagreed to.*

*Amendment 4 moved—[Alison Johnstone].*

**The Convener:** The question is, that amendment 4 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 4 disagreed to.*

**The Convener:** Amendment 114 is in the name of Jenny Marra—but she is not here to move it.

*Amendment 114 moved—[Chic Brodie].*

**The Convener:** The question is, that amendment 114 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 114 disagreed to.*

**The Convener:** I am not entirely sure whether Ms Marra would have wanted to move that amendment. Anyway, we are where we are.

Amendment 115 is also in the name of Jenny Marra.

*Amendment 115 moved—[Hanzala Malik].*

**The Convener:** The question is, that amendment 115 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)

Brodie, Chic (South Scotland) (SNP)  
 Fraser, Murdo (Mid Scotland and Fife) (Con)  
 MacKenzie, Mike (Highlands and Islands) (SNP)  
 Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 115 disagreed to.*

*Section 6 agreed to.*

### **Section 7—Power to modify schedule 1**

*Amendment 5 not moved.*

*Section 7 agreed to.*

### **After section 7**

**The Convener:** The next group is on primary authorities. Amendment 14, in the name of Fergus Ewing, is grouped with amendment 99.

**Fergus Ewing:** Having primary authorities in Scotland will allow a business to form a partnership with one local authority in order to receive tailored support in relation to a range of regulation. Over the summer, we consulted on whether some form of primary authority should be introduced in Scotland. The 42 responses indicated clear support for a primary authority model to be available here. Sixty-four per cent of respondents supported the introduction of some primary authority partnership; 24 per cent opposed it. One hundred per cent of businesses and industry associations that responded supported the proposal. The response from local authorities was also mostly positive: 47 per cent supported it, and 33 per cent opposed it. COSLA has signalled support for the proposed consultation. I thank Stephen Hagan and his officers for their constructive approach to considering the matter.

The two amendments add provisions to the bill to provide a broad legal framework for primary authority in Scotland. At present, businesses operating in different local authorities need to work with each local authority separately. That can be time consuming and can add to the burden of running a business. Primary authority will deliver consistent regulation through partnership working with local authorities, and it will help to deliver the “considerable benefits” that companies such as Asda and Sainsbury’s tell me primary authority has delivered to their stores south of the border.

Further detailed consideration and consultation is required, however, before reaching a decision on the scope and detail of any primary authority scheme in Scotland. We will therefore continue to work closely with COSLA and the business sector to ensure that the model that is developed meets the needs of both local communities and business.

I reassure the committee that, in due course, the proposals that emerge will be subject to public

consultation before being implemented through secondary legislation.

I move amendment 14.

**The Convener:** The reform has been introduced down south, as you said, minister. It has been working well and has been welcomed, and there has been strong support for the proposal from the business community in Scotland. I think that we should support it, as I think it will improve regulation and governance for businesses here.

I invite the minister to wind up.

**Fergus Ewing:** I agree with you, convener.

**The Convener:** I am delighted to hear it, minister.

*Amendment 14 agreed to.*

*Sections 8 to 10 agreed to.*

### **Schedule 2—Particular purposes for which provision may be made under section 10**

**The Convener:** The next group is on regulations for protecting and improving the environment. Amendment 116, in the name of Alison Johnstone, is grouped with amendments 15 to 17.

**Alison Johnstone:** Amendment 116 is designed to make it explicitly possible for a permit to have effect only if the person who holds it is financially secure enough to fulfil all of its requirements.

We have recently seen a dramatic example in Scotland. Scottish Coal and ATH Resources operated opencast coal mines under various permits, despite having no ability to fulfil all the legal requirements, such as remediation. That was revealed only when the companies went bust. East Ayrshire Council, for example, is now left with an estimated £133 million shortfall in the finance available for restoration, which is likely to leave communities that live in East Ayrshire with a black hole for a long time to come.

One of the problems was that, although bonds were put in place at the start, no checks were carried out during the lifetime of the operations. For that reason, the amendment explicitly refers to the requirement for financial security for the duration of the permit.

Some tidying up of the amendment may be required at stage 3, now that we have passed an amendment that requires removing the planning function from the meaning of regulatory activities. That said, part 2 of the bill refers to environmental activities, of which opencast mining is clearly one. In addition, opencast mines operate under numerous permits—for example, permits that are

issued under the Water Environment (Controlled Activities) (Scotland) Regulations 2011—all of which operators should be able to comply with.

I move amendment 116.

**The Minister for Environment and Climate Change (Paul Wheelhouse):** I will start by referring to the points that Alison Johnstone has made.

I certainly recognise the challenge that has been left to Scotland, and local authorities in particular, as a result of the decline of opencast coal mining operations in Scotland. Mr Mackay and Mr Ewing will bring forward improved methods to give confidence on bonds that relate to similar types of activities. We hope to announce plans to do so before Christmas, and we think that that is the appropriate place to deal with the issue to which Alison Johnstone referred.

The bill as introduced allows SEPA to consider whether an applicant for a permit or registration is a fit and proper person, but it does not clearly provide SEPA with power to vary, revoke or suspend permits or registrations when the authorised person ceases to be a fit and proper person. We also want to make it clear that SEPA can refuse the transfer of permits and registrations if the transferee is not a fit and proper person. Finally, we wish to make it clear that remaining a fit and proper person can itself be included as a condition in a permit or registration. Those are important powers if we are to assist the prevention and disruption of serious organised crime, particularly in the waste sector.

As well as examining criminal history and requiring permit or registration holders to provide technically competent management at a site, the test is likely to require operators to make adequate financial provision. The Rural Affairs, Climate Change and Environment Committee highlighted that issue in its stage 1 report on the bill in connection with the problems of the opencast coal industry and restoration costs.

The amendments clarify the existing provisions and make it clear that the fit-and-proper-person test can be considered through the lifetime of a permit or registration, and that, on transfer, a permit or registration can be revoked, varied or suspended where the person ceases to be a fit and proper person.

As the powers in the bill are enabling ones, the precise definitions and implementing detail will be set out in the regulations and supporting guidance, and will be subject to future public consultation and parliamentary scrutiny.

I sympathise entirely with the thinking behind amendment 116. As I have already explained, the provisions in paragraph 11 of schedule 2 already

allow SEPA to consider whether an applicant for a permit or registration is a fit and proper person, and my amendments will ensure that the fit-and-proper-person test can be considered through the lifetime of a permit or registration and on transfer.

The fit-and-proper-person test can be tailored to the needs of individual sectors, but it is likely to cover criminal history, technical competence and adequacy of financial provision. That is already in place for the waste industry, but it may well be appropriate to apply it to other sectors. The requirements for being a fit and proper person will be set out in the regulations, which can make the sort of provisions that are set out in amendment 116. Those regulations will, of course, be consulted on.

