OFFICIAL REPORT
AITHISG OIFIGEIL

Economy, Energy and Fair Work Committee

Tuesday 1 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 1 September 2020

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ECONOMY, ENERGY AND FAIR WORK COMMITTEE
26th Meeting 2020, Session 5

CONVENER

*Gordon Lindhurst (Lothian) (Con)

DEPUTY CONVENER

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Maurice Golden (West Scotland) (Con)
*Rhoda Grant (Highlands and Islands) (Lab)
*Alison Harris (Central Scotland) (Con)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*Andy Wightman (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Neil Bibby (West Scotland) (Lab)
Nick Hawthorne (Scottish Parliament)
Sarah-Jane McArthur (Law Society of Scotland)
Gavin Mowat (Scottish Land & Estates)
Professor Roderick Paisley (University of Aberdeen)
Tammy Swift-Adams (Homes for Scotland)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Economy, Energy and Fair Work Committee

Tuesday 1 September 2020

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Gordon Lindhurst): Good morning, and welcome to the 26th meeting in 2020 of the Economy, Energy and Fair Work Committee. I welcome members, witnesses and those joining us online. I remind members who are in the room that the sound desk will operate your microphones and consoles, so there is no need to press the buttons.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take agenda items 4, 5 and 6 in private? I will pause to allow for any objections.

As no members object, we agree to take items 4, 5 and 6 in private.

Heat Networks (Scotland) Bill: Stage 1

09:31

The Convener: Agenda item 2 is an evidence session on the Heat Networks (Scotland) Bill. I welcome our witnesses, who are Gavin Mowat, policy adviser on rural communities at Scottish Land & Estates; Tammy Swift-Adams, director of planning at Homes for Scotland; Sarah-Jane McArthur, a member of the Law Society of Scotland's energy law sub-committee; and Professor Roderick Paisley, chair of Scots law at the University of Aberdeen.

Each member will ask their question and I will then go to the relevant witness for a response. Members may wish to follow up on those points, and I will then move to the next member. Please keep your questions and answers succinct and allow broadcasting staff a few seconds to operate your microphones before beginning to speak to ensure that everything is broadcast.

To start with the bill and the definitions in it, given that heat and other technologies are fast moving, both in their development and in the ways in which they can operate or become part of a heat network, are the definitions in the bill sufficiently future proof to enable them to relate to current and future technologies?

Gavin Mowat (Scottish Land & Estates): Scottish Land & Estates considers the bill and its definitions to be flexible enough to allow for newly developed technologies to be added to heat networks. As you will be aware, the networks are quite agnostic, in that they can allow for the development of new technology. The bill is sufficiently flexible in that regard.

Sarah-Jane McArthur (Law Society of Scotland): As Gavin Mowat has said, heat networks are technology agnostic, so many future generation technologies could be incorporated as they are developed. The definitions in the bill are incredibly broad. Although that is a good thing if you want to capture as many types of network as possible, there is potential for unintended consequences.

When Government comes to think about which types of networks could be exempted in future, it is worth considering, first, whether networks that are set up by an entity purely for self-supply should be caught by the licensing rules and, secondly, because of the broadness of the definition, whether generators of heat—operators of energy-from-waste plants, for example—would be captured within the licensing provisions. On the

last point, as the bill stands, there is a risk that they would be.

The Convener: You have touched on something that I was going to ask about. For example, are the definitions in the bill adequate to include waste heat producers? How do the definitions in the bill need to be improved, if they do? Are regulations—statutory instruments—flexible enough to deal with issues that may develop once the bill is passed?

I ask Sarah-Jane McArthur to comment, after which one of our two other witnesses might like to comment.

Sarah-Jane McArthur: The definition of "network" is wide enough to capture waste heat users, in the sense that those will supply to a network. There are definitions in the bill that refer to "waste heat or cold", but I would defer to people with engineering experience as to whether those will adequately capture the various producers of waste heat or cold in future.

Secondary legislation is probably the only way to retain the level of flexibility required to adapt quickly to future markets, given the constraints on parliamentary time to pass more primary legislation.

The Convener: Professor Paisley, do you want to share any comments on those issues?

Professor Roderick Paisley (University of Aberdeen): My comment relates primarily to the issue of wayleaves through land. A landowner with a pipe or cable through his land will want to know the answer to a simple question: "What, physically, is being done on my land?" With regard to wayleaves, before the bill is suitable, a bit more work is needed on the definitions, so that someone operating a heating system will be able to get a specific order requiring work to be done or enabling him to do work.

The Convener: If witnesses feel that any aspects are not covered adequately or that they would like to comment further after the evidence session, the committee would welcome written comments on any of those issues.

Tammy Swift-Adams, do you want to comment on any of those matters?

Tammy Swift-Adams (Homes for Scotland): Picking up on what Gavin Mowat and Sarah-Jane McArthur said about the definitions, Homes for Scotland members always look for flexibility in how different policy requirements or regulations can be met. Therefore, I welcome the comments that the bill's definitions are technology agnostic and flexible.

On whether regulations are flexible enough to capture changes over time, that would be the preferred mechanism for our members for rolling out the policy, because they are used to using regulations for other technical aspects of building. Regulations are clear and familiar, so our members will be happy with that.

The Convener: We now have questions from Richard Lyle.

Richard Lyle (Uddingston and Bellshill) (SNP): Are there any practical differences between a licensing authority, as is set out in the bill, and/or a regulator, as is set out in the policy memorandum?

Sarah-Jane McArthur: Again, there is a degree of flexibility in the bill on that point. To me, the regulator is the person who issues licences, determines who can get one, and then monitors the conditions of those licences, so, to my mind, it is just a difference in language rather than a difference in function per se.

Richard Lyle: Are there any comments from other witnesses? No.

The Convener: No. I say to our witnesses that, unless you are specifically asked by a member, do not feel that you must respond to every question, but if you wish to come in, please indicate by raising your hand, or by commenting using the chat function.

Mr Lyle, does that conclude your questions for now?

Richard Lyle: Yes—that is fine, convener.

The Convener: We will move on to questions from the deputy convener.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Do the witnesses support or welcome the proposed licensing regime? If so, should licence standard conditions be left to the licensing authority, or should those be in the bill? What are your views on each of those options?

Sarah-Jane McArthur: I welcome the licensing regime that will be introduced. People across the sector are supportive of the bill. It is a step in the right direction to ensure that standards for heat networks across the country will be sufficient, and there will be a degree of consumer protection through the introduction of the licence standards.

On whether those should be in the bill or introduced by a licensing authority, the problem with introducing them in the bill is that they would lose flexibility. In the current electricity licensing regime, licence standards are updated frequently to deal with new technology or issues as they arise, and that can be done quite quickly. If it is desired, it would be fine to include general principles in the bill, but having the flexibility to respond to scenarios and to impose licence conditions and standards to deal with those as the

market develops separately from the bill would be the best plan.

Willie Coffey: Do any of the other witnesses have a view on that?

Tammy Swift-Adams: To concur with what Sarah-Jane McArthur said, home builders would agree that it is right that customers who get their heat from heat networks get the same level of protection through regulation as they would get when using other providers. At this stage, we probably do not have a comment on the level of detail that should go into the bill, but I am sure that house builders would be supportive of the general principle.

Willie Coffey: The committee has heard evidence that the lack of standards in the area could lead to a situation akin to the wild west, which is quite a thought. Is there work to be done to develop standards that will be adopted, embraced, observed and followed? Is that important work that should continue?

09:45

Tammy Swift-Adams: Much as we would agree that there is a need for regulation, there is a need for clarity for everyone involved as to what standards are expected. How those standards are laid out would depend on the detail. We would always ask that, through Homes for Scotland, home builders are involved in any collaborative work to develop the standards, to ensure that they can deliver the policy intentions without unintended consequences for delivery ability or customer choice.

Sarah-Jane McArthur: I am not a technical expert in this area—I am a lawyer, not an engineer—but my understanding is that there are already voluntary customer protection standards through the Heat Trust, which operators across the market are signing up to. There are also standards developed with the Chartered Institution of Building Services Engineers. In contracts, we ask for networks to be built to those now well-established standards. Therefore, although I am sure that further development is possible, the industry is already moving towards a set of standards that it would be happy to sign up to.

The Convener: We move on to questions from Andy Wightman.

Andy Wightman (Lothian) (Green): Thank you, convener. Most of my questions are directed at Professor Paisley, although Sarah-Jane McArthur might also have some observations. First, thank you, Professor Paisley, for submitting your detailed evidence, which is incredibly useful to the committee. Obviously, you are one of the leading experts in the area. In creating a new system of regulations around putting pipes under the ground, it is important that we get the drafting correct.

Your evidence is detailed, which is useful, but, in summary, are you essentially saying that, first, we need to create these wayleaves as real rights? As I understand it, "wayleaves" is not a recognised legal term, but it is, nevertheless, in common usage. Secondly, you say that there are drafting issues, and you point out various examples of those. For example, interestingly, you say that section 60 is "English inspired nonsense." Thirdly, you say that we need positive prescription. In summary, are those the three key messages in your evidence?

Professor Paisley: Andy, you are absolutely right. On real rights, my view is simply that, if all you have is a contract or an agreement—in other words, a personal right—with the landowner, the strength of the right available to the provider of the energy is only as strong as the individual who is the landowner at the time. If he becomes insolvent, dies or sells his property, that right will come to an end, which is absolutely inconsistent with a network that is intended to be long term or perpetual. It is important that the right is a real right, because that will allow the right to be perpetual and enforceable against third parties. As I pointed out in my evidence, the only people who are specified in this English-inspired nonsense who are bound by these rights are the owner and the occupier. That does not include anybody who goes on to the ground with a digger. It does not include anybody who has a lesser right, such as a banker who goes on to the land and just rips it up or someone who just wants to cause trouble. All that is needed is for those rights to be specified as real rights, and then they are more secure and enforceable against the world or anybody who interferes with them. It is a simple procedure. The term "wayleave" is commonly used, but it is much better to be technically correct, because it will then fit the Scottish system of landowning perfectly and it will not be an import from England, which is like oil on water to Scots law.

Andy Wightman: Thank you. To clarify, would the wayleaves that a telecoms provider might have down a country road or across a field for underground cables typically be a real right in Scots law? Would those typically be registered in the land register?

Professor Paisley: The answer to the second question is no. Anybody buying the land would not have a clue that that is in the ground. There is no public notice of that. On whether it is a real right or a personal right, a personal right is just a contract between, for example, me and you. It is not enforceable against anybody else. The statute is so obscure that, for most of the wayleaves for

telecoms, it is very difficult to know what the right is. The telecommunications legislation does say that it is binding on the person who grants it and on their successors, but it tries to identify every single individual and to make it binding on them by specific drafting. All you need is a general statement that it is a real right, and then that right to put a cable in the ground is enforceable against everybody as soon it is constituted. It is much better if it is constituted on the land register so that everybody can see that the right exists.

