OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 20 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 February 2018

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DELEGATED POWERS AND LAW REFORM COMMITTEE
5th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Neil Findlay (Lothian) (Lab)
*Alison Harris (Central Scotland) (Con)
*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Norman Macleod (Scottish Government)
John McNairney (Scottish Government)
Kevin Stewart (Minister for Local Government and Housing)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 20 February 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the fifth meeting in 2018 of the Delegated Powers and Law Reform Committee. I welcome Kevin Stewart, the Minister for Local Government and Housing, and his officials, who will be speaking about the Planning (Scotland) Bill.

Under agenda item 1, it is proposed that we take items 7 and 8 in private. Item 7 is the committee's approach to the delegated powers memorandum for the Scottish Crown Estate Bill, and item 8 is consideration of the evidence that we are about to hear on the Planning (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Planning (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is consideration of the Planning (Scotland) Bill. The committee's role in scrutinising the bill is to consider the delegated powers. We have before us today Kevin Stewart, Minister for Local Government and Housing.

Kevin Stewart (Minister for Local Government and Housing): Good morning.

The Convener: The minister is supported by Jean Waddie, the bill co-ordinator, Norman Macleod, senior principal legal officer, and John McNairney, chief planner. Minister, would you like to make a statement before we begin the session?

Kevin Stewart: I would, convener.

The Town and Country Planning (Scotland) Act 1997 sets the structure of Scotland's planning system. The Planning (Scotland) Bill builds on previous modernisation to amend the 1997 act. It introduces well-targeted changes to the system to ensure that planning realises its full potential.

The bill balances the need to establish the key principles of the planning system in primary legislation with the practical merits of allowing for more detailed secondary legislation, such as on specific aspects of the process, to be brought forward in due course.

Three key factors have guided our approach. First, we are building on the existing planning system rather than starting again. The extent of the delegated powers that are proposed in the bill is consistent with the current system. Regulations have long set out procedural detail for significant parts of the system, such as development management and development planning, along with the use classes order and the general permitted development order. Detailed process changes to follow the bill will include amending existing secondary legislation as well as regulations on the use of the proposed new powers.

Secondly, the approach to the Planning (Scotland) Bill has been open and inclusive, beginning with the review undertaken by the independent panel. The changes that we propose have already been widely debated by stakeholders and members of the public over the past two years. We will continue that approach to inform the more detailed design of future secondary legislation.

Thirdly, flexibility is crucial. Planning needs to be sufficiently agile to handle changing circumstances. Examples include the need to allow for digital innovation to help improve

procedures or allowing for new features of the system, such as the gate check for development plans. Those need to be informed by new ways of working. A lot can change between planning bills and we should not restrict new approaches by having too much detail in primary legislation.

With regard to the powers for Scottish ministers to intervene through making directions, the committee will appreciate that existing discretionary powers are used sparingly to take action on nationally significant issues as they arise. Examples of the use of existing powers include the directions made to support our moratorium on unconventional oil and gas extraction and the use of ministers' discretion to intervene when development plans lack sufficient land for housing. The powers are a backstop, recognising that any development may have an impact outwith its own area and that sometimes ministers have to make difficult decisions in the national interest.

I hope that that provides a useful context to inform our discussion and I look forward to questions.

The Convener: Thank you. We will cover those areas in our questioning.

The bill contains a large number of delegated powers—we counted 46, which is not unprecedented, but it is a lot. The theme of the bill seems to be that powers come to you and do not flow down. Therefore a lot of powers will come your way if the bill is passed. Can you explain, in general terms, why you have taken that approach, and why you have left so much to secondary legislation?

Kevin Stewart: I appreciate that there are a large number of delegated powers in the bill. However, the approach very much follows the existing arrangements for planning legislation. For the most part, the main provision is set out in the primary legislation, and secondary legislation then fills in procedures, timescales and information requirements and so on. Direction-making powers are available to allow ministers to act where necessary in relation to individual cases.

The bill seeks to follow the same approach as the Planning etc (Scotland) Act 2006, so that, in the future, it will be possible to update procedures together and to keep them absolutely consistent. Even where the powers in the bill are new, in many cases they follow the existing provisions that are laid out. For example, there are existing powers for ministers to make regulations about costs, procedure and what is to be assessed in the examination of a local development plan. The bill includes the gate-check assessment of the evidence report, which in effect moves part of the examination process to the beginning of the plan's preparation. It includes equivalent regulation-making powers, so that the examination and the gate check can be treated similarly and the procedures can be changed together.

Planning involves a lot of procedural detail. Although there are some more significant delegated powers in the bill, I am afraid that, as the bill team leader has previously said to me, many of them are dull and are a standard use of secondary legislation. I hope that Ms Waddie will forgive me for using her term "dull" in that regard.

The Convener: Many of them are dull, but some of them are not and are very important. We will go on to explore some of the ones that we have picked up on.

For example, proposed new section 3CA(3) of the 1997 act allows ministers to make further provision in regulations about amendments to the national planning framework. We asked the Scottish Government why it is appropriate for that provision to be made in regulations rather than in the bill, given that it concerns the setting of the procedure for parliamentary scrutiny. You explained to us in your written response that there is a need for flexibility to respond to a range of circumstances that could arise requiring procedures to be amended or new procedures to be developed, and that a regulation-making power is appropriate. However, the regulations will establish the parliamentary procedure for consideration of amendments to the national planning framework. Why do you consider it appropriate for ministers to determine the procedure for parliamentary scrutiny in regulations, rather than that procedure being set out in the bill for Parliament to agree? Why should it be you who decides the procedure and not Parliament?

Kevin Stewart: As our written response explains, one of the options that we are looking at in relation to amendments to the national planning framework is frequent minor updating in response to real-time data. Obviously, that would be only for agreed specific aspects that did not change overall policy. However, it might not be proportionate for all such adjustments to be laid before the Parliament each time they are made, and regulations might set out how such regular amendments could be made and how Parliament could review them periodically.