The bill already goes a little further than amendment 116, by allowing the fit-and-proper-person test to be applied to registrations as well as permits, although the nature of the activities that registration covers means that financial provision is unlikely to be a significant issue.

Given that explanation and the assurance that the bill already provides what the member seeks, I invite her to withdraw amendment 116.

10:30

**The Convener:** I have a great deal of sympathy with the policy intent of amendment 116. I am well aware of the issues in the coal industry; some of my parliamentary region—in Fife—has been affected by restoration bonds not being adequate to cover the costs of restoring former opencast mines. The intent is right, but I was interested to hear what the minister said about the Government's plans to deal with the issue in another way. It might be appropriate to see what those plans are before considering whether the bill needs to be amended at stage 3. That is my personal view.

**Alison Johnstone:** I thank the minister for his comments. We all understand that it is important that permits are complied with and that sites such as former opencast mines are restored. Communities that have lived with bad-neighbour developments trust the Government to ensure that the promised restoration is delivered.

We need to get back trust in the system. It is important to seek the financial certainty that is needed, so that nobody finds themselves in such a position again. The scandal has left people out of work and it risks breaching European Union laws, such as the birds and habitats directives. Companies cannot be allowed to walk away from legal obligations just because they do not have the money to fulfil them. The purpose of amendment 116 is to address that.

I am interested in what the minister said. I believe that he is seeking to ensure that we never find ourselves in such a situation again. I am interested that he said that the fit-and-proper-person test will last through the lifetime of a permit and will look at criminal activity and the financial situation. He claimed that the sort of provision that is set out in the amendment can be made.

As the convener suggested, I seek to withdraw the amendment and will look at how the bill progresses at stage 3.

*Amendment 116, by agreement, withdrawn.*

*Amendments 15 to 17 moved—[Paul Wheelhouse]—and agreed to.*

*Schedule 2, as amended, agreed to.*

### **Section 11—Regulations relating to protecting and improving the environment: consultation**

*Amendment 117 moved—[Hanzala Malik].*

**The Convener:** The question is, that amendment 117 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### **For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

#### **Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 117 disagreed to.*

*Section 11 agreed to.*

### **Section 12—Fixed monetary penalties**

**The Convener:** The next group is on SEPA's powers of enforcement. Amendment 18, in the name of Paul Wheelhouse, is grouped with amendments 19 to 46.

**Paul Wheelhouse:** These technical amendments to part 2 relate to SEPA's powers of enforcement. The Rural Affairs, Climate Change and Environment Committee particularly welcomed those new powers in its stage 1 report.

Following the bill's introduction, we have continued to engage with stakeholders on how the new enforcement measures will work in practice. Part of that process has involved detailed

discussions with the Crown Office and Procurator Fiscal Service on how the bill will interface with the criminal justice system. Those discussions have highlighted an opportunity to improve consistency in the bill's references to criminal proceedings. That matters because the new monetary penalties cannot be used when criminal proceedings have been taken.

Amendments 28, 36 and 39 clarify the measures that are to be treated as criminal proceedings for the purpose of giving fixed or variable monetary penalties and making enforcement undertakings. Amendments 42 and 46 do the same thing for the purpose of combining such sanctions.

The amendments in this group will ensure that imposing a monetary penalty for a particular offence will not prevent a prosecution for a similar subsequent offence if imposing the penalty does not solve the problem. They will also ensure that imposing a penalty for a particular offence will not prevent a prosecution for a different offence that is constituted by a common act or omission, and that imposing a penalty on or prosecuting one person will not prevent action from being taken against others when more than one person has committed an offence.

Amendments 18 to 27 seek to adjust sections 12, 13 and 14 in relation to fixed monetary penalties; amendments 29 to 35 seek to adjust sections 15, 16 and 17 in relation to variable monetary penalties; and amendment 38 seeks to adjust section 19 in relation to enforcement undertakings.

Amendments 40, 41, 44 and 45 will ensure that prosecution for a particular offence will not prevent the imposition of a monetary penalty for a different offence that is constituted by the same act or omission, or for a different act or omission that constitutes the same offence, provided that that is in accordance with the Lord Advocate's guidance on the matter.

Amendment 37 seeks to set an upper limit for a non-compliance penalty following a breach of an undertaking that has been given to SEPA, which it has accepted in place of a variable monetary penalty. The maximum amount of a non-compliance penalty is linked to the maximum amount of the variable monetary penalty to which the non-compliance penalty relates, and it will be set by order. That will ensure consistency with section 15.

Amendment 43 is a minor technical amendment.

I move amendment 18.

*Amendment 18 agreed to.*

*Amendments 19 and 20 moved—[Paul Wheelhouse]—and agreed to.*

*Section 12, as amended, agreed to.*

**Section 13—Fixed monetary penalties: procedure**

*Amendment 21 moved—[Paul Wheelhouse]—and agreed to.*

*Section 13, as amended, agreed to.*

**Section 14—Fixed monetary penalties: criminal proceedings and conviction**

*Amendments 22 to 28 moved—[Paul Wheelhouse]—and agreed to.*

*Section 14, as amended, agreed to.*

**Section 15—Variable monetary penalties**

*Amendments 29 to 31 moved—[Paul Wheelhouse]—and agreed to.*

*Section 15, as amended, agreed to.*

**Section 16—Variable monetary penalties: procedure**

*Amendment 32 moved—[Paul Wheelhouse]—and agreed to.*

*Section 16, as amended, agreed to.*

**Section 17—Variable monetary penalties: criminal proceedings and conviction**

*Amendments 33 to 36 moved—[Paul Wheelhouse]—and agreed to.*

*Section 17, as amended, agreed to.*

**Section 18—Undertakings under section 16: non-compliance penalties**

*Amendment 37 moved—[Paul Wheelhouse]—and agreed to.*

*Section 18, as amended, agreed to.*

**Section 19—Enforcement undertakings**

*Amendments 38 and 39 moved—[Paul Wheelhouse]—and agreed to.*

*Section 19, as amended, agreed to.*

**Section 20—Combination of sanctions**

*Amendments 40 to 46 moved—[Paul Wheelhouse]—and agreed to.*

*Section 20, as amended, agreed to.*

*Sections 21 to 27 agreed to.*

**Section 28—Power to order conviction etc for offence to be publicised**

**The Convener:** The next group is on environmental regulation: court powers on publicity orders. Amendment 118, in the name of Alex Fergusson, is the only amendment in the group.