Andy Wightman: Clearly, you have expertise in the area, and you have a view on how the legislation should be amended. However, there are many utilities, such as water, gas, electricity, telecoms and so on, that have wayleave agreements. Is the statutory basis for those equally open to criticism and subject to the sort of critique that you have provided to us on their use for heat networks? Are all utilities suffering from the problems that you outline in your written evidence?

Professor Paisley: None of those statutes is drafted to a particular style. They are all drafted individually. Almost all the statutes that you refer to suffer from those problems, at least in part, and some are worse than others. That is a goldmine for landowners who want to employ surveyors who ask for compensation once the land changes hands. There is no real regulation of that aspect. We are not going to get into a general review of the law of wayleaves here, but the law of wayleaves is an absolute shambles in Scots law. It would not be a good idea to model what you propose to do in the bill on what is already in legislation, drafted by the Westminster Parliament, which has not got the foggiest clue about how Scots law works.

Andy Wightman: Thanks. Essentially, you are saying that this is a new statute that is being proposed and that a very important part of it is the law around wayleaves, so we should get it as good as it can be, particularly in light of the history of statutes and various case law, which have shown its deficiencies. Your position is basically that we should make this as good as it can be.

Professor Paisley: Absolutely right. I agree with that, yes.

Andy Wightman: Thanks. I think that you say in your evidence that there are no real rights created in the bill. Is that correct?

Professor Paisley: As far as I can see, there are no real rights created in the bill. The nearest it comes to that is the so-called necessary wayleave, which binds the owner and the occupier. However, that just binds the owner and the occupier and nobody else. It would be much clearer if it were simply stated that those rights could be real rights. It is possible that you might want just a temporary agreement with a landowner, to locate some equipment for a limited time, for example. However, it is much easier to have a simple statement, as has been done in other Scottish Parliament legislation, such as for the trams in Edinburgh. You simply have a sentence that states: “These rights are real rights.”

Andy Wightman: That is very helpful. To be clear, real rights created by statute do not necessarily have to be registered in the land register to be real rights.

Professor Paisley: You are correct. Parliament is sovereign and can do whatever it likes. Rights do not have to be entered in the land register of Scotland to make them real rights. You can say that they are real, and, like fiat lux, they just come into existence when they are constituted by being signed. However, that leaves the problem of where you go to find out the location of the rights. If I buy a piece of ground, how can I find out whether it is affected by a pipe or a cable or a wire or a duct? With most wayleaves, you have to phone up the various statutory operators, who say that they have lost the records or that the records are incomplete. It is far better to have an idea of who owns land in Scotland—the general policy is to make it as obvious as possible to the public—but also of what derivative rights there are, such as wayleaves.

That is not difficult to do if you are setting up a new system. I agree that it would be impossible now to go back and to try to have a registration of all ancient electricity wayleaves, gas pipelines and everything else. However, we are setting up a completely new system, and if we start from scratch and require those to be registered, it will not cost very much, and it will ultimately save a lot of money by allowing anybody who is buying land or dealing in land to know exactly what they are dealing with.

Andy Wightman: Yes, I understand that it is a long-standing problem with utilities that we cannot easily find that out, and that is probably not going to be solved by the bill. It would an added advantage if it could be.

Turning to Sarah-Jane McArthur, in the Law Society of Scotland’s evidence on part 6 of the bill, you essentially say nothing. You say that you have nothing specific to add and that the powers seem similar to those for utilities. I do not know whether you have read Professor Paisley’s evidence, but he has identified what he believes are quite significant flaws in part 6. Why do you think that you do not have anything to add on the matter?

Sarah-Jane McArthur: I have now read Professor Paisley’s advice, which I have no particular comment on. To explain, I am a

contracts lawyer. I deal quite a lot in the delivery of such schemes, but I am not a property lawyer. Therefore, the Law Society would need to ask our property committee whether it had a view on that. I am happy to follow that up in written evidence, if you would like confirmation on that.

Andy Wightman: Yes, that would be helpful. I assumed that the Law Society's evidence would have covered property rights, if it were commenting on part 6. That would be useful. With all respect to Professor Paisley, he has specific concerns, which I do not doubt are probably valid, but it would be useful to get some other views on that so that the committee can come to its own view on the extent to which the bill may be amended. That is all from me just now, convener.

The Convener: Thank you. To follow up Mr Wightman's questions, Professor Paisley, if I may put it in layman's language, your point is that, if one makes these real rights and they appear on the land register, people then know where they are at, because someone buying a property sees it in the land register and they know what they are getting. Is that a fair summary?

Professor Paisley: That is a summary of about a quarter of it. Not only—

The Convener: I am sorry, I was not suggesting that your detailed submission could be limited to those two sentences. Is there a mechanism or have you proposed a mechanism whereby such rights, if entered as real rights on the title sheet of a property, will also be removed if they cease to exist? As you will know, the land register includes ancient rights and so forth that get carried over into the title sheet but which are completely irrelevant in the modern day. Would it also be useful to have a mechanism whereby rights are removed when they cease to apply?

Professor Paisley: Absolutely, yes. In my evidence, I give some idea of how that could be done. The creation of these as real rights and their availability to be seen by the general public are important, as is getting rid of those real rights in due course. However, critically, right at the core of it, is the enforceability of those real rights. In practice, wayleave rights are only enforceable against the other party, and they are as weak as the other party. If I enter into a contract with a man of straw, my contract is worthless, but, if I have a real right, it is enforceable against anybody else interfering with the system that is in the ground.

10:00

The Convener: Thank you. One is a personal right, which is something that I can enforce against an individual, and the other is a real right, which can be enforced by anyone against anyone, as it were. Gavin Mowat, you have not had the opportunity to comment yet. Do you have anything to say on the issue of real rights and their appearing in the land register? Would that be useful to your members?

Gavin Mowat: I do not have a specific comment on the evidence from the Professor. I am not an expert in that area, but I am happy to go back to our legal group and come back to you with written evidence on that specific matter. More generally, the knowledge of where infrastructure is as part of the lie of the land would be very useful to our members. We have frequent issues with utility providers related to locating where infrastructure is in the ground, and we have a number of problems related to that. If there is a mechanism that can better determine those factors, SLE would support that. I would be prepared to submit some written evidence to support that.

The Convener: It would be useful to have written comment, if that is possible. We move to Rhoda Grant for the next questions.

Rhoda Grant (Highlands and Islands) (Lab): We have heard evidence that there is little in the consenting process about fuel poverty. The process is about scale and about decarbonisation. However, we also heard that, if excess energy was produced, it would obviously have to be paid for and that it would be added to the bills of those energy customers. Is there enough emphasis on fuel poverty and how we could redress it?

Sarah-Jane McArthur: There is a large degree of flexibility within the licensing arrangements, such that, if policy makers wanted to put in place pricing restrictions, it would be possible to do that through the licensing regime. I do not think that anyone would disagree about the need to address fuel poverty. Delivering at scale tends to reduce the costs for everyone who can join the network.

Rhoda Grant: I see that no one else has a comment. Moving on, should there be a right of appeal? As well as the issues that I raised about fuel poverty, there is deemed consent. The bill is obviously designed to make it easier to get heat networks through the planning process, but are there enough checks and balances in the system?

Sarah-Jane McArthur: To my understanding, the legislation has been modelled on the approach taken to electricity projects, so a lot of the language is taken from the Electricity Act 1989. Under that regime, the right of appeal, in effect, is by judicial review, and that same right would apply in relation to the decisions of Scottish ministers to award consents. Therefore, if the ministers decided to award a consent but there had not been due process, there would be the right of judicial review.

That said, I understand that there is a desire among those in the sector to have a clear appeals

process, so that the basis upon which the decision has been made and the factors that were taken into account in the decision could be challenged. However, I understand that that is not in the bill, and to include it would be inconsistent with the approach taken for electricity projects, for example.

The Convener: On that point about appeals, you mentioned judicial review. Am I right in saying that that can currently take place only in the Court of Session? Considering the attendant costs, what would your suggestion be for a better set-up for appeals or a review of the process, with regard to the ease of bringing the appeal, the cost and the accessibility for the parties?

Sarah-Jane McArthur: Forgive me, but I do not feel terribly qualified to give you an answer on that this second, with a design of a revised appeal process, but I can follow that up separately, if you would like further thoughts on that.

The Convener: Yes, it would be very helpful to have written comment on that. I will hand back to Rhoda Grant.

Rhoda Grant: I am happy with those responses.

The Convener: Thank you. Colin Beattie has the next question.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Thank you, convener. To expand a bit on Rhoda Grant's questions, on planning permission, to what extent should local authorities and communities—who we hope will be the customers for many of the heating systems—have a role in determining applications? Should a size of network be specified under which local authorities and communities have a locus in the process? Most of the heat networks will probably be of a reasonably small size. Could there be better or more input locally? Perhaps Gavin Mowat could comment on that.

Gavin Mowat: Given the growing expectations around involving communities when significant decisions are being made in relation to land, the consenting process should also do that in some way, not least because it is a good opportunity to have an engaged community that is informed about exactly what district heating is. There might be an element of naivety or people might not know exactly what it is and how it could benefit them.

The flip side of that is that we appreciate that adding a planning process to the licensing and permitting process will inevitably increase bureaucracy for any development, which could have an impact on the viability of a scheme, particularly a small scheme.

Colin Beattie: I take your point on that, but I would challenge one thing. We do not want bureaucracy—we want these networks to come on stream relatively quickly and without difficulty—but the communities will also be the consumers of the product and many of the systems will be very localised. Should there be more in the bill about bringing communities into the process? I am sure that we are capable of doing that without creating too much bureaucracy. If we just leave them out, are we not storing up problems?

Gavin Mowat: I tend to agree with you. The point that I was going to make is that, essentially, it is perhaps more realistic to apply the approach taken with electricity generation, where small developments up to a certain size can be given consent by the local planning authority and anything larger needs consent from ministers. Precisely as you have said, it is a case of trying to get the balance right between not leaving the community out and ensuring that people know what is going on and how the development process works. Just to give you an example—

Colin Beattie: Should there be more in the bill about that?

Gavin Mowat: The difficulty is that there is an opportunity for the local heat and energy efficiency strategies and the zoning districts to involve communities quite a lot on where there could be district heating. It is a shame that the local heat and energy efficiency legislation is not coming in before this bill, so that we could know what sort of community engagement there will be in that process. There could be a need for more in this bill but it is difficult to say without knowing what the local heat and energy efficiency strategies might include.

The Convener: Does Tammy Swift-Adams have a view on that?

Tammy Swift-Adams: Yes, thank you—I have been waiting for a planning question as it is an area that I am comfortable in. I do not think that there is a need for anything specific on planning and community engagement in the bill because of what has already been put in place in the Planning (Scotland) Act 2019.