I can give you an example to highlight the real-time data issue. I have established a digital task force to look at improving planning across the board, and in particular a matter that has previously come in for criticism, which is the fact that the national planning framework does not necessarily move quickly enough to meet changing times. Mr McNairney will correct me if I get this slightly wrong, but a good example to

highlight is the reference to Longannet and Cockenzie in national planning framework 3, which I think came out in 2014—I am getting the nod, so I must be right about the date. After that framework was agreed, both plants were closed. We need to take cognisance not just of the ever-changing situation in which we find ourselves with some of these major matters but of the fact that technology, too, is ever changing, and folk would appreciate it if we could deal quickly and effectively with real-time data on such matters.

We have proposed that the procedure for making amendments be set in regulations precisely to provide flexibility for that type of innovative approach. I have given you some examples, but we do not know what will be thrown up by new technology within the planning framework period, and I do not—and I am sure that Parliament does not—want to limit what we can do in this regard or our ability to change things quickly.

Of course, the Parliament scrutinises all regulations that are proposed by ministers and has the opportunity to reject them, if it sees fit. I do not accept that this kind of provision must always be set out in primary legislation. Indeed, with other legislation that we have brought into force in Scotland—a good example is building standards—we have been able to keep ahead of the game and have a more robust system than exists south of the border because the primary legislation allows us to introduce secondary legislation as required to update regulation on a regular basis.

As I have said, I do not accept that all of this must be in primary legislation. There are benefits to putting some of these things in secondary legislation, such as ensuring that we can keep as up to date as we possibly can.

Neil Findlay (Lothian) (Lab): Just for clarification, you seem to be arguing that, because the world and technology can change quickly, powers need to be concentrated in your hands to allow such things to be dealt with quickly.

Kevin Stewart: That is not what I am asking for at all. As I have already explained, Parliament scrutinises all of these regulations, and I expect that to be the case with any secondary legislation that is brought forward in this regard. I know not only from my role as minister but from my previous role as a committee convener that committees can do a huge amount in scrutinising secondary legislation, and I expect that to continue.

10:15

The Convener: The thing is, minister, that the bill enhances the role of the NPF; it becomes very important and everything flows up through it. No one will argue that changes should not be made—after all, with a 10-year plan, there are going to be changes—but the key question is how such changes are scrutinised. Do you accept that any changes that are to be made should go through the affirmative rather than the negative procedure so that Parliament can at least be satisfied that such changes have been thoroughly scrutinised?

Kevin Stewart: From the review at the very beginning of the process right through to the bill's publication, we have done as much as we can to involve stakeholders at every stage. I agree that any significant changes to the national planning framework will be of considerable interest to stakeholders, and you can be sure that, where that is the case, we will consult widely.

I have already highlighted other cases involving more minor amendments and where a lighter touch would be more suitable. However, I recognise the committee's concerns about the procedure for regulations prescribing when amendments should be laid before Parliament, and I am prepared to look at the issue.

The Convener: That is good. It would be useful to have something in the bill that sets out the parameters for when and how changes can be made and the procedure that must be used. Are you prepared to look at that?

Kevin Stewart: I am. I do not think that it necessarily needs to be in the bill, but I am prepared to look at how we deal with these matters. We require a level of flexibility to ensure that we create the best possible planning system for Scotland. After all, that is what we deserve. We also require that flexibility in order to meet the challenges of an ever-changing world, and I am sure that, like me, the committee will want any changes that are necessary to be brought in as quickly as possible but with the required level of scrutiny and stakeholder involvement.

The Convener: We will move on to a different line of questioning. Alison Harris will ask about some of the direction-making powers in the bill.

Alison Harris (Central Scotland) (Con): Good morning. The bill provides for significant direction-making powers. What will you do to ensure that ministers are accountable for exercising those powers and that public transparency is applied to the exercise of power?

Kevin Stewart: I have already said that, as with other delegated powers, the bill provides for direction-making powers in line with those that already exist in the planning system. That will allow ministers to take the necessary action in individual cases or in relation to any particular issues that might arise. In some cases, these powers allow for a more proportionate approach than we had before; perhaps the best example in that respect relates to the fact that planning zone

proposals have to be notified to Scottish ministers, while the new simplified development zones have to be notified only where required by direction.

Ministers are always accountable to Parliament for the use of their powers and can be asked to come and explain themselves at any time. All directions made under planning legislation are a matter of public record and are published routinely on the planning pages of the Scottish Government website. As I have said, we are accountable to Parliament in all regards. I cannot think of a case, off the top of my head, where ministers have been asked to account for those directions after they have been published. Parliament could do that at any time, but thus far it has chosen not to do so.

Alison Harris: Given the significance of some of the direction-making powers, would you consider setting out in the bill a requirement to publish the directions, including the reasons for making them?

Kevin Stewart: We already publish the decisions on directions on the Scottish Government website, as I said. I do not see what adding that to the bill would actually do. As I said in my previous answer, the directions are published on the Scottish Government website, and Parliament can ask ministers to account for the directions that have been made, but that has never happened, as far as I am aware.

The Convener: Perhaps you need to go a bit further, then, and alert people when you have used those powers, rather than just publishing a direction and expecting people to notice it.

Kevin Stewart: If you want me to inform the Scottish Parliament information centre, or some other parliamentary body, when those things are published on the website, I am quite happy to do that.

The Convener: That might be useful. What about providing the reasons when you have made the direction?

Kevin Stewart: Those are always set out too. Again, if Parliament wants me to account for those situations, I am more than happy—as always—to come before a committee. As you well know from the number of times that I have appeared before the Local Government and Communities Committee since taking up my post, I am not shy about coming in front of committees to account for what I have done and to allow members to scrutinise my actions.

The Convener: That is fair comment, minister.

David Torrance (Kirkcaldy) (SNP): My question follows on from Alison Harris's question. Although it may not be appropriate for a report to be made to Parliament on each occasion on which direction-making powers are exercised, would you consider reporting to Parliament regularly—perhaps every three years—on the use of more significant powers collectively?

