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ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 26 June 2013

Session 4

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ECONOMY, ENERGY AND TOURISM COMMITTEE
21st Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Dennis Robertson (Aberdeenshire West) (SNP)

COMMITTEE MEMBERS

*Marco Biagi (Edinburgh Central) (SNP)
*Chic Brodie (South Scotland) (SNP)
*Rhoda Grant (Highlands and Islands) (Lab)
*Alison Johnstone (Lothian) (Green)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Margaret McDougall (West Scotland) (Lab)
David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Adamson (Food Standards Agency in Scotland)
Richard Escott (SSE)
George Fairgrieve (Royal Environmental Health Institute of Scotland)
Frances McChlery (Law Society of Scotland)
Aedán Smith (RSPB Scotland)

CLERK TO THE COMMITTEE

Jane Williams

LOCATION

Committee Room 4

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 26 June 2013

[The Convener *opened the meeting at 09:33*]

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Murdo Fraser): Good morning, ladies and gentlemen, and welcome to the 21st meeting in 2013 of the Economy, Energy and Tourism Committee. I welcome all members and witnesses as well as those in the public gallery.

I remind everyone to turn off, or at least turn to silent, their mobile phones and other electrical devices. We have received apologies from David Torrance.

Item 1 on the agenda is continuation of our scrutiny of the Regulatory Reform (Scotland) Bill at stage 1. We will hear from two panels of witnesses. I welcome our first panel: Aedán Smith, head of planning and development at RSPB Scotland; Frances McChlery, from the Law Society of Scotland; and Richard Escott, head of offshore developments at SSE—Scottish and Southern Energy. I thank you all for coming. You have all given us written submissions, so I propose that we go straight to questioning.

A number of areas are of interest to members. We will want to discuss marine licence applications and the appeals process in relation to them. Members are also interested in the bill's provisions regarding the duty on regulators to promote sustainable economic growth. We will also want to look at the change to the planning fees system proposed in the bill.

As we cover those points, I ask members to direct their questions to particular individuals, given that we have three quite disparate interests represented on the panel. If one of our witnesses wants to answer a question that has been directed at someone else, they should catch my eye. If there are any other points that our witnesses want to make, they should catch my eye and I will bring them in as time allows.

Dennis Robertson will start with questions on marine licensing.

Dennis Robertson (Aberdeenshire West) (SNP): Good morning. My question is directed to Richard Escott. We have read what you say in your written submission about marine licensing and the appeals process. Will you elaborate on it for the committee? You seem to take the view that there should not be an appeals process.

Richard Escott (SSE): The position that we are trying to put across is not that there should not be an appeals process; it is more that we are keen that in any process that we go through, from a consenting and development perspective, we should have clarity of what will happen from end to end.

Currently, section 36 of the Electricity Act 1989 provides an opportunity for ultimate judicial review at the end of a consent being granted for one of our offshore energy developments. Throughout the consent process, there are lots of opportunities for consultation and response, and there is also the gathering of evidence from statutory consultees. There are many opportunities for individuals and organisations to put forward their views, which must be taken into consideration as part of the application for the energy consent. When we reach the end, in the event that there is dissatisfaction with the process that has been gone through there is the option of a judicial review of the decision that has been made.

We are comfortable with that as a process, but we are uncomfortable with the thought that a second or parallel process could run alongside it. If there is also an appeals process within marine licensing that runs to a different timescale, we could end up with two different appeals going on simultaneously to slightly different timescales and about slightly different points. That would add a level of uncertainty.

When we reach the end of the journey of trying to get a consent, which takes several years in the offshore environment, how much uncertainty can we allow to remain as we look to invest significantly in the next phases of the project?

Dennis Robertson: Do you see the provision as a potential obstacle or obstruction to future investment?

Richard Escott: We do. We see it as an additional hurdle that potentially needs to be crossed. We have to consider how we would plan for the eventuality and what would happen if we had two appeals running simultaneously. We whole-heartedly support the concept that, if an error has been made at some point in the process that we have gone through, there should be an opportunity for that to be addressed. However, we do not want different ways of addressing it. If there were a single appeals process that covered the entire consenting process, that would be fine. Our concern is that the provision potentially creates two pathways.

Dennis Robertson: Your solution is to have a single process rather than two parallel ones.

Richard Escott: That is correct.

Dennis Robertson: Does RSPB Scotland have a view on that?

Aedán Smith (RSPB Scotland): Our view is similar in some respects. We are after clarity and certainty on the matter. The situation that has arisen is illustrative of some of the difficulties that we face with appeals processes generally. We have long advocated that there should be a general review of appeals, looking at other sectors as well, and that there would be real benefits in having a more general environmental tribunal system or environmental court system that could pick up on all the different appeals. That could be developed as part of a more comprehensive review of appeals generally.

We have a set of different appeal systems that have evolved almost in isolation. That leads to a lot of uncertainty, difficulty and often extra expense when individuals or organisations look to challenge decisions. Although in the short term we see the need to sort out uncertainty in marine licensing, in the medium term at least we need to look at a more comprehensive review of appeals.

We picked up on a few interesting specifics in the proposals in the bill for marine licensing appeals. We have noticed that the proposed appeal will apply to an aggrieved person, which is broader than just the applicant. That is good and welcome from our perspective, because it would allow organisations such as us to get involved.

We also picked up that the period for appeals is restricted to six weeks, which is very short. It would be difficult for an organisation such as RSPB to get engaged and get lawyers involved in six weeks if we wanted to get involved in a challenge, and I imagine that, if an individual or a small business ever wanted to challenge a decision, it would be very difficult for them to get organised in that short timescale.

We therefore have some specific concerns about that element of the process, but our overarching point is that we should look at appeal systems across the piece, including not just marine licensing appeals but other appeals.

Dennis Robertson: I think that Richard Escott was making the point that the due process is a long, protracted one before we even get to an appeal stage. I assume that organisations such as RSPB would gear themselves up prior to that so that you would be prepared. Is six weeks not a reasonable timescale?