The 2019 act does a couple of things. First, it improves and expands on existing requirements for pre-application consultation with communities on certain types of development. I believe that the categories and scales of eligible development are set out in regulations. Therefore, if there was a need to revise those definitions to pick up anything on the heat networks, there would be scope to do so. Some of the networks might already be covered by that, depending on whether they are coming forward through their own planning permission or as part of a bigger strategic application, through master planning or the planning permission process. I am not entirely

clear on what permissions would be needed. However, either way, there is scope there to bring them into the fold of community engagement.

Secondly, under the 2019 act, there is a strategy requirement on the planning minister to introduce guidance on how to involve communities more effectively in planning matters. Again, that requirement is all embracing in terms of the type of development to which it could apply.

Sarah-Jane McArthur: There is a practical point about how you would deliver the schemes. Often, if a heat network is being delivered alongside a new development, the network would be given consent as part of that development. The two would come together and the timing would be consistent. One issue with the framework in the bill is that all heat networks will require consent from Scottish ministers and there is no guarantee that the timeline for that would run alongside the planning permission for the development. Therefore, in practical terms, it may make sense for a heat network to be included in planning permission for new developments, without requiring a separate consent. That may address some of your concerns.

I have a personal view that it would seem to make sense that Scottish ministers would not need to give consent to particularly small schemes, which might be better left to local decision making, in the same way as happens with the planning system or, indeed, with consent under the Electricity Act 1989. Small schemes receive planning permission and larger schemes require consent from ministers.

Colin Beattie: One of the issues is how you specify the size of a scheme. When is it a small scheme that will fall within the remit of the local authority and local community engagement, and when will it fall within the remit of Scottish ministers? Do you exclude Scottish ministers from a certain size of project? You could get into quite a debate on that, and I am not sure how you would resolve that. Do you have any thoughts?

Sarah-Jane McArthur: It all comes down to definitions, I suppose. It is for policy makers to determine what they want to achieve and then for the legislators to try to define that as accurately as possible. I understand your point about the potential for local people to be more involved in the smaller schemes.

10:15

Colin Beattie: Local authorities have duties on matters such as zoning, awarding permits and so forth. How does that fit in with the proposal?

Sarah-Jane McArthur: That is one of the areas in the bill that probably requires some clarification. This is very new—we have not regulated heat networks before—and the bill introduces four new concepts: there is a licence, a consent, a zone and a permit. It would be helpful to have a flow chart or a guide as to how it is intended that those four different concepts will flow together. For example, what happens if you get your licence at a different time to your consent? Do you need to have a licence in order to apply for a consent? Thought needs to be given to how those concepts interact.

On the duties around zones and permits, those make a lot of sense when you think about delivering heat networks at scale. It makes sense to strategically lay out a zone that is suitable for heat networks and then to give someone a permit to run that zone. However, once a zone is created, there is no requirement to issue a permit. Therefore, you might have decided that a zone is suitable for heat networks, but if there is then no requirement to say whether you are going to issue a permit or a timeline for that, that could create more risk of heat networks not being built in that area, while it is zoned but not permitted.

The other issue about the duty to consider zones is that it would be helpful if local authorities were given a bit more guidance on what they have to consider in order to set the zone. What factors do they have to take into account, and what areas are we expecting them to cover? Also, we should bear in mind that local authorities will need to be resourced and supported to enable them to complete that task.

The Convener: Thank you. Andy Wightman wants to come back in on one or two points.

Andy Wightman: Thank you for that last point, Sarah-Jane McArthur; it is an important one, because it is unclear how some of these things link together. For example, under section 18, “Exemptions from requirement for heat network consent”, regulations can be introduced to exempt certain applications. That could be based on size and so on, but there is no such exemption for deemed planning permission or for granting or modifying heat network consent in section 35.

Under section 11, “Revocation of heat networks licence”, there are no regulation-making powers, and there is no right of appeal. Ministers can revoke licences just as is set out in the bill. There are no regulations to modify or set out the circumstances in which revocation can take place, and there are no appeal rights. However, section 24, “Revocation of heat network consent”, is a very brief section, which just states:

> “The Scottish Ministers may revoke a heat network consent in such circumstances and in such manner as may be specified by them by regulations.”

In other words, in revoking consents, we are giving ministers huge freedom, by regulation, to

determine the circumstances of revocation, but there is no flexibility whatsoever on the revocation of licences, and there is certainly no right of appeal. Does anyone have a view on whether those two sections should be consistent?

Sarah-Jane McArthur: Again, I would draw a parallel with the position in relation to electricity licences. The Electricity Act 1989 is quite light on the detail of when Ofgem can revoke the licence, because the circumstances in which the licence can be revoked are set out within the licence conditions. The circumstances in which revocation might happen change over time, because, as new conditions are entered into the licence, breaches of some of those conditions may trigger revocation, while breaches of other licence conditions may not. Therefore, the process is outwith the legislation. I acknowledge that it is not clear whether that is the intention here. However, that would be a way to manage that issue.

Andy Wightman: That is helpful, because section 11(1)(b) states:

"has failed to comply with a condition of the licence."

In essence, you are suggesting that, following the model of the Electricity Act 1989, it would be better to leave the circumstances of revocation to the licence or, as section 11(1)(a) states, to the circumstances where the person holding the licence

"no longer has the ability to perform the activities authorised by the licence".

Therefore, you would not have any regulation-making powers or appeals but essentially leave that matter to contract law.

Sarah-Jane McArthur: You would leave it to the terms of the licence, because, over time, the licence conditions will change, and the conditions that may trigger revocation would therefore need to change as well.

The Convener: Thank you. We now come to questions from Maurice Golden.

Maurice Golden (West Scotland) (Con): Thank you, convener. I am interested in the transfer of the schedule of assets when an operator ceases or is required to cease operating those assets. What are witnesses' thoughts on the strengths and weaknesses of the transfer scheme set out in the bill?

Sarah-Jane McArthur: We made a point in our written submission about how you might capture existing assets. One of the purposes of the asset transfer scheme is to enable a replacement operator to be brought in to continue supply to customers who are already connected to a network. However, the way in which those assets are known to ministers is through the consenting process. Therefore, if infrastructure was not consented because it already existed, there would not be a list of key assets to transfer. If there are networks that are not being operated properly at the moment, the ability to use that transfer scheme to resolve that and to pass the network on to a new operator might be defeated. As it stands, the transfer scheme would not work as intended.

We know that the transfer scheme is trying to get towards an operator-of-last-resort-type function, but that is not what it actually does, because we would have to try to transfer assets to a new operator. It is not as easy as transferring contracts. I would defer to Professor Paisley—if he has also looked at that section of the bill—with regard to the property rights, how we would be able to transfer assets that belong to third parties and how that might affect the on-going ownership of their property, if the network assets are being transferred without their control.

Professor Paisley: The transfer scheme in the bill would operate in a similar way to a transfer between a defunct local authority and a new local authority, or almost like a bankruptcy or insolvency scheme. It will work, but the regulations will require to be relatively generously phrased, because the assets will include not only rights in things that are corporeal, but incorporeal rights, such as rights to enforce contracts, rights to sue people and the like. However, that is perfectly manageable; even if it were to be the case that some of those rights would be in the land register, which is ultimately for Parliament to decide, the scheme can work.

Those involved in conveyancing will know and be familiar with that type of general transfer of assets that is used as a link in title. I like the scheme; it is a good idea and it will be capable of being a sweeper. I would like to see an express statement that the initial transfer scheme can get it wrong. It should be possible to make a supplementary scheme to sweep up things that are subsequently discovered. Beyond that, I am happy with the scheme.

Maurice Golden: Professor Paisley, do you have any thoughts on how assets that are already in existence might be dealt with under the legislation?

Professor Paisley: May I ask you a question before I answer that? When you say, "assets that are already in existence", do you mean pieces of land or equipment, or something like that?

Maurice Golden: Yes. Existing—[*Inaudible*.]—scheme.

Professor Paisley: The critical thing here is identification. As long as we know that the material exists and can be identified, it can be identified in general terms—I do not think that you need a

schedule of every nut and bolt. In a sense, it could be as general a transfer as, for example, a will. A will is a transfer, and you have a residue clause in a will, along the lines of, "I hereby convey all my property that I have not otherwise particularly disposed of." A transfer scheme can work like that.

Maurice Golden: Given that the bill, in essence, creates localised monopolies, what are the likely impacts on consumers? How best would we regulate that to ensure correct pricing and a minimum level of service?

Professor Paisley: I had perhaps better let someone else have a go at that question. Sarah-Jane McArthur knows a lot more about that than I do.

Sarah-Jane McArthur: It will be possible to introduce a lot of consumer protection provisions in the licences themselves, although we all acknowledge—as did the Government when it promoted the bill—that the Scottish Government does not currently have the legislative competence to enact consumer protection provisions to the level that it would want in the bill. I am not going to suggest how best to resolve that devolved competence issue, but I understand that discussions are on-going as to whether ministers should be able to get competency in relation to heat networks to enable ministers to enact those provisions. However, it will be possible to achieve a level of protection through the licence conditions.

Maurice Golden: Do any of the other witnesses have comments on either of those questions?

Tammy Swift-Adams: Home builders would like that question to be resolved as well, because anything that reduces choice for the occupier of a new home, including choice about where, as a customer, they take their heat from, has a potential knock-on impact on demand for, or interest in, new homes. Those issues are combined; we need to maintain the market for new homes and the interest in them, and we need to ensure that the occupiers of new homes have similar rights and options to those of consumers in the second-hand market.

Maurice Golden: How can that be resolved? Clearly, the operator requires that demand to allow it to function. How can that be squared with consumer choice?

Tammy Swift-Adams: I will take that question back to the technical forum, because it is an area that moves on every time innovation or policy changes. I think it would be best for me to submit something in writing to you on that.

Maurice Golden: Thank you. I have no further questions, convener.

The Convener: Thank you. We now move to questions from Gordon MacDonald. Richard Lyle might also have further questions on the same area.

Gordon MacDonald (Edinburgh Pentlands) (SNP): Thank you, convener. I will follow on from Maurice Golden's questions. To deliver heat networks, we need to ensure that there is enough demand within a proposed heat network zone to attract investors. Last week, the committee heard evidence calling for the bill to be strengthened by the introduction of an obligation to connect new buildings, public sector buildings and non-domestic buildings within heat network zones. Should there be a duty to connect all new buildings? What would be the advantages and disadvantages of adopting that approach? Tammy Swift-Adams might want to go first, given her planning background.

10:30

Tammy Swift-Adams: The consideration that jumps out at me is whether any disbenefits or burdens that might result from making that a firm requirement on either the builder or the occupier of the home—whether the development must be a compatible development, or there is a requirement to be a customer, in effect—come with a good enough reward in policy outcomes. Given that new-build homes have fairly low heat demand, because of energy efficiencies that have been achieved through building standards, it might be that there is not enough gain from requiring occupiers of new-build homes to be customers of a heat network. Again, I can confirm that in writing and possibly add some detail. I understand where the question comes from, but new-build homes are unlikely to be the bulk of the users of the heat.