**Alex Fergusson (Galloway and West Dumfries) (Con):** I will not take up too much of the committee's time, but both of the amendments that I have lodged at this stage of debate arise from what I would call the lack of information available on how relevant offences will be defined.

Amendment 118 relates to publicity orders, which will become a new penalty available to the courts. As yet, we do not know which offences those orders might be applied to, and I suspect that we would all make the reasonable assumption that they would be applied only to the more serious environmental offences, but there is no assurance of that nature in the bill.

Publicity orders can be a potent tool in deterring large organisations that deliberately flout environmental laws, and I do not doubt that they should have a place in the suite of options available to the courts. However, as I read it, the penalty may also apply to minor offences and to smaller businesses, such as the diversified farming, food and drink, and tourism businesses that abound in all our rural constituencies and which are important to the local economy. Those businesses may not have the large amounts of resources that might be needed or may be operating, as is often the case, at the margins of financial viability. If an inadvertent or unintentional breach of a fairly minor environmental regulation resulted in an adverse publicity order, it could have a devastating impact on some of those smaller businesses.

My amendment does not seek to remove the possibility of a publicity order; it simply adds a small safeguard, to allow the person who is likely to be subject to the order to make representations to the court before any publicity order is imposed. That would ensure that the court would be clear about the consequences for that particular business or individual, and it would ensure the proportionality of any conditions in the order.

Such safeguards already exist in other legislation where publicity orders can be made, such as the Corporate Manslaughter and Corporate Homicide Act 2007, and although we are talking about a slightly different level of crime in this case I think that the principle still applies, and I see no reason why it should not apply here.

I move amendment 118.

**Dennis Robertson (Aberdeenshire West) (SNP):** I welcome Alex Fergusson's amendment, because it seeks to clarify the bill and he has made his point well. I offer him my support for the clarification sought in his amendment.

**Hanzala Malik (Glasgow) (Lab):** I second that. It is a worthy amendment.

**Paul Wheelhouse:** I thank Alex Fergusson for lodging amendment 118, which establishes an additional safeguard around the use of the new sanction in the courts. On 5 June 2013, I gave the Rural Affairs, Climate Change and Environment Committee an assurance that the policy intent is that publicity orders will be used only for the most serious and deliberate breaches of environmental legislation. Alex Fergusson is right to say that publicity orders are an additional sentencing power that will be given to the criminal courts, and it is right that we have clarity as to when they might be used and that we give people the opportunity to make a statement as to why such an order is unnecessary in their case. As such, discretion is with the court as to how they use those orders. I support Alex Fergusson's amendment 118 and encourage members to do so.

**The Convener:** Do you wish to sum up, Mr Fergusson?

**Alex Fergusson:** No, I shall move on before anybody changes their mind.

**The Convener:** I assume that you are pressing your amendment.

**Alex Fergusson:** Yes, I shall press the amendment.

*Amendment 118 agreed to.*

*Section 28, as amended, agreed to.*

#### After section 28

**The Convener:** The next group is on commission of offences: vicarious and corporate liability. Amendment 100, in the name of the minister, is grouped with amendments 119, 47 to 50, and 108.

**Paul Wheelhouse:** The Scottish Government's amendments are largely clarifying amendments. They introduce culpable officer provision, which allows an individual—for example, a director, manager or partner of a company or partnership—as well as the company or body itself to be held guilty of failure to comply with a remediation notice or publicity order, or of the significant environmental harm offence, and to be punished accordingly.

Such culpable officer provisions already exist in environmental legislation and they are modelled

on sections 19 and 45 of the Water Resources (Scotland) Act 2013. They will ensure that, when significant damage is done to Scotland's environment and publicity or remediation orders are breached with the consent or connivance of, or because of the neglect of, company directors or managers, those individuals will be held to account for their actions.

10:45

The policy intent behind sections 29 and 30 is to allocate responsibility for environmental offences that are committed by an employee, agent or contractor to the person who is most able to supervise, manage and control the activities that give rise to any such offence. That could be their employer or another principal.

However, during evidence sessions it became clear that there is some uncertainty about whether sections 29 and 30 apply to unincorporated bodies and trusts that do not have their own legal personalities. Amendments 47 to 49 will ensure that sections 29 and 30 will apply to all persons, including trusts and unincorporated bodies. That is necessary to ensure that bodies that otherwise lack separate legal personality and cannot directly contract staff and enter into agreements with other bodies are covered by the vicarious liability provisions, which will ensure consistent application of the provision.

It is the Scottish Government's view that the Opposition amendment is not helpful, and I will explain why. In circumstances in which there is a clear and direct contractual relationship between an employer and employee, or a principal and agent, the additional reference to the subsection applying in the course of carrying on a regulated activity does not add clarity. At the point at which the relevant offences order is made, it will be clear that all relevant offences that are listed for section 29 will relate to the carrying on of a regulated activity. The Scottish Government intends to have a detailed relevant offences order or orders that will specify which of the many offences that relate to SEPA's regulatory work are relevant offences for each of the sections. The order will be consulted on with the draft regulations in due course.

I hope that my explanation on the drafting of section 29 and the reassurances that I have given will provide what Alex Fergusson seeks, and I invite him not to press his amendment.

**The Convener:** I invite Alex Fergusson to speak to amendment 119 and the other amendments in the group.

**Paul Wheelhouse:** I am sorry convener, but could I finish?

**The Convener:** I am sorry, minister. I had not realised that you were not finished.

**Paul Wheelhouse:** It was my fault entirely.

On amendment 50, which I forgot to mention, it was never the Scottish Government's intention that the powers in section 30 would be used for non-environmental activities. In our letter of 17 May to the Delegated Powers and Law Reform Committee, the Scottish Government agreed to lodge an amendment to clarify our position. The amendments will make it clear that only the environmental activities within the meaning of the section can be specified as regulated activities for the purposes of section 30.

I move amendment 100.

**The Convener:** I now invite Alex Fergusson to speak to amendment 119 and the other amendments in the group.

**Alex Fergusson:** Again, amendment 119 has come about largely because of a lack of consultation on the relevant part of the bill and the resultant uncertainty about how the provisions in this part of the bill might be applied.

In amendment 119, I seek to articulate what I understand to be the bill's policy intention in that vicarious liability would relate only to environmental offences that arise from the carrying on of regulated activities, which I think is correct. Although I would expect secondary legislation to define the relevant offences and restrict the definition to a specified list of the more serious environmental offences, that is not expressed in the bill.