Kevin Stewart: I do not think that setting out a timescale is the best way of doing that. Parliament can currently call me to account for actions, as I have already stated. A timescale is not necessarily a good thing. If Parliament wants me to account for a direction that I make, it would be right to do so at that particular point in time, rather than laying down a marked period for reporting.

The Convener: Do you have a follow-up question?

David Torrance: No.

The Convener: We have some new powers, such as the power to alter and simplify developments, the power to transfer functions when there are insufficient trained councillors, and powers concerning directions to a planning authority following an assessment of performance. Those are all new, and we do not know how often you would use them, so surely it is not unreasonable to expect you to report to Parliament?

Kevin Stewart: As I said, I am not averse to reporting to Parliament at any time.

I would like to clarify a couple of the things that the convener raised. Let us take, for example, training and the situation in which there might be insufficient elected members who have been trained and are able to take a decision. I would expect the power in relation to that to be used very sparingly indeed. The only situation in which I envisage that power being used would be when there had been an election that resulted in a huge change in the membership on a local authority, such that no members had had the requisite training, and an application had to be dealt with very quickly. All those factors would have to be in play, which is kind of unlikely, but the power is in the bill just in case something like that happens. Someone suggested to me the example of the entire membership of a local authority being on a bus that was in an accident—a highly unlikely circumstance that I hope never happens.

The power would be used sparingly. It is in the bill because logic dictates that we have to take account of every single thing that could possibly happen.

The Convener: That covers that power, but there are others that we simply do not know about. Surely it is not unreasonable to ask that, if you get the new powers, you report to Parliament on whether you have used them.

Kevin Stewart: I would do that, as I have already said. I am not averse to coming to

committee to account for actions that have been taken.

Neil Findlay: Do the provisions pertaining to training for councillors who have to make decisions also apply to you?

Kevin Stewart: Those provisions do not apply to me under the bill, but I am always happy to undergo training: continuous professional development is essential. When I was a councillor, changes in 2007 meant that there was a requirement for continuous professional development: I did that CPD and I took it seriously. I am sure that if somebody wanted to, they could look back at all the training that I undertook as an elected member. CPD is essential for all elected members.

In the past, there has been agreement that licensing board members should undertake training with an exam at the end of it, for obvious reasons. I see no difference here. In some local authorities, training that was done in the past might not have been all that was required.

The bill provides a huge opportunity for folks to get planning absolutely right. No one should be afraid of continuous professional development or training. I hope that folk out there will agree that that is the right way forward. Accusations are often made that elected members make decisions without full knowledge; training will ensure that elected members are better able to scrutinise planning, and it will put a stop to some of the accusations that we hear regularly.

Neil Findlay: I am not personalising this about you as an individual, minister, but ministers are seeking to impose on elected councillors conditions that will not be imposed on themselves. You said that you would be willing to do X, Y and Z, which is very noble.

Kevin Stewart: I do X, Y and Z.

Neil Findlay: Excellent. I am sure that you do A, B and C as well. I am sure that that is very noble and right, but it is not necessarily the approach that will be taken by a subsequent minister, who might have a different point of view. It therefore seems to be a bit hypocritical that, having applied conditions to councillors who will make the decisions, you—or another minister—could be making more and bigger strategic decisions without any training whatsoever.

Kevin Stewart: I go back to the point that I made about licensing board members. Parliament agreed that elected council members who make those decisions locally should undergo that training. That is the right thing to do.

The bulk of planning decisions are taken by local authority councillors. We want that to continue. They should have at their disposal all the tools that they need to do that properly, including a level of training that is in many places not currently provided. I see no difference between the situations of elected members on licensing boards and elected members on planning committees in that regard.

10:30

When Parliament agreed that licensing training should take place, there was no suggestion that Parliament members or ministers should also undertake that training. The training is without doubt required by the folks who make the vast bulk of the decisions—the local councillors.

The Convener: Mr Findlay's point is that councillors take decisions on planning matters and that ministers—including you and your successors—also take such decisions, so is it not therefore right that ministers should also have to go through that training?

Kevin Stewart: I am not at all unhappy about undertaking that training. I am quite sure that my successors, if they are wise, will undertake continuing professional development, too. I can also call on officials in regard to a lot of things, and I am able to challenge my officials using the knowledge that I have garnered over the piece. I want more local authority councillors also to be able to challenge officials where necessary, which they will be able to do after undertaking that training.

The Convener: That happens already, as you know. Are you prepared to put something on the face of the bill about a requirement for ministers to undergo training?

Kevin Stewart: I do not think that any such thing is needed in the bill. A wise minister will always ensure that he or she has all the knowledge that they require and will continue with the CPD that I expect everyone would do.

Neil Findlay: The inference that is to be drawn from that is that ministers have wisdom and councillors do not—

Kevin Stewart: Not at all.

Neil Findlay: That is the inference.

When a transfer of functions is to take place and is being done by ministers, how should it be explained? Should we describe in the bill the process of the transfer of the functions? How should that be put in the public domain?

Kevin Stewart: I am not sure exactly what you are getting at.

Neil Findlay: The Government says that it is for the planning authority and not the Scottish ministers to explain why a transfer of functions

direction under section 25(1) has been made by ministers. Should the requirement to explain the circumstances leading to such a direction, and the choice of body that the functions have been transferred to be set out in the bill?

Kevin Stewart: First, I hope that that power will never be used. As I said earlier, it is a backstop for exceptional circumstances. The power is very tightly drawn and can be used only when a planning authority is unable to exercise a planning function because it does not have sufficient trained members.

I have given examples of exceptional circumstances. A massive change in membership following an election, resulting in there being no members who had completed the training, would be a reason for a direction. It would be for the planning authority to explain the background and how that situation had come about.

The choice of body to which functions would be transferred would depend on a range of factors, including the capacity of neighbouring authorities and whether they have experience of similar issues. For example, I would not necessarily expect a rural authority to take on such a function for an urban authority, or vice versa.

I agree that it might be helpful to explain the choice, so I am happy to take that away and consider it.