Gordon MacDonald: Does anyone else want to comment?

Professor Paisley: I would like to make a comparison with the existing duty to connect to services that lies on water authorities and electricity authorities, for example. Invariably, the statutory provisions are hedged about with a limitation that it is required that the obligation to connect be complied with only if it can be done at reasonable cost. In the majority of my experiences of dealing with operators, that is a complete get-out, because—to link back to what I said earlier about wayleaves—they simply say, "Because we require to obtain rights in land to put the system through to you, we're not going to comply with any obligation to connect unless you, Mr Consumer and Ms Consumer, go and get those rights for us." If you are going to put an obligation on the heat-transfer provider to connect to particular houses, you will need to draft the legislation quite tightly so that there is not the same get-out as already exists more widely for electricity and water suppliers.

Gordon MacDonald: Section 39 of the bill identifies key criteria to be considered in identifying anchor buildings. Are those criteria adequate or are changes to the bill required?

Professor Paisley: I would probably add to that that there is a presumption that the supplier will actively take steps to exercise its powers to connect. In other words, suppliers cannot shovel the responsibility to acquire the rights on to the person who wishes to receive the heat. There must be a presumption that the provider will exercise its rights and will basically try to make the system work and expand it, rather than put that responsibility on to the person who wishes to receive the heat.

Gordon MacDonald: Does anybody else have a view on that?

Gavin Mowat: On the first question—about the compulsion to connect new builds to a heat network—Tammy Swift-Adams touched a bit on technology development in house building. It is worth bearing it in mind that the energy efficiency of new-build homes is improving all the time, and is moving towards carbon neutrality. With developments such as passive houses, making those connect to a heat network would defeat their purpose by spending money for no effect. There will be instances when new-build houses will not need to be connected to heat networks because they are passive houses, or because some technology that is yet to be developed means that they already meet a very acceptable low-carbon energy-efficient standard.

Gordon MacDonald: Finally, given that part 5 requires that building assessment reports be carried out only on publicly owned buildings, is there a risk that community-owned assets will be missed? Does anybody want to volunteer?

Sarah-Jane McArthur: May I come back on the suite of questions that you just asked? The main policy intent of the bill is decarbonisation of heat in Scotland. The biggest prize in that sense, as Tammy Swift-Adams and Gavin Mowat have alluded to, is not suburban new builds but city centres, old buildings and dense urban areas. The creation of heat network zones and suggesting that that is where we will make great strides forward in decarbonisation, without there being some kind of compulsion that the core anchor loads that have been identified connect to the network, would defeat the policy aim of the bill.

I am not necessarily a supporter of requiring domestic consumers to sign up for anything like that. Also, identifying key anchor loads in an area then not having them connect effectively will mean that the zone that has been set will not be as effective as it could be. On building assessment reports, when, having done a report, it can be seen that a building is particularly suitable for connection to a heat network, not to require then that it be connected, or—at least—not to require an explanation for why it cannot or should not be connected, is a failing in the bill.

Gordon MacDonald: How would you change it? Would you just put that duty in the bill?

Sarah-Jane McArthur: Yes. I would ensure that the building assessment reports be required for more than just public sector buildings, for a start, and I would ensure that, if the building assessment report says that a building is suitable for connection to heat network, there would be a next step of having to explain any decision not to connect. If, for example, a building has had a new heating system installed in the past year, it might not make economic sense to rip that out and connect to a heat network, but it might make sense to do so in five or 10 years, which could be built into the report.

The Convener: Richard Lyle has questions on that.

Richard Lyle: Thank you, convener. I have two questions, one of which is for Sarah-Jane McArthur, who has given us quite a lot of good information, and one is for Tammy Swift-Adams.

Sarah-Jane, are you suggesting that we use the bill to retrofit old buildings, rather than to create new networks, as was done with water, gas and electricity many decades ago?

Sarah-Jane McArthur: Networks that have been rolled out recently in Glenrothes and Stirling are supplying buildings that already existed. The network is new, but the buildings are not. I appreciate that the Scottish Government has a fabric-first approach, which is correct from a decarbonisation perspective. It might make sense to put energy efficiency measures in those buildings, which would improve the efficiency of the heat network, as well. “Retrofitting” is perhaps the wrong word, but using heat networks to serve existing buildings in dense urban areas seems to make more sense from a decarbonisation perspective than does rolling out heat networks only to new energy-efficient suburban buildings.

Richard Lyle: In that way, we would get an instant hit, instead of waiting a long time for the benefit. Is that what you are saying?

Sarah-Jane McArthur: Yes. New build does not account for very much of our built environment.

Richard Lyle: Thanks.

This question is for Tammy Swift-Adams. How, from a planning perspective, could the designating and permitting process be improved to ensure a

more strategic and joined-up approach to local implementation of national policy?

Tammy Swift-Adams: Perhaps more than the permitting process, it is the development and planning process that needs to be dovetailed with that policy area. Sarah-Jane McArthur mentioned earlier that local authorities and planning authorities will need guidance on how to support that. That is particularly true with regard to how to develop a 10-year local development plan that supports the roll out of heat network maps, which has spatial strategies and suites of site allocations that are compatible with emerging heat network zones, but which does not go down the road that planning sometimes goes down of having too-rigorous or too-blunt tools, in terms of planning policies.

Over the past few years, we have seen planning authorities and the Scottish Environment Protection Agency trying to use the planning system to start to roll out district heating policy. They did that by putting policy requirements on individual residential developments that asked, at that last stage—the permitting stage—that viability assessments be done on whether a particular development in itself could fund and incorporate heat networks. Of course, all that that resulted in was a series of viability studies that said that they could not support that, for the reason that I mentioned earlier—heat demands were too low, even with quite large strategic housing developments.

As Sarah-Jane McArthur suggested earlier, we must, for any area, identify a spatial strategy that is right, in terms of where it is possible and viable to achieve new development, but which also considers where the best gain is to be had from a heat network. Again, it is harder to do, but the gain will always come from aligning a heat network with where there is highest demand for heat.

The programme for government for 2019-20 states that emissions from buildings account for about 20 per cent of Scotland's greenhouse gas emissions, which is obviously why there are policies and bills such as this. However, the amount of those emissions that comes from residential properties, whether from existing or new-build properties, will be relatively small compared to industry, education and buildings that are open all the time. Within that relatively small amount, emissions from new-build homes—those that are being built now and those that have been built in recent years—will be very small. I will see whether I can get a figure for that, although I am not sure that I can.

With planning, the task is not to take what, I guess, some would see as the easy option of saying that we will use new development as a trigger for asking for heat networks to be rolled out and funded, but to look at how the planning system could better achieve the policy outcome.

Richard Lyle: From a planning point of view—I am going to put you on the spot—we need waste heat plants, but most people oppose those, so how would you implement a waste heat policy, from a planning perspective? Do you have a view on that, or is that not possible at the moment?

Tammy Swift-Adams: I do not have a view on that specifically, but it is one of many examples of changes that can happen in the built environment that communities will not automatically welcome. That is why the planning reforms are focusing so much on pre-application consultation and community engagement. That is not about asking communities questions in a tick-box way; it is about bringing in more opportunities, whether you are a developer, local politician or a planning officer, to help communities to see how all the policies on net zero carbon, district heating, housing delivery and so on relate to what happens through the planning system.

I cannot comment specifically on the type of development that you are asking about, but it is typical of a range of challenges for communities in planning.

10:45

Richard Lyle: From a planning point of view, can the bill work?

Tammy Swift-Adams: My understanding, from colleagues and home builders who have looked at the bill, is that there are questions to which we want answers before we can say whether it could work. I will try to look at that again and address it in writing after the committee meeting. The evidence session has been useful for me; I will look at previous sessions then come back to you with a fuller view.

Richard Lyle: Ladies—thank you both. Thank you, convener.

The Convener: Our final questions are from Alison Harris.

Alison Harris (Central Scotland) (Con): Part 5 of the bill places a duty on public-sector building owners to assess the viability of connecting their building to a heat network. Why does that duty not apply to all non-domestic buildings? Should it be extended? I am happy for anyone to answer.

Sarah-Jane McArthur: As I said earlier, in order to make the building assessment reports really work as part of wider heat network zoning, it makes sense to expand the number of people who have to do that—certainly, to include big non-domestic buildings. However, that is ultimately a decision for Parliament and policy makers.

Alison Harris: Does anyone else have any comment on that?

Gavin Mowat: From the Scottish Land & Estates perspective, local authorities seem to be in the best position to develop the initial spine of the network, because they have, throughout their regions, large non-domestic assets that can provide anchor loads. Significantly, many of those tend to be—[*Inaudible*.]—domestic properties that are, essentially, near the demand.

It makes sense to start there, at least, but it is important to remember that it is not about ensuring that local authority buildings are assessed just for the sake of it; it is important that they are assessed in terms of the fact that they have demand next to them. The same should be true for private community assets and local authority assets. There is no point in assessing a building that is in the middle of nowhere and which is unlikely to be part of any network in the near future. We need to assess buildings that are near demand.

Alison Harris: Thank you. Is it likely that the process will rely on existing data from energy performance certificates? If so, what are the strengths and weaknesses of that approach?

Gavin Mowat: We think that relying on EPC data to predict demand for heat is not entirely sound. SLE has consistently called for review of the EPC methodology, which we consider to be flawed, particularly in respect of existing housing stock. We have a number of examples on which we can write to the committee in more detail. Essentially, our members' experience shows that costly upgrades to properties often result in insignificant, if any, increases in EPC ratings.

That is largely due to a reliance on using model data—[*Inaudible*.] There is concern that if you start basing assessments on data such as that which is gathered in EPCs, systems might be oversized or undersized, which would result in people being either overcharged or not being supplied with adequate energy.

SLE suggests placing more emphasis on the environmental impact rating, which is a measure of a home's impact on the environment in terms of carbon dioxide emissions. The higher the rating, the less impact it has on the environment. That rating is based on the performance of the building and its fixed services, such as heating and lighting, and it is potentially—[*Inaudible*.]—to this. I am happy to provide more information.

Alison Harris: Thank you.

The Convener: Thank you. We have a final brief supplementary question from Andy Wightman.

Andy Wightman: Thank you, convener. I will follow up on Professor Paisley's evidence.

We discussed creating real rights and the land register, as did the convener. I want to be absolutely clear. Creating a real right in the bill would resolve many of the problems—not all of them—that you identify, but can you confirm that it is not necessary also to make those real rights registrable in the land register? Desirable as that might be, it is a separate question. The very creation of those real rights by statute would achieve much of what you want. Is that correct?

Professor Paisley: It is possible to create a real right without going anywhere near the land register. Such rights do not need to be registered in the land register. A statement in a statute that a right is real suffices.

Andy Wightman: That is helpful. Therefore, all the consequences would flow from such a real right in law.

Professor Paisley: That is correct.

Andy Wightman: Thanks very much.