Aedán Smith: Sure. As far as RSPB is concerned, I would hope that we would be ready. We have been engaged in a great deal of detail with every offshore renewables developments proposal that has been introduced. In fact, I met some of Richard Escott's colleagues yesterday in Perth to have a general catch-up on a number of different cases, so we certainly are engaged from an early stage.

However, sometimes there are differences with regard to the ability to get engaged. RSPB employs professional staff such as me to carry out these tasks, but a small business might not have staff and local individuals are not necessarily so well equipped to get engaged with the issues. There may be issues that we do not necessarily pick up on: there are broader issues than just our interests.

Dennis Robertson: Does the Law Society have a legal view on this?

Frances McChlery (Law Society of Scotland): Yes. It might be helpful to say that the Law Society is not arguing for an increase in the six-week period. However, it is important to bear it in mind that any challenge—both under the existing legislation and this bill if passed—can be made only on a point of law. In a very real way, any challenger only knows whether they have a case when they get the decision in their hand. Prior to that point, they will not necessarily have warning that there might be a need to gear up for a challenge in the Court of Session.

The Convener: Is it your view that six weeks is sufficient time to make a case?

Frances McChlery: The planning system, for example, is used to a six-week deadline; it is a familiar timescale and we are not asking for an extension. Certain things can be done to improve the process, such as preliminaries—things known in England as letters before action. They can be dealt with in the context of the civil justice review. We are not arguing for a longer period, but it is important to note that it would not be correct for the committee to think that a challenger could think about an appeal prior to receiving the decision.

Rhoda Grant (Highlands and Islands) (Lab): Aedán Smith, you said that you maybe wanted environmental tribunals and that you agreed with what Richard Escott said about judicial review. Are you suggesting another strand in the appeals process, or would having all appeals under the one framework of judicial review suit your purposes?

Aedán Smith: I think the latter. It would be a matter of simplifying the current appeals landscape, because there are so many routes that it is possible to go down for different regimes and types of development.

The difficulties that have come to light in marine licensing are illustrative. There is justification to look into whether there is scope to simplify the

process across the piece and have more of an overlap between the different systems. Rather than marine licensing developing its own discrete appeal system as well as the planning system and environmental permitting having their own appeal systems, we could look at where there is scope to simplify and clarify the systems and bring them together so that the appeals landscape is simpler for everybody.

09:45

That seems to be an issue in which we could simplify regulation so that everybody benefits—businesses, environmental non-governmental organisations and individuals.

Chic Brodie (South Scotland) (SNP): On preservation, the RSPB submission talked about

"the natural capital upon which our long-term prosperity"

is built. I know that you will get questions about economic duty, but where do you see the balance as regards the bill recommendation in terms of development versus economic growth?

Aedán Smith: We absolutely support economic growth; we need it as an organisation and our members need it to pay for their memberships of RSPB. However, the aim must be to support economic growth within environmental limits. There is a limit to how much our natural environment can be exploited. In certain situations, we need to be aware of that and respect the limits, so that it is not about growth without—

Chic Brodie: My question is: in your opinion, does growth or development take priority?

Aedán Smith: I think that they need to be considered collectively. Sustainable development, which is a well-established term, is certain to take into account social, economic and environmental factors, so it is possible in some situations to have both economic growth and improvements to the environment.

For example, we work quite frequently with developers—such as Richard Escott's company—when they are putting forward a development proposal and delivering environmental improvements alongside that proposal, so that we get a high-quality development that can deliver not only economic benefits but benefits for the natural environment as well.

Chic Brodie: That sounds like a possible "maybe".

I have a question for Frances McChlery. We have just heard about the tribunals. Your submission states:

"The Law Reform Committee is also considering other important reforming initiatives for the reform of the courts, with the background prospect of reform to the Scottish Tribunals system."

Has there been any progress on that? How do you see it operating as regards its application to the proposals in the bill?

Frances McChlery: We are talking about a major project. In a way, our suggestions would entail a major redesign of the Scottish state. That is already happening in the context of some administrative law. We are suggesting that there is certainly a case—as Aedán Smith alluded to—for including environmental decisions in that structure in order to address questions of specialisation and complexity. However, we are not making any glib suggestions. We are putting it forward as a project that should be tackled.

There has been some progress. I came across a provision that was recently enacted and which I have been dying to get an opportunity to quote to you: section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. In the act, Parliament tells the Civil Justice Council how it should go about making the rules:

"The principles are—

(a) the civil justice system should be fair, accessible and efficient,

(b) rules relating to practice and procedure should be as clear and easy to understand as possible,

(c) practice and procedure should, where appropriate, be similar in all civil courts, and

(d) methods of resolving disputes which do not involve the courts should, where appropriate, be promoted."

We would like those principles to infect environmental procedure. It would be a major support of the aspirations to have a straightforward, welcoming Scottish regulatory culture.

The Convener: Chic Brodie touched on the new duty in respect of sustainable economic growth. Alison Johnstone has a question on that.

Alison Johnstone (Lothian) (Green): I will direct my first question to Frances McChlery, if I may. The Law Society's submission expresses concern over uncertainty about what the phrase actually means and you note that

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

Can you perhaps help us to understand your concerns and what issues that uncertainty may raise?

Frances McChlery: My answer might become quite subtle.

Professor Andrea Ross at the University of Dundee has written a rather interesting essay on the subject. From my perspective—that of

somebody who is trying to advise a client on what is and is not relevant—we immediately begin to encounter problems with sustainable economic growth that we do not encounter with sustainable development. It is as if sustainable economic growth is a step too far. Sustainable development is less problematic because it is a universally recognised value. The concept has a root in international law and we have been using it for some time. As I think Scottish Natural Heritage told the committee, it is not absolutely clear how much difference it would make. The underlying point is that everybody has regard to sustainable development.

Sustainable economic growth introduces a suggestion towards development; it is as if something is being added that confuses the balance between "sustainable" and "development". That is why we are unhappy to have it added into the mix. It will make matters less clear in advising clients who are applying for permissions and it will introduce confusion that will make it less easy for the regulator to take a clear-cut decision.