Neil Findlay: God forbid that it should happen, but there could be political reasons for deciding that a particular authority or body was to make what might, in the circumstances, be a major planning decision.

Kevin Stewart: As I said, I expect that the power would be used only in very exceptional circumstances. Politics would not come into play, Mr Findlay.

Neil Findlay: God forbid.

Kevin Stewart: Perhaps you can give me an example of where you think that politics could come into play.

Neil Findlay: If there were a major and controversial planning decision and the circumstances prevailed that another authority or organisation had to make the decision and to see the process through, it might be that the choice of one authority with a certain political leaning rather than another authority might be beneficial for that development.

Kevin Stewart: As I have explained, the power in section 25(1) would be used only in extremely exceptional circumstances. Quite honestly, I find it difficult to believe that it will ever be used. I have given examples of where it might be used, but they are highly unlikely. As logic dictates, we have to deal with every possible circumstance that might arise, which is why the provision is included. As I said, I am more than happy to go away and consider the matter further. If the committee comes up with logical examples of where the provision might cause difficulty, I am willing to take a look at them.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, minister. The committee wrote to you previously about proposed new section 54C of the 1997 act. The committee's concerns about it relate to the removal of parliamentary scrutiny, in so far as a simplified development zone scheme might disapply any regulations for restricting or regulating the display of advertisements, and apply alternative provision. How do you intend to respond to those concerns?

Kevin Stewart: I will start off on that, but I might bring in Norman Macleod for more details. I have responded to the committee in writing. The advertisement regulations set out certain types of adverts that are outwith control or are automatically deemed to have consent, and areas where there are specific restrictions. Everything that does not fall into those classes needs consent from the planning authority. Our intention is that simplified development zone schemes should be able automatically to grant advertisement consent, just as they grant planning consent, for advert types that are set out in the scheme as being acceptable for that scheme area.

However, we do not want that to override restrictions that are imposed by the regulations. The provisions for SDZ schemes should be within what is allowed by the regulations. I have asked officials to look again at the wording to see whether it needs to be amended in any way. Perhaps Mr Macleod has something to add to that; the matter is quite technical.

Norman Macleod (Scottish Government): The minister has got that right. The only thing that I will add is that it really comes down to how the requirements for consent technically arise under the legislation. Proposed new section 54B(3) of the 1997 act sets out the ability to grant planning permission in an SDZ, whether that is construction consent or building consent, which arises from the primary legislation. The requirement for advertisement consents arises only under the regulations that are made under section 182 of the Town and Country Planning (Scotland) Act 1997. In its drafting, proposed new section 54C has been used to disapply regulations under section 182 of the 1997 act. We can look again at whether we can express more clearly in the bill what the minister explained.

Kevin Stewart: If the committee requires any more detail on the matter, I am willing to write to you with that.

Stuart McMillan: When you do your further work on the matter, please make the committee aware of whether you will lodge an amendment, if possible. Obviously, you will lodge amendments in the course of the parliamentary process, but it would be helpful if you could make us aware of anything that you are going to do.

The Convener: As I understand it, under the current legislation, a simplified planning zone cannot apply to green-belt areas, national scenic areas and conservation areas but your proposal does not include such areas. Are you minded to be more specific or to reintroduce those restrictions?

Kevin Stewart: You are right to say that the proposed simplified development zones would not cover such areas. Mr McMillan's question was about advertising. Are you asking a similar question about advertising in the areas that you listed?

The Convener: No, I am asking a slightly different question.

Kevin Stewart: Right. Simplified development zones would not apply to the areas that you listed.

The Convener: They would not.

Kevin Stewart: No.

The Convener: Okay, but that is not in the bill.

Kevin Stewart: I will check and get back to you on that. I will bring in Mr McNairney.

John McNairney (Scottish Government): Our policy aspiration is that we should consider some areas—for example, conservation areas in town centres—where there might be potential to use simplified development zones. It might be that, in relation to changes of use and other opportunities to regenerate town centres, there could be a role in the future for a simplified development zone in a town centre or conservation area. However, the scope might be much less than it would be in, for example, a mainstream industrial or commercial area. We want to ensure that we can tailor the implementation of simplified development zones to avoid the most sensitive areas but consider the capacity in areas such as conservation areas, which would currently not be simplified planning zones.

The Convener: That contradicts what the minister just said. He said that the current restrictions would apply but you are saying that they might not.

John McNairney: I raised conservation areas because we think that there is some potential for simplified development zones in them. However, we have not promoted the use of SDZs in national scenic areas, for example, as a policy proposal.

The Convener: As I said, that is not in the bill but perhaps it should be.

Kevin Stewart: I will get back to you, convener, and we will clarify some of the issues that have been raised. It would address your concerns if we were to set out in the bill the types of land that may not be included in simplified development zones while allowing for entries to be added or removed by regulations. I am content to adopt that approach. We will write to you on those issues, particularly advertising and conservation areas.

Neil Findlay: Why is the negative procedure, not the affirmative procedure, deemed appropriate for regulations should changes have to be made to the functions of the national planning performance co-ordinator?

10:45

Kevin Stewart: First, I will outline how the national planning performance co-ordinator's role would work. The co-ordinator's functions are to monitor planning authorities' performance, to provide advice to them on how they might improve and to report to the Scottish ministers on their activities and on any recommendations that they have. The functions are not particularly wide. I expect further provisions to include details on how performance is to be monitored and how often reports are to be submitted. I expect such technical details to be covered by the negative procedure rather than the affirmative procedure.

The committee can be assured that we will continue to work with the high-level group on planning and other stakeholders to develop how the role of the co-ordinator will operate. It is intended that the role will be supportive and will help to streamline reporting and share good practice.

The convener has heard me say many times that I want to ensure the export of good practice. The co-ordinator could play a part in doing that, by ensuring that best practice is rolled out across the country.

Neil Findlay: The proposal would, again, give ministers—depending on the circumstances—extensive powers. Should there not be something in the bill on their usage?