I do not think that anyone questions that it is right to target employers who turn a blind eye or deliberately and repeatedly carry out activities in a way that causes harm to the environment, but from experience in other sectors, we know that the introduction of vicarious liability can create a quite substantial burden across the board on all employers, not just those who need to be targeted. Even the employers who are behaving completely responsibly and doing everything that we ask of them, and who are being reasonable in preventing environmental harm, will now need to put in place an extensive paper trail and collate evidence of their day-to-day activities to provide a record of due diligence that could stand up in court if necessary.

Obviously, there is a cost attached to that for professional advice and other resources; in some cases, that cost could be quite substantial. This is given added impetus by the proposed removal of the non-natural person restriction in section 29(1)(b). Because of that, vicarious liability would again be applicable to many farming families across Scotland and their associated food and

drink and tourism businesses. As I mentioned when speaking to amendment 18, those businesses are often marginally viable but they are hugely important to the rural economy. Any regulatory burden must be justified and must be as targeted and proportionate—a word that we should not lose sight of—as possible.

In deciding whether to press the amendment, I would be grateful for the minister's reassurance that vicarious liability will be applied in a targeted and proportionate way, only to the more serious offences arising from carrying on regulated activities, and that in due course there will be a full consultation on the definition of relevant offences with those who are potentially affected. I look forward to hearing what the minister says on this issue.

**Paul Wheelhouse:** I fully recognise the importance of the points that Alex Fergusson has made. I want to give him sufficient assurance that we will take forward in consultation any detailed proposals that we have. As I said earlier, those proposals will be presented in the form of an order, so there will be adequate opportunity for Parliament to consider them in detail. I identify with the point that he made and I confirm that we will seek a targeted approach, not a general provision. The offence in section 30, for example, can be extended only to cover environmental activities. We will take a focused approach.

*Amendment 100 agreed to.*

#### **Section 29—Vicarious liability for certain offences by employees and agents**

*Amendment 119 not moved.*

*Amendment 47 moved—[Paul Wheelhouse]—and agreed to.*

*Section 29, as amended, agreed to.*

#### **Section 30—Liability where activity carried out by arrangement with another**

*Amendments 48 to 50 moved—[Paul Wheelhouse]—and agreed to.*

*Section 30, as amended, agreed to.*

#### **Section 31—Significant environmental harm: offence**

**The Convener:** Amendment 101, in the name of the minister, is grouped with amendments 102 to 107.

**Paul Wheelhouse:** Amendments 101 to 103 deal with the new significant environmental harm offence that is created by the bill. We are making these technical amendments in order to sharpen the focus of the essential elements of the offence. There is no change in the scope of the offence,

but the new wording is shorter and clearer, which will enable the courts and the public to understand it better.

Amendments 104 to 107 deal with remediation order compliance. The bill as introduced makes failure to comply with a remediation order an offence punishable on summary conviction by a fine not exceeding £40,000 and on conviction on indictment by an unlimited fine. However, a number of those prosecuted for environmental offences are individuals or sole traders, rather than companies. For those cases, imprisonment might be an appropriate punishment.

The serious environmental harm offence in section 31 for which remediation orders are an option for the court already carries the possibility of imprisonment. By introducing imprisonment as a sentencing option for failure to comply with a remediation order, we will bring this offence into line with other similar offences.

The bill already enables a person who is subject to a remediation order to ask the court to extend the period for complying with the order. The amendments will also enable courts to vary the order. They could do so for example where, through no fault of the person, it is no longer possible to comply with the order.

I move amendment 101.

*Amendment 101 agreed to.*

*Amendments 102 and 103 moved—[Paul Wheelhouse]—and agreed to.*

*Section 31, as amended, agreed to.*

### **Section 32—Power of court to order offence to be remedied**

*Amendments 104 to 107 moved—[Paul Wheelhouse]—and agreed to.*

*Section 32, as amended, agreed to.*

**The Convener:** I suggest that we now have a five-minute suspension for a comfort break. We will resume at 11 o'clock.

10:55

*Meeting suspended.*

11:01

*On resuming—*

### **After section 32**

**The Convener:** We continue our stage 2 deliberations on the Regulatory Reform (Scotland) Bill.

The next group is on fixed penalty notices for offences relating to the supply of carrier bags. Amendment 51, in the name of the Minister for Environment and Climate Change, is the only amendment in the group.

**Paul Wheelhouse:** Amendment 51 provides for modest fixed monetary penalties as part of the enforcement of carrier bag charging offences under the proposed carrier bag charging regime from 20 October 2014. The aim is to provide a proportionate and cost-efficient enforcement option to complement the criminal penalties for failure to comply with the proposed regulations.

In last year's consultation on carrier bag charging, we proposed enforcement through civil penalties, but when we prepared the proposed regulations this summer it emerged that the enabling powers would not allow for that. Following discussion with the Convention of Scottish Local Authorities and retailer representatives, we decided to bring forward proposals for inclusion in the bill.

With good communications to ensure that retailers understand their responsibilities and a pragmatic approach from local authorities, we do not expect that enforcement action will be necessary in a significant number of cases. However, for the small number of cases in which enforcement may be necessary, we want to ensure that local authorities have an option that provides a realistic threat of enforcement action without the need for court action and the associated costs for all sides.

Amendment 51 sets out a fixed penalty regime in some detail. In view of the concerns that the Scottish Retail Consortium has expressed, I highlight the following. Enforcement authorities will need to take account of guidance, which will help to ensure that a consistent and proportionate approach is taken to enforcement. Anyone who receives a fixed penalty notice will be able to make representations to the enforcing authority if they disagree or believe it to be unfair, and anyone who wants to force the enforcement authority to decide whether to take the matter to court will be able to do so simply by not paying the penalty.

I move amendment 51 and I urge the committee to support it.

**The Convener:** Do any members wish to speak to the amendment?

**Members:** No.

**The Convener:** I have two concerns about the amendment, minister. The first is on the principle of carrier bag charging. I appreciate that you were not in the Parliament at the time, but back in 2005 the then Environment and Rural Development Committee considered the issue in some detail

when it looked at a member's bill from Mike Pringle MSP that proposed a similar set of charges. Having considered the evidence in great detail, the committee came to the conclusion, I think unanimously, that it did not support the measure.

I commend to the minister that committee's report, which I read with great interest last night. It contains a lot of detailed arguments on why the proposed measures might be counterproductive in terms of environmental protection.

I was also interested to note the make-up of the committee, because among those who supported that unanimous decision were not just Rob Gibson, the minister's parliamentary colleague from his own party, but Richard Lochhead, who is now the Cabinet Secretary for Rural Affairs and the Environment and, in effect, the minister's boss. Perhaps he has had a sudden change of heart on the subject.

The issue is undoubtedly a controversial one, and I would be interested to know why the Scottish Government's view has changed so dramatically from the stance that was taken by the minister's colleagues not so long ago on a similar issue.