Alison Johnstone: Thank you. I will direct a similar question to Aedán Smith.

In the written submission from RSPB you make it quite clear that you oppose the introduction of a duty for regulators to contribute to sustainable economic growth. You suggest that to place such a

"... duty on regulators would introduce a bias towards economic aspects over the other two pillars of sustainable development",

and you think that

"It would be more sensible to extend a sustainable development duty ... "

Would you like to elaborate on that?

Aedán Smith: My concern is similar to Frances McChlery's, in many ways. I guess that we are worried that the duty might lead to confusion for regulators, because it does not have the same weight of clear definition as the term "sustainable development". There has been a lot of discussion about the meaning of sustainable development itself over the last few decades, but there are now fairly well understood definitions. Sustainable economic growth is a much newer concept: although there are some definitions out there, they are not nearly as widely known or understood.

Therefore, I think that to add the duty to the mix would result in additional confusion for regulators. Our experience of existing duties that regulators have—for example, SNH has a duty in its decision making to balance various different needs, including the economic needs of communities—is that they can lead to confusion when tension exists between issues.

The way that the provision is put in the bill is interesting; it applies to a specific list of regulators that is provided in the bill. It is odd that Scottish ministers are not on that list, given that in Scotland they are the ultimate regulator, if you like.

Another thing that is unusual and a bit unexpected is that sustainable economic growth is part of the Scottish Government's central purpose. We are supportive of that central purpose in its entirety, given that it is about allowing Scotland to become a more successful country. That is backed up by the national performance framework, which includes a range of indicators on how Scotland can be more successful. We are supportive of that framework, too, but there is no link in the bill to that or the central purpose. The bill seems to be a halfway house that applies only to a select number of regulators, which is likely to result in more confusion for and less benefit to regulators.

Alison Johnstone: Would it be more appropriate to guide regulators to the national performance framework as the basis for regulation?

Aedán Smith: That would be much clearer, because the framework includes a dashboard of indicators. I guess that, as part of the Government group of agencies and so on, it is headed in that direction, but at least that would be more consistent with what is already out there. The way in which the sustainable economic growth duty is put into the bill does not appear to be consistent with other things that are out there.

If anything, our preference would be to have a duty for sustainable development. Our next preference would be to keep the bill simple and not to go with that duty at all.

The Convener: I have a question for Frances McChlery on the same subject. Would a definition of sustainable economic growth be of assistance?

Frances McChlery: I would want to see a definition before I could answer that. It is possible that a definition might assist. There is guidance on sustainable development, but that is not a particularly good read from a lawyer's point of view—it describes things in terms of being a bit on the one hand or the other because sustainable development personifies and defines a balancing process in deciding in each case whether the answer is a yes or a no.

A similar issue might arise with sustainable economic growth—a definition could entail a great deal of debate. My chief concern and that of other lawyers is that a confusing factor is introduced when that is not necessary.

Mike MacKenzie (Highlands and Islands) (SNP): On the same theme, it seems that we are

discussing two terms in the abstract. Although people seem to be happy with sustainable development, they are not happy with sustainable economic growth. Will the witnesses give a practical illustration that helps to make the point? Can they conceive of a situation in which a regulator would be confused were they to apply the duty of sustainable economic growth but would not be confused if, by contrast, they were to apply a duty of sustainable development? Do you have practical examples of how that concern could give rise to problems?

Frances McChlery: I could suggest something. We are accustomed to taking decisions in the planning and electricity systems that are entirely spatial in nature; the decisions all relate to the environment—where something is placed and its effect on the space that it will occupy. As we have developed our approach to wind farms—in which both the planning and electricity systems play a role—that has been influenced by climate change and related targets. That becomes empirical and facts and figures are needed.

In my experience—I have acted for every kind of participant—that is never terribly satisfactory. If you go into the concept of sustainable economic growth, you are in grave danger of having an economic passage of evidence that will, although it will be terribly interesting, take nobody anywhere. In order to allow the decision maker to address that question, they might have to listen to all sorts of evidence from professors of economics. I question the value of that in a decision-making process. That aspect seems to me to be the Government's business, not that of the decision makers.

10:00

Mike MacKenzie: I accept your point that economic growth should perhaps not be considered at all, but can you explain how—

Frances McChlery: Do not misunderstand me: I am certainly not saying that. I am saying that sustainable development already includes the concept of economic growth.

Mike MacKenzie: If sustainable development already includes the concept of economic growth, where is the problem in merely restating it using slightly different words?

Frances McChlery: I think that it is a step too far and it skews the balance. My main concern is that the term introduces confusion both in the minds of those who are trying to get permissions, who want to know what they have to do, and in the mind of the regulator. The problem is the confusion rather than the terminology.

Mike MacKenzie: I am still unclear. The consensus appears to be, "Economic development—good; economic growth—bad." I am still quite unclear about the difference between the two terms. What makes sustainable economic growth objectionable that is not implicit in sustainable development?

Frances McChlery: I think that you might be making my point for me. That is the confusion. I certainly am unclear, and I imagine that others who might seek to use the legislation would be unclear.

Mike MacKenzie: It seems to me that I could ask which of those three words people do not understand. We all understand "sustainable", we all understand "economic" and we all understand "growth", yet the term "sustainable economic growth" seems to be giving rise to an undue amount of confusion. I am almost tempted to think that witnesses are perhaps protesting too much on this point.

The Convener: Does Mr Smith want to respond?

Aedán Smith: I just want to make the point that we have absolutely no objection to economic growth if it is not considered in isolation. Promoting economic growth while taking into account environmental limits and the social impacts of economic growth is what sustainable development is all about. If the definition of sustainable economic growth was to be the same as the already clearly established, well debated and fairly well understood definitions of sustainable development, the matter would not be of concern to us. However, we do not currently have a clear definition of sustainable economic growth that makes that connection, whereas we have quite well established definitions of sustainable development.

The Convener: Three members want to ask supplementary questions. I call Marco Biagi first.