Kevin Stewart: I do not understand why Mr Findlay refers to "extensive powers", given the role that I have outlined. As I said in my first answer, much of the co-ordinator's role is about monitoring performance and ensuring that best practice is rolled out. I cannot see why any changes to the role could not be considered by the negative procedure rather than by the affirmative procedure.

Neil Findlay: If a different minister wanted to change the co-ordinator's role, how would Parliament scrutinise that?

Kevin Stewart: It might be useful if I return to the Planning etc (Scotland) Act 2006. The performance provisions that were introduced by the 2006 act did not provide for a performance co-ordinator—although, given what we are seeing, that role is probably now necessary. The act provided for an assessment of planning authorities' performance. The co-ordinator role will be a good thing in getting performance absolutely right.

The bill does not change things to any huge extent, apart from introducing the co-ordinator role, which will be extremely useful and beneficial. I really do not see—perhaps Mr Findlay can point this out—what "extensive powers" would be given.

Neil Findlay: You and I do not know what might happen in the future, so the role could expand and change.

Kevin Stewart: The role could expand and change, but I expect that the Government would be subject to scrutiny in front of the committee on such a proposal. As I have said previously, and a number of times in this evidence-taking session, I would not be averse to being scrutinised if any changes were to be made.

The Convener: The new role could, in theory, be very powerful. In fact, the bill says that the planning tsar could not just give advice, but step in and take over the planning department of a council.

Kevin Stewart: I do not see where the bill says that, convener; in fact, it says directly the opposite. The Scottish Government cannot take over a planning department on performance grounds. I realise that some folk have previously said otherwise. Indeed, convener, you did so yourself when, in a question that you asked after my statement to Parliament, you suggested:

"The Scottish Government would even be able to take over a planning department. That runs a coach and horses through any pretence of localism."—[*Official Report*, 5 December 2017; c 20.]

The fact is that the Scottish Government cannot take over a planning department on performance grounds. There is only the power for a planning authority's functions to be transferred to another authority or to Scottish ministers if it does not have sufficient elected members who have completed the required training to make planning decisions. We have gone over that this morning, and I think that most of us agree that such an event is unlikely to happen and would be particularly exceptional.

The co-ordinator's role is laid out in proposed new section 251B(1) and (2) of the Town and Country Planning (Scotland) Act 1997, as inserted by section 26 of the bill. Proposed new section 251B(1) says that ministers

"may appoint a person to ... monitor the performance by planning authorities of their functions, and ... provide advice to planning authorities as to how they may improve the performance of their functions",

while proposed new section 251B(2) says:

"A person appointed under subsection (1) must submit reports to the Scottish Ministers on—

(a) the activities carried out under that subsection,

(b) any recommendations the person has in consequence of carrying out those activities."

That is what is in the bill.

Neil Findlay: Given your obvious enthusiasm for scrutiny, minister, why will you not just use the affirmative procedure?

Kevin Stewart: I do not see the need for the affirmative procedure with regard to this role. I am not averse to using that procedure, but I do not see the point of it for a provision that has been laid out very simply in the bill and which completely and utterly outlines the planning co-ordinator's roles and responsibilities.

Neil Findlay: You are not so enthusiastic, then.

The Convener: After your helpful correction of what I said, it occurred to me that, if this person is not to have these powers and they are to play more of a helpful or advisory role, Mr McNairney, who is sitting next to you, could do that work. Why do we need someone new?

Kevin Stewart: As it stands, Mr McNairney and his team have a huge amount of work to do. It is incumbent on us all to ensure that various services across the country are improved. Convener, you have heard me wax lyrical about all this before, but I think that it is incumbent on us to try to improve this service in order to support planning authorities and ensure that best practice is exported and that folk out there get the services that they require. The planning co-ordinator will be able to do that, and I think that this is a worthy role that can lead to much better service delivery across Scotland.

The Convener: We move on to Stuart McMillan, who will ask about the infrastructure levy.

Stuart McMillan: We wrote to you about paragraph 17 to schedule 1, which relates to the infrastructure levy. The penalties in question are set at the maximum permissible amounts, and in your written correspondence, you suggested that that was necessary to provide flexibility and that the appropriate levels of penalties for different offences would be discussed as part of future consultation on the regulations. Given the emphasis that is being placed on the consultation

and the potentially significant nature of the penalties, will you consider applying the super-affirmative procedure to any such regulations?

Kevin Stewart: Following the passage of the bill, we will begin a detailed design phase to look at the detailed operation of the levy mechanism and the potential implications of its introduction, and to test scenarios. A key element of that phase will be a consultation process to ensure that all stakeholders are able to provide input in an open and transparent way, and the process will include consultation on the penalties, taking account of the sums that could be due from the levy for major developments. We consider the affirmative procedure to be appropriate to ensure that the regulations are not introduced without Parliament's active approval.

Stuart McMillan: The use of the affirmative procedure is certainly helpful in this area, but going back to the detailed design phase and the future consultation that you have just mentioned and which we will get into following the passage of the bill, can you tell us whether any consultation has been undertaken to bring us to the point that we are at?

Kevin Stewart: Mr McNairney will tell you about the work that we have been doing on this with stakeholders, after which I might well come back in.

John McNairney: The policy proposals arise from the findings of the independent panel, which, in commenting on an infrastructure levy, suggested that there should be either a new agency with funding or a working group with powers. However, it was supportive of the principle, and we have picked that up in our stakeholder working groups, which looked at the prospect of an infrastructure levy, and in our own policy consultation in January last year. There has been consultation on the principle, although not on the detailed operation of the mechanism.

Kevin Stewart: I should also say that some of the work that we are undertaking, including work that is being done independently of Government, has been published on the Scottish Government website. As I highlighted in my earlier answer to Mr McMillan, I think that we need much more detailed consultation with stakeholders, and that is what we will do in these circumstances. Work needs to be done on this issue, and we will continue to consult as we move forward to ensure that we get all of this absolutely right.