The Convener: I will follow that up. The difficulty with that can be that people do not know that the real rights exist. The purpose of the land register, in public policy terms, is to have a public record of all rights that are real rights affecting land, is it not?

Professor Paisley: That is absolutely correct. It is possible to create a real right by a statutory declaration that, if an agreement is entered into, a real right will flow from that agreement. However, the agreement could be stored under somebody's bed and no one would be able to see it. It is important for anybody who is not a party to that original agreement to be able to get a copy of that to see what its terms are, particularly about depth, width and the type of material that is going down a pipe.

If you are buying land, it is important to be able to get such information, not from a private person who might charge you for it, but from a state register that is open to everyone without the need to demonstrate an interest. That is the difference between us and England. In England, a person must show that they have a legitimate interest in order to be able to look at the register. In Scotland, everybody—this is very important—has the freedom to look at the land register to find out what the responsibilities and rights are in relation to a piece of land.

The Convener: I thank you very much, Professor, and I thank our other witnesses.

We will have a brief suspension before agenda item 3.

10:54

Meeting suspended.

10:58

On resuming—

Tied Pubs (Scotland) Bill: Stage 1

The Convener: We now come to agenda item 3, which is the Tied Pubs (Scotland) Bill. I welcome Neil Bibby MSP, who is the member in charge of the bill; Nick Hawthorne, who is the senior assistant clerk for the non-Government bills unit; and Neil Ross, solicitor. They all join us by live link. I invite Neil Bibby to make a short opening statement, then we will move to questions, the first of which will be from the deputy convener.

Neil Bibby (West Scotland) (Lab): Thank you, convener. Good morning, committee members. For transparency, I refer the committee to my entry in the register of members' interests and the in-kind support that I have received from the Scottish Licensed Trade Association, the Campaign for Real Ale, GMB Scotland and Tennent Caledonian wholesalers.

I am grateful for the opportunity to discuss the bill. Now is a critical moment for Scotland's pubs: it is the worst time for them since the second world war. Some may never open their doors again after the coronavirus crisis. We need to do everything that we can to protect and save the pubs that we all cherish and that contribute so much to our communities.

I have never claimed that the bill would help with all the problems of all pubs, but it is vital that it proceeds in order to help the approximately 750 pubs in the tied sector, which has well-documented, deep-rooted problems. Tied pubs, unlike free-of-tie pubs, face costly and unusual restrictions, which can deny tenants the flexibility that they need to sustain and grow their businesses. As you have heard, pub-owning companies often take far more than is fair from pub profits. The opportunities for Scottish products to reach the tied sector are limited, and the mark-up on tied products can be excessive and unsustainable. By rebalancing the relationship between tied tenants and pub company landlords, we can help tenants to make their businesses work and keep a fairer share of the profits that pubs make in the Scottish economy.

11:00

The big pub-owning businesses say that the bill is a

"solution to a problem that doesn't exist."

They are entitled to disagree with the bill, but it is arrogant and irresponsible to deny that problems exist in the sector in the face of the evidence, so let us talk about the problems and the evidence.

As the Federation of Small Businesses and CAMRA explained in their written evidence, self-regulation has failed. Prior to the introduction of the England and Wales pubs code, there had been six voluntary codes in 10 years and four parliamentary select committee inquiries, culminating in a 2011 report, which said of statutory regulation:

"we see no other alternative for an industry which has for too long failed to put its own house in order."

The Economy, Energy and Fair Work Committee has access to the findings of the consultation that I conducted on the bill, in which 93 per cent of the 275 individual responses supported legislative action. Most responses to the committee's call for evidence support legislative action. Ninety-three per cent of the nearly 100 tenants taking part in the committee's survey said that legislation is necessary. Do not let the pubcos tell you that there is no problem here.

The committee will also be aware of the 2014 CAMRA-commissioned study, which found that 65 per cent of tenants had an annual income of less than £15,000 and that 74 per cent believed that they were worse off as a result of their tie. How can that be fair or sustainable?

Tennent Caledonian has supplied evidence showing that, over a two-year period, while revenues grew by more than 5 per cent for free-of-tie pubs, revenues for tied pubs fell by 8 per cent, according to the CGA trading index. Times are tough but they are tougher if you are tied. Tennent Caledonian also cites a CGA study showing that the tied model extracts more than £30 million of profit from the Scottish economy. In written evidence, it said that English beers are stocked on the tied estate in Scotland at twice the level that they are in free-of-tie pubs, to the detriment of local products.

The committee heard evidence from Jamie Delap of the Society of Independent Brewers, who said that Beerflex provides only a "relatively small" element of access to the tied market. You heard evidence from Greg Mulholland of the British Pub Confederation that

"the reality of what they"—

pubcos—

"term 'investment' is that it is just a form of loan".—[*Official Report*, *Economy, Energy and Fair Work Committee*, 18 August 2020; c 8.]

The investment myth has been busted. Tenants pay it back over and over again. You also heard Chris Wright of the Pubs Advisory Service say that investment by pubcos is often at high and uncompetitive rates. You heard that tenants on one side of the border have the protection of a statutory adjudicator, whereas tenants of the same pubcos here in Scotland do not. I have never made it a party-political issue, and I have no desire to do so, but it is a matter of fact that Scottish MPs of all parties, including the SNP, voted for the adjudicator in England and Wales.

However, there is something that the committee did not hear about, which is what the pubcos really think of the statutory code in England and Wales. In written evidence to the Business, Energy and Industrial Strategy Committee, they say that awareness of the statutory code is up, tenure has increased, the number of young applicants taking on a tenancy has increased and pubcos now provide better support for licensees and better recruitment processes.

The evidence is clear. If pubcos are good, responsible landlords, what do they have to fear from the bill? If a tied agreement is working well for a tenant, there is no reason to seek redress through a pubs code. However, if tied deals are not working, we need to rebalance the pubcos' relationships with their tenants to ensure that they do. That boils down to three regulatory principles, on which I propose a code should be based: the principle of fair and lawful dealing, the principle that tied pubs should be no worse off than free-of-tie equivalents, and the principle that tied deals should offer a fair share of risk and reward.

The committee is asked to decide whether to recommend the general principles of the bill to Parliament. I believe that those principles are sound and represent a proportionate response to the deep-seated issues detailed in the evidence that the committee has received. I look forward to answering your questions.

The Convener: Thank you, Mr Bibby. We now move to questions from the deputy convener.

Willie Coffey: Good morning, Neil. The committee heard some evidence that turnover of tied tenants can be high in the market. Do you have any data that illustrates the scale of that issue and how that compares to turnover in free-of-tie or freehold premises, to give us a sense of the turnover issues in the different sectors?

Neil Bibby: Only pub companies would really know about that and be able to provide full data. The issue is churn, and the industry does not want to talk about the fact that we have so many business failures in tied pubs. As Greg Mulholland said, the number 1 reason for pubs closing is that publicans cannot make an income. Things are particularly tough in the tied sector.

I am aware from evidence that the Pubs Advisory Service has sent to me that at least one pub company has an average tenure of around nine months. We can see the churn in our communities with the "To let" signs on pubs. You can also see the churn on websites such as

www.findmypub.com, which shows about 60 pubs up for lease. As I said earlier, pubcos have said that tenure has increased as a result of the introduction of the code in England and Wales.

Willie Coffey: Is the failure rate something that we could address through the provisions that you propose in the bill? If so, how do we address—[*Inaudible*.]

Neil Bibby: Yes. As I said earlier, the main reason that pubs are failing is that publicans are failing to make an income. There is an issue in the tied sector, in that we have profitable pubs where publicans are not getting a fair share of the profits. If we have a fair share of risk and reward, publicans can have that security and the balance that will allow them to sustain and grow their businesses. Also, the market-rent-only option would give publicans greater flexibility to sustain and grow their businesses to make them more viable.

Willie Coffey: Thanks, convener. I am happy to let colleagues come in with their questions for Neil.

The Convener: Thank you. Maurice Golden has the next questions.

Maurice Golden: The Scottish Government study found that no one part of the pub sector in Scotland suffers significant detriment. Furthermore, a voluntary code was introduced in 2016. The evidence that the committee has received from tied pub tenants suggests that awareness of the code is low. If promoted and communicated more effectively, could a voluntary code help to address the issue that you intend to legislate on?

Neil Bibby: The problem with the Scottish Government study that you refer to is that it heard from only 25 pubs, and only 10 of those were fully tied. The CAMRA study that looked at the issue spoke to 200 Scottish tied pubs. The committee has heard from nearly 100 tied pubs in the tenants' survey. I have also heard from well over 100 tied pubs. Therefore, there is an issue with the scale of the Scottish Government study. The evidence from other sources far outweighs that study.

On the voluntary code, to go back to what I said earlier, self-regulation has failed. Tenants have told me that and they have told you that. Ninety-three per cent of tenants who completed the tenants' survey said that; 93 per cent of people who responded to my consultation said that. There have also been four House of Commons select committee reports on the issue that concluded that self-regulation had failed. The pubcos were given 10 years and six different versions of a voluntary code, and time after time they failed to put their house in order. The voluntary code is exactly that. It covers only about 72 per cent of pubs in Scotland, and it does not deal with the fundamental problem of fair share of risk and reward, and tenants do not have confidence in it. There is a real issue that we need to address by having an independent adjudicator and a code.

Maurice Golden: You have been making comparisons between Scotland and England and Wales, but those markets are significantly different. Therefore, is the same legislation equally applicable in Scotland, given the different market in England and Wales?

Neil Bibby: Although Scotland has a smaller number of tied outlets than England and Wales—nobody is disputing that—it is still part of a UK tied pub sector, and the sector is operated in the same way. The numbers are different, but the principle remains that although tenants in England and Wales have statutory protection and access to an independent adjudicator and code, hundreds of tenants in Scotland who have the same pubco for their landlord do not. We need to redress that imbalance and ensure that tenants in Scotland have the same rights. It is a matter of principle. There are at least 750 tied pubs in Scotland, and they need that statutory protection.

The Convener: We move on to questions from Rhoda Grant.

Rhoda Grant: I have a follow-up to Maurice Golden's question. Has enough time passed to assess the impact of the changes to the voluntary code?

Neil Bibby: As I said to Maurice Golden, there has been ample time for the pubcos to get their house in order. I referred to the fact that, in England and Wales, there were six different versions of the voluntary code in 10 years. When I carried out a consultation on the bill in 2017, there was significant support for statutory regulation. Three years on from then, the committee has taken evidence and there is still significant support for statutory regulation. That time has passed, but tenants still have no confidence in the code and the pubcos have not got their house in order. There has been ample time for the situation to be addressed through the voluntary code, but it is not going to be addressed through the voluntary code, because it does not deal with the fundamental issues that tenants are concerned about.

Rhoda Grant: The Minister for Business, Fair Work and Skills told the committee that he is sceptical about the need for the bill because of what the Scottish Government's study showed, and the evidence that we have received is polarised. What is the compelling evidence for your bill?