Marco Biagi (Edinburgh Central) (SNP): Can you envisage scenarios whereby the addition of the duty to promote sustainable economic growth makes challengeable in court a decision that would not currently be challengeable?

Frances McChlery: Yes.

Marco Biagi: Can you go into detail on that?

Frances McChlery: The essential principle behind any legal challenge is whether the decision maker has had regard to the right legal criteria and relevant material. The consideration of sustainable economic growth seems to me to be one of the most debatable pieces of potentially relevant material that I have seen in 25 years of doing this kind of law. If you have a decision that you object to and you are sending it to your lawyers, one

thing that you will now look at is whether the duty to promote sustainable economic growth has been correctly applied. In my view, that will be highly contestable either way.

Marco Biagi: What will be the impact of the change that has happened during the development of the bill whereby the duty on regulators to promote sustainable economic growth is now qualified by the wording

"except to the extent that it would be inconsistent with the exercise of those functions to do so"?

Frances McChlery: That makes things worse rather than better. As SNH has said to the committee, it already takes into account, in its criteria, development and the potential benefits that will flow from development. Everyone who is taking a decision does that. Suddenly, some kind of contest or ranking will now be introduced. In my personal view, given that my problem with the wording is about clarity, that modification does not really help.

Marco Biagi: Having said that this issue has an effect on how challengeable the legislation is, can you sketch out a specific example or two of where that could happen?

Frances McChlery: To go back to the example that I gave previously, people who got involved in a contested application would have to give additional evidence about economics and economic growth; that is where the problem would arise. Perhaps I do not appreciate what your question is.

Marco Biagi: You said that the addition of the duty would make more decisions challengeable. I am trying to imagine what scenarios would throw up a challenge in court after this legislation had passed that would not have been thrown up before.

Frances McChlery: The question would be whether the decision maker had had correct regard—or any regard—to sustainable economic growth. The wording adds a new area of exploration for lawyers.

Marco Biagi: What sort of plaintiffs would that be likely to throw up?

Frances McChlery: Parties might be thrown up on either side. It is important to understand the scope of making a major proposal under any of the measures: we are talking about big, very expensive projects. Developers will have to invest in establishing that their proposal supports sustainable economic growth, as opposed to just sustainable development, which is inherent in everything that they are doing.

On the other side, the objector will have to attack the developer's proposal, possibly on quite fundamental grounds. It is very difficult for the decision maker; there is lots of scope for getting it wrong. That is certainly something the lawyers are going to check. I do not think that I can take the question further than by giving that theoretical perspective.

Chic Brodie: I know that you want to move on to other matters, convener. This is my final throw on the semantics.

The written submissions before the committee included a definition of economic growth from the Royal Environmental Health Institute of Scotland that seems immensely sensible, as:

"an increase in the capacity of an economy to produce goods ... compared from one period ... to another".

I believe that that should be the driver, though we should recognise the other factors as well—namely, that economic growth should be "socially equitable and environmentally sustainable".

Ms McChlery, you confuse me. You said that

"sustainable economic development includes ... economic growth",

so you must have in your mind what sustainable economic growth means.

Frances McChlery: You have to remember that you are asking a lawyer.

Chic Brodie: I am conscious of that—that is why I put the question in that way.

Frances McChlery: I genuinely do not know what sustainable economic growth means.

Chic Brodie: You must know—you said that

"sustainable development includes the concept of economic growth".

You must have some idea of why you said that.

Frances McChlery: I know what sustainable development means; I know what it means internationally and in Scotland, because it is in the planning acts and there is statutory guidance from ministers. However, I do not know what sustainable economic growth means; I do not know whether it means something different.

Chic Brodie: Are you prepared to consider it as a factor and a characteristic in sustainable economic development?

Frances McChlery: Can you say that again?

Chic Brodie: You say you do not know what it means, but you described it earlier: you said that

"sustainable economic growth introduces a suggestion towards development".

I wrote it down verbatim; so you must have some concept of what it means.

Frances McChlery: If you remember, I alluded to the point that was made to the committee by SNH, which is quite clear that the new duty will not make any difference to it. I am happy that SNH should feel that way. I do not agree that that would be the case for everybody else; I think that the wording introduces confusion.

Chic Brodie: Thank you.

Rhoda Grant: I would like to get some clarity on the issue. You are saying that sustainable development is understood, recognised and defined and that everybody knows where they are, so we need to assume that sustainable economic growth is something different. The words in the bill are "sustainable economic growth", not "sustainable development".

If I have understood your evidence correctly, you are saying that we need a definition of sustainable economic growth, of how it differs from sustainable development and of what the proposed duty will mean. Is that right?

Frances McChlery: As any definition might well help to address the concern about confusion that I and others have, my answer must be yes.

Aedán Smith: I, too, think that a definition would help but, given that sustainable development encompasses economic development, I wonder whether we need to bother with the proposed term.

Rhoda Grant: Are you saying that you would be happier with the term "sustainable development", which is recognised and used and which covers economic growth, instead of moving to something quite different whose definition we are not very sure about?

Frances McChlery: Yes, because that approach would not give rise to the confusion that we are concerned about.

The Convener: Richard Escott has been sitting quietly. For the sake of completeness, does SSE have a view?

Richard Escott: SSE and developers look for clarity on the hurdles that we have to go over. My primary focus is on offshore development. As far as that is concerned, our industry is in its infancy and we are trying to demonstrate how we satisfy all existing requirements as we go through the consents process. That is proving to be exceptionally challenging, because the science and research are in their infancy in a lot of areas. As a result, we are struggling with many different dynamics.

If new tests are introduced, we can build them into the process as long as we know what they and their satisfaction criteria are. The challenge will arise if the rules change as we go through the process; for example, there might be projects that we would not have progressed had we known that test X, Y or Z was going to be introduced. I agree with the other panellists that we need clarity about what we are being asked to deliver against but, once we have that clarity, we can aim to satisfy those tests and ensure that everyone knows what the evidence base and the criteria are.