Stuart McMillan: Finally, if at the end of the process, with the bill having been passed, you find that any other changes requiring secondary legislation might have to be made with regard to the delegated powers memorandum, will you, if it is deemed necessary as a result of your consultation, consider using the super-affirmative procedure in this area?

Kevin Stewart: I think that the affirmative procedure will definitely be required. As I have said, we intend to consult to the max, and I think that at the end of that process the affirmative procedure will be the right way forward.

Stuart McMillan: Thank you.

The Convener: I suppose that Mr McMillan's point is that, because you have basically not decided what you want to do, any scheme that you come up with should be subject to enhanced scrutiny—that is, the super-affirmative procedure.

Kevin Stewart: As I said in my answer to Mr McMillan, given the consultation work that we will undertake and our involvement of stakeholders on all the issues, the affirmative procedure is the one that is required.

11:00

The Convener: Subparagraph 16(1) of schedule 1 provides that infrastructure-levy regulations may make provision about how related planning legislation may or may not be exercised. The first circumstance in which that power can be exercised is where ministers consider it expedient to modify legislation to enhance

"the effectiveness of infrastructure levy as a means of raising revenue".

Why does the Government consider it appropriate to take such broad regulation-making powers? Could more be done to develop the policy to ensure that the power is limited to that which is necessary and proportionate?

Kevin Stewart: The policy principles have been reflected in the bill's provisions. The levy would be payable to a local authority in relation to developments in its area, to fund, or to partly fund, infrastructure projects. A myth has developed that the infrastructure levy would be retained by Government. That is definitely not the case, and I reiterate that the levy would be retained by local authorities to fund, or to partly fund, infrastructure projects in its area. Of course, there should also be scope for authorities to pool resources to fund regional-scale projects jointly.

The regulations would be informed by further development work and consultations on how the principles could be achieved through appropriate and practical operational arrangements. Regulation-making powers would allow us to ensure that the approach reflects the context within which the levy would operate, such as changing economic and market circumstances.

The bill specifically links modifications to legislation to the effectiveness of the infrastructure

levy, so it would be limited in scope. In practice, the main consideration would be the relationship with section 75 of the Town and Country Planning (Scotland) Act 1997 and related legislation through which financial payments could be sought from development.

It is possible that the levy could lead to the adjustment of other parts of the system, such as ensuring that the evidence report, which forms part of the local development plan process, provides an appropriate level of information on infrastructure capacity.

I am determined that we get this right. We have seen difficulties arise south of the border because of the community infrastructure levy in place there—I am referring to agreements under section 106 of the Town and Country Planning Act 1990. We are carrying out this work to make sure that we do not have that conflict or face accusations of double charging.

The Convener: That has been a concern.

I think you said that the Scottish Government would not retain infrastructure-levy money, but am I correct in thinking that you could collect and redistribute it?

Kevin Stewart: I make it clear that infrastructure-levy income could not be retained by the Scottish Government, but it might be appropriate for the money to be aggregated and redistributed to fund infrastructure across a wider area.

Subparagraph 14(2) of schedule 1 clearly states that if regulations require infrastructure-levy income to be transferred to the Scottish ministers, those regulations

"must provide for all infrastructure-levy income transferred to the Scottish Ministers to be distributed amongst local authorities."

The Convener: In other words, councils could retain the money, but you, too, could get the money and decide how it would be split up around the country.

Kevin Stewart: I want to make it clear that the Scottish Government would not retain that money—I want to blow up that myth. Let me again read out exactly what the bill says. The infrastructure levy could not be retained by the Scottish Government, but it might be appropriate for the money to be aggregated and redistributed to fund infrastructure across a wider area. Subparagraph 14(2) of schedule 1 clearly states that if regulations require infrastructure-levy income to be transferred to the Scottish ministers, those regulations

"must provide for all"

that income

"to be distributed amongst local authorities."

The Convener: A few members want to come in on that. I will bring in Ms Harris first.

Alison Harris: I heard what you read out, minister, but I ask you to answer the question that the convener asked. I think that we need a definitive answer, and not just one in which you read out from the bill.

Kevin Stewart: I will bring in Mr McNairney before I come back with the definitive answer for you, convener.

John McNairney: Let me be clear. There is no proposal that the Scottish Government should retain any money. However, there might be circumstances, for example in a city region, in which funds are aggregated and can be distributed over more than one local authority area. For example, transport improvements funded by the infrastructure levy might cover more than one authority area.

There could be central administration of that, if it helped, or that could happen locally. The key point is that the money would not be retained by Government or distributed across the wider country. However, there are clear circumstances, such as city deals, in which funding might transfer over one administrative area. That is the point.

Kevin Stewart: A key example from the past that I can give is the Aberdeen western peripheral route, which is 81 per cent funded by the Scottish Government, 9.5 per cent funded by Aberdeenshire Council and 9.5 per cent funded by Aberdeen City Council.

It might well be wise for the moneys from the infrastructure levy for such a project to be collected centrally and then redistributed. That is probably a good example. However, there is no intention on the part of Government to benefit from the infrastructure levy; it is for local projects. As I pointed out, there will be agreements between local authorities about joint working in some airts and pairts, when that is required.

Neil Findlay: My understanding—from my time on a council—is that any levies that are applied fall to the individual local authority. Is that still the situation?

Kevin Stewart: I will bring in Mr McNairney on the technical point.

John McNairney: There are no levies, as such, just now. The presumption is that developers, through section 75 of the Town and Country Planning (Scotland) Act 1997—

Neil Findlay: Let us call it section 75 rather than a levy, then.

John McNairney: Okay. Section 75, in essence, is about restricting and regulating development. The improvement through funds raised under section 75 must have a significant relationship with the development. Some of that income could be pooled, currently, but there would still have to be a clear and direct relationship with the individual application or development.

The infrastructure levy breaks that clear link and applies, over a geographical area, a set levy for roads, education or whatever. That is where the difference is.

Neil Findlay: But am I correct in saying that at the moment any moneys fall directly to the local authority and no one else?