Neil Bibby: There is a body of evidence. We have the four House of Commons select committee reports and we have the CAMRA study.

There are other studies, including a CGA study that was commissioned by Tennent Caledonian, which I would be happy to provide to the committee. We have the responses to my consultation and to the committee.

You mentioned that views were polarised; the bill is not uncontroversial. There are different opinions on each side of the debate. On one side, we have the Scottish Licensed Trade Association, the Campaign for Real Ale, the Federation of Small Businesses and hundreds of tenants in Scotland and many others, including the Society of Independent Brewers. On the other side, we have the big multinational pubcos. There are polarised views on the subject. I believe that we should support what the coalition in Scotland is saying, but I also think that, if we accept that there are polarised views, that in itself is acceptance that there is a problem. That has always been clear to me, but I think that it is becoming more and more evident in the committee's work that we have a problem and that we have polarised views.

I am not asking the committee to sit as judge and jury on all the issues and problems. However, given that there are deep-rooted, well-documented problems, we need to establish an independent adjudicator to look at the issues and resolve them. If we do not do that, we will be back here over and over again. We need to bring in the legislation now to establish an adjudicator to deal with the problems, to improve the tied pub sector and to improve the relationship between pub tenants and landlords. That is why the bill is vital.

11:15

Rhoda Grant: I also put this question to the Minister for Business, Fair Work and Skills. How would your bill support the economy? We are in a bad place because of Covid-19, and the pub sector is in a bad place. Would your bill help the pub sector? More important, would it help the economy in general?

Neil Bibby: I believe that it will, and the evidence from a range of sources suggests that that is the case. One of those sources is the submission from Tennent Caledonian, which points to £31 million of profit extraction from the Scottish economy. It believes that £23 million is being extracted from pubs and that £8 million is being extracted from brewers. That is an issue not just for pubs but for Scottish brewers. If more of that money was retained by Scottish pubs and in the Scottish economy, it would be good for Scottish pubs and good for Scottish brewers.

There is also the potential benefit of investment in the real economy. For example, many pubcos have big contracts with big procurement companies, but if we give local businesses such as pubs more flexibility to invest in their businesses, it is far more likely that that money will be invested in the real economy and local businesses.

The Scottish Parliament, the Scottish Government and councils talk a great deal about community wealth building. The bill would be an example of how we can retain more of the profits that pubs make in local communities.

Gordon MacDonald: I want to follow up on Willie Coffey's questions. At the time of the English legislation, the Institute of Economic Affairs produced a report that said that the removal of the beer tie would make little difference to the health of the industry. It said:

> "The blame attached to the beer tie has been greatly overstated. There is little evidence that pubs owned by PubCos have been closing permanently at a faster rate than those in the rest of the sector."

Other evidence suggests that, since 2010, the closure rate in the free trade is three times that in the tied pub sector. Do you have any explanation for why freehold pubs are closing at three times the rate of tied pubs?

Neil Bibby: Pubs have been closing at a significant level since 2010, and there is a range of reasons for that. There are pressures on the industry and on pubs across the board. I hear what you say about the IEA's report; there are conflicting views on that. That report did not persuade the select committees before they proceeded with legislation, and it did not deal with the issue of churn. We see significant churn in the tied pub sector, where businesses are failing. The pubs might still be there, but there is significant churn and business failure in the tied pub model, and we need to rebalance that situation. Although many of those pubs are profitable, publicans cannot make a living from them.

Gordon MacDonald: But we also have a situation in which freehold pubs are for sale and will change ownership, so there is churn in the freehold market as well as in the tied pub sector.

Neil Bibby: Yes, there will be churn, but the turnover that we see in the tied sector is significant. For example, there is a former tied pub in Renfrewshire that I know of that had four different tenants in two years, and I do not think that that is necessarily uncommon. I am not aware of a free-trade pub that has had that level of turnover in my area, for example. There are significant issues with churn, and that is more the case in the tied pub sector.

The Convener: The next questions come from Colin Beattie.

Colin Beattie: The committee has heard concerns about the market-rent-only right that is

included in the bill—in particular, it has heard that the legal context in Scotland is different for tenants, because the Landlord and Tenant Act 1954 does not apply. Did you consider that when drafting the MRO provisions in the bill?

Neil Bibby: Yes, we did consider that issue. It is important that we have a market-rent-only option for tied tenants in Scotland, that we ensure that they are no worse off than free-of-tie tenants and that we give them the flexibility to grow their own businesses. The MRO provisions are extremely important, and tenants should have that right automatically.

The Landlord and Tenant Act 1954 does not apply in Scotland, but that does not take away the need for the bill. It is just that there is a different landscape for the code and the adjudicator to work in. I believe that those who have raised concerns about the bill are mainly the pubcos. Some might say that it is uncharacteristic for them to be concerned about a possible impact on tenants.

It is important that we have an MRO option, and we have considered the point about the 1954 act. The Scottish licensed trade is as supportive of new legislation for Scotland as the trade was in England and Wales, and people are aware of the differences in commercial tenancy law.

Colin Beattie: Let us hold the thought about MRO. In your opening statement, you touched on the income levels of some tied tenants in Scotland. According to CAMRA, more than 60 per cent of tied tenants take home less than £15,000. Why would anyone work for less than £15,000? That aside, if the MRO provision comes into force, tenants will presumably pay whatever the market rent is, which might be more than they are paying now, but they would have the freedom to operate in the way that they wanted to. On that level of income, how could they support running a pub?

The Scottish Beer & Pub Association says that the average take-home pay for a tied tenant in Scotland was £38,000. It also says that 96 per cent of respondents earned more than £18,200 a year. That is not big money for running a pub, given the unsociable hours and hard work and the fact that, frequently, it is a husband-and-wife team running it. How can they support that independent business?

Neil Bibby: That is a really good question. You make a very valid point. The amount of money that tied tenants have in income means that they are struggling to make ends meet; they are on the brink. As you said, the CAMRA study said that 65 per cent of tenants earn less than £15,000 a year. At the same time, the pubs are making significant profits. It was highlighted to the committee in the evidence session two weeks ago that Enterprise Inns, which is typical of the UK operation, takes around 80 per cent of the pub's profits, with the remaining 20 per cent going to the tenant. That is not uncommon, based on the experiences that pub tenants have discussed with me in Scotland. It is a real issue.

At the same time, Star Pubs & Bars is owned by Heineken, which reported a profit of €832 million earlier this year. There is a huge disparity between the position of tied tenants on the ground in Scotland and the big profits that the multinational pubcos and brewers—the second biggest brewer in the world, in Heineken's case—are making.

You mentioned the figure of £38,000, which was cited by the Scottish Beer & Pub Association. The Scottish Licensed Trade Association said that it does not recognise that figure. I do not recognise that figure. I have spoken to many tenants in Scotland who say that their income is not much more than the figure in the CAMRA study. Times are tough. Of the £38,000 figure, tenants have said things such as, "That's nonsense" and "No chance." I cannot repeat some of the things that tenants have said about the £38,000 income claim. They feel that the figure is not accurate and that it misleads the committee on the level of income for tied tenants in Scotland.

Colin Beattie: Those figures are important. Do you have any data that shows that tied tenants struggle, compared with other subsectors of the pub market?

Neil Bibby: I refer to the studies that I have mentioned before, including the CAMRA study, which said that more than 60 per cent of tied tenants earned less than £15,000. The same study said that 74 per cent felt that they were worse off because of the tie and that 96 per cent felt that the reduced rent did not fully take into account the higher prices that were paid for tied products. That reinforces other things that the FSB has said, such as that 76 per cent of tenants believe that pubcos take too much of the profits. Therefore, there is a range of sources for the view that the tied sector is hit hard in that way.

The committee also heard from Paul Waterson, who talked about the mark-up on beer. If a keg of beer costs a tied tenant £35 to £40 extra and they sell 1,000 kegs a year, the tenant is £35,000 to £40,000 worse off because of the tie. I mentioned earlier the study that Tennent Caledonian commissioned, and I would be happy to provide that to the committee, if that would be helpful.

Colin Beattie: That would be useful, because even if all the issues that you are talking about as regards income constraints were to go away, somebody who is taking home less than £15,000 a year could triple their income and still not be bankable, and they would struggle to get loans to develop their business. Their income would need

to go up by five, six or seven times for them to be able to afford the sort of renovations and so on that they would need to do in their pub, because pubs wear out—people use them and they need to be refurbished from time to time. My concern is that we are working on the basis that these people are going to be able to get loans, but from where?

Neil Bibby: I am not going to prescribe to tied publicans what they should do with their businesses. The bill is about the principle of allowing them a fairer share of risk and reward and giving them extra leverage to demand a fairer deal from their pubco. It is also about giving them the flexibility, if they wish, to move to an MRO lease. If publicans do not think that that would make them better off and be in their interests, they do not need to exercise that right. However, tenants consistently say to me that they could be £20,000 a year better off if they were free of tie. That is a significant amount of money to invest in their business and in the bricks and mortar.

Tom Stainer from the Campaign for Real Ale made the important point that, if pubs in Scotland retained more profits, that would not simply be invested in bricks and mortar; they could invest in taking on staff, in marketing or in other ways of creating jobs. As I mentioned earlier, they could also decide to invest in a way that used more local businesses. Generally speaking, tenants would be better off if they were able to exercise their right to an MRO option. By passing the bill, we would also give tenants the leverage to get a fairer deal from the pub company, if the pub company wanted to ensure that it could keep them tied.

Colin Beattie: I have one last question. What you are saying is laudable. Nobody should be on that level of income, given the hard work that is needed to run a pub. However, I wonder how much leverage somebody who is on that sort of net income actually has when it comes to taking over their business and running it independently. It is quite a cliff to climb.

11:30

Neil Bibby: The bill is about giving tenants the chance to take that opportunity. Tenants in England and Wales have leverage because they have access to the MRO option. There are trigger points in that, which has resulted in a backlog of cases that is now being worked through. However, there is no leverage for tied tenants in Scotland. At the very least, we should ensure that tenants in Scotland have the same leverage as tenants in England and Wales and can exercise a market-rent-only option and get a fairer deal from their pubco.

At the end of the day, the bill might not result in all tied pubs moving to a market-rent-only arrangement; it might result in renegotiated deals. A lot of the changes that have happened in England and Wales have involved the renegotiation of deals between pub landlords and pubcos so that the MRO option has not been exercised. That would be a positive thing. I am happy to provide the committee with the number of renegotiated deals in England and Wales, but off the top of my head I think that there have been about 400 or 500. It is important to consider that approach as well. In England and Wales, landlords do not have to exercise the right to an MRO arrangement, because they have the leverage to demand a fairer deal from their pub company.

Richard Lyle: I would like to ask about the support that pub companies have given their tenants in the pub trade during the pandemic. What do you make of that?

Neil Bibby: That is a good question and an important one. Generally speaking, the pubcos have not treated tenants fairly during the crisis. This is a really tough time for tenants and publicans. Many are working long hours just to break even and many are not making any money at all.