We look at economic development, sustainable economic development and economic growth as part of our normal development process. After all, with our offshore applications in particular, we might have to deal with multiple local authorities, all of which will look for economic development and economic growth in their areas. We have to try to satisfy them and demonstrate how we will deliver against those aims.

We would be concerned if another appeals mechanism or another area for appeal were introduced. However, that will not happen if we have the clear definition that we are looking for.

The Convener: That was helpful. We have given that topic a pretty good kick of the ball and we will move on to planning fees.

Margaret McDougall (West Scotland) (Lab): Good morning. The bill provides for variations in planning fees to penalise underperforming planning authorities. Aedán Smith and the Law Society of Scotland have said that they are not in favour of such penalising. Why have you taken that position and what are your fears?

I note that Frances McChlery mentioned

"a task force of planners"

in her submission. How would that work?

Frances McChlery: In our discussions, we found ourselves in alignment with many other people who were concerned about whether the proposed approach would address the problem effectively. That is our fundamental concern. If a local authority planning service is failing, not meeting its targets or doing a poor job, stripping it of its resources is the least helpful and least constructive way of addressing the issue.

We are talking about planning at a time when there has been huge progress on culture change. The agencies are dealing with planning much more tightly, and all the processes have been substantially streamlined. That has happened against a background of diminishing resources. They are diminishing because planning authorities do not have as much work and because of other concerns relating to local authorities' revenues. Therefore, we have a tricky situation anyway.

10:15

If a planning authority is failing, the first thing that one wants to know is why it is failing and what is wrong with it. The way to deal with the matter is not to strip it of resources but to send in help. Mechanisms already exist. There is the Improvement Service, which is associated with the Convention of Scottish Local Authorities. Heads of Planning Scotland, which is concerned about how the approach would intervene with continuous improvement, suggests various mechanisms. Our reference to a task force is more generic. If a planning service is recognised to be failing, the Government should send somebody or a number of people in to sort it out. That is more constructive than removing resources from it.

Aedán Smith: Our view is very similar. If a planning authority is already struggling, there is a good chance that that is because of a lack of finances in the first place. Punishing it financially therefore seems to be the wrong way to deal with the matter.

We are conscious that planning authorities are often at the front line of environmental protection, so their decisions are often to protect the environment. We are concerned about whether they will have the continued capacity to carry out environmental protection roles if they are already struggling and face a further financial penalty.

For example, I would be concerned if there was any loss of capacity in a planning authority to assess proposals for developments that might impact on internationally designated wildlife sites, which Scotland has an international duty to protect. If there was and that resulted in problems, the difficulties would come back to Scotland at a national level. Ministers need to reassure themselves that they will not end up creating more work for themselves by carrying out such actions.

Margaret McDougall: What is your view on how to monitor performance? Is an underperforming planning authority one that does not meet the timescales for turning around applications? How do you measure the quality aspect?

Frances McChlery: I do not know. From my long experience of the planning system, I think that both factors should be present in a well conducted planning service. People should be able to turn things around quickly and manage the service to that effect, but they should also be sure that officers are working towards securing quality of place. If people do not watch out, they can attend to one to the detriment of the other. The trick is to be on the ground ensuring that officers are working well.

Co-operation from developers is part of the culture change. The changes that have happened in the planning system have supported culture change from developers. All those things go into the mix.

Aedán Smith: Performance is definitely about quality of outcomes rather than the number of applications processed in a set time period. That is for sure; it absolutely has to be the case.

The Scottish Government has done quite good work on that with Heads of Planning Scotland to produce the planning performance framework. We support the theory and principle of that, but we are not quite happy with its details yet, because we do not think that it factors in environmental quality and environmental decision making enough. It is still heavy on the process elements of the planning system.

Getting a framework that includes a range of measures is definitely one of the ways forward. The framework needs further evolution, but that sort of thing is a better way of measuring planning performance than simply finding out how long it takes to process applications.

Richard Escott: As I said, we interface with a lot of local planning authorities. We have different journeys on different projects in the amount of interaction that is required to get through the process. The problem that we struggle with on some offshore projects is that we deal with one local planning authority in relation to the onshore infrastructure that is associated with the development, but we might deal with more than one planning authority in relation to the landscape, visual impacts and so on. Those authorities have the ability to logjam the process; if we cannot get through the process with them, we can spend a lot of time trying to get to where we need to go.

In the planning environment, there are timescales in which applications are supposed to be progressed and, if we do not get there, it is within the regulator's gift to move on. However, it is unlikely that that would ever happen and we would not expect it to happen, because it would be likely to trigger a judicial review.

We are looking for quality and predictability of timing. I understand the thought process on needing to come up with something that incentivises getting through the planning process in the right length of time, but I am afraid that we do not have a wonderful idea for resolving that issue.

I worry that changing the planning fees would mean resource constraints in the areas where we need resources. On the other hand, we need to continue to increase the quality and turnaround in the planning process. That is a difficult one to solve, but I am not convinced that adjusting planning fees is the best way of delivering the desired outcome.

Frances McChlery: I will speak up for processing agreements, which are a non-statutory mechanism that local authorities are gradually coming to terms with—some more quickly than others. That is merely a mechanism to engage the regulator and the developer in managing the process effectively together. There is still a bit of a learning curve on that; some agreements have been more complicated than they needed to be. However, processing agreements are increasingly being used as one of the ways to address the problem.

Dennis Robertson: My question is to Aedán Smith. I think that you suggested that poor performance in planning is due to a lack of resources. Will you clarify that slightly? Surely many factors are involved in underperformance, rather than just resource constraints. Planning authorities that get it right deal with many factors, so performance is surely not just about resources.

Aedán Smith: No, of course it is not. Other factors are involved, which are often external to the planning authorities. The authorities depend heavily on advice and the quality of inputs into the system, such as the quality of developers' submissions, the contentiousness of the applications that the planning authority must deal with and so on. The process is therefore very difficult to measure, which is why a suite of measures is needed across the piece, to make the process as even as possible.