I have a further issue to raise about process. The measure is being introduced at stage 2 with very little prior notice, as the minister will be aware. It was not raised at stage 1, and the committee has not had the opportunity to give it the detailed scrutiny that such a measure would deserve.

The minister fairly highlighted his engagement with the Scottish Retail Consortium. Like me and other members, he will have seen the submission from the SRC, which is very critical of the measure being proposed. Although COSLA might be content with what is being proposed, it is not the case that the retailers are content. If the Government wants to introduce a measure such as this, it should do so with proper parliamentary scrutiny and consultation, and that has simply not been done by introducing it at a very late stage through an amendment.

I would be grateful if the minister could respond to those concerns.

**Paul Wheelhouse:** I have listened with interest. Unlike you, convener, I was not reading that particular report last night. On the issue of the change of heart that is being described on the part of members of the Government, we should remember that the Climate Change (Scotland) Act 2009 has happened since the original debate in the Parliament about carrier bags. We feel that the 2009 act has changed the context in which we are having the debate today. We therefore feel that it is important to address the issue.

As for why we are introducing the proposal at a late stage in the parliamentary process, I acknowledge that scope for discussion on this issue is more limited at stage 2. As I said in my opening remarks, we proposed enforcement through civil penalties in last year's consultation. It has subsequently proved to be the case that we do not have the enabling powers to allow for that. Therefore, we have had to introduce the proposed provisions now, at stage 2.

I recognise some of the points and concerns that the Scottish Retail Consortium has raised, for example about the distribution of the fines that are collected. We note its suggestion that they should go to a consolidated fund. Amendment 51 would allow ministers to prescribe how any funds raised would be applied, but that would clearly require dialogue with stakeholders before any decisions on whether and how to exercise that power. That is one example of where we recognise that issues have been raised by the SRC, and we will continue to have dialogue with it. We hope to engage further with stakeholders on the detail of such matters.

**The Convener:** The question is, that amendment 51 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
McDougall, Margaret (West Scotland) (Lab)  
Robertson, Dennis (Aberdeenshire West) (SNP)

#### Against

Fraser, Murdo (Mid Scotland and Fife) (Con)

**The Convener:** The result of the division is: For 8, Against 1, Abstentions 0.

*Amendment 51 agreed to.*

*Amendment 108 moved—[Paul Wheelhouse]—and agreed to.*

*Section 33 agreed to.*

#### **Section 34—Land no longer considered to be contaminated or to be special site**

**The Convener:** The next group is on contaminated land and special sites. Amendment 52, in the name of the minister, is grouped with amendments 53 to 63.

**Paul Wheelhouse:** The main effect of section 34 is to empower local authorities to declare that a site should no longer be regarded as contaminated land.

As Bruce Crawford highlighted in his stage 1 speech with reference to a constituency issue in Blanefield, the economic, social and environmental costs of dealing with contaminated land can be very high. Since part IIA of the Environmental Protection Act 1990 came into force, local authorities have had responsibility for inspecting land in their area for land contamination and for identifying any site that constitutes an unacceptable risk to human health or to the water environment.

Our concern is that, at present, once a site has been declared to be contaminated land, which is a technical legal term, it remains on the register of contaminated land. That is the case even if the council or a developer has carried out the remediation required. Such remediation must mean that the site no longer meets the criteria of being contaminated land. We want to help residents such as those in Blanefield and to get remediated land back into productive use as soon as possible.

The proposed amendments to section 34, which were developed following engagement with the contaminated land action group, are designed to remove that anomaly. When a local authority has declared a site to be contaminated land, it will in future be able to declare in a similar way that it no longer regards the site as being contaminated land. The site will thus no longer have the stigma of being on the register of contaminated land.

There are safeguards in the process. The council will have to retain the information on the site, including a record of what, if any, remediation has been carried out, and in line with the freedom of information rules it will have to make that information available on request. When a site has been identified as a special site and SEPA has become responsible for it, SEPA will have to remove the special site designation before the local authority can declare that the site is no longer regarded as contaminated land.

Further Government amendments to section 34 will help to achieve the wider objective of land moving into productive use as quickly as is practical.

In Scots law, on the dissolution of a company, property and rights that were held prior to dissolution are deemed under the Companies Act 2006 to be bona vacantia and to belong to the Crown, and they are dealt with in Scotland by the Queen's and Lord Treasurer's Remembrancer. In practice, the QLTR never becomes the owner of the property in a conventional sense but simply facilitates the transfer to whoever wants it, with any value that is realised being paid into the Scottish consolidated fund.

Amendments 52 and 63 do not relieve the Crown of any legal liability that it would otherwise have; they simply mean that the QLTR will be able to deal with the property without having to worry about taking on additional liabilities.

I move amendment 52 and I urge the committee to support it.

**The Convener:** Do any members wish to speak on the amendments in the group?

**Members:** No.

**The Convener:** Minister, you mentioned the Blanefield situation, of which I have some knowledge as a local issue. Will you clarify how the amendments might help that situation?

My understanding of the Blanefield issue is that the contamination on the site is still there and it is the poor home owners, who bought their properties in good faith, who are being hit with the bill for cleaning up contaminated land of which they had no knowledge at the time of purchase. They are looking to the local authority and potentially the Scottish Government and other authorities to assist. Perhaps you could explain a little more how you think that the amendments will assist with that situation.

**Paul Wheelhouse:** That is a fair point to raise and I am glad to have the opportunity to clarify it.

In the particularly distressing situation in which residents in Blanefield find themselves, they are being asked to contribute a substantial amount to remediate the site but with no prospect of the blight of the land being regarded as contaminated being removed.

The provision will not make it financially easier for the residents of Blanefield—I make no pretence about that—but it will at least mean that, having borne the cost of remediation, they will know that their properties will in effect have the blight of being on contaminated land removed. I hope that, when properties are sold, they will recover at least some of the cost of remediating the site and not continue to have the property values depressed by the badge or stigma of the land being contaminated.

**The Convener:** Thank you for that clarification.

*Amendment 52 agreed to.*

*Amendments 53 to 63 moved—[Paul Wheelhouse]—and agreed to.*

*Section 34, as amended, agreed to.*

#### **After section 34**

**The Convener:** The next group is on powers of entry etc under section 108 of the Environment Act 1995 and related offences. Amendment 64, in the

name of the minister, is grouped with amendments 90, 95 and 96.

**Paul Wheelhouse:** Scotland's environment and natural resources are vital to its economic success and the health and wellbeing of its citizens. Environmental crime threatens the resources on which many of the mainstays of the Scottish economy depend, and it acts as a major barrier and constraint as Scotland moves towards being a resource-efficient economy with secure employment and growth.