The biggest bone of contention during the coronavirus crisis has been that pubcos have charged rent on locked-down pubs. There has been no income for tenants during that period, which has been crippling, and many have gone into debt. I think that the committee has had testimony from a tied publican about the thousands of pounds of debt that they have gone into. For the pubcos, the crisis has not been at the same level. They have had a cash-flow interruption but, as I mentioned, Heineken's profits in the first part of the year were €832 million.

Some pubcos acted to cancel rent early in the process—I think that Admiral Taverns did that—but others that have given evidence have not been as supportive of their tenants. Campaigners had to introduce a wall of shame in order to shame some of the pub companies into giving rent cancellations or deferrals. The pubcos' response to the crisis has been inadequate, and that view comes directly from the tenants. At the end of the day, the rent that tenants are meant to be paying is rent based on turnover. Their turnover has been zero, but that has not been properly accommodated.

I believe that there is a section in the voluntary code that mentions tenants being compensated for a loss of income as a result of issues that are outwith their control. There is no better example of that than the coronavirus, but tenants do not believe that they have been properly compensated in that regard.

Richard Lyle: Two weeks ago, we heard from Edith Monfries about the support that has been

provided, particularly by her company, which is Hawthorn Leisure. Do you accept that most companies have helped their tenants to keep their businesses open? We were told that, because beer goes off, most of it had to be taken away and replaced. Would that have happened if the pubs were not tied?

Neil Bibby: It is quite right that the support that you mentioned, which has been outlined by pub companies, has been provided; pub companies should be supporting their tied tenants. It is in their interest to keep their tenants viable, so they should be doing that. The fact is that there is a different picture with different pub companies—some might be better than others. We should have a statutory code and statutory regulation to ensure that all pub companies treat their tenants properly.

On the issue of beer credits and beer being destroyed, I have spoken to a number of tied tenants who are still waiting for the cash for beer credits. Therefore, even though that area has been flagged up as one in which pub companies might have supported their tenants, the experience of tenants on the ground does not necessarily reflect that.

Richard Lyle: Can you confirm that your policy memorandum acknowledges that there could be pub closures as a direct consequence of the bill being passed?

Neil Bibby: What I said about pub closures in the policy memorandum has been taken out of context. I said that the bill is about sustaining and protecting pubs, investing in them and allowing them to grow. The reference in the policy memorandum was based on what the pub companies had threatened if legislation were to go through; they said that they would close pubs. It is not my view that pubs would close. I believe that the bill has the potential to sustain and grow numbers in the pub industry.

Alison Harris: One of the aims of the bill is to improve the process for tenants who wish to seek an MRO arrangement in Scotland, yet it removes the various trigger points. What consideration have you given to the impact that that change could have?

Neil Bibby: In drafting the bill, we carefully considered the removal of the trigger points. There are trigger points in the English and Welsh system. Those were introduced to avoid a rush of tenants applying for MRO arrangements, but they also resulted in a big backlog of cases. I understand that that backlog is being worked through. The trigger points involve extra red tape as part of the MRO process.

The bill makes the system simpler and more straightforward: there is less red tape, it allows tenants more leverage in demanding a fairer deal and it shifts the balance between risk and reward, which tenants and campaigners have been calling for. I have been at pains to say that the English and Welsh legislation was a starting point; I wanted to make improvements on it, and I believe that the removal of the trigger points represents a significant improvement on the legislation in England and Wales.

Willie Coffey: Those who support the bill suggest that it could create investment in Scotland's pubs, and those who oppose it say that it could have quite the opposite effect. Do you have any evidence of data that supports the view that free-of-tie pub tenants are more able to make or attract investment?

Neil Bibby: If tied tenants were free of tie, they would have more resources and more opportunities to invest in their business. I said earlier that tenants I have spoken to have said that they would be around £20,000 a year better off. In his written submission, Joe Ghaly, who is a leaseholder in Aberdeen, said that he would be £35,000 to £40,000 better off, because the mark-up on beer that he currently has to pay makes him that amount worse off. In addition, as I said earlier, 76 per cent of tenants who responded to a survey that was carried out by the Federation of Small Businesses said that they would invest in their business.

Greg Mulholland made an important point to the committee two weeks ago when he said that it was a "complete myth" that pubcos would no longer invest in their pubs if the tenants were free of tie. The pubcos would still have an interest. The pubs in question would still be their assets and it would still be in pubcos' interest to invest in their businesses.

I recently saw an online article that discussed the investment levels of pubcos in England and Wales, where there is a statutory code and an adjudicator, and it talked about £500 million to £600 million of investment being made by pubcos there. When Lawson Mountstevens spoke to the committee two weeks ago, he mentioned a figure of about £190 million.

Pubcos will still have the opportunity to invest. There is nothing in the bill that prevents pubcos from investing in pubs. Equally, as a tenant said to me at the weekend, there is nothing in lease agreements to say that tenants have a right to investment from the pubcos.

I come back to the point that the bill is about having a fairer share of risk and reward, giving tenants more leverage and providing them with the flexibility to take decisions that would sustain or grow their businesses and allow them to keep more of their profits in the pub.

Gordon MacDonald: I want to ask about a couple of areas. My first question relates to what the Scottish Courts and Tribunals Service said in its submission. According to it, the Sheriff Appeal Court deals only with appeals from the sheriff court. The bill would involve a new process that would require an investment by the Scottish Courts and Tribunals Service. Why was that additional cost not reflected in the financial memorandum?

Neil Bibby: I would like to bring in Nick Hawthorne to talk about that.

Nick Hawthorne (Scottish Parliament): The simple answer is that we were unaware that there would be such an additional cost. Neil Bibby wanted to include an appeals provision, and the drafter of the bill drafted it in that way, with appeals being made to that court.

Since then, we have engaged with the Scottish Courts and Tribunals Service. It would be for Neil Bibby to say, but if the bill required amendment, the service has suggested that an alternative would be to amend it to change which court an appeal would be heard by. That would avoid any additional cost. That would be a matter for Mr Bibby, but it is certainly an option. That is why that cost is not reflected in the financial memorandum.

Gordon MacDonald: Neil, would you consider amending your bill to avoid that additional cost?

Neil Bibby: I am aware of that issue. I will be happy to look at it at stage 2 and to liaise with the Scottish Courts and Tribunals Service if necessary, and I am sure that Nick Hawthorne and the non-Government bills unit will do the same.

Gordon MacDonald: I want to move on to the issue of guest beers. The Kilderkin, where you launched your bill, is owned by Star Pubs & Bars. It has a good range of guest beers. How can you argue that the tied model limits choice of local beers when the pub where you launched the bill has a good range of guest beers?

Neil Bibby: There is a good range of beers at that pub, but there are many pubs that do not have a good range of beer. It is important that the guest beer right is included in the bill. It is important to provide an opportunity for access to the tied market. The Society of Independent Brewers has told us about the problems that there have been with access to the market—it says that independent brewers have relatively little access to it.

The guest beer right is about giving publicans the opportunity to stock more beers and to stock the beers that they want to stock. It will also allow consumers the opportunity to demand more choice at the bar.

There is an economic element to the beer tie. I understand that one tenant in the committee's focus group said that they wanted to support the local economy and local products, but that they could not because of the tie. In some markets, customers are demanding local products that cannot be provided because of the tie, as that makes them unaffordable to stock. I am sure that the pub companies will show you lengthy lists of all the beers in the world that they can buy, but the prices at which pubs sell them on makes them unaffordable to stock. There was an example in the committee's focus group of a publican who could buy a keg of beer from Norfolk for £77, but a Scottish beer that they wanted to introduce would have cost them £135. That discourages pubs and local businesses from being able to stock more beers and the beers that customers want.

11:45

Gordon MacDonald: I agree that we need to get more craft beers into bars and support the Scottish craft beer industry, but is there not a concern that the proposed guest beer right might not achieve its aim of improving market access for smaller local brewers—[*Interruption*.] Excuse me. Rather, it might allow tied pubs to offer an alternative mass-produced lager at a more competitive price than under the existing tie. What consideration did you give to that risk?

Neil Bibby: We need to get the code right. The bill is about ensuring that there will be a code and, as part of that code, I want there to be a guest beer right. In considering that right, I think that it should be down to the publican to decide what beer they want to select under the guest beer agreement. In some pubs that might be a mass-produced lager such as Tennent's lager, and in other pubs it might be a beer from the Stewart Brewing company in Midlothian, Kelburn Brewing Company in Barrhead or one of the many other breweries across Scotland.

My thinking is that we should give publicans the flexibility and give consumers the choice. That should be looked at in the code, but we want to establish a guest beer right in the first instance. The MRO option, if exercised, would give publicans the opportunity to stock however many different beers they wanted to and their consumers demanded them to.

Gordon MacDonald: If the bill is about supporting the Scottish craft beer industry, surely we should be encouraging publicans to take up the Society of Independent Brewers' Beerflex option. Maybe we should say to publicans that if they want to stock a guest beer, they should buy from the local brewery on their doorstep, because they would be supporting the local industry.

Neil Bibby: The aim of the bill is to support pubs and the brewing industry in Scotland. It should be for publicans to make decisions on what beers they want to have in their pubs, based on what their consumers demand. It is about giving pubs the flexibility and the right to stock the beers that they want to stock. There is a great demand out there for Scottish beer and produce, which is currently underrepresented and to which access is being restricted. As the committee has heard from the Society of Independent Brewers and others that represent the many fine brewing companies that we have in Scotland, that needs to change and something needs to be done. This is an example of a situation where voluntary codes and voluntary regulation are not working. For example, the committee heard that, under Beerflex, only 1,000 barrels a year are sold. Many pubs sell that amount on their own; that is a tiny proportion of the beer that goes into the tied sector.

Gordon MacDonald: I accept that, but the bill would not guarantee Scottish craft brewers more access to the market; as you have said, it would just give publicans an option. They could move over to another mass-produced lager rather than taking a local craft beer.

Neil Bibby: It would present more of an opportunity than they currently have for Scottish brewers to access the tied sector. My view is that what the beer is should be down to the publicans and consumer choice. I would like to see more Scottish craft beer in Scottish pubs, and I think that the bill affords that opportunity. I repeat that, if the MRO option is exercised, there is a lot of opportunity for pubs to stock the beers that they want.

You are right: if the guest beer right was exercised, that would make publicans better off, too, and they would potentially be able to cross-subsidise other ties. However, judging from the submissions from the pub companies, I think that they oppose the bill and many of the provisions in it. I think that their opposition to a guest beer right for just one beer in a pub shows how unreasonable they are. They are not even willing to allow that level of access. That is regrettable, and it is another reason why we need to do something.

Gordon MacDonald: Thank you for that. I apologise for my land-line phone ringing in the middle of those questions.