Some planning authorities are quite small; even just one big and contentious planning application in a year can completely skew a small planning authority's results for the year. That sort of thing needs to be factored into the measurement of performance.

Dennis Robertson: Do you agree with Richard Escott that improvement should be based on incentivisation rather than penalties?

Aedán Smith: Yes, absolutely. One of the big incentives for a planning authority is to see how it is performing against its peers—the other planning authorities. Anything public, such as the planning performance framework, is therefore a big incentive for planning authorities. A financial penalty is too big a risk, because it could exacerbate existing problems if it happens.

Chic Brodie: To follow on from what the panel members have said, incentivisation has a downside as well as an upside in how it is perceived by those who are not performing. Would you care to comment on the following points? In your dealings with planning authorities, you come up against not just a lack of resources but a lack of skills and expertise. The comments that you have made so far underpin the need for processing agreements, which I am aware of and which are progressing slowly, and for the bill.

Will you comment on the consistency of applications across councils and on the need for meaningful outcomes to establish a level of productivity? It is all very well saying that planning fees should not be reduced, but that takes us into the arena that Frances McChlery talked about when she mentioned sending in a task force—that is putting on a sticking plaster rather than seeking to cure something as quickly as we can.

I am asking about skills, the process in the bill, consistency across Scotland, and meaningful outcomes and a measurement of true productivity. Would the panel care to comment on each of those points?

Frances McChlery: My experience with the reform of the planning system since the Planning etc (Scotland) Act 2006 has been instructive. There was a collective recognition that everyone had to work together to improve the situation.

Planning is an easy target, but I am not the only one who would question how representative a single bad experience or a single vocal complainer is. Planning gets a much worse reputation than it usually deserves, in my experience.

That being said, I am aware that there has been quite a substantial deskilling of planning departments, particularly recently. A lot of the collective memory has been lost, for better or for worse, in some councils. We have yet to see what the impact of that will be, but I certainly commend the planning authorities, the developers that I have encountered and the agencies that support the planning system for their response to the 2006 act. Planning is not as bad as it is sometimes made out to be.

Richard Escott: From our interaction with planning departments, we know that a range of skills comes out in planning in the same way as it does among our advisers and in all the other areas that we deal with. Some are better than others, and a lot of that comes down to the openness of the interaction between the developer and the planning authority when they have an issue and how they address that issue. It is down to an individual on either side of that relationship—

Chic Brodie: I am sorry to interrupt but, if a clear process defined the limitations in the bill, would that help? I am not saying that there should be total rigidity, but in some cases there appears to be anarchy.

Richard Escott: Clarity of process should always help us, provided that the right resources are in place to deliver against those processes. If we understand what the outputs are and what the quality and definition of the product are by defining

more closely what we are trying to deliver, we will get there.

The breadth of what planning departments now have to look at means that they need more breadth of skill and experience. Experience has been lost from a lot of planning departments during the past few years. A lot of the senior guys who had been round the block a few times and understood the situation have moved on. In addition, because of the new aspects of planning applications that are coming in, people have a lot to grapple with and to learn.

Aedán Smith: Having the right skills and experience in planning authorities is a fairly constant concern of ours. We come across that concern fairly regularly when we advise planning authorities on the impacts of developments in their areas.

The example that I will give is in part the result of planning authorities not having sufficient resources or expertise. Recently, some opencast coal mines have collapsed, and it transpires that the bonds that were supposed to be in place to provide enough money to facilitate and pay for the restoration of those sites do not provide nearly enough. That is likely to be because of insufficient resource or because the resourcing to monitor and enforce the conditions and the bonds was trimmed, so the planning authorities did not become aware of the situation until they found themselves in the current position, in which two companies have gone into liquidation. That is a clear and unfortunate illustration of what happens when planning authorities are not resourced adequately.

There should be a certain level of consistency, but there will always be different skill sets in different planning authorities, because of their nature. The planning applications that the City of Edinburgh Council deals with differ from the ones that Western Isles Council deals with, for example. The experience and skills in different areas will always differ according to the applications that have been made. That is why the central support for planning authorities that is provided by statutory agencies such as the Scottish Environment Protection Agency and SNH is really important.

It is also important to get a clear steer on things from the Scottish ministers through the Scottish planning policy and the national planning framework. That can provide the level of consistency.

Chic Brodie: Can you comment on the code of practice and how it might impact?

Aedán Smith: Which code of practice?

Chic Brodie: The guidance that will be given under the bill.

Aedán Smith: The most useful thing that will have an impact on planning authorities is the performance framework that ministers are developing in association with Heads of Planning Scotland, because that looks more at the potential outcomes of the planning process. That could be a useful tool.

The Convener: As there are no more questions, we can call a halt. Thank you all for coming and giving your evidence.

10:31

Meeting suspended.

10:35

On resuming—

The Convener: I welcome our second panel for our continuing scrutiny of the Regulatory Reform (Scotland) Bill at stage 1. We are joined by George Fairgrieve, who is a council member from the Royal Environmental Health Institute of Scotland, and Bill Adamson, who is head of food standards, hygiene and regulatory policy at the Food Standards Agency in Scotland. I thank you both for coming along. Before we get into questions, would either of you like to make a brief opening statement?

Bill Adamson (Food Standards Agency in Scotland): I am happy to summarise the written evidence that I provided to the committee. My organisation is interested in the proposal because we oversee in Scotland the implementation of food hygiene and safety law, which the street trader's certificate of compliance relates to. In that capacity, we provide an oversight of the local authority functions and, on behalf of the minister, administer the food law code of practice, which gives some national direction in the area.

As I state in my written evidence, the proposal, as I see it, is to build on the idea of having one authority that will issue certificates of compliance for licensing purposes, which seems to be in accordance with the principles of the home authority principle in the food code. We are happy to support that as a proportionate way forward in terms of compliance with both the code and the general better regulation principles.

We do not have responsibility for the Civic Government (Scotland) Act 1982. That lies with justice and licensing but, clearly, there is an interaction between our area of responsibility and the Scottish Government's in that respect.