11:15

The Scottish Government is committed to tackling environmental crime. That is why the Cabinet Secretary for Rural Affairs and the Environment announced the creation of an environmental crime task force in November 2011. The report of the task force is due to be published and a letter to the committee regarding its work has now been issued, to which I draw members' attention.

The creation of the task force recognises that criminal activities have a significant impact on Scotland's environment, economy and communities and that the most effective way to tackle environmental crime is partnership working among all relevant stakeholders.

Amendments 64 and 95 are key outcomes of the task force's work and are based on recent experience of major operations involving SEPA and the police, particularly in dealing with the involvement of serious organised crime in waste activities. They will expand the effectiveness of SEPA's regulatory toolkit and provide the agency with stronger powers to investigate environmental crime.

Environmental crime is a blight on our communities and threatens our environment and legitimate businesses alike. The amendments will ensure that SEPA is better able to tackle such criminality.

Criminal behaviour does not manifest itself only in the form of damage to the environment. During a visit to a waste site on the outskirts of Edinburgh this year, I was genuinely horrified to hear evidence of serious threats of violence being made against SEPA officers and, in some cases, their families, as well as evidence of stalking of SEPA officers on social media. That is totally unacceptable. A lot of very aggressive behaviour is being conducted and we need to rebalance the situation so that SEPA staff have the tools to do the job and do not face unreasonable threats in carrying out their duties.

Under section 110 of the Environment Act 1995 it is already an offence to obstruct "authorised

persons"—mainly SEPA staff—in the performance of their powers and duties. The amendments expand the offence to include assault and hindrance and provide for hindering and obstructing to include both direct and indirect acts.

Amendment 90 increases the penalties for all the offences in section 110 of the 1995 act, so that the maximum fine on summary conviction is increased from £5,000 to £10,000 and so that the courts will be able to imprison an offender for up to 12 months or impose both a fine and imprisonment.

The amendments will give SEPA staff protection similar to that of other officers carrying out emergency statutory duties. They will ensure that criminal elements who threaten or obstruct SEPA officers and prevent them from protecting Scotland's environment will be held to account.

Amendment 96 ensures that the increased penalty provisions in amendment 90 will not apply retrospectively.

I move amendment 64 and I urge the committee to support it.

*Amendment 64 agreed to.*

*Sections 35 to 37 agreed to.*

#### **After section 37**

**The Convener:** We move on to smoke-control areas—fuel and fireplaces. Amendment 65, in the name of the minister, is in a group on its own.

**Paul Wheelhouse:** Fuels and fireplaces to be used in smoke-control areas have to be approved by a statutory instrument made under the Clean Air Act 1993, which is time consuming and resource intensive. The proposed changes, which bring in an administrative process, will make granting approval considerably easier and simpler. That will have significant benefits for business. Manufacturers and suppliers will no longer face delays waiting for approval to market and sell their products after those products have passed the necessary technical tests—that is an important point.

Delays also lead to confusion among local authorities and the general public regarding the status of products that have passed the test but have not yet been approved for use.

This is not really a matter where parliamentary oversight adds value. That is the opinion that we have reached. The principles are set out in the 1993 act and the maintenance of the lists of fireplaces and fuels is an administrative procedure.

Saving time and resources does not mean that there will be any negative impacts on air quality.

The testing procedure itself, which ensures that fuels and fireplaces comply with prescribed emissions standards, remains unchanged.

I move amendment 65.

**Chic Brodie:** I do not disavow these amendments, but why are we seeing all these introductions to the bill at this stage?

**Paul Wheelhouse:** I recognise that this amendment has come late in the day. It reflects a discussion between ourselves and the UK Government on trying to bring in a simpler process to enable suppliers and manufacturers of products not to be put at a disadvantage after developing a product by having to wait for the next update through a Scottish statutory instrument, which can take some time. Having to wait puts them in a position in which they have a product that is potentially better than existing ones on the market but they cannot sell that product, so we feel that the change is justified.

There are on-going discussions at UK level, and all devolved Administrations are being asked to consider the process. We have sought the opportunity to address the issue in the bill rather than by bringing the proposal back to Parliament later.

*Amendment 65 agreed to.*

### Section 38—General purpose of SEPA

**The Convener:** I remind members that, if amendment 6 is agreed to, I will not call amendment 7, which would be pre-empted.

*Amendment 6 moved—[Alison Johnstone].*

**The Convener:** The question is, that amendment 6 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 6 disagreed to.*

*Amendment 7 moved—[Alison Johnstone].*

**The Convener:** The question is, that amendment 7 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 7 disagreed to.*

*Section 39 agreed to.*

### Section 40—Marine licence applications, etc: proceedings to question validity of decisions

**The Convener:** Amendment 111, in the name of the Minister for Energy, Enterprise and Tourism, is in a group on its own.

**Fergus Ewing:** The bill as introduced provides that appeals in connection with offshore generating stations proceed directly to the inner house of the Court of Session. Amendment 111 introduces a leave to appeal process—that is, the appeal cannot proceed unless the inner house has granted such leave.

The amendment also introduces a test that the inner house must satisfy before granting leave, which is that the applicant must have sufficient interest and have a real prospect of success. The amendment provides that the inner house may grant leave for the appeal application to proceed subject to conditions, or only on such grounds that are specified in the application as it thinks fit. Further consideration is being given to whether it would be desirable to stipulate that leave to appeal must be sought within a specific time limit.

Amendment 111 also provides that an application for appeal may be made to the court even though at the time of that application the court has not granted leave for the application to proceed.

I move amendment 111.

*Amendment 111 agreed to.*

*Section 40, as amended, agreed to.*

### Section 41—Planning authorities' functions: charges and fees

**The Convener:** Amendment 120, in the name of Margaret McDougall, is grouped with amendments 121 to 124.

**Margaret McDougall (West Scotland) (Lab):**

This set of amendments aims to deal with the issues that were raised in evidence on the idea of linking planning fees to performance. The question on that proposal was one of the most frequently answered of all the consultation questions, and many concerns were raised at that stage.

The amendments that I have lodged seek either to remove the section entirely or to add certain safeguards to the process.

Amendment 120 seeks to ensure that the Scottish ministers must prepare and publish guidance that sets out the principles to which they must have regard in determining whether the functions of a planning authority are not being, or have not been, performed satisfactorily, and outline that guidance before Parliament. The definitions of “satisfactory” and “non-satisfactory” are set out nowhere in the bill, and they could be very subjective concepts. Amendment 120 would ensure that the process is rigorous.