John McNairney: Unless—

Kevin Stewart: I think that Mr Macleod needs to come in.

Norman Macleod: As Mr McNairney said, because funds raised by section 75 relate to an individual project, where the money goes depends on what needs to be mitigated as a result of that individual project—and there may be several projects that impact on the same thing, such as a trunk road network or a local road network.

It may be that contributions are made by developments under various agreements that are contracted with the planning authority, or are entered into through section 75, but there may be other mechanisms that would enable funding to be provided to an organisation that is not a local authority, because it is that organisation's area that is being impacted on by the development. Therefore, the money under that arrangement flows to where it needs to go.

Kevin Stewart: I am trying to think of an example that does not relate to a live planning application, because commenting on a live application could get me into trouble. The best example that I can think of off the top of my head—I will not name the authority, just in case—is a section 75 agreement under which the money does not go to the local authority, but goes towards improving a railway station.

In some cases involving things such as trunk roads and railway stations, although the development may not necessarily be within a particular local authority area, there is benefit in the section 75 money going to something in that area. I hope that explains the situation a little bit.

As I said, I am trying to think of an example that does not relate to a live planning application. Perhaps Mr McNairney can think of an example, so that I do not put my foot in it and end up unable to deal with something in the future as a result.

John McNairney: Strategic development plans have a core function, which is to deal with cross-border issues and growth areas, such as where housing should—or should not—be built, particularly with regard to infrastructure. There may be a proposal in a current strategic development plan that is the basis for taking contributions. It may be that the improvement—a roundabout, for example—is technically outwith a local authority area, but some developers will make a contribution to that improvement. Whether the proposed development is within or outwith the local authority, there is a clear line of sight, so that developers who are asked to contribute through section 75 have visibility about where their money is going.

Neil Findlay: Under the new system, in what circumstances would we see that money being held temporarily to be redistributed at the Scottish Government level? Who would direct that? Who would say what is to happen with that money?

John McNairney: The priorities for spending that money would be set locally. At present, that may be through a strategic development plan. We envisage there being regional partnerships, but we are not trying to control how they would operate. I know that in the Tay plan area, for example, authorities are working together on housing, the economy, infrastructure and other services.

The authorities would set the priorities. It may well be that they would have a non-statutory strategic development plan showing the infrastructure that they want, or that the priorities could be translated into local development plans. I hope that the decisions for the improvement would come through the development plan set by the relevant planning authorities, but the spend would be determined locally.

Neil Findlay: Why is there any role whatsoever for the Scottish Government in this? If only two or three authorities are involved, surely it is simply a matter of opening up a bank account and sticking the cash into it.

John McNairney: In practice, I do not know whether it would be as straightforward as that. Furthermore, more than two or three authorities may be involved—in the SESplan and the Clydeplan areas, the numbers involved are significantly higher.

That matter is for consideration, but we have tried to secure an enabling power that allows us to develop more and to consult more widely on the detail of how a levy might operate. The provisions that you see are wide because of that. We do not want to miss the opportunity that the bill presents for us to consider seriously whether an infrastructure levy would support development delivery across the country in a way that—

11:15

Neil Findlay: I am not questioning any of that—there is a lot of logic to it—but I do not see what the Scottish Government's role is in holding on to or even being the banker of the cash. I do not get it.

Kevin Stewart: As I have already pointed out, there are joint projects between the Scottish Government and local authorities. From a procurement point of view, in some regards, it may be better for a lead partner to hold the money before all the money goes back to the local authority area. There are circumstances in which such situations arise—the AWPR is an example of where that may happen.

The key point, which I have made, is that this is not a national infrastructure levy for the Government to hold and then spend the money as it sees fit; rather, it is an infrastructure levy that benefits the projects that local authorities want to see in their area and agreements that they may want to enter into with other local authorities, such as city deals and growth deals, and, on occasion, deals with the Government to introduce the infrastructure that is required for that area.

The key point is that the Scottish Government would not retain infrastructure-levy money.

The Convener: I do not think that anyone in this room is suggesting that that would be the case, minister. Could money go to bodies that are not councils, such as Transport Scotland?

Kevin Stewart: At this moment, section 75 agreements cover things that are governed by Transport Scotland. I have previously mentioned trunk roads and railway station improvements. The entire point of the provision is to make sure that the infrastructure in the area is right to support the development of that place.

The Convener: We could probably question you for hours on this aspect of the bill, but you get the thrust of the questioning. Given that, perhaps you could consider spelling out more detail in the bill about the use of the levy.

Kevin Stewart: I am quite happy to provide any more detail that the committee requires. I have already said that we will write to you on various aspects of our discussions today, convener. If the committee requires anything else from me or my officials, please write and we will respond accordingly—as we always do.

David Torrance: The second circumstance in which infrastructure-levy regulations may prevent or restrict the use of planning powers is where the minister considers

"the power to charge infrastructure levy ... would be more appropriate."

The Scottish Government's response to the committee's written questions indicates that it has not consulted on the detail of the infrastructure levy and that it is neither possible nor appropriate to set out its relationship with, for example, section 75 planning obligations in primary legislation. Would it not be more appropriate for the Scottish Government to develop its policy first and to set out in the bill, at least in principle, how related planning provisions should operate, with a power available to amend those provisions in the light of experience or changing priorities and practice?

Kevin Stewart: We have already gone over the key policy principles in some depth, but let us look at the relationship with section 75, which I have touched on. The relationship between the infrastructure levy and section 75 is the key to success and to getting it absolutely right so that we have a fairer charging mechanism.

We must get the detail absolutely spot on. I have talked about further consultation and why we need the definitions to be right when it comes to regulation, including on how the levy will be calculated. The convener has heard me talk about that previously at a public event, when I said that I was not entirely happy with some of the independent views that had come back. All of that information is currently available on the website, as many of you know. We need to make sure that we get the formula absolutely right. We need to get the calculation, the exemptions and the discounts right and we need to get the aggregation on spend right.