The Convener: Mr Fairgrieve, would you like to say something? It is not compulsory.

George Fairgrieve (Royal Environmental Health Institute of Scotland): First, I say that I am a last-minute stand-in. Robert Howe had to go to something else. Apart from that, I think that our submission is self-explanatory, so I will leave it at that.

The Convener: That is grand. Thank you. I think that there are two issues that we ought to explore. The first is the provisions on mobile food businesses and what impact they will have on food hygiene across Scotland. The second is the broader issue of the new duty to promote sustainable economic growth. A number of members have questions on the first issue.

Chic Brodie: Just for clarity, Mr Adamson, the FSA is accountable to both the Westminster and the Scottish Parliaments. Is there any conflict in terms of policy development or management?

Bill Adamson: Not in relation to this particular issue with street traders, or even in the wider better regulation agenda. You are right that we have obligations to both Administrations. I do not see any conflict in relation to the proposals in the bill, or in relation to street traders specifically. As I say, although there is a specific code of practice for Scotland, there is a very similar code that applies in the rest of the United Kingdom and gives general direction in the same way.

Chic Brodie: I think that the written submission was very clear. However, one thing that concerns me is that, once again, we are talking about setting up liaison groups. We have the Scottish Food Enforcement Liaison Committee, which is there to assist your agency in developing agreed standards. One wonders what on earth the FSA is there for in that case. Why are we creating another body or liaison group? Why can the FSA not carry out this regulation?

Bill Adamson: The FSA does indeed oversee the regulation—

Chic Brodie: Why can it not do it?

Bill Adamson: We do, in some areas, but much of the delivery has traditionally been done at a local level. As I indicated in the evidence, it is done by the local authorities on our behalf—that has been in place for some time. The FSA's role is to provide national co-ordination of that on behalf of ministers, and we administer the code of practice on their behalf. We have a role in trying to ensure consistency and proportionality, which are issues that the bill is trying to address. One could say that, in so far as the bill relates to food law, to a certain extent there are already national standards that are designed to fulfil the bill's principles.

Chic Brodie: The Scottish Government has asked SFELC, which is a daughter of the FSA, to "assist in developing agreed standards".

What is happening? Is the FSA overseeing the overseer or what?

Bill Adamson: I will explain a bit more about what SFELC is. The code of practice provides for the idea that we must ensure that there is consistency across the piece in Scotland. We are quite lucky in Scotland in that we have a relatively small number of authorities compared with other parts of the country, but there still needs to be a mechanism by which those authorities consistently apply Community law. I say, first and foremost, that most of the law that we are talking about is set at a European level and is consistent anyway. There is also a requirement for the law to apply consistently in each member state, so that provides the backdrop.

SFELC is a national body that gives advice to the FSA on enforcement matters on the ground. Its members are practitioners in the field and include representatives from the enforcement community, consumers and industry. SFELC is a sounding board for the FSA to ensure that the policies that it imposes on behalf of Scottish ministers are practical and work. That is in accordance with the better regulation principles.

Chic Brodie: Thank you.

Dennis Robertson: My question is for George Fairgrieve in the first instance. There seems to be general agreement on issuing a single certificate to a street trader to provide for the mobility of street traders who move around different local authority areas. However, the certificate in itself does not really enable mobility and trading, does it? A street trader still has to apply for a licence in the different local authorities.

George Fairgrieve: I would have thought that the street trader's certificate of compliance would work hand in hand with any licensing provisions or requirements. I am sorry, but I retired in August, so my remarks are about what happened up to then. At that time, each local authority had to issue a licence to a street trader and they required a certificate of compliance from environmental health in relation to food hygiene. That process was quite cumbersome.

We envisage that the certificate would be issued by the home authority, or the authority where the street trader is based, and that it would show that the moveable premises were in compliance. It would be a bit like an MOT, so that certificate would go with the vehicle, wherever it operated. There would therefore be confidence that the structure of the moveable premises complied with the requirements of the legislation.

However, that does not mean that the person operating the vehicle is operating it in compliance

with the legislation—that is slightly different. It may be that, because Scotland is such a small place and local authorities tend to have good liaison, the street trader's licence as well as the certificate of compliance can be issued nationally, but maybe that is a step too far.

Dennis Robertson: In reality, if the street trader goes down to Edinburgh from Aberdeen, which may be the issuing authority, they still have to get a licence.

George Fairgrieve: At present, yes. I do not know what your thoughts are on extending the national system to include the licence, because that is about the legal system. I was not involved in that—I was involved only from the hygiene point of view.

Dennis Robertson: When we took evidence from environmental health officers, there was some discussion of a concern that standards would perhaps be lowered as a consequence of the certificates being issued. What is your view on that? Basically, should we be going for the gold standard, as apparently Glasgow, Edinburgh, Aberdeen and other authorities have?

10:45

George Fairgrieve: I do not understand that. As an ex-practising environmental health officer, my view is that the consistency required for the vehicles means that they should all meet the same standard as laid down by the regulations—an EHO in Inverness and an EHO in Edinburgh should have the same standard. The certificate of compliance would ensure that. I do not know where they are coming from on the lowering of standards, unless they expect not to inspect the vehicle at all. If an Inverness vehicle came to the Royal Highland show in Edinburgh, for example, the Edinburgh environmental health officers would still inspect it for the hygiene practices that the operator had in place, but they could ignore the physical nature of the premises because that would already have been inspected and found to be in compliance with the legislation.

Rhoda Grant: So having the certificate of compliance does not mean that the street trader will not be visited by environmental health officers at the place where the licence will operate. Does the certificate make no real difference, then? When someone applies for a licence, normally the environmental health officers will examine the business and issue a certificate of compliance, but you are saying that that covers only the vehicle and nothing else.

George Fairgrieve: In effect, that is what happens at the moment anyway, because the vehicle is inspected for a street trader's licence and it gets its food hygiene compliance certificate, but the environmental health officers will still inspect it while it is trading to ensure that the food hygiene practices are in compliance with the law.

Rhoda Grant: But not as a proviso of getting the street trader's licence; it is just part of their day-to-day examination.