Although I welcome the minister Derek Mackay’s confirmation to the committee that the Scottish Government would provide assistance to improve a planning authority’s performance before resources are removed, I feel that the bill should contain a statutory requirement to ensure that all reasonable steps are taken before ministers are allowed to place sanctions on a planning authority.

That is what amendment 121 adds to the bill. It seeks to ensure that the provisions do not adversely affect a planning authority’s performance or range of services. If these provisions are genuinely being introduced to improve and incentivise planning authorities, it makes no sense to penalise them to such an extent that their performance is further affected—which could, in turn, result in their being penalised further through no fault of their own.

Amendment 123 states that, before any changes are made, the Scottish Government must lay before the Scottish Parliament

“a statement setting out ... the percentage variation by which, and ... the period for which,”

it proposes

“to vary the fee or charge”.

That would ensure that the power could not be misused and would offer safeguards that I feel are not explicitly set out in the bill. It would also allow Parliament to scrutinise the changes, which, again, would provide additional safeguards that are not present in the current bill.

These three amendments will not drastically alter the function of section 41; instead, they will strengthen the proposal by adding safeguards that are not currently present, ensure that planning

authorities are not unfairly penalised and allow parliamentary scrutiny of changes. They will also add transparency and openness to the legislation, which is something that I hope all committee members would support.

Failing any amendment of section 41, I have lodged amendment 124, which seeks to remove the entire section from the bill. As COSLA’s Stephen Hagan stated in a letter to the committee, the changes provide for

“fundamentally too much Ministerial interference in the operations of a specific council service”,

while Unison said that scrutiny of the process was

“the role of democratically elected councillors”

not of central Government. This bill demonstrates the Scottish Government’s worrying trend towards centralisation. We should not be taking functions away from local councils but extending them through more devolution.

As I have said, my preferred option is the removal of section 41; indeed, it is the only sensible option, as the section potentially gives the Scottish ministers too much control over the planning process. There are no safeguards in the bill and we have only the minister’s word that all reasonable steps will be taken to support and improve a planning authority’s performance. The bill contains no function for proper parliamentary scrutiny of proposed fee variations and COSLA has made it clear that it does not want this provision in the bill.

I move amendment 120.

**Mike MacKenzie:** I was listening carefully to Margaret McDougall, and she said that she felt that local councillors themselves should scrutinise local planning authorities. How could that scrutiny be carried out? After all, some planning authorities are very good but others are not so good, and local members might not be aware of how well their planning authority is performing compared with others. Unless the Government provides some overview or assistance in that respect, how on earth are they to know whether their planning authority is performing well or badly?

**Margaret McDougall:** Well—

**The Convener:** You will get a chance to respond at the end of the debate, Ms McDougall.

**Chic Brodie:** I support Mike MacKenzie’s comments. If you look at the whole spectrum of performance by planning authorities in Scotland, you will see that it is—shall I say—fairly variable. In some cases it is very good, and in others it is not so good. Section 41 will help local authorities understand the regulatory regime under which we will have to proceed in order to update the

performance of those planning authorities that are not performing to the expected standards.

11:30

**Hanzala Malik:** I am a little surprised at the suggestion that local authorities are unable to judge how good their performance is. As we know, planning is not the only issue that they deal with. By putting section 41 in the bill, the Government is either looking for a job to do and taking something away from local authorities or saying that they are incompetent, which I do not believe. I am sorry, but I do not agree with the counter-argument about local authorities' ability to carry out this task.

If the Scottish Government wanted to support local authorities by giving them additional resources, I would support such a move; after all, we know how much of an issue that is. Other than that, however, I do not agree with the counter-argument to these amendments.

**The Convener:** As no other members wish to speak, I welcome to the meeting—in the nick of time—the Minister for Local Government and Planning, Mr Mackay.

**The Minister for Local Government and Planning (Derek Mackay):** I have arrived in the way I would like the planning system to operate: timeously, effectively and efficiently. I thank the convener for his latitude, which allowed me to speak at the low-carbon conference just across the road.

Although the thrust of the Government's work on planning has been positive and focused on encouragement, incentivisation, new investment, support and picking up best practice, that is not good enough if it does not achieve the right performance outcomes. I am therefore serious about this particular mechanism and I propose to continue with it.

A council leader, a director of finance or a chief executive with an underperforming planning system might not be taking as much interest in the matter as they should. That might be unfair comment, but if it resulted in a potential loss of income generation for their authority it would become a financial as well as a performance matter, and that type of corporate attention is one of the things that we need to improve if we are to achieve a better planning service. This mechanism will improve behaviour and outcomes, and there will be no loss of income, because planning authorities will step up to the plate. I fundamentally believe that, as do many stakeholders with whom I have engaged.

The high-level group on planning performance has already identified a set of 15 performance markers that reflect key areas of essential good

performance and service quality across the planning service. The markers have been considered by COSLA and welcomed by the committee as a qualitative and quantitative method of assessing a planning authority's performance, and they are the aspects of good performance and service quality that we expect to be implemented across the country.

As the committee will be aware, detailed practical arrangements for the use of section 41 provisions are being taken forward with our COSLA partners through the high-level group. Explicit in the group's remit is the setting of working arrangements and processes, and ministers have stated that we will inform the committee of the outcome once discussions are complete.

The Scottish Government will continue to work closely with authorities to help them improve their performance. For example, we provided each authority with written feedback on their first planning performance framework report, and we will shortly do so again in response to the second annual reports received in September, with a sharp focus on the agreed performance markers.

Through our "Planning Reform—Next Steps" programme, we are working with our local government partners to establish and roll out good practice in a range of aspects to improve the planning service's quality, including strong project management of application and development plan processes; drawing closer links between different consenting regimes; proportionate information requirements focusing on the key issues that influence decisions; and improving the handling of planning applications and agreements.

As the committee itself concluded in its stage 1 report, a high-quality and effective planning service should benefit the economy, the environment and our communities and is an aspiration of both the Scottish Government and stakeholders. We consider that the best way forward is to work in partnership with COSLA, Heads of Planning Scotland, the Society of Local Authority Chief Executives and Senior Managers, the Society of Local Authority Lawyers and Administrators in Scotland and the Royal Town Planning Institute through the high-level group to agree the detailed practical arrangements.

As a result, the Scottish Government does not support these amendments. I am happy to go into further depth if required.

**The Convener:** I invite Margaret McDougall to wind up and indicate whether she is pressing or withdrawing her amendment.

**Margaret McDougall:** I will press my amendments.

The committee heard evidence from several witnesses, including Councillor Cook of COSLA and David Cooper of Aberdeenshire Council, who both stressed that the quality of planning decisions was critical. Councillor Cook said:

“in our view, the important thing is quality decision making.”