We have committed to reviewing our guidance on section 75 planning obligations. To inform that and to inform our work on the levy, we will draw on the recent review that has been carried out south of the border of the community infrastructure levy and its relationship to section 106 of the Town and Country Planning Act 1990, which I mentioned earlier. We will look at that extremely closely indeed. South of the border, the review team found that the position taken in relation to the community infrastructure levy in section 106 had resulted in unintended consequences. It had led to confusion and a lack of certainty for those who were using the system, and changes were recommended as a result of that.

That highlights why it is necessary for us to do that further consultation. It is important that we get the bill absolutely right and we must allow our stakeholders to have a say in exactly what is happening here. I do not want a situation in which there are unintended consequences, as there were south of the border. I would rather that we got it absolutely spot on.

I reassure the committee that we will carry out in-depth stakeholder consultation. I hope that at the end of that, when the committee scrutinises

the bill further, you will be happy with what we have done in that regard.

David Torrance: Previous levy-raising powers conferred in regulations have been subject to a form of super-affirmative procedure. Given the breadth of the powers in part 5 of and schedule 1 to the bill, would it not be more appropriate for such a procedure to apply to the infrastructure-levy regulations?

Kevin Stewart: I reiterate that the affirmative procedure is the suitable method here, as I think I said earlier, convener.

The Convener: You did.

Neil Findlay: Why is it more suitable?

Kevin Stewart: The affirmative procedure is the suitable procedure to use because of the scrutiny and the extensive consultation that we will undertake.

The Convener: Okay. We may come back to you on that, and you can reflect further on it if we do. As there are no further questions from members, I thank the minister and his officials for attending today. I will suspend the meeting briefly to allow them to leave.

11:23

Meeting suspended.

11:24

On resuming—

Instruments subject to Affirmative Procedure

Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [Draft]

The Convener: Agenda item 3 is consideration of instruments subject to affirmative procedure. Section 1 of the Equality Act 2010 applies to Scotland, England and Wales, although it has been commenced only in relation to Scotland. Subsection 3 contains a list of authorities that are subject to a duty under subsection (1). Regulation 2(2) substitutes the list of authorities in section 1(3) of the 2010 act. However, the power conferred on Scottish ministers by section 2(4) of the 2010 act permits the addition or removal of "relevant authorities" from the list of authorities in section 1(3). Accordingly, regulation 2(2) can have effect only to add to the list of authorities in respect of Scottish authorities.

Does the committee agree to draw the instrument to the attention of the Parliament on reporting ground (g), as regulation 2(2) has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following two instruments.

Budget (Scotland) Act 2017 Amendment Regulations 2018 [Draft]

Carers (Scotland) Act 2016 (Adult Carers and Young Carers: Identification of Outcomes and Needs for Support) Regulations 2018 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (SSI 2018/33)

11:26

The Convener: The first instrument for consideration under agenda item 4 is a set of regulations relating to the Carers (Scotland) Act 2016. Regulation 4 defines what a material impact on the care provided by a carer may include "for the purpose of regulations 2(d) and 3(f)". However, there is no regulation 2(d) or 3(f). The only references to "material impact" in the instrument are contained in regulations 2(c) and 3(c). Given the meaninglessness of the reference to regulations 2(d) and 3(f), the committee could recommend that the error be corrected by means of an amendment.

Does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground, as there is a drafting error in the instrument?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following 18 instruments.

Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Amendment Regulations 2018 (SSI 2018/28)

Self-directed Support (Direct Payments) (Scotland) Amendment Regulations 2018 (SSI 2018/29)

Carers (Waiving of Charges for Support) (Scotland) Amendment Regulations 2018 (SSI 2018/31)

Carers (Scotland) Act 2016 (Short Breaks Services Statements) Regulations 2018 (SSI 2018/32)

Conservation of Salmon (Scotland) Amendment Regulations 2018 (SSI 2018/37)

Local Governance (Scotland) Act 2004 (Remuneration) Amendment Regulations 2018 (SSI 2018/38)

Council Tax (Discounts) (Scotland) Amendment Regulations 2018 (SSI 2018/39)

Carbon Accounting Scheme (Scotland) Amendment Regulations 2018 (SSI 2018/40)

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2018 (SSI 2018/41)

Community Care (Provision of Residential Accommodation Outwith Scotland) (Scotland) Amendment (No 2) Regulations 2018 (SSI 2018/42)

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2018 (SSI 2018/43)

Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2018 (SSI 2018/44)

Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2018 (SSI 2018/45)

Non-Domestic Rate (Scotland) Order 2018 (SSI 2018/46)

Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2018 (SSI 2018/47)

Premises Licence (Scotland) Amendment Regulations 2018 (SSI 2018/49)

Scottish Road Works Register (Prescribed Fees) Amendment Regulations 2018 (SSI 2018/50)

Duty of Candour Procedure (Scotland) Regulations 2018 (SSI 2018/57)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:27

The Convener: Under agenda item 5, no points have been raised by our legal advisers on the following two instruments.

Education (Scotland) Act 2016 (Commencement No 5 and Savings Provision) Regulations 2018 (SSI 2018/36 (C5))

Health (Tobacco, Nicotine etc and Care) (Scotland) Act 2016 (Commencement No 4) Regulations 2018 (SSI 2018/56 (C6))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Islands (Scotland) Bill

11:27

The Convener: Agenda item 6 is consideration of the Government's response to the committee's stage 1 report on the Islands (Scotland) Bill. The committee queried why the powers in section 7(3) did not include a power to amend the schedule by modifying an entry. The committee considered that the inclusion of that power would be consistent with the approach taken in earlier provisions, such as in section 6(2) of the British Sign Language (Scotland) Act 2015. The committee therefore recommended that a consistent approach be taken to the drafting of the power unless there is a good reason not to include the power to modify an entry. The Government accepted the committee's recommendation and indicated that it would lodge amendments at stage 2.

Does the committee welcome the Government's response to its stage 1 report on the Islands (Scotland) Bill?

Members *indicated agreement.*

11:28

Meeting continued in private until 11:38.

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