George Fairgrieve: It is part of their normal working routine and is just the same as would happen with a shop, for example. A large supermarket chain, for example, will produce a building that complies with all the relevant legislation and will put in place documentation in relation to its duties under the hazard analysis and critical control point system, but it will rely on the local manager to work to those standards, so it is only as good as the local manager. That is what we are really talking about here, because the EHO will give a compliance certificate for premises, but it will only be as good as the person operating on-site and under pressure.

Rhoda Grant: What would be the practicalities if somebody had a certificate of compliance issued by Aberdeen City Council and decided to go to Rock Ness, where they were examined by Highland Council EHOs who found that, although the vehicle was in compliance, the method of operation was not? How do the EHOs go about revoking the certificate of compliance? What steps can they take?

George Fairgrieve: The certificate of compliance is purely for the vehicle, so if it complies, the certificate does not require to be revoked. The only thing that would be revoked would be the street trader's licence, if it was still being issued by individual local authorities. It would be the permission to trade at that time that would be revoked because the operator would be in breach of the hygiene legislation. In practice, the environmental health officer would serve notices on the hygiene practices and stop the operation of those unhygienic practices.

Rhoda Grant: The trader who had been stopped by environmental health officers at Rock Ness might decide to go back to Aberdeen, where they had a street trader's licence and certificate of compliance. Would there be anything to stop them setting up shop again?

George Fairgrieve: Normal practice in a situation like that—at least, this used to happen—is that environmental health would immediately notify the home authority of the action that it had taken.

Rhoda Grant: There would be no added complications, then.

George Fairgrieve: I do not think so.

The Convener: If no one has questions about regulation and licensing of mobile food traders, we

will move on to the duty to contribute to achieving sustainable economic growth.

Alison Johnstone: Mr Fairgrieve, will you elaborate on the concern that REHIS expressed in its submission about how an economic duty might sit alongside regulators' other core functions and duties?

George Fairgrieve: I am sorry, but I will have to check the submission—I did not write it. My personal opinion has always been that, in a local authority context, local economic development is one of the primary considerations.

I am trying to envisage what Robert Howe was thinking about when he wrote the submission. Much depends on how the bill is drafted. If the bill imposes a statutory duty on regulators with regard to specific action, there might be a conflict of interest, in that the regulation would say one thing but the regulator would have in the back of their mind their duty to consider the economic impact on the area. There might need to be clear guidelines.

In many discussions that we have had in committees and so on, we have heard a wide range of opinions on what constitutes sustainable economic growth.

Alison Johnstone: That is the case in this committee, too.

In the submission, Robert Howe expressed concern about the definition of sustainable economic growth. He also expressed surprise that, given that the bill will impose a duty on regulators to contribute to achieving sustainable economic growth, the bill will not also impose a duty on regulators to improve the health and wellbeing of people in Scotland. Can you comment on that?

George Fairgrieve: REHIS's main aim is to stimulate interest and disseminate knowledge in relation to environmental health, to try to raise standards professionally and improve the health of the British public. In the days when sanitary inspectors were introduced, their aim and duty was to improve the health of the Scottish public. I think that that is what is behind what Robert Howe wrote. We must be careful not to lose sight of the reason why environmental health inspection was introduced, way back in the 1890s.

The Convener: Does the FSA have a view on the sustainable economic growth duty?

Bill Adamson: Yes, convener. Committee members might not be aware that I was asked to give evidence to the Rural Affairs, Climate Change and Environment Committee on that aspect of the bill. I provided written evidence to that committee, which I can share with you.

We do not have a problem with the wording. Our strategic plan contains objectives about ensuring that we try to contribute to sustainable economic growth.

There is an important caveat in section 4, which provides that regulators must contribute to achieving sustainable economic growth only in so far as is consistent with the exercise of their functions. We think that that makes it quite clear that a decision about a public health risk could not be overturned on the basis that we must promote economic growth. We cannot promote economic growth in a way that is in conflict with public health protection.

The FSA's view is quite simple. We think that better, proportionate, consistent and targeted regulation supports economic growth, because it ensures that the marketplace is protected, public health is protected and public confidence is maintained. As I am sure that committee members are aware, when there is a food incident, the marketplace is disrupted and public confidence is lost. In such circumstances, we do not get sustainable economic growth. A targeted approach, which minimises the number of food incidents, will in itself go a long way towards sustaining economic growth.

The Convener: If there are no more questions, we can call a halt. I thank the witnesses very much for giving their time—your evidence has been very helpful to us.

10:55

Meeting suspended.

10:57

On resuming—

Work Programme

The Convener: Item 2 is consideration of the committee's work programme. We have had written responses from a number of bodies in relation to our inquiry into underemployment in Scotland. We also have responses to some of our one-off evidence sessions, from the Office of Gas and Electricity Markets, Scottish Enterprise and Highlands and Islands Enterprise. Responses have been circulated to members.

Does anyone want to comment on the responses on underemployment? Are there issues that you want to follow up? We had a detailed and comprehensive response from the Scottish Government; if members go through it paragraph by paragraph, they will find that there is a lot in there. There are quite a lot of on-going issues, which we should keep an eye on.

If there are no comments, are you happy to note the response?

Members *indicated agreement.*

Chic Brodie: I think that I read recently that Westminster had done something on underemployment. Was there some comment or ministerial statement on the issue? Can we check that?

The Convener: I am not aware of that, but we can check.

Do people want to follow up points in the correspondence from Ofgem, Scottish Enterprise and Highlands and Islands Enterprise? If not, are we happy to note the correspondence?

Members *indicated agreement.*

The Convener: Before we move into private session, I remind members—or let you know, if you did not know—that this is the final day when Jane Williams and Catherine Fergusson are with us, because they are both moving on. Jane is moving back to the Public Audit Committee and Catherine is moving to the Finance Committee. I put on record our grateful thanks to them both for all their efforts in the committee in previous weeks and months. We wish them well in their new positions.

10:59

Meeting continued in private until 11:34.

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