David Cooper said:

“There is a multitude of reasons for the time taken, but it is far better to get an application properly assessed, taking on board objectors’ views, rather than rush it through.”—*[Official Report, Economy, Energy and Tourism Committee, 5 June 2013; c 2960, 2963.]*

As I mentioned, the letter from Stephen Hagan of COSLA stated that COSLA had not agreed to the performance markers being used as the basis of decisions on reducing fees. We also need to take into account that it is not only planning authorities that are responsible for application forms and processing applications; other agencies are involved too. It is not always down to the planning authority if a planning application is delayed, but it is the only organisation that would be penalised in such instances. I am therefore trying to protect and safeguard against that.

On Mike MacKenzie’s comments, democratically elected councillors already sit on planning authorities and I am sure that they are fully aware of their responsibilities as a planning authority. On Chic Brodie’s comments, we already have procedures in place in which underperforming planning authorities can be identified and action taken.

**Chic Brodie:** No, we do not.

**Margaret McDougall:** We do, because Audit Scotland looks at such matters and raises concerns, which are then addressed.

I will press my amendments.

**The Convener:** The question is, that amendment 120 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Fraser, Murdo (Mid Scotland and Fife) (Con)  
Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 120 disagreed to.*

*Amendment 121 moved—[Margaret McDougall].*

**The Convener:** The question is, that amendment 121 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 121 disagreed to.*

*Amendment 122 moved—[Margaret McDougall].*

**The Convener:** The question is, that amendment 122 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 122 disagreed to.*

*Amendment 123 moved—[Margaret McDougall].*

**The Convener:** The question is, that amendment 123 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)

MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 123 disagreed to.*

*Amendment 124 moved—[Margaret McDougall].*

**The Convener:** The question is, that amendment 124 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Johnstone, Alison (Lothian) (Green)  
Malik, Hanzala (Glasgow) (Lab)  
McDougall, Margaret (West Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)

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

*Amendment 124 disagreed to.*

*Section 40 agreed to.*

#### **Section 42—Application for street trader's licence: food businesses**

**The Convener:** Amendment 66, in the name of Fergus Ewing, is grouped with amendments 109 and 68.

**Fergus Ewing:** Members will recall that section 42 deals with matters specified in paragraph 43 of the policy memorandum and paragraph 49 of the explanatory notes.

Mobile food businesses need not be based in Scotland to trade here, including those at large events, such as shows, games, trade fairs or festivals. Although not based in Scotland, such businesses require a street trader's licence from the relevant local authority in Scotland.

The amendments set out that, for businesses based outwith Scotland, which will not be registered with a food authority in Scotland, certificates of food hygiene compliance should be issued by the authority to which the street licence application is being made or to which a previous application has been made. That will enable all businesses operating in Scotland to benefit from the same consistency and transparency that the bill provides in that respect.

I am grateful to Stewart Stevenson for pointing out at an earlier stage in consideration of the bill that such a change was necessary.

I move amendment 66.

*Amendment 66 agreed to.*

*Amendments 109 and 68 agreed to.*

*Section 42, as amended, agreed to.*

*Section 43 agreed to.*

#### **Schedule 3—Minor and consequential modifications**

**The Convener:** The next group is on minor and technical modifications of enactments. Amendment 69, in the name of the minister, is grouped with amendments 70 to 73, 76 to 89, 91 to 94, 110, 97, 98 and 112.

**Paul Wheelhouse:** These minor technical amendments are part of our work on better regulation. That includes making consequential or clarifying amendments, simplifying or streamlining procedures and searching out spent provisions with a view to eradicating them and thereby clearing up the legislative landscape.

Unless the committee feels it necessary to go into great detail, I simply move amendment 69 and urge the committee to support the minor technical amendments in this group.

*Amendment 69 agreed to.*

*Amendments 70 to 73 moved—[Paul Wheelhouse]—and agreed to.*

**The Convener:** We now come to the group on offences in relation to controlled waste and litter—fixed penalty notices. Amendment 74, in the name of the minister, is grouped with amendment 75.

**Paul Wheelhouse:** This summer, we consulted on Scotland's first national litter strategy since devolution, which we will publish next year. We believe that enforcement has a key role to play in deterring littering and fly-tipping, and we have already made an order to increase fixed penalties from £50 to £80 for littering, and up to £200 for fly-tipping, with effect from 1 April 2014.

Our consultation also sought views on a number of other actions to make the enforcement system a more effective deterrent. Those included two measures covered by the amendments in this group, and both of those measures received clear support from consultees.

First, the amendments will extend the ability to issue fixed penalty notices to the Loch Lomond and the Trossachs National Park Authority, which has been dealing with long-running litter and fly-tipping issues. They also provide a power that will allow ministers to add other authorities by order under the negative procedure, and to adjust the administrative arrangements appropriately.

Secondly, they will close a loophole in the current legislation so as to require alleged offenders to provide their names and addresses to the litter authorities, replicating a power that the police already have.

Coupled with other proposals on, for example, enforcement training and the trialling of new approaches, we believe that the proposed changes will help to deter future offending, contributing to cleaner environments and reducing clean-up costs.

I move amendment 74.

**Chic Brodie:** I have a question for the minister. He will know about my obsession, almost, with the plans for litter. In some cases, local authorities are now subcontracting litter collection and penalties to social enterprises and so on. How will those be dealt with under the bill?

**Paul Wheelhouse:** I understand that they will be covered by the amendments. We will write to the committee to give some detail on why we believe that we can cover situations where a social enterprise has been subcontracted, for instance. I acknowledge Mr Brodie's long-standing interest in this area.

*Amendment 74 agreed to.*

*Amendments 75 to 96, 110, 97, 98 and 112 moved—[Paul Wheelhouse]—and agreed to.*

*Schedule 3, as amended, agreed to.*

#### **Section 44—Subordinate legislation**

*Amendment 99 moved—[Fergus Ewing]—and agreed to.*

*Amendment 8 not moved.*

*Section 44, as amended, agreed to.*

*Sections 45 to 48 agreed to.*

*Long title agreed to.*

11:45

**The Convener:** That ends stage 2 consideration of the bill. Members should note that the bill will now be reprinted as amended and will be available in print and on the web tomorrow morning. The Parliament has not yet determined when stage 3 will take place, but members can lodge stage 3 amendments at any time with the clerks in the legislation team. Members will be informed of the deadline for amendments once it has been determined.

I thank the ministers and their officials for coming along and I thank committee members and the additional members who were with us for their forbearance.

*Meeting closed at 11:47.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

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