Andy Wightman: I have a few questions for you, Mr Bibby. First, can you clarify that, in Scotland, tied arrangements are purely private contracts and they are not subject to any existing regulation—obviously, outwith standard contract law, health and safety and all the rest of it? There are no specific statutory provisions that govern the arrangement between a tied tenant and a pubco, and your bill would be the first piece of legislation to introduce such provisions.

Neil Bibby: Yes.

Andy Wightman: Returning to the market-rent-only option, I note that the landlords argue that it would disincentivise investment on the basis that, when they made any investment, they would not be sighted on whether the tenant might choose to exercise that right at some point in the future.

I did not get the chance to ask them this because we did not have a great deal of time, but I spoke to them privately subsequently and I asked them whether there is really a difference there. My understanding is that, if a tenant exercised a market-rent option and the landlord had made an investment of, let us say, £100,000 in new kitchen equipment, any rent assessment that was made for the purpose of the market-rent-only option would take account of the investment that had been made in the asset, and it would attract a higher rental.

In other words, landlords would not be disincentivised from making investments, because the market-rent-only option would reflect the fact that they had made them, although the pubcos tell me that that is not strictly true because part of the return that they get is not in the dry rent but in the wet rent.

Given the way that you have framed the bill, would the rent assessor, where a market-rent-option was being exercised, adequately take account of the investment that had been made by the pubco, such that it need not worry about the option being exercised?

Neil Bibby: Broadly, yes. If a company has invested in a property, the value of the property and the asset will increase, so I would say yes.

Andy Wightman: When it comes to making a market-rent-only assessment, does the bill make adequate provision for assessing the wet rent as part of the payback? I want to be clear about whether, in your view, if a tenant exercises a market-rent-only option, the rent that is then set will be an adequate return for the investment that the landlord has made.

Neil Bibby: Either the MRO will be agreed or there will be an independent rent assessment. I am happy to consider the matter further and write to the committee or, if necessary, deal with it at stage 2. There are a lot of issues here. The bill will establish an adjudicator, whose view will count.

Andy Wightman: Yes. I just want to be confident that the mechanism that has been chosen will set a fair rent in light of the investment that has been made by the landlord. On the flipside, the Scottish Licensed Trade Association has brought to our attention in supplementary

evidence that, because of the on-going wet rent, tenants often pay back more than the investment. However, I will welcome it if you can bring some clarity on the matter, given the uncertainty. Part of the problem that we have in considering the bill is that, in some cases, we are having to grapple with two diametrically conflicting opinions and sets of evidence.

I will move on. Gordon MacDonald asked you a question about pubs closing. As I recall, evidence that was given to the committee showed that there is a difference between pubs closing—in other words, the doors being shuttered and the pub being closed—and businesses failing. A pub tenant's business might fail and they will leave, but the pub is still there, and it will either be sold or be offered on a managed tenancy or to a new tied tenant. In other words, the pub will not close, but businesses might fail.

Will you comment on the trends in the closure of pubs—where the pub is completely closed and it will never come back—and business failures, which do not necessarily lead to the closure of pubs? Do you have any data on those two types of closure or interruption?

Neil Bibby: I do not. Figures are available on overall numbers of pub closures, which, sadly, show a decline in the number of pubs over a 20-year period. That is regrettable. I do not have information on churn and business failures, but I think that the pubcos would be able to provide figures and information on churn.

As I said earlier, the Pubs Advisory Service has highlighted in supplementary evidence that average tenure in one pubco is about nine months. If you look online, you will see that there are about 60 tied pubs for lease in Scotland, which is a fair proportion of the 750. I think that we can see the model.

I have tried to progress the bill as quickly as possible, but a member's bill can take time, particularly when you are dealing with complex legislation and trying to learn lessons and rules as you go along. When I did the consultation in 2017, I spoke to tied tenants, and one of the saddest things about the length of time that the bill's development has taken is that at least half a dozen of those tenants' pubs are now for let online. Far more tenants will have been brought to the brink and their businesses will have failed, and unfortunately the bill is too late for them.

Over the past few years, I have received a number of emails from tied publicans who have got in touch with me to say, "We're really struggling to make ends meet—can you tell me when the bill is going to be introduced?" Unfortunately, it has been too late for them. They have had to hand the keys back because their business has failed. However, I still believe that the bill is important to protect current and prospective tenants. That is a critical point.

Andy Wightman: Okay. You mentioned 60 businesses being up for rent. Are they all tied arrangements?

12:00

Neil Bibby: Yes—I had a look online the other day, and it seems that there are around 60 tied pubs for rent in Scotland. Obviously, it is a really difficult time for pubs, but the churn rate is consistently high, regardless of the coronavirus.

Andy Wightman: A criticism of the bill that has been made to us relates to the fact that the number of tied pubs in Scotland is relatively small compared with the number in England and Wales. It could be argued that the arrangements that have been put in place for England and Wales are proportionate because the proportion of tied pubs there is high, but the proportion of tied pubs in Scotland is far more modest in comparison. Are you satisfied that the bill is a proportionate response to the problems that you perceive in the tied sector in Scotland?

Neil Bibby: Absolutely. I do not think that it is a numbers game, but there are still a significant number of tied pubs in Scotland. There are statutory protections for tied pub tenants in England and Wales, and there are a considerable number of tenants in Scotland who do not have those statutory protections. We need to ensure that those rights are in place.

It has been said that only a very small number of cases would go to a pubs code adjudicator because of the smaller number of tied pubs in Scotland, but I think that the exploitation of one tied tenant is one case of injustice and unfairness too many. We have a Scottish Housing Regulator, which I think dealt with nine cases last year. Despite the fact that that is a low number, I do not think that anyone is suggesting that we should not have the Scottish Housing Regulator. Several other statutory and regulatory bodies in Scotland deal with small numbers of organisations and small numbers of complaints.

As a matter of principle, it is important that we have the same statutory protection in Scotland so that tied tenants here are afforded the same rights that are afforded to tied tenants south of the border.

Andy Wightman: The Scottish Housing Regulator might have dealt with only nine complaints last year, but it has a wide range of other statutory duties as well. Putting that to one side, however, I take the point that you are trying to make—

Neil Bibby: That was just one example.

Andy Wightman: Sure.

One of the concerns about the bill is that, ultimately, the cost of implementing the provisions would be borne by the pub industry. Its argument is that, because there are so few tied pubs in Scotland, that would impose on it a relatively high cost per pub.

Are you confident that an adjudicator could be put in place without it being accompanied by a large bureaucracy? In other words, could we have a part-time, light-touch arrangement that would be cost effective? When we have adjudicators, regulators and all the rest of it, it is important that they do not lead to empire building, that they are structured in such a way that their operations are proportionate, that they are nimble and that they do not come at great cost. That is particularly so when the cost is to be borne by the private sector, unlike the situation with other regulators such as the Scottish Housing Regulator, the cost of which is born by the public purse.

Are you satisfied that a flexible, nimble and cost-effective arrangement could be put in place? The pubcos are not.

Neil Bibby: I hear what the pubcos say about the costs being radically underestimated but, on the other hand, they also say that there are too few tied pubs in Scotland and that there would be too few complaints. They cannot have it both ways; they cannot simultaneously say that the costs are underestimated and that the number of tied pubs is too small to justify the bill.

I would envisage the adjudicator being part time, and I would envisage a structure that is not bureaucratic. I return to what I said about the MRO provisions. In England and Wales, there has been a big backlog of cases, which is to do with the MRO trigger point. I have tried to improve on the experience there by doing away with MRO trigger points in the bill. That should simplify the process and make it more streamlined. If it works well and we give tenants more leverage to get a fairer deal out of their pub companies, that should also lead to less bureaucracy.

As I have said in response to other points that have been made about the cost, I do not want what is proposed to be overly bureaucratic or to cost a significant amount of money, and I do not think that it will. There will be a small contribution for pubcos to make. The worst offenders will find that the more complaints there are about them, the more they will pay—in that regard, the polluter will pay.

As I mentioned, the pub companies can well afford a small amount to fund an adjudicator. I gave the example of one of the companies that owns pubs and its profits. It can well withstand a small charge to set up an adjudicator.

Andy Wightman: My final question is about the coronavirus pandemic. The committee dealt with the Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill. In scrutinising that bill at stage 1, we were very conscious that the coronavirus pandemic had brought into sharp relief the contribution that retail workers make. However, we cannot legislate for the possibility of such temporary emergencies—that would be for emergency legislation.

The legislation that we pass has to endure and be able to resolve issues that will endure beyond the pandemic. The pandemic might change some of those fundamentals in ways that we do not quite understand yet, but we cannot legislate for that. Although we are conscious of the impact of the pandemic, it is important that we do not legislate in response to it, as it is in essence temporary.

One way of asking my question would be to ask this: do you envisage that, if your bill is enacted, the number of tied pubs in Scotland might increase because the option will be more attractive to tenants?

Neil Bibby: Possibly, yes. There is a wider issue with the pub sector more generally. However, as I said, I want there to be a fairer sharing of risk and reward and the ability for publicans to get a fairer share of the profits that pubs make. I want to see pubs grow.

You mentioned the coronavirus pandemic. The bill was published before the pandemic, but there are still deep-rooted issues in the tied pub sector—they were there before the coronavirus, and they are still there. We can look at the issue that you raise.

There is legislation in England and Wales. We have an opportunity to make Scotland the best place in which to be a tied tenant, and an opportunity to have the best tied pub sector. We are coming to legislation after England and Wales, but we have an opportunity to have better legislation and to improve the tied pub sector here in Scotland.

The Convener: As there are no further questions from committee members, I ask Neil Bibby to briefly sum up his position before we move into private session.

Neil Bibby: If you do not mind, convener, I will ask Nick Hawthorne whether he has any further points to make. Is that in order?

The Convener: Yes, certainly. Do you have any points to sweep up on, so to speak?

Nick Hawthorne: I have nothing specific. I have a few notes of things that Neil Bibby said, and one

or two things on data and statistics given members' questions, on which we could usefully write to the committee. We will speak to Neil and refer back to the committee as appropriate.

Neil Bibby: Thank you again, convener, for the opportunity to discuss the bill today. I reiterate the need to support publicans at this time, and our much-loved small businesses in Scotland. I believe in the bill. I believe that it represents the right thing to do and that doing nothing would be the wrong thing.

The bill seeks to introduce statutory rights for tenants that already exist in England and Wales. The legislation there was passed on a cross-party basis, and I see no reason why my bill, which seeks to give rights to tenants in Scotland, should not also be passed. I am happy to work across parties and with all committee members to get that done.

I hope that the committee will support the general principles of the bill, which are fair, reasonable and sound. If the committee believes that the bill should be considered further, the Parliament will have the opportunity to do that at stage 2. I repeat that I am happy to work with the committee to develop the bill, and I will be happy to expand on my evidence and answer any further questions that members have.

The Convener: I thank Neil Bibby and also Nick Hawthorne and Neil Ross, who appeared with him virtually.

12:10

Meeting continued in private until 12:56